

## CITY OF CLINTON, IOWA

# Press Release

TO: NEWS MEDIA, STAFF, COUNCIL

SUBJECT: **City of Clinton, Iowa vs. Hopkins & Huebner, P.C.**

The City Council for the City of Clinton, Iowa has resolved to file a legal malpractice claim against its former attorneys, Hopkins & Huebner, P.C. This action is being taken as a result of further research and analysis of the underlying facts which led the city to settle a *qui tam* Complaint under the Federal False Claims Act, 31 U.S.C. Sec. 3729 et. seq. The settlement was finalized in September of 2010. This settlement resulted in the City of Clinton agreeing to pay the sum of \$4.5 million dollars over 10 years in equal sums, with no interest, beginning in October of 2010.

The City Council and City at large, in settling the case, placed their trust in the advice, counsel and opinions of its attorney Michael C. Walker of Hopkins & Huebner, P.C. The City alleges that Defendants negligently failed to properly and adequately analyze the case, failed to conduct necessary pretrial discovery and failed to properly advise the City about its realistic exposure to liability and damages.

The City has retained the services of Hannafan & Hannafan, Ltd. Chicago, Illinois, to act as lead council in this matter and Gosma, Tarbox & Associates of Davenport, Iowa as Iowa co-counsel.

All inquires about the legal proceeding should be directed to Jeffrey Farwell City Attorney for Clinton, Iowa.

FILED

2012 MAR 28 PM 2:13

MARYLYN K. JONES  
CLERK OF DISTRICT COURT  
CLINTON COUNTY, IOWA

IN THE IOWA DISTRICT COURT  
FOR CLINTON COUNTY

CITY OF CLINTON, IOWA,

Plaintiff,

vs.

HOPKINS & HUEBNER, P.C. and  
MICHAEL C. WALKER,

File Number LA 39049

PETITION at Law and  
Demand for Jury Trial

Defendants.

**PETITION AT LAW  
FOR LEGAL MALPRACTICE**

Plaintiff City of Clinton, Iowa, a municipal corporation, by its attorneys Gosma, Tarbox & Associates, PLC, states:

**I. NATURE OF PROCEEDING**

1. This is a legal malpractice action by Plaintiff City of Clinton against its former attorneys, Hopkins & Huebner, P.C., and one of its principals, Michael C. Walker, for negligently representing the City in a False Claims Act *qui tam* (or “whistleblower”) case captioned *United States of America, ex rel. Timothy C. Schultheis, v. City of Clinton, Iowa*. As a result of Defendants’ negligent representation, the City settled the case for \$4,500,000.00 where the actual damages were only at most \$108,000.00. The City relied upon its attorneys’ advice to settle the *Schultheis* action for that egregious amount.

2. Defendants negligently failed to properly analyze the *Schultheis* case, negligently failed to conduct necessary pretrial discovery, negligently failed to properly advise the City about its realistic financial exposure and negligently advised the City to settle the case for an unrealistically high amount. Therefore, Defendants improperly caused the City to “rush to

judgment" for a settlement which was grossly excessive. Because the City's realistic exposure was substantially less than \$4.5 million, Defendants caused the City damages in the millions of dollars.

## **II. PARTIES**

3. Plaintiff City of Clinton, Iowa (the "City"), is an Iowa chartered municipal corporation. Its affairs are governed by a publicly elected City Council and mayor.

4. Defendant Hopkins & Huebner, P.C. ("H & H") is an Iowa professional corporation engaged in the practice of law. It is a general practice law firm with offices in Des Moines and Davenport, Iowa.

5. Defendant Michael C. Walker ("Walker") is a principal partner (or shareholder) in H & H. He is employed in H & H's Davenport office and he focuses his practice on litigation. He is a citizen of the State of Iowa. The term "Defendants" means both H & H and Walker.

## **III. JURISDICTION AND VENUE**

6. Jurisdiction is proper in this Court under Iowa R. Civ. P. 1.306 because Defendants are residents of Iowa and transact business in Iowa. Venue is proper in this Court under Iowa Code § 616.18 because the events, transactions, commissions and omissions at issue occurred in Clinton County, Iowa. In addition, the injury and damages caused by Defendants were sustained in Clinton County.

