

## IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA-23-0319

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JANICE M. DODDS,*Plaintiff and Appellant,*

v.

GREGORY S. TIERNEY, M.D.  
BENEFIS, HEALTH SYSTEM, AND  
JOHN and JANE DOES I-IV,*Defendants and Appellees.*

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**APPELLEE GREGORY S. TIERNEY, M.D.'S ANSWER BRIEF**

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On Appeal from the Eighth Judicial District Court, Cascade County, Montana  
Cause No. CDV-13-364  
Honorable John A. Kutzman Presiding

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## **I. STATEMENT OF ISSUES**

Whether the district court correctly granted Dr. Tierney's motion to dismiss under Rule 12(b)(5) where Dodds had process delivered during the automatic stay prescribed by 11 U.S.C. § 362(a), the three-year service period of Rule 4(t) lapsed during the automatic stay, and Dodds neither made nor perfected service after expiration of the automatic stay within the grace period provided by 11 U.S.C. § 108(c)(2).

## **II. STATEMENT OF CASE**

Claiming Gregory Tierney, M.D., negligently performed a total left knee replacement circa November 2009, Janice Dodds filed the present medical malpractice action on May 7, 2013. Dr. Tierney petitioned for Chapter 7 bankruptcy approximately thirty-three (33) months later, February 5, 2016. Dodds had process delivered to Dr. Tierney May 2, 2016, while the automatic stay associated with the bankruptcy case was in effect.

On August 3, 2016, the bankruptcy court granted Dr. Tierney a Chapter 7 discharge. Thereafter, Dodds failed to make, correct, and/or perfect service of process upon Dr. Tierney. In March 2019, Dr. Tierney moved for dismissal under Montana Rule of Civil Procedure 12(b)(5) based upon Dodds' failure to serve effective process within the period required by Rule 4(t).

The district court granted Dr. Tierney's motion and dismissed Dodds' medical

malpractice action February 13, 2023. The district court concluded Dodds failed to timely serve Dr. Tierney with process because: the process delivered May 2, 2016, was void and ineffective pursuant to 11 U.S.C. § 362; the service period of Rule 4(t) expired during the automatic stay; and, upon expiration of the stay, Dodds failed to make or perfect service within the grace period provided by 11 U.S.C. § 108(c).

Dodds filed this appeal after her motion seeking relief from the district court's order under Rules 59-60 was deemed denied.

### **III. STATEMENT OF FACTS**

Gregory Tierney, M.D., stipulates to the substance of Janice Dodds' statement of facts, (Dodds Br. 4-6), incorporates by reference the district court's other findings of fact, (Dodds App. 5-9 ¶¶ 14-37), and offers for factual purposes the various bankruptcy filings considered by the district court, (Tierney App. 1-6).

### **IV. STANDARD OF REVIEW**

An abuse of discretion standard generally applies to orders denying motions made under Montana Rule of Civil Procedure 59(e). *Folsom v. Mont. Pub. Employees' Ass'n, Inc.*, 2017 MT 204, ¶ 59, 388 Mont. 307, 400 P.3d 706. Likewise, orders denying motions made under Rule 60(b) are typically reviewed for an abuse of discretion. *In re Marriage of Orcutt*, 2011 MT 107, ¶ 5, 360 Mont. 353, 253 P.3d 884.

When a motion to dismiss under Montana Rule of Civil Procedure 12(b)(5) is

granted, a district court's findings of fact are reviewed for clear error and its conclusions of law are reviewed for correctness. *Nolan v. RiverStone Health Care*, 2017 MT 63, ¶¶ 6-9, 387 Mont. 97, 391 P.3d 95.

## **V. SUMMARY OF ARGUMENT**

Janice Dodds failed to timely serve effective process upon Gregory Tierney, M.D. The process delivered May 2, 2016, during the automatic stay was void and ineffective as a matter of law. *See e.g. State v. McWilliams*, 2008 MT 59, ¶ 51, 341 Mont. 517, 178 P.3d 121. The three-year service period prescribed by Montana Rule of Civil Procedure 4(t) (2013) expired May 7, 2016. Upon discharge of the bankruptcy proceeding August 3, 2016, federal law afforded Dodds a 30-day grace period to take any actions prohibited or voided by the automatic stay. 11 U.S.C. § 108(c). Dodds made no attempt to serve or perfect service upon Dr. Tierney within that timeframe. Therefore, dismissal under Rule 12(b)(5) was not only appropriate but mandatory.

Dr. Tierney had a personal stake in the outcome of this medical malpractice action when Dodds filed it against him May 7, 2013. Dr. Tierney maintained throughout this action a personal stake in exculpating himself of alleged malpractice. Dodds never established her claim that Dr. Tierney negligently caused her alleged injury and, thus, the insurer was never a necessary party because the contractual duty to indemnify is triggered when the underlying claim is established.



## **VI. ARGUMENT**

“A plaintiff must accomplish service within three years after filing a complaint.” Mont. R. Civ. P. 4(t) (2013). If a plaintiff fails to do so, and a defendant has not voluntarily appeared, dismissal of the action against that defendant is mandatory. *Id.* Dismissal for insufficient (e.g. untimely) service of process may be pursued via motion. *See* Rule 12(b)(5). Intertwined with acquisition of personal jurisdiction, the rules governing service of process require “strict compliance.” *Semenza v. Kniss*, 2005 MT 268, ¶ 13, 329 Mont. 115, 122 P.3d 1203.

Filing a petition for bankruptcy triggers an automatic stay of all proceedings against the debtor. 11 U.S.C. § 362(a). The automatic stay specifically includes “issuance or employment of process . . . against the debtor.” *Id.* Any action or proceeding undertaken in contravention of the automatic stay is void and ineffective as a matter of law. *In re Schwartz*, 954 F.2d 569, 570-72 (9th Cir. 1991); *see also State v. McWilliams*, 2008 MT 59, ¶ 51, 341 Mont. 517, 178 P.3d 121 (recognizing the automatic stay is “an immediate freeze of the status quo [] precluding and nullifying post-petition actions”). This principle applies to service of process. *Voga v. U.S. Bank*, No. 3:11-CV-316-RCJ-VPC, 2001 WL 5180978, at \*4 (D. Nev. Oct. 27, 2011) (service of process was ineffective because debtor had previously filed petition for bankruptcy); *In re Kline*, 472 B.R. 98 (B.A.P. 10th Cir. 2012) (service of complaint upon debtor after bankruptcy petition had been filed was void and

ineffective).

Because the automatic stay can have harsh consequences, the Bankruptcy Code specifically provides relief in situations where a deadline in a proceeding against the debtor was precluded by and expired during the automatic stay. *See* 11 U.S.C. § 108(c). In such cases, § 108(c)(2) provides a 30-day grace period upon expiration of the stay. The automatic stay in a Chapter 7 bankruptcy case expires upon the earlier of the bankruptcy case being closed, dismissed, or a discharge being granted. 11 U.S.C. § 362(c)(2).

Here, Dodds failed to serve effective process upon Dr. Tierney within the three-year period prescribed by Rule 4(t). As a matter of law, the process served during the automatic stay May 2, 2016, was void and ineffective. *Voga*, 2001 WL 5180978, at \*4; *In re Kline*, 472 B.R. at 98. The district court correctly concluded the same, (Dodds App. 10:¶ 41), and Dodds does not contend otherwise.

The district court also correctly assessed the relationship between Montana's three-year service deadline, the automatic stay, and the post-discharge grace period:

The 3-year service of process deadline is a state law defense. Federal bankruptcy law *impacted* it by, in effect, depriving [] Dodds of the last few months of the state-law service period but then granting her an additional 30 days to complete service following the expiration of the automatic stay[.]

(Dodds App. 13:¶ 47). Indeed, while the process served during the automatic stay was void and the three-year service period of Rule 4(t) expired during the automatic

stay, the Bankruptcy Code specifically afforded Dodds a grace period to make, correct, and/or perfect service upon Dr. Tierney within 30 days of the discharge granted August 3, 2016. 11 U.S.C. § 108(c). As Dodds failed to make or perfect service within the additional time afforded by § 108(c), dismissal under Rule 12(b)(5) was appropriate.

**A. Dodds misinterprets the pertinent bankruptcy statutes.**

Dodds' course of action after the August 3, 2016, discharge was, and Dodds' position in this appeal is, based upon misinterpretation of 11 U.S.C. § 524(a)(2). Contrary to Dodds' position, § 524(a)(2) prohibited neither continuation of the medical malpractice action nor service of Dr. Tierney post-discharge. Section 524(a)(2), rather, simply prohibited Dodds from attempting to collect any judgment from Dr. Tierney personally. Dodds' misinterpretation of § 524(a)(2) also refutes her contention the district court ignored the bankruptcy court's February 25, 2019, order.