#### **IV. FACTS AND SPECIFICATIONS**

**Former Firefighter  
Files Federal False Claims  
Act Suit Against City of Clinton**

7. On September 19, 2008, former City firefighter Timothy C. Schultheis filed a federal False Claims Act *qui tam* lawsuit under seal on behalf of the United States against the City in the U.S. District Court for the Southern District of Iowa-Davenport Division. The case was captioned *United States of America, ex. rel. Timothy C. Schultheis, Relator v. The City of Clinton, Iowa*, Case No. 3:08-CV-120. The City denied the claims alleged in the *Schultheis* Complaint. On September 10, 2009, the United States declined to intervene in the action.

8. In his Complaint, Schultheis alleged that the City violated the False Claims Act, 31 U.S.C. §§ 3279, *et seq.*, by knowingly submitting false or fraudulent emergency medical service claims to the government under the Medicare and Medicaid programs. The *Schultheis* action alleged, *inter alia*, that the City knowingly, deliberately or recklessly submitted all of its claims for ambulance services to Medicare and Medicaid which were classified as Advanced Life Support Level 1 Emergency Services (“ALS”). It was also alleged that certain of those claims should have been classified as Basic Life Support Services (“BLS”) which called for lower government-reimbursed payments to the City.

**Defendants Represented the City  
of Clinton in the *Schultheis* Case**

9. The *Schultheis* case was kept under seal by the federal court until September 19, 2009. Service of the Complaint was made on the City on September 28, 2009. Shortly thereafter, the City engaged Defendants to represent and defend it in the *Schultheis* case. On behalf of H & H, Walker was the lead attorney for the City. Defendants were counsel of record

for the City in the federal action. The actions and conduct of Walker in connection with his representation of the City was on behalf of H & H and constituted the actions and conduct of H & H. Defendants continued their legal representation of the City through at least September 22, 2010, when the federal court dismissed the *Schultheis* Complaint with prejudice pursuant to a settlement agreement reached with the City.

**The *Schultheis* Case  
Involved the City's Classification  
of Its Ambulance Services**

10. The *Schultheis* case principally involved the City's classification of its ambulance service dispatches for the statutory period of six years from September 2002 through September 2008. As stated in paragraph 8 above, the gist of the *Schultheis* Complaint was that the City had committed Medicare fraud. According to the Complaint, the City had been falsely overbilling the Medicare and Medicaid agencies for higher reimbursement of ALS ambulance services when many of those services should have been billed at the lower BLS rates. The principal issue in the suit was whether the City was justified in its ambulance run classifications of ALS or BLS which were assigned to each run.

**The City's Six-Year Split of  
ALS-BLS Ambulance  
Services Allegedly Was 95%-5%**

11. As part of Defendants' representation of the City, they retained and consulted with a purported expert, Douglas Wolfberg. He held himself out to be an emergency medical services ("EMS") consultant and supposedly had specialized knowledge about EMS compliance with Medicare and other government regulations.

12. H & H and Mr. Wolfberg determined that from 2002 through 2008, the City had

classified 95% of its ambulance runs at the higher federal reimbursement rate of ALS and only 5% of its runs at the lower BLS rate. According to Defendants and Mr. Wolfberg, the normal trend for ALS Medicare billing, *based upon the national average*, was approximately 60% of all municipal ambulance services. Therefore, Walker assumed that the City would be facing a liability of at least \$37 million of alleged ALS charges in excess of the national average. Further, Walker told the City's City Council on April 13, 2010, that the City could be liable for \$100 million in damages under the False Claims Act after calculating statutory overcharge penalties and plaintiff's attorneys' fees.

**Based Upon Defendants' Advice,  
the City Agreed to Settle  
the *Schultheis* Case for  
\$4,500,000.00**

13. By the summer of 2010, Defendants advised the City to settle the *Schultheis* case for the sum of \$4,500,000.00. As a result, on September 14, 2010, only one year after service of process, the City signed a Settlement Agreement with the United States and Mr. Schultheis to pay the United States \$4,500,000.00 over a 10-year period in equal annual installments. However, by contrast, the actual claimed overcharges calculated by Defendants were at most \$108,000.00 for the six-year statutory period. Thus, in less than 12 months since the City was served with the *Schultheis* Complaint, Defendants negligently told the City that it should pay \$450,000.00 per year to the government over 10 years in order to settle. To date, the City has paid \$900,000.00 of the settlement amount. Additional payments are due in October of each year.

**Defendants Negligently Performed Only  
Minimal Pretrial and  
Investigative Work**

14. During the 12 months between the service of the *Schultheis* Complaint on the City and the execution of the Settlement Agreement, Defendants negligently conducted only minimal pretrial discovery on behalf of the City. For example, Defendants did not seek or take the deposition of Mr. Schultheis, did not interview several potential important City witnesses, did not sufficiently involve Fire Chief Mark Regenwether in the investigative process, conducted only a superficial examination of the reasons for the City's 95%-5% ALS-BLS ambulance run split and otherwise negligently jumped to the erroneous conclusion that the City faced catastrophic liability merely because the national trend of municipalities' ALS billing ratios was far lower than the City's.

15. Defendants also negligently failed to adequately pursue the City's defenses available under the False Claims Act. For example, the City's computer programs regarding the classification of ambulance runs were not properly synchronized and were partially corrupted which resulted in inadvertent changes in ambulance run narrative descriptions. In addition, the Medicare ALS-BLS rules and regulations are complex, confusing and difficult to apply. There were also other factors which would have supported the City's defenses but Defendants negligently ignored them.

16. In the fall of 2010, the City retained a new Medicare ambulance billing service. Since 2010 to the present, the City's ambulance billing service has conservatively established the ALS-BLS split at approximately 86% ALS and 14% BLS. That corrected ALS ratio still is substantially higher than the so-called national trend upon which Defendants negligently relied when they advised the City to pay \$4.5 million in settlement of the *Schultheis* case.

**The City's Actual  
Estimated ALS Overcharges  
Were at Most  
\$108,000.00 for Six Years**

17. Walker testified at a City Civil Service Commission Public Hearing on November 23, 2010, that Defendants had determined the actual difference between the City's Medicare reimbursement charges for ALS ambulance runs compared to the BLS runs for 2002-2008. Defendants' determination of those charges, as Walker stated at the Hearing, was that the City's total Medicare purported overcharges were approximately \$15,000.00 to \$18,000.00 per year. Consequently, the total estimated overcharges for the False Claims Act statutory period were at most only \$108,000.00. Despite that relatively paltry sum, Defendants told the City to settle the *Schultheis* case for more than 41 times that amount.

18. At the Civil Service Commission hearing, Walker also attempted to justify the City's \$4.5 million settlement by claiming that the City faced \$5,000 to \$10,000 in statutory penalties for each incident of ALS overbilling plus treble damages and plaintiff's attorneys' fees. He admitted, however, that the actual amount of possible overbilling was only \$45.00 per incident. It was negligent for Defendants to have reasonably believed that any court or jury actually would have penalized the City in the amount of \$10,000-\$15,000 for an inadvertent \$45.00 overcharge to Medicare. Moreover, the legal analysis of the False Claims Act by Defendants was negligently and fundamentally flawed as the result of their failure to adequately investigate the facts underlying the City's ambulance billing practices.

**COUNT I**  
**LEGAL MALPRACTICE AGAINST**  
**DEFENDANT MICHAEL C. WALKER**

19. The City realleges and incorporates by reference Paragraphs 1 through 18 above.

20. Walker and the City had a client-attorney relationship in the *Schultheis* action. Therefore, as a licensed attorney specializing in litigation, Walker had a duty to use such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the task undertaken. Walker's duties, at the minimum, included the duty to the City to carefully and adequately analyze the statutory defenses available in the *Schultheis* case and properly investigate the underlying facts and circumstances of the City's ambulance practices. Walker also had the duty to properly advise the City of its realistic exposure to possible liability and damages in light of the applicable law and facts. He negligently failed to comply with any of those duties and therefore committed legal malpractice against the City which caused the City millions of dollars in damages through an unjustifiable settlement.

21. In addition to Walker's negligent commissions and omissions as described above, Walker breached his legal duties to the City and committed legal malpractice by:

(1) Negligently overestimating the realistic amount of damages under the False Claims Act to be in the \$50 million to \$100 million range. (April 13, 2010, City Council meeting recording.)

(2) Negligently failing to properly utilize the defenses available to the City under the False Claims Act. The statute states that any person who "*knowingly* makes use, uses, or causes to be made or used a false record or statement to get a false or fraudulent claim paid or approved" by the government is liable for damages. (31 U.S.C. §3729(2)). (Emphasis added.) Simple negligence or judgmental coding errors by the City is not enough to carry a plaintiff's

burden of proof.

(3) Negligently failing to depose Mr. Schultheis in order to test the credibility of his claims and failing to adequately conduct in-depth interviews of the City's relevant employees who were involved in classifying and coding the ambulance runs.

(4) Negligently advising the City to settle the case for an unjustifiably high amount. Walker negligently and prematurely "rushed to judgment" before the City employees and administrators had an opportunity to adequately and completely explain their actions to Defendants.