- 1. Section 524(a)(2) did not prohibit Dodds from serving Dr. Tierney and continuing the medical malpractice action; it simply prohibited Dodds from enforcing any monetary judgment against Dr. Tierney personally.**

Upon discharge, § 524(a)(2) enjoins the commencement or continuation of proceedings to recover discharged debts “*as a personal liability of the debtor.*” (Emphasis added). Dodds concedes the injunction provided by § 524(a)(2) covers only proceedings targeted at the personal liability of the debtor. (Dodds Br. 18 (“as

a personal liability of the debtor”)).

Accordingly, § 524(a)(2) did not prohibit Dodds from serving process upon and continuing the medical malpractice action against Dr. Tierney after the August 3, 2016, discharge. *See, e.g., In re Beeney*, 142 B.R. 360, 362-363 (B.A.P. 9th Cir. 1992). Continuation of an action post-discharge against a debtor “to collect on an insurance policy is permissible [and] has been addressed in many cases.” *Id.*, 142 B.R. at 362. Dodds was enjoined by § 524(a), therefore, only from attempting to collect any judgment obtained in the medical malpractice action from Dr. Tierney personally.

[T]he vast majority of courts that [have] addressed the issue determined that *such a suit could proceed so long as no collection efforts would be made against the debtor*.

*Beeney*, 142 B.R. at 362 (emphasis added). In sum, § 524(a)(2) did not prohibit Dodds from serving and continuing the medical malpractice action against Dr. Tierney post-discharge. Dodds was permitted to do so “as a matter of law” up to the limits of the applicable insurance policy. *Beeney*, 142 B.R. at 363.

As a factual matter, moreover, the August 3, 2016, discharge order put Dodds on notice she could have continued the medical malpractice action against Dr. Tierney and attempted to collect upon the applicable insurance policy. (Tierney App. 2). In line with the plain language of § 524(a)(2) and cases interpreting its scope, the discharge order indicated it was discharging only “the debtor’s personal liability.”

*Beeney*, 142 B.R. at 363. . The order expressly stated “*this discharge does not stop [collection] from anyone else . . . such as an insurance company.*” (Tierney App. 2-2) (emphasis added).

Thus, there is neither legal nor factual support for Dodds’ position that serving Dr. Tierney was prohibited during the 30 days following August 3, 2016. Nor is there support for Dodds’ contention the district court’s findings and conclusions created a legal impossibility. The district court’s findings and conclusions, rather, reflect a proper analysis of how the pertinent bankruptcy statutes impacted the applicable state law service deadline under the circumstances of this case.

**2. The district court neither rejected nor ignored the bankruptcy court’s order of February 25, 2019.**

Dodds mistakenly contends the district court gave no credence to the bankruptcy court’s February 25, 2019, order. (*See e.g.* Dodds Br. at 17-18). This erroneous contention is built on a fallacy of necessity Dodds created and perpetuated. This fallacy starts with imprecise statements about “what” aspects of her claim were discharged in August 2016, extends to assertions about nature and purported necessity of her post-discharge filings with the bankruptcy court, and includes her assertion about the effect of the bankruptcy court’s February 25, 2019, order. (*See e.g.* Dodds Br. 9-10). As previously discussed, § 524(a)(2) only precluded Dodds from seeking to hold Dr. Tierney personally liable; nothing prohibited Dodds from making service upon Dr. Tierney post-discharge, litigating

the claim, and enforcing any judgment up to the limits of the applicable insurance policy. *Beeney*, 142 B.R. at 362-363 (and decisions cited therein); (Tierney App. 2-2). Therefore, contrary to the fallacy perpetuated by Dodds, (i) she was ‘authorized’ upon discharge to serve Dr. Tierney and pursue the medical malpractice claim up to the limits of the applicable insurance policy, (ii) her subsequent filings with the bankruptcy court were unnecessary to pursue the medical malpractice claim against Dr. Tierney up to the limits of the applicable insurance policy, and (iii) the bankruptcy court’s February 25, 2019, order clarified details about authority she had possessed since discharge.

This interpretation is necessarily correct when considered alongside the rule that the statutory injunction of § 524(a)(2) is self-executing and unmodifiable by courts. *In re Munoz*, 287 B.R. 546, 552 *et seq.* (B.A.P. 9th Cir. 2002). Arguendo accepting Dodds’ contention that § 524(a)(2) enjoined her from serving process and continuing the action post-discharge up to the limits of Dr. Tierney’s insurance policy, (Dodds Br. 18-19), dismissal would nevertheless have been the correct legal result because the bankruptcy court lacked authority to lift said injunction. *Munoz*, 287 B.R. at 553 (“the § 524(a)(2) discharge injunction cannot be modified”). Dodds’ contention<sup>1</sup> must be rejected, however, as it ignores the plain language of § 524(a)(2)

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<sup>1</sup> It is ironic that Dodds contends the district court erroneously rejected the bankruptcy court’s decision, (Dodds Br. 17), then proffers an interpretation of § 524(a)(2) that would render the bankruptcy court’s decision *ultra vires* as a matter of law, (*Id.*, at 18-19).

and would eviscerate § 524(e) of the Bankruptcy Code. *Munoz*, 287 B.R. at 555 (holding “§ 524(e) compels us to construe” the discharge injunction of § 524(a)(2) as non-applicable to continuing an action against the debtor and attempting to collect any judgment from a third party).

Dodds’ misinterpretation of § 524(a)(2), mistaken belief she lacked authorization to serve Dr. Tierney before the bankruptcy court’s February 25, 2019, order, and erroneous contention the district court ignored that order were self-perpetuated from the beginning. (Dodds Br. 9 (representing post-discharge motions to the Bankruptcy Court were filed pursuant to *In re: Robin Jean Lyon Cini*, No. 10-62715-11, 2012 WL 2374224 (Bankr. D. Mont. June 22, 2012))). The *Cini* decision had nothing to do with continuation of a tort action against a debtor post-discharge. That case, rather, concerned a plaintiff seeking relief from the pre-discharge automatic stay of § 362. *Cini*, 2012 WL 2374224, at \*6 *et seq.* This is a vital distinction because, unlike the post-discharge injunction of § 524(a)(2), which is unmodifiable, relief may be granted from the pre-discharge automatic stay. *See e.g. Munoz*, 287 B.R. at 552-53 (contrasting § 524(a)(2) from § 362). Contrary to Dodds’ contention, (Dodds Br. 20), any lack of meaning or peculiarity in the bankruptcy court’s February 25 order resulted from her decision to file a superfluous motion (§ 524(a)(2) did not enjoin continuation of the malpractice claim against Dr. Tierney and attempting to collect any judgment from the insurer) based upon inapplicable

authority (*Cini* concerned § 362) arguing principles inapposite to those actually applicable (relief can be granted from the automatic stay of § 362; relief cannot be granted from the post-discharge injunction of § 524(a)(2)).

In sum, there is no basis to suggest the district court disregarded the bankruptcy court's order of February 25, 2019. Ironically, under Dodds' erroneous interpretation of § 524(a)(2), the district court would have been required to reject the bankruptcy court's order as *ultra vires*. *Munoz*, 287 B.R. at 553 (courts lack discretion to modify the § 524(a)(2) discharge injunction). Under the correct interpretation of § 524(a)(2) – injunction did not prohibit continuing the claim and attempting to collect from the insurer any judgment against Dr. Tierney – the bankruptcy court's order clarified details about Dodds' existing authority. Rather than ignore those details, the district court explicitly gave them credence:

Judge Myers essentially confirmed [federal law impacted the state law service of process deadline but did not transform it into a federal defense] by carefully and deliberately ruling that “this Order shall not in any way affect either the substantive or procedural claims or defenses of any party, including Dodds or Debtor, in CDV 13-364.”

(Dodds App. 13:¶ 48).

**B. Dr. Tierney had standing to litigate the medical malpractice action Dodds filed against him May 7, 2013.**

Standing is a doctrine of justiciability concerning whether a party is entitled to participate in adjudication of a dispute or particular issue. *Chipman v. N.W. Healthcare Corp.*, 2012 MT 242, ¶ 25, 366 Mont. 450, 288 P.3d 193; *Gryczan v.*



*State*, 283 Mont. 433, 442, 942 P.2d 112, 118 (1997); *Mont. Trout Unlimited v. Beaverhead Water Co.*, 2011 MT 151, ¶ 27, 361 Mont. 77, 255 P.3d 179. Standing, in essence, requires a personal stake in the outcome. *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 29, 360 Mont. 207, 255 P.3d 80. “Standing is determined ***as of the time the action is brought.***” *Chipman*, ¶ 25 (emphasis added) (citing *Heffernan*, ¶ 30).

Here, Dr. Tierney plainly had standing when Dodds filed this medical malpractice action against him May 7, 2013. Dodds does not contend otherwise. In fact, by arguing Dr. Tierney purportedly lost standing upon discharge, (Dodds Br. 10), Dodds effectively concedes Dr. Tierney had standing when this action was filed. Therefore, because Dr. Tierney had standing when this action was filed, Dodds’ argument fails as a matter of law. *Chipman*, ¶ 25; *Heffernan*, ¶ 30.

**C. Despite the bankruptcy discharge, Dr. Tierney maintained a personal stake in the outcome of this medical malpractice action and particular issues essential to its resolution.**

The doctrine of mootness – not to be confused with standing, which is determined when an action is filed – concerns maintenance of a personal stake in the outcome throughout litigation. *Heffernan*, ¶ 30. Neither at the district court level, nor in this appeal, has Dodds explicitly raised a mootness argument. However, what Dodds incorrectly labels as a loss of standing argument – i.e. purported loss of personal stake during litigation – is, in substance, a mootness argument.

[T]he requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).

*Progressive Direct Ins. Co. v. Stuivenga*, 2012 MT 75, ¶ 17, 364 Mont. 390, 276 P.3d 867.

**1. Persuasive authority demonstrates a defendant’s personal stake in contesting allegations of negligence is not erased by a bankruptcy discharge.**

Mootness is a threshold issue of justiciability courts must address before considering the merits of a dispute. *Stuivenga*, ¶ 17. Accordingly, the “many [federal] cases” holding an action could be continued against a debtor post-discharge up to the limits of an applicable insurance policy, *Beeney*, 142 B.R. at 362, suggest the debtor maintained some personal stake in the action to be continued. Decisions from the courts in which such actions were continued, moreover, reflect determinations (implicit or explicit) that the debtor maintained some personal stake. *See e.g. Hilgarth v. Nankervis*, 612 N.Y.S.2d 542, 544-45 (Sup. Ct. N.Y. 1994) (denying defendant’s motion to dismiss based upon bankruptcy discharge and holding the plaintiff could “continue the instant action against [the defendant] to prove liability as a prerequisite to recovery from her liability carrier”); *Easterling v. Progressive Specialty Ins. Co.*, 251 So.3d 767, 772 (Al. 2017) (noting, despite bankruptcy, the merits of the plaintiff’s claim against the defendant would still be at issue); *Lightowler v. Continental Ins. Co.*, 769 A.2d 49, 54 (Conn. 2001) (holding the plaintiff could continue a legal malpractice against the defendant for purposes of

enforcing any judgment against insurer).

It is patently unreasonable to assume these (and other) courts ignored threshold obligations of addressing justiciability. It is far more likely that an express mootness analysis was unwarranted because a defendant's interest in exculpating themselves of alleged wrongdoing plainly constitutes a personal stake in the outcome.

**2. Dodds' argument ignores the fundamental question underlying a mootness inquiry.**

The central question underlying mootness is whether granting "some form of effective relief" remains possible. *Matter of Big Foot Dumpsters & Containers, LLC*, 2022 MT 67, ¶ 10, 408 Mont. 187, 507 P.3d 169.

Here, Dr. Tierney agrees discharge of the bankruptcy proceeding mooted the issue of whether he could be personally financially responsible if Dodds obtained a judgment in this medical malpractice action. However, Dodds ignores two crucial points: (1) she needed to prove her medical malpractice claim against Dr. Tierney to obtain a judgment, and (2) if Dodds obtained a judgment, effective relief remained vis-à-vis the professional liability insurance policy. Neither the medical malpractice action filed by Dodds against Dr. Tierney nor Dr. Tierney's participation in the action, therefore, were mooted by the bankruptcy discharge.

Dodds' argument that personal stake turns on potential for personal financial responsibility is absurd. Whether or not an insurance policy might cover a judgment, a defendant accused of tortiously injuring another has a personal stake in defending

the claim. It would defy common sense, logic, and practical reality to accept Dodds' position and conclude no person covered by a liability insurance policy has a personal stake in defending adverse claims unless alleged damages exceed policy limits.

Dodds' attempt to equate personal stake with contractual settlement authority also misses the mark. Montana law does not require any or all liability insurance policies contain a consent to settlement clause. Accordingly, it is fair to assume, and Dr. Tierney's counsel has seen in practice, many liability insurance policies that entirely reserve settlement authority to the insurer. It would be unreasonable to conclude persons covered by such a policy lack personal interest in exculpating themselves of alleged torts. Any settlement authority Dr. Tierney lost via discharge, therefore, is immaterial to the present inquiry. Dr. Tierney had when this action was filed, and maintained at all times, a personal stake in exculpating himself of alleged legal wrongdoing.

**3. Dr. Tierney had and maintained a personal stake in exculpating himself of the allegations levied by Dodds.**

A party need not have a personal interest regarding every issue involved in a dispute; a personal stake in a particular issue is sufficient. *Gryczan*, 283 Mont. at 442, 942 P.2d at 118. The personal stake inquiry concerns a party's right to court determination of a "dispute *or* of particular issues." *Id.* (emphasis added); *see also Mont. Trout Unlimited*, ¶ 27 (is the litigant "a proper party to seek adjudication of a

particular issue”).

Here, exclusively focusing on the issue of financial responsibility is a fatal flaw in Dodds’ argument. Dr. Tierney had when this action was filed and maintained after bankruptcy discharge a personal stake in many issues essential to Dodds’ medical malpractice claim. For example, Dr. Tierney had a personal stake in resolving the issue of what standard of care applied to him as a physician under the circumstances. Dr. Tierney also had a personal stake in absolving himself of allegedly committing malpractice, an issue with serious potential consequences beyond merely paying a judgment. An adverse finding would compel reporting to the National Practitioner Data Bank. An adverse finding (and the resulting data bank hit) could irreparably affect professional reputation, license, employability, insurability, and/or insurance rates. Adverse findings or verdicts in this regard are also associated with causation or catalyzation of mental health issues.<sup>2</sup> After claiming he negligently injured her, it is myopic and untenable for Dodds to contend Dr. Tierney lacks a personal stake in defending himself.

**D. Joinder was unnecessary and substitution of the insurer would have been inappropriate.**

Contrary to Dodds’ contention that determining liability in this medical malpractice action was impossible without joinder/substitution of the insurer,

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<sup>2</sup> See e.g. Balch, et al., *Personal Consequences of Malpractice Lawsuits on American Surgeons*, 213(5) J. AM. COLL. SURG. 657-667 (Nov. 2011) (DOI: 10.1016/j.jamcollurg.2011.08.005).

(Dodds Br. 10), an insurer's duty to indemnify arises if and when coverage is established, *State Farm Mut. Auto. Inc. Co. v. Freyer*, 2013 MT 301, ¶ 26, 372 Mont. 191, 312 P.3d 403. To establish the insurer's contractual liability under the policy, therefore, Dodds needed to prove her malpractice claim against Dr. Tierney. *Freyer*, ¶ 26 (duty to indemnify hinges on facts proved or otherwise established). Whether the insurer was a party had no bearing on whether Dodds could prove the elements of her medical malpractice claim against Dr. Tierney.

Dodds' reliance on Mont. R. Civ. P. 17(a) is, likewise, misplaced. Rule 17(a)(1) concerns only by whom an action may be "prosecuted." It prescribes no rule governing by whom an action may be defended. The same is true of Rule 17(a)(3), which governs propriety of dismissal for "failure to prosecute in the name of the real party in interest." Dr. Tierney prosecuted no action against Dodds; Dodds, rather, prosecuted this medical malpractice action against Dr. Tierney. Rule 17(a) has no application to the issue at hand. *See Emanuel v. Great Falls School Dist.*, 2009 MT 185, ¶ 19, 351 Mont. 56, 209 P.3d 244 (rejecting the plaintiff's argument because Rule 17(a) had no application to "a proposed party defendant").

The cases cited by Dodds (e.g. *White v. Lobdell*, 208 Mont. 295, 678 P.2d 637 (1984) and *Bergh v. Rogers*, 167 Mont. 243, 536 P.2d 1190 (1975)) are plainly distinguishable from the present matter. (Dodds Br. 13 *et seq.*). Unlike *White*, there is no principal-agent relationship between the insurer and Dr. Tierney nor has Dodds

alleged any such theory. Unlike *Bergh*, the present matter does not involve a subrogated co-plaintiff and, as just discussed, Rule 17(a) is inapplicable to defendants.