(5) Negligently relying upon the average "national trend" of ALS-BLS splits of 60%-40% and using it to conclude that the City's 95%-5% split demonstrated statutory violations.

(6) Otherwise negligently failing to properly advise and represent the City in the *Schultheis* case.

As a result, Walker's negligence and breach of his duties proximately caused millions of dollars in damages to the City by settling too early, too high. *But for* Walker's negligence and breaches of his duties, the City would have achieved a substantially lower settlement or substantially prevailed at trial. The City reasonably relied upon Walker to diligently and competently represent it in the defense and resolution of the *Schultheis* case. Therefore, Walker's breaches of his duties constituted legal malpractice.

WHEREFORE, Petitioner City of Clinton prays that the Court enter judgment in its favor and against defendant Michael C. Walker in an amount to be determined at trial but not less than \$3,000,000.00 plus interest and grant such other relief as permitted by law.

**COUNT II**  
**LEGAL MALPRACTICE AGAINST**  
**DEFENDANT HOPKINS & HUEBNER, P.C.**

22. The City realleges and incorporates by reference the allegations contained in Paragraphs 1 through 21 above.

23. H & H and the City had a client-attorney relationship in the *Schultheis* action. Therefore, as licensed attorneys engaging in litigation, H & H had a duty to use such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the task undertaken. At the least, H & H had a duty to the City to carefully and adequately analyze the statutory defenses available in the *Schultheis* case and properly investigate the underlying facts and circumstances of the City's ambulance billing practices. H & H also had the duty to properly advise the City of its realistic exposure to possible liability and damages in light of the applicable law and facts. As discussed above, it negligently failed to comply with any of those duties and therefore committed legal malpractice against the City which caused the City millions of dollars in damages.

24. In addition to H & H's negligent commissions and omissions as described above, H & H breached its legal duties to the City and committed legal malpractice by:

(1) Negligently overestimating the realistic amount of damages under the False Claims Act to be in the \$50 million to \$100 million range. (April 13, 2010, City Council meeting recording.)

(2) Negligently failing to properly utilize the defenses available to the City under the False Claims Act. The statute states that any person who "knowingly makes use; uses, or causes to be made or used a false record or statement to get a false or fraudulent claim paid or approved" by the government is liable for damages. (31 U.S.C. §3729(2).). (Emphasis added.)

Simple negligence or judgmental coding errors by the City is not enough to carry a plaintiff's burden of proof.

(3) Negligently failing to depose Mr. Schultheis in order to test the credibility of his claims and failing to adequately conduct in-depth interviews of the City's relevant employees who were involved in classifying and coding the ambulance runs.

(4) Negligently advising the City to settle the case for an unjustifiably high amount. H & H negligently and prematurely "rushed to judgment" before the City employees and administrators had an opportunity to adequately and completely explain their actions to Defendants.

(5) Negligently relying upon the average "national trend" of ALS-BLS splits of 60%-40% and using it to conclude that the City's 95%-5% split demonstrated statutory violations.

(6) Otherwise negligently failing to properly advise the City in the *Schultheis* case.

As a result, H & H's negligence and breach of its duties proximately caused millions of dollars in damages to the City by settling too early, too high. *But for* H & H's negligence and breaches of its duties, the City would have achieved a substantially lower settlement or substantially prevailed at trial. The City reasonably relied upon H & H to diligently and competently represent it in the defense and resolution of the *Schultheis* case. Therefore, H & H's breaches of these duties constituted legal malpractice.

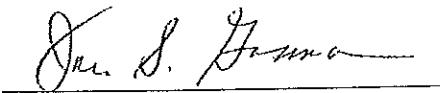
26. From 2008 through 2010, Walker was a partner or shareholder and principal of H & H. As a principal, Walker's actions and omissions which resulted in legal malpractice as alleged above were done on behalf of H & H and, therefore, his actions and omissions

constituted those of H & H. As a result, H & H is vicariously liable to the City for the legal malpractice of Walker and is liable for the damages caused to the City for his legal malpractice.

WHEREFORE, Petitioner City of Clinton prays that the Court enter judgment in its favor and against defendants Hopkins & Huebner, P.C., and Michael C. Walker, jointly and severally, in an amount to be determined at trial but not less than \$3,000,000.00 plus interest and grant such other relief as permitted by law.

28. Petitioner demands a trial by jury on all issues and counts.

Respectfully submitted,



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Dated: March 25, 2012

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