## **VI. CONCLUSION**

The district court correctly dismissed the action against Dr. Tierney under Rule 12(b)(5) for Dodds' failure to timely serve sufficient process. The parties agree attempted service during the automatic stay was ineffective. Dodds failed to perfect service post-discharge within the grace period provided by the Bankruptcy Code. Instead, Dodds caused years of additional delay pursuing a superfluous course of action. Dr. Tierney respectfully requests the district court's order be affirmed.

Respectfully submitted this 13th day of October 2023.

**HALL BOOTH SMITH, P.C.**

*Attorneys for Appellant*

*Gregory S. Tierney, M.D.*

/s/ Joe Newman

Joe Newman

## **CERTIFICATE OF COMPLIANCE**

Pursuant to Montana Rule of Appellate Procedure 11(4)(e), I certify that this brief is printed with proportionately-spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word 360 is 4,241 words, excluding caption, table of contents, table of authorities, certificate of compliance, certificate of service, and appendix.

Dated this 13th day of October, 2023.

**HALL BOOTH SMITH, P.C.**

*Attorneys for Appellant*

*Gregory S. Tierney, M.D.*

/s/ Joe Newman

Joe Newman



# **TIERNEY'S APPENDIX**

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**TIERNEY'S APPENDIX**  
**NO. 1**

Fill in this information to identify your case:

United States Bankruptcy Court for the:

DISTRICT OF MONTANA

Case number (if known) \_\_\_\_\_

Chapter you are filing under:

☒ Chapter 7

☐ Chapter 11

☐ Chapter 12

☐ Chapter 13

☐ Check if this an amended filing

Official Form 101

Voluntary Petition for Individuals Filing for Bankruptcy

12/15

The bankruptcy forms use you and Debtor 1 to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, these forms use you to ask for information from both debtors. For example, if a form asks, “Do you own a car,” the answer would be yes if either debtor owns a car. When information is needed about the spouses separately, the form uses *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known). Answer every question.

Part 1: Identify Yourself

About Debtor 1:

About Debtor 2 (Spouse Only in a Joint Case):

1. Your full name

Write the name that is on your government-issued picture identification (for example, your driver's license or passport).

Bring your picture identification to your meeting with the trustee.

**Gregory**

First name

**Scot**

Middle name

**Tierney**

Last name and Suffix (Sr., Jr., II, III)

First name

Middle name

Last name and Suffix (Sr., Jr., II, III)

2. All other names you have used in the last 8 years

Include your married or maiden names.

3. Only the last 4 digits of your Social Security number or federal Individual Taxpayer Identification number (ITIN)

**xxx-xx-3345**

**About Debtor 1:****4. Any business names and Employer Identification Numbers (EIN) you have used in the last 8 years**☒ I have not used any business name or EINs.Include trade names and  
doing business as names

Business name(s)

EINs

**About Debtor 2 (Spouse Only in a Joint Case):**☐ I have not used any business name or EINs.

Business name(s)

EINs

**5. Where you live****75 Spring Tree Road  
Great Falls, MT 59404**

Number, Street, City, State &amp; ZIP Code

**Cascade**

County

**If your mailing address is different from the one above, fill it in here.** Note that the court will send any notices to you at this mailing address.

Number, P.O. Box, Street, City, State &amp; ZIP Code

**If Debtor 2 lives at a different address:**

Number, Street, City, State &amp; ZIP Code

County

**If Debtor 2's mailing address is different from yours, fill it in here.** Note that the court will send any notices to this mailing address.

Number, P.O. Box, Street, City, State &amp; ZIP Code

**6. Why you are choosing this district to file for bankruptcy**

Check one:

☒ Over the last 180 days before filing this petition, I have lived in this district longer than in any other district.☐ I have another reason.  
Explain. (See 28 U.S.C. § 1408.)

Check one:

☐ Over the last 180 days before filing this petition, I have lived in this district longer than in any other district.☐ I have another reason.  
Explain. (See 28 U.S.C. § 1408.)

**Part 2: Tell the Court About Your Bankruptcy Case**

7. **The chapter of the Bankruptcy Code you are choosing to file under** *Check one. (For a brief description of each, see Notice Required by 11 U.S.C. § 342(b) for Individuals Filing for Bankruptcy (Form 2010)). Also, go to the top of page 1 and check the appropriate box.*
- ☒ Chapter 7
- ☐ Chapter 11
- ☐ Chapter 12
- ☐ Chapter 13
- 
8. **How you will pay the fee** ☒ **I will pay the entire fee when I file my petition.** Please check with the clerk's office in your local court for more details about how you may pay. Typically, if you are paying the fee yourself, you may pay with cash, cashier's check, or money order. If your attorney is submitting your payment on your behalf, your attorney may pay with a credit card or check with a pre-printed address.
- ☐ **I need to pay the fee in installments.** If you choose this option, sign and attach the *Application for Individuals to Pay The Filing Fee in Installments* (Official Form 103A).
- ☐ **I request that my fee be waived** (You may request this option only if you are filing for Chapter 7. By law, a judge may, but is not required to, waive your fee, and may do so only if your income is less than 150% of the official poverty line that applies to your family size and you are unable to pay the fee in installments). If you choose this option, you must fill out the *Application to Have the Chapter 7 Filing Fee Waived* (Official Form 103B) and file it with your petition.
- 
9. **Have you filed for bankruptcy within the last 8 years?** ☒ No.
- ☐ Yes.
- |          |       |      |       |             |       |
|----------|-------|------|-------|-------------|-------|
| District | _____ | When | _____ | Case number | _____ |
| District | _____ | When | _____ | Case number | _____ |
| District | _____ | When | _____ | Case number | _____ |
- 
10. **Are any bankruptcy cases pending or being filed by a spouse who is not filing this case with you, or by a business partner, or by an affiliate?** ☐ No.
- ☒ Yes.
- |          |                            |                       |                  |
|----------|----------------------------|-----------------------|------------------|
| Debtor   | <u>Shoot the Moon, LLC</u> | Relationship to you   | <u>Affiliate</u> |
| District | <u>Montana</u>             | When                  | <u>10/21/15</u>  |
|          |                            | Case number, if known | <u>15-60979</u>  |
| Debtor   | _____                      | Relationship to you   | _____            |
| District | _____                      | When                  | _____            |
|          |                            | Case number, if known | _____            |
- 
11. **Do you rent your residence?** ☒ No. Go to line 12.
- ☐ Yes. Has your landlord obtained an eviction judgment against you and do you want to stay in your residence?
- ☐ No. Go to line 12.
- ☐ Yes. Fill out *Initial Statement About an Eviction Judgment Against You* (Form 101A) and file it with this bankruptcy petition.

**Part 3: Report About Any Businesses You Own as a Sole Proprietor****12. Are you a sole proprietor of any full- or part-time business?**☒ No. Go to Part 4.☐ Yes. Name and location of business

A sole proprietorship is a business you operate as an individual, and is not a separate legal entity such as a corporation, partnership, or LLC.

If you have more than one sole proprietorship, use a separate sheet and attach it to this petition.

\_\_\_\_\_  
Name of business, if any\_\_\_\_\_  
Number, Street, City, State & ZIP Code*Check the appropriate box to describe your business:*

- ☐ Health Care Business (as defined in 11 U.S.C. § 101(27A))  
☐ Single Asset Real Estate (as defined in 11 U.S.C. § 101(51B))  
☐ Stockbroker (as defined in 11 U.S.C. § 101(53A))  
☐ Commodity Broker (as defined in 11 U.S.C. § 101(6))  
☐ None of the above

**13. Are you filing under Chapter 11 of the Bankruptcy Code and are you a small business debtor?**

For a definition of *small business debtor*, see 11 U.S.C. § 101(51D).

*If you are filing under Chapter 11, the court must know whether you are a small business debtor so that it can set appropriate deadlines. If you indicate that you are a small business debtor, you must attach your most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return or if any of these documents do not exist, follow the procedure in 11 U.S.C. 1116(1)(B).*

☒ No. I am not filing under Chapter 11.☐ No. I am filing under Chapter 11, but I am NOT a small business debtor according to the definition in the Bankruptcy Code.☐ Yes. I am filing under Chapter 11 and I am a small business debtor according to the definition in the Bankruptcy Code.**Part 4: Report if You Own or Have Any Hazardous Property or Any Property That Needs Immediate Attention****14. Do you own or have any property that poses or is alleged to pose a threat of imminent and identifiable hazard to public health or safety? Or do you own any property that needs immediate attention?**☒ No.☐ Yes. What is the hazard? \_\_\_\_\_\_\_\_\_\_  
If immediate attention is needed, why is it needed?

*For example, do you own perishable goods, or livestock that must be fed, or a building that needs urgent repairs?*

\_\_\_\_\_  
Where is the property?\_\_\_\_\_  
Number, Street, City, State & Zip Code

**Part 5: Explain Your Efforts to Receive a Briefing About Credit Counseling****15. Tell the court whether you have received a briefing about credit counseling.**

The law requires that you receive a briefing about credit counseling before you file for bankruptcy. You must truthfully check one of the following choices. If you cannot do so, you are not eligible to file.

If you file anyway, the court can dismiss your case, you will lose whatever filing fee you paid, and your creditors can begin collection activities again.

**About Debtor 1:**

*You must check one:*

- ☒ **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, and I received a certificate of completion.**

Attach a copy of the certificate and the payment plan, if any, that you developed with the agency.

- ☐ **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, but I do not have a certificate of completion.**

Within 14 days after you file this bankruptcy petition, you **MUST** file a copy of the certificate and payment plan, if any.

- ☐ **I certify that I asked for credit counseling services from an approved agency, but was unable to obtain those services during the 7 days after I made my request, and exigent circumstances merit a 30-day temporary waiver of the requirement.**

To ask for a 30-day temporary waiver of the requirement, attach a separate sheet explaining what efforts you made to obtain the briefing, why you were unable to obtain it before you filed for bankruptcy, and what exigent circumstances required you to file this case.

Your case may be dismissed if the court is dissatisfied with your reasons for not receiving a briefing before you filed for bankruptcy. If the court is satisfied with your reasons, you must still receive a briefing within 30 days after you file. You must file a certificate from the approved agency, along with a copy of the payment plan you developed, if any. If you do not do so, your case may be dismissed.

Any extension of the 30-day deadline is granted only for cause and is limited to a maximum of 15 days.

- ☐ **I am not required to receive a briefing about credit counseling because of:**

- ☐ **Incapacity.** I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances.
- ☐ **Disability.** My physical disability causes me to be unable to participate in a briefing in person, by phone, or through the internet, even after I reasonably tried to do so.
- ☐ **Active duty.** I am currently on active military duty in a military combat zone.

If you believe you are not required to receive a briefing about credit counseling, you must file a motion for waiver of credit counseling with the court.

**About Debtor 2 (Spouse Only in a Joint Case):**

*You must check one:*

- ☐ **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, and I received a certificate of completion.**

Attach a copy of the certificate and the payment plan, if any, that you developed with the agency.

- ☐ **I received a briefing from an approved credit counseling agency within the 180 days before I filed this bankruptcy petition, but I do not have a certificate of completion.**

Within 14 days after you file this bankruptcy petition, you **MUST** file a copy of the certificate and payment plan, if any.

- ☐ **I certify that I asked for credit counseling services from an approved agency, but was unable to obtain those services during the 7 days after I made my request, and exigent circumstances merit a 30-day temporary waiver of the requirement.**

To ask for a 30-day temporary waiver of the requirement, attach a separate sheet explaining what efforts you made to obtain the briefing, why you were unable to obtain it before you filed for bankruptcy, and what exigent circumstances required you to file this case.

Your case may be dismissed if the court is dissatisfied with your reasons for not receiving a briefing before you filed for bankruptcy.

If the court is satisfied with your reasons, you must still receive a briefing within 30 days after you file. You must file a certificate from the approved agency, along with a copy of the payment plan you developed, if any. If you do not do so, your case may be dismissed.

Any extension of the 30-day deadline is granted only for cause and is limited to a maximum of 15 days.

- ☐ **I am not required to receive a briefing about credit counseling because of:**

- ☐ **Incapacity.** I have a mental illness or a mental deficiency that makes me incapable of realizing or making rational decisions about finances.
- ☐ **Disability.** My physical disability causes me to be unable to participate in a briefing in person, by phone, or through the internet, even after I reasonably tried to do so.
- ☐ **Active duty.** I am currently on active military duty in a military combat zone.

If you believe you are not required to receive a briefing about credit counseling, you must file a motion for waiver of credit counseling with the court.



**Part 6: Answer These Questions for Reporting Purposes**

16. What kind of debts do you have?	16a.	<b>Are your debts primarily consumer debts?</b> <i>Consumer debts</i> are defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose."		
		<input checked="" type="checkbox"/> No. Go to line 16b. <input type="checkbox"/> Yes. Go to line 17.		
	16b.	<b>Are your debts primarily business debts?</b> <i>Business debts</i> are debts that you incurred to obtain money for a business or investment or through the operation of the business or investment.		
		<input type="checkbox"/> No. Go to line 16c. <input checked="" type="checkbox"/> Yes. Go to line 17.		
	16c.	State the type of debts you owe that are not consumer debts or business debts		
<hr/>				
17. Are you filing under Chapter 7?	<input type="checkbox"/> No.	I am not filing under Chapter 7. Go to line 18.		
Do you estimate that after any exempt property is excluded and administrative expenses are paid that funds will be available for distribution to unsecured creditors?	<input checked="" type="checkbox"/> Yes.	I am filing under Chapter 7. Do you estimate that after any exempt property is excluded and administrative expenses are paid that funds will be available to distribute to unsecured creditors?		
		<input type="checkbox"/> No <input checked="" type="checkbox"/> Yes		
<hr/>				
18. How many Creditors do you estimate that you owe?	<input type="checkbox"/> 1-49 <input type="checkbox"/> 50-99 <input type="checkbox"/> 100-199 <input checked="" type="checkbox"/> 200-999	<input type="checkbox"/> 1,000-5,000 <input type="checkbox"/> 5001-10,000 <input type="checkbox"/> 10,001-25,000	<input type="checkbox"/> 25,001-50,000 <input type="checkbox"/> 50,001-100,000 <input type="checkbox"/> More than 100,000	
<hr/>				
19. How much do you estimate your assets to be worth?	<input type="checkbox"/> \$0 - \$50,000 <input type="checkbox"/> \$50,001 - \$100,000 <input type="checkbox"/> \$100,001 - \$500,000 <input type="checkbox"/> \$500,001 - \$1 million	<input checked="" type="checkbox"/> \$1,000,001 - \$10 million <input type="checkbox"/> \$10,000,001 - \$50 million <input type="checkbox"/> \$50,000,001 - \$100 million <input type="checkbox"/> \$100,000,001 - \$500 million	<input type="checkbox"/> \$500,000,001 - \$1 billion <input type="checkbox"/> \$1,000,000,001 - \$10 billion <input type="checkbox"/> \$10,000,000,001 - \$50 billion <input type="checkbox"/> More than \$50 billion	
<hr/>				
20. How much do you estimate your liabilities to be?	<input type="checkbox"/> \$0 - \$50,000 <input type="checkbox"/> \$50,001 - \$100,000 <input type="checkbox"/> \$100,001 - \$500,000 <input type="checkbox"/> \$500,001 - \$1 million	<input type="checkbox"/> \$1,000,001 - \$10 million <input checked="" type="checkbox"/> \$10,000,001 - \$50 million <input type="checkbox"/> \$50,000,001 - \$100 million <input type="checkbox"/> \$100,000,001 - \$500 million	<input type="checkbox"/> \$500,000,001 - \$1 billion <input type="checkbox"/> \$1,000,000,001 - \$10 billion <input type="checkbox"/> \$10,000,000,001 - \$50 billion <input type="checkbox"/> More than \$50 billion	

**Part 7: Sign Below****For you**

I have examined this petition, and I declare under penalty of perjury that the information provided is true and correct.

If I have chosen to file under Chapter 7, I am aware that I may proceed, if eligible, under Chapter 7, 11, 12, or 13 of title 11, United States Code. I understand the relief available under each chapter, and I choose to proceed under Chapter 7.

If no attorney represents me and I did not pay or agree to pay someone who is not an attorney to help me fill out this document, I have obtained and read the notice required by 11 U.S.C. § 342(b).

I request relief in accordance with the chapter of title 11, United States Code, specified in this petition.

I understand making a false statement, concealing property, or obtaining money or property by fraud in connection with a bankruptcy case can result in fines up to \$250,000, or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

**/s/ Gregory Scot Tierney****Gregory Scot Tierney**

Signature of Debtor 1

Signature of Debtor 2

Executed on 02/05/2016

MM / DD / YYYY

Executed on

MM / DD / YYYY

Debtor 1 **Gregory Scot Tierney**

Case number (if known)

**For your attorney, if you are represented by one**

**If you are not represented by an attorney, you do not need to file this page.**

I, the attorney for the debtor(s) named in this petition, declare that I have informed the debtor(s) about eligibility to proceed under Chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each chapter for which the person is eligible. I also certify that I have delivered to the debtor(s) the notice required by 11 U.S.C. § 342(b) and, in a case in which § 707(b)(4)(D) applies, certify that I have no knowledge after an inquiry that the information in the schedules filed with the petition is incorrect.

**/s/ Joel E. Guthals**

Signature of Attorney for Debtor

Date

**02/05/2016**

MM / DD / YYYY

**Joel E. Guthals**

Printed name

**Guthals, Hunnes & Reuss, P.C.**

Firm name

**P.O. Box 1977**

**Billings, MT 59101**

Number, Street, City, State & ZIP Code

Contact phone **(406)245-3071**

Email address

**jeguthals@ghrlawfirm.com**

**589**

Bar number & State

Certificate Number: 01141-MT-CC-026475999



01141-MT-CC-026475999

## CERTIFICATE OF COUNSELING

I CERTIFY that on November 4, 2015, at 12:12 o'clock PM EST, Gregory Tierney received from American Consumer Credit Counseling, Inc., an agency approved pursuant to 11 U.S.C. § 111 to provide credit counseling in the District of Montana, an individual [or group] briefing that complied with the provisions of 11 U.S.C. §§ 109(h) and 111.

A debt repayment plan was not prepared. If a debt repayment plan was prepared, a copy of the debt repayment plan is attached to this certificate.

This counseling session was conducted by internet.

Date: November 4, 2015 By: /s/Jennifer Papa

Name: Jennifer Papa

Title: Credit Counselor

\* Individuals who wish to file a bankruptcy case under title 11 of the United States Bankruptcy Code are required to file with the United States Bankruptcy Court a completed certificate of counseling from the nonprofit budget and credit counseling agency that provided the individual the counseling services and a copy of the debt repayment plan, if any, developed through the credit counseling agency. See 11 U.S.C. §§ 109(h) and 521(b).

**TIERNEY'S APPENDIX**  
**NO. 2**

**Information to identify the case:**Debtor 1 **GREGORY SCOT TIERNEY**

First Name Middle Name Last Name

Social Security number or ITIN **xxx-xx-3345**

EIN --\_--\_--\_--\_--\_--

Debtor 2

(Spouse, if filing)

First Name Middle Name Last Name

Social Security number or ITIN \_ \_ \_ \_ \_

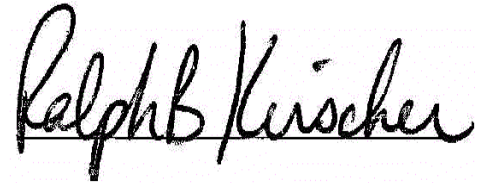
EIN --\_--\_--\_--\_--\_--

United States Bankruptcy Court **U.S. Bankruptcy Court, District of Montana**Case number: **16-60060-RBK****Order of Discharge**

12/15

**IT IS ORDERED:** A discharge under 11 U.S.C. § 727 is granted to:

GREGORY SCOT TIERNEY

8/3/16By the  
court:

United States Bankruptcy Judge

**Explanation of Bankruptcy Discharge in a Chapter 7 Case**

This order does not close or dismiss the case, and it does not determine how much money, if any, the trustee will pay creditors.

**Creditors cannot collect discharged debts**

This order means that no one may make any attempt to collect a discharged debt from the debtors personally. For example, creditors cannot sue, garnish wages, assert a deficiency, or otherwise try to collect from the debtors personally on discharged debts. Creditors cannot contact the debtors by mail, phone, or otherwise in any attempt to collect the debt personally. Creditors who violate this order can be required to pay debtors damages and attorney's fees.

However, a creditor with a lien may enforce a claim against the debtors' property subject to that lien unless the lien was avoided or eliminated. For example, a creditor may have the right to foreclose a home mortgage or repossess an automobile.

This order does not prevent debtors from paying any debt voluntarily or from paying reaffirmed debts according to the reaffirmation agreement. 11 U.S.C. § 524(c), (f).

**Most debts are discharged**

Most debts are covered by the discharge, but not all. Generally, a discharge removes the debtors' personal liability for debts owed before the debtors' bankruptcy case was filed.

Also, if this case began under a different chapter of the Bankruptcy Code and was later converted to chapter 7, debts owed before the conversion are discharged.

In a case involving community property: Special rules protect certain community property owned by the debtor's spouse, even if that spouse did not file a bankruptcy case.

**For more information, see page 2 >**

### **Some debts are not discharged**

Examples of debts that are not discharged are:

- ◆ debts that are domestic support obligations;
- ◆ debts for most student loans;
- ◆ debts for most taxes;
- ◆ debts that the bankruptcy court has decided or will decide are not discharged in this bankruptcy case;
- ◆ debts for most fines, penalties, forfeitures, or criminal restitution obligations;
- ◆ some debts which the debtors did not properly list;
- ◆ debts for certain types of loans owed to pension, profit sharing, stock bonus, or retirement plans; and
- ◆ debts for death or personal injury caused by operating a vehicle while intoxicated.

Also, debts covered by a valid reaffirmation agreement are not discharged.

In addition, this discharge does not stop creditors from collecting from anyone else who is also liable on the debt, such as an insurance company or a person who cosigned or guaranteed a loan.

**This information is only a general summary of the bankruptcy discharge; some exceptions exist. Because the law is complicated, you should consult an attorney to determine the exact effect of the discharge in this case.**

**TIERNEY'S APPENDIX**  
**NO. 3**

John E. Seidlitz, Jr.  
SEIDLITZ LAW OFFICE  
21 Third Street North, Suite 412  
P.O. Box 1581  
Great Falls, MT 59403-1581  
Telephone: (406) 727-1431  
Facsimile: (406) 452-9933  
Attorney for Janice Dodds

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF MONTANA

GREGORY SCOT TIERNEY,  
  
Debtor.

Case No.: 16-60060

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**MOTION TO PURSUE CLAIM  
COVERED BY INSURANCE**

---

1. I represent Janice Dodds.
2. On November 4, 2012 Janice M. Dodds filed a complaint against Gregory S. Tierney with the Medical Malpractice Panel.
3. The Panel made their decision on April 9, 2013.
4. On May 7, 2013 a Complaint was filed in District Court.
5. The Complaint contains the following allegations:

**I.**

Plaintiff Janice M. Dodds is a resident of Great Falls, Cascade County, Montana.

**II.**

Defendant Gregory S. Tierney, M.D. is a resident of Great Falls, Cascade County, Montana.



**III.**

Defendant Gregory S. Tierney, M.D., at all relevant times herein, was and is a physician licensed to practice by the State of Montana.

**IV.**

Defendant John Goodnow is a resident of Great Falls, Cascade County, Montana.

**V.**

Defendant Benefis Health System is a Montana Corporation, located in Great Falls, Montana, providing patient care services to the members of the public as Benefis Health System.

**VI.**

The true names and capacities of the defendants named herein as Does I - IV, inclusive, are unknown to the Plaintiff, who therefore bring this action against such defendants by such fictitious names. Plaintiff will seek leave to amend the Complaint to state the true names and capacities of Does I - IV when the same have been fully ascertained, together with further appropriate charging allegations. The Plaintiff is informed and believes and there upon allege that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged and that Plaintiff's damages as herein alleged were proximately caused by said defendants' acts or omissions.

**VII.**

On November 23, 2009, Janice Dodds presented to Health Care Facility and Physician for a total knee replacement of her left knee.

**VIII.**

On November 23, 2009, during the knee replacement procedure, Plaintiff incurred a burn in her leg, above the surgery site, when the guide wire was used to get the top part of the joint in, the wire had gone through Plaintiff's femur and out her skin.

**IX.**

Plaintiff returned to Physician the week of November 30, 2009 for follow up. X-rays were taken. Plaintiff complaint of continued pain but was advised it would improve.

**X.**

On subsequent follow up visits Plaintiff complained that her leg was not straight. She was advised it was straighter than her right leg.

**XI.**

On November 17, 2011 Plaintiff was examined by Dr. Albert Olszewski. She was advised she had a 10 degree deviation in her knee and the most reasonably medically acceptable following her surgery was 7 degrees, and the head of Plaintiff's femur was misplaced in the socket because of the misaligned knee position.

**XII.**

Plaintiff was scheduled for a knee revision December 6, 2011 in Kalispell, however, due to the physician negligence Plaintiff's muscle tendons and ligaments were stretched on the inside of her leg and have shortened on the outside of her leg and she continued to suffer from severe pain.

**XIII.**

The Health Care Facility and Physician were negligent and breached the standard of care in failing to properly align her knee as part of the surgery.

**XIV.**

The Health Care Facility and Physician were negligent and breached the standard of care in failing to determine the knee had been misaligned after the surgery.

**XV.**

The Health Care Facility and Physician were negligent and breached the standard of care in failing to determine the cause of Plaintiff's pain and complaints were the misaligned knee and such delay increased her pain and suffering and delayed surgical repairs.

**XVI.**

The Health Care Facility and Physician were negligent and breached the standard of care in failing to provide records and x-rays which established the misalignment.

**XVII.**

As a direct result of the conduct of the Health Care Facility through its Physician, Plaintiff suffers permanent pain and limitations.

**XVIII.**

Defendants were negligent and violated the standard of care by failing to properly treat Plaintiff Janice Dodds' condition and failing to utilize the ordinary skill, care and learning of physicians authorized by the State of Montana to practice medicine.

**XIX.**

Defendants' negligence and the resulting injury has directly and

proximately caused Plaintiff to suffer damages and contributed to the deterioration of Plaintiff Janice Dodds' medical condition and subsequent need for additional medical care.

**XX.**

As a direct and proximate result of defendants' negligence and breach in the standard of medical care, Plaintiff suffered severe and permanent damages including pain and suffering, lost earning capacity, loss of enjoyment of life, loss of established course of life, loss of medical and incidental expenses, and wages, both accrued and future.

6. Plaintiff seeks damages from the Debtor, which are covered by a policy of malpractice insurance. There are no benefits which would be the personal responsibility of Debtor and not the responsibility of malpractice insurance.

7. Plaintiff has submitted a copy of the Motion to Pursue Claim Covered by Insurance to the Debtor's attorney, Joel E. Guthals.

8. On September 18, 2016 he indicated he does not consent to the Motion to pursue the claim.

9. Based upon the facts contained herein John E. Seidlitz, Jr., on behalf of Janice Dodds, requests permission to pursue the claim against Tierney, Debtor, covered by insurance in Cause No. CDV-13-364.

DATED this 18<sup>th</sup> day of October, 2016.

SEIDLITZ LAW OFFICE

By: /s/ John E. Seidlitz, Jr.  
John E. Seidlitz, Jr.  
P.O. Box 1581  
Great Falls, MT 59403-1581  
Attorney for Plaintiff

**CERTIFICATE OF MAILING**

I do hereby certify that on this 3<sup>rd</sup> day of November, 2016, I served a true and correct copy of the above and foregoing **Motion to Pursue Claim Covered by Insurance** on all interested parties by placing said copy in the United States Postal Service, postage prepaid, addressed to the following:

Joel E. Guthals  
GUTHALS, HUNNES & REUSS, PC  
175 N. 27<sup>th</sup> Street, Ste. 903  
P.O. Box 1977  
Billings, MT 59103-1977

Darcy M. Crum  
Attorney at Law  
300 Central Avenue  
Great Falls, MT 59401

/s/ John E. Seidlitz, Jr.

**TIERNEY'S APPENDIX**  
**NO. 4**

**UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF MONTANA**

In re

**GREGORY SCOT TIERNEY,**

Debtor.

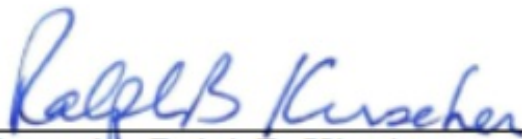
Case No. **16-60060-7**

**ORDER**

At Butte in said District this 9<sup>th</sup> day of December, 2016.

A hearing was held in this Chapter 13 case at Great Falls on December 9, 2016, on the "Motion to Pursue Claim Covered by Insurance" filed on November 3, 2016, by creditor Janice Dodds (Document No. 168). The Debtor filed objections and was represented at the hearing by attorneys Joel E. Guthals and Laura T. Myers of Guthals, Hunnes & Reuss, P.C., of Billings. Janice Dodds was represented at the hearing by attorney John E. Seidlitz, Jr., of Great Falls. No witness and exhibit list was filed by Janice Dodds prior to the hearing as required by Montana Local Bankruptcy Rule No. 5074-1(b). Consequently, no witness testimony or exhibits were offered or admitted into evidence at the hearing. The Court heard argument of counsel, at the conclusion of which the Court summarily denied Janice Dodds' Motion, with leave to refile in compliance with applicable Rules.

**IT IS ORDERED** the "Motion to Pursue Claim Covered by Insurance" filed on November 3, 2016, by creditor Janice Dodds (Doc. 168) is **DENIED**, with leave to refile in compliance with all applicable Rules.

  
\_\_\_\_\_  
Honorable Ralph B. Kirscher  
Chief U.S. Bankruptcy Judge

**TIERNEY'S APPENDIX**  
**NO. 5**

John E. Seidlitz, Jr.  
SEIDLITZ LAW OFFICE  
12 6<sup>th</sup> Street South, 1A  
P.O. Box 1581  
Great Falls, MT 59403-1581  
Telephone: (406) 727-1431  
Facsimile: (406) 452-9933  
Attorney for Janice Dodds

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF MONTANA

GREGORY SCOT TIERNEY,  
  
Debtor.

Case No.: 16-60060-7

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**MOTION TO PURSUE CLAIM COVERED BY INSURANCE  
and  
NOTICE OF OPPORTUNITY TO RESPOND AND  
REQUEST FOR HEARING**

---

This Motion and Notice of Opportunity to Respond and Request for Hearing is filed pursuant to the Court's Order of December 9, 2016, Cause No. 16-60060-7, (Doc. 177), and Rule 9013.1.

1. I represent Janice Dodds.
2. On November 4, 2012 Janice M. Dodds filed a complaint against Gregory S. Tierney with the Medical Malpractice Panel.
3. The Panel made their decision on April 9, 2013.



4. On May 7, 2013 a Complaint was filed in District Court.

5. The Complaint contains the following allegations:

**I.**

Plaintiff Janice M. Dodds is a resident of Great Falls, Cascade County, Montana.

**II.**

Defendant Gregory S. Tierney, M.D. is a resident of Great Falls, Cascade County, Montana.

**III.**

Defendant Gregory S. Tierney, M.D., at all relevant times herein, was and is a physician licensed to practice by the State of Montana.

**IV.**

Defendant John Goodnow is a resident of Great Falls, Cascade County, Montana.

**V.**

Defendant Benefis Health System is a Montana Corporation, located in Great Falls, Montana, providing patient care services to the members of the public as Benefis Health System.

**VI.**

The true names and capacities of the defendants named herein as Does I - IV, inclusive, are unknown to the Plaintiff, who therefore bring this action against such defendants by such fictitious names. Plaintiff will seek leave to amend the Complaint to state the true names and capacities of Does I - IV when the same have been fully ascertained, together with further appropriate charging allegations. The Plaintiff is informed and believes and there upon allege that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged and that Plaintiff's damages as herein alleged were proximately caused by said defendants' acts or omissions.

**VII.**

On November 23, 2009, Janice Dodds presented to Health Care Facility and Physician for a total knee replacement of her left knee.

**VIII.**

On November 23, 2009, during the knee replacement procedure, Plaintiff incurred a burn in her leg, above the surgery site, when the guide wire was used to get the top part of the joint in, the wire had gone through Plaintiff's femur and out her skin.

**IX.**

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**XII.**

Plaintiff was scheduled for a knee revision December 6, 2011 in Kalispell, however, due to the physician negligence Plaintiff's muscle tendons and ligaments were stretched on the inside of her leg and have shortened on the outside of her leg and she continued to suffer from severe pain.

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As a direct result of the conduct of the Health Care Facility through its Physician, Plaintiff suffers permanent pain and limitations.

**XVIII.**

Defendants were negligent and violated the standard of care by failing to properly treat Plaintiff Janice Dodds' condition and failing to utilize the ordinary skill, care and learning of physicians authorized by the State of Montana to practice medicine.

**XIX.**

Defendants' negligence and the resulting injury has directly and proximately caused Plaintiff to suffer damages and contributed to the deterioration of Plaintiff Janice Dodds' medical condition and subsequent need for additional medical

care.

**XX.**

As a direct and proximate result of defendants' negligence and breach in the standard of medical care, Plaintiff suffered severe and permanent damages including pain and suffering, lost earning capacity, loss of enjoyment of life, loss of established course of life, loss of medical and incidental expenses, and wages, both accrued and future.

6. Plaintiff seeks damages from the Debtor, which are covered by a policy of malpractice insurance. There are no benefits which would be the personal responsibility of Debtor and not the responsibility of malpractice insurance.

7. Plaintiff has submitted a copy of the Motion to Pursue Claim Covered by Insurance to the Debtor's attorney, Jeffery Hunnes.

8. On September 18, 2016 he indicated he does not consent to the Motion to pursue the claim.

9. Based upon the facts contained herein John E. Seidlitz, Jr., on behalf of Janice Dodds, requests permission to pursue the claim against Tierney, Debtor, only to the extent the claim is covered by insurance in Cause No. CDV-13-364.

10. Debtor objected to the Motion to Pursue Claim on the basis Dodds was "simultaneously pursuing the same claim against the Debtor's employer."

11. Dodds claims she will not obtain judgment against Debter personally or against Debter's assets and only seeks to pursue the claim to the extent it is already covered by insurance.

12. The claim is meritorious and Dr. Albert Olszewski has indicated the claim is meritorious.

13. The motion is filed pursuant to *In re: Robin Jean Lyon Cini*, Debtor, United States Bankruptcy Court, for the District Court Montana, Cause No. 10-62715-11, decided June 22, 2012, 2012 Bankr, Lexis 2865, 2012 WL 2374224.

14. Intent to file the motion has been provided to Jeffery Hunnes, attorney for Debtor Teirney. They indicated as of July 25, 2018 they would not stipulate or consent to the proposed motion until it had been filed.

DATED this 24<sup>th</sup> day of September, 2018.

SEIDLITZ LAW OFFICE

By /s/ John E. Seidlitz, Jr.  
John E. Seidlitz, Jr.  
P.O. Box 1581  
Great Falls, MT 59403-1581  
Attorney for Janice M. Dodds

**NOTICE OF OPPORTUNITY TO RESPOND  
AND REQUEST FOR HEARING**

**If you object to the motion, you must file a written responsive pleading and request a hearing within fourteen (14) days of the date of the motion. The responding party shall schedule the hearing on the motion at least twenty-one (21) days after the date of the response and request for hearing and shall include in a caption of the responsive pleading in bold and conspicuous print the date, time and location of the hearing by inserting in the caption of the following:**

**NOTICE OF HEARING**

**Date:** \_\_\_\_\_

**Time:** \_\_\_\_\_

**Location:** \_\_\_\_\_

**If no objections are timely filed, the Court may grant the relief requested as a failure to respond by any entity shall be deemed an admission that the relief requested should be granted.**

**By: /s/ John E. Seidlitz, Jr.**  
**John E. Seidlitz, Jr.**  
**Attorney for Janice M. Dodds**

**CERTIFICATE OF SERVICE**

I do hereby certify that on this 24<sup>th</sup> day of September, 2018, a true and correct copy of the above and foregoing **Motion to Pursue Claim Covered by Insurance and Notice of Opportunity to Respond and Request For Hearing** was served electronically by the Court's ECF notice to all persons/entities requesting special notice or otherwise entitled to the same and that in addition service by mailing a true and correct copy, first class mail, postage prepaid, was made to the following persons/entities who are not ECF registered users pursuant to the Court's Order limiting service by mail dated June 29, 2016 (Doc. 124).

Gregory Scot Tierney  
75 Spring Tree Road  
Great Falls, MT 59404

American Express Bank FSB  
c/o Becket and Lee LLP  
PO Box 7701  
Helena, MT 59601-7701

Montana Department of Revenue  
PO Box 7346  
Philadelphia, PA 19101-7346

Internal Revenue Service  
Centralized Insolvency Operation  
PO Box 3001  
Malvern, PA 19355-0701

WA Department of Revenue  
Attn: Maria Ditol  
2101 4th Ave Ste 1400  
Seattle, WA 98121-2300

Miranda Wilburn  
14515 E. Bridges Rd.  
Elk, WA 99009

Jerry and Jan Hall  
90 Herron Bank Road  
Great Falls, MT 59404

Armond Hill  
1626 Laurens Way SW  
Atlanta, GA 30311

Capital One Bank (USA), N.A.  
PO Box 71083  
Charlotte, NC 28272-1083

Lois Hatzenbeller  
1626 Laurens Way SW  
Atlanta, GA 30311-3718

Thomas Sidor  
2177 Big Bar Drive  
Henderson, NV 89052

Ascentium Capital LLC  
Crist, Krogh & Nord PLLC  
2708 First Avenue North, Ste 300  
Billings, MT 59101

John Goodnow  
PO Box 7010  
Great Falls, MT 59406-7010

U.S. BANK NATIONAL  
ASSOCIATION  
14841 Dallas Parkway, Suite 300  
Dallas, TX 75254

Anthony Hopper  
222 S Jackson St. #Q  
Boise, ID 83705

By: /s/ John E. Seidlitz, Jr.  
John E. Seidlitz, Jr.





**TIERNEY'S APPENDIX**  
**NO. 6**

**UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF MONTANA**

<b>GREGORY SCOT TIERNEY,</b>	)	<b>Chapter 7</b>
	)	
<b>Debtor.</b>	)	<b>Case No. 16-60060</b>
	)	
	)	

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**ORDER**

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On September 24, 2018, in this Chapter 7 bankruptcy, Creditor Janice Dodds (“Dodds”) filed a Motion to Pursue Claim Covered by Insurance [ECF No. 204] (the “Motion”). Debtor Gregory Tierney (“Debtor”) filed an objection to the Motion on October 9, 2018 [ECF No. 206] (the “Objection”). Hearing on Dodds’ Motion and Debtor’s Objection thereto was held on December 21, 2018. The Court having reviewed the Motion and Objection and having heard argument from the parties, and for good cause appearing, orders that the Motion is **GRANTED**.

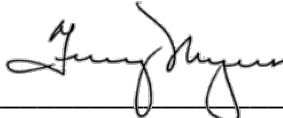
**IT IS ORDERED** that Dodds may pursue her claim against Debtor in the Montana Eighth Judicial District Court, Cascade County Cause No. CDV 13-364 (“CDV 13-364”) only to the extent necessary to establish liability, if any, against a third party.

**IT IS FURTHER ORDERED** that:

- (A) Debtor shall only be a nominal party in CDV-13-364; provided that Debtor shall have full right to defend any claims against him and Dodds may obtain a judgment against Debtor solely to the extent necessary to obtain insurance coverage. Debtor shall have no economic interest or liability in the ultimate outcome of CDV 13-364.
- (B) Dodds may not execute and no writ of execution shall issue against Debtor either personally or against his assets on any judgment that Dodds may obtain in CDV 13-364.
- (C) No costs or expenses of CDV 13-364 shall be borne by Debtor.

- (D) This Court makes no ruling on the allegations of the Dodds complaint in CDV 13-364 and this Order shall not in any way affect either the substantive or procedural claims or defenses of any party, including Dodds or Debtor, in CDV 13-364.
- (E) In the event Debtor's insurance carrier denies coverage of the claims in CDV 13-364, Dodds shall reimburse and indemnify Debtor for any and all actual costs and fees, including attorney fees, incurred by him personally in defending claims against him in CDV 13-364 or in establishing the availability, or lack of, insurance coverage for Dodds' claims in CDV 13-364. Debtor will promptly notify Dodds of his intent to hire personal counsel that would be subject to this paragraph.
- (F) Upon request of Debtor, Dodds or Dodds' attorney shall provide a narrative explanation to any consumer credit reporting agencies that Debtor has no personal liability as a result of CDV 13-364 and is only named as a nominal party therein.

DATED: February 25, 2019

A handwritten signature in black ink, appearing to read "Terry L. Myers", is written over a horizontal line.

TERRY L. MYERS  
U.S. BANKRUPTCY JUDGE

## **CERTIFICATE OF SERVICE**

I, Gary Darling Kalkstein, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 10-13-2023:

John E. Seidlitz (Attorney)  
12 6th Street South, 1A  
PO Box 1581  
Great Falls MT 59403  
Representing: Janice M. Dodds  
Service Method: eService

Julie A. Lichte (Attorney)  
Crowley Fleck, PLLP  
1915 S. 19th Ave.  
P.O. Box 10969  
Bozeman MT 59718  
Representing: Gregory S. Tierney, Benefis Health System, Inc.  
Service Method: eService

Electronically signed by Lisa Gournay on behalf of Gary Darling Kalkstein  
Dated: 10-13-2023