

PERSONAL & CONFIDENTIAL

May 3, 2024

Attn: Ms. Judy Spoor
Kalkaska County Hospital Authority
jspoor@mhc.net

Dear Ms. Spoor,

We acknowledge receipt of the above captioned claim on April 26, 2024. As previously communicated on April 30, 2024, Coverys will be declining coverage for Kalkaska County Hospital Authority in this matter, and Coverys will NOT be defending or indemnifying Kalkaska County Hospital Authority.

In the Complaint, Plaintiffs allege that through the actions of Kalkaska County Hospital Authority's CEO and various members of its Board of Trustees that they were falsely led to believe that their conversations in the Commissioners' Chambers in the County Government Center were private when, unbeknownst to them, the County was audio recording their gathering. Defendants allegedly later distributed the audio recording, which contained private conversations. Defendants allegedly then used said audio recording to vilify Plaintiffs, to intentionally or recklessly falsely accuse Plaintiffs of violating the OMA, and disclosed private facts from the gathering to retaliate against Plaintiffs for questioning the propriety of converting to an NPO. Plaintiffs allege that Defendants accused Plaintiffs, as public officials, of intentionally committing the crime of violating the OMA, which is defamatory, and then published their false accusations to every Township in the County.

Specifically, Plaintiffs allege in **Count I—Electronic Communications Privacy Act**, that they reserved the Commissioners' Chambers in the County Government Center where they gathered to discuss the Act 47 Decision Matrix Survey. Plaintiffs locked the door and believed they had privacy during the gathering but allege that the County was audio recording their gathering and that Defendant Trustee Cannon made a copy of the audio and video recording and provided it to the Hospital. Defendants then allegedly used the audio recording to vilify Plaintiffs and to accuse Plaintiffs of violating the OMA. Plaintiffs allege that the recording and distribution of the recording both violated the Electronic Communications Privacy Act.

In **Count II—Invasion of Privacy/Intrusion of Seclusion**, Plaintiffs allege that by obtaining an audio recording of their gathering that Defendants intentionally invaded Plaintiffs' private matters and intruded on Plaintiffs' seclusion and privacy.

In **Count III—Invasion of Privacy/Public Disclosure of Private Facts**, Plaintiffs allege that by obtaining an audio recording of Plaintiffs' gathering and distributing it to the public, Defendants intruded on Plaintiffs' privacy by publicly disclosing private facts.

In **Count IV—Invasion of Privacy/False Light**, Plaintiffs allege that Defendants intentionally and recklessly falsely accused Plaintiffs of committing the crime of violating the OMA. Plaintiffs further allege that said accusation is defamatory and that Defendants published their false accusations to every Township in the County.

In **Count V—Invasion of Privacy/Appropriation of Plaintiffs’ Likeness**, Plaintiffs allege that Defendants used Plaintiffs’ name and likeness through distribution of the audio and video recording of Plaintiffs’ gathering to convince the public that the other Trustees questioning “Board Leadership” about converting to an NPO were criminals.

In **Count VI—MCL § 750.539(a-h)—Eavesdropping Upon Private Conversation**, Plaintiffs allege that Defendants secretly and willfully used an electronic device to eavesdrop upon Plaintiffs’ conversation and then knowingly aided each other in procuring and distributing the eavesdropped audio recording. Defendants knew, or should have known, that the audio recording and its distribution were invasions of Plaintiffs’ privacy.

In **Count VII—42 U.S. Code § 1983/Due Process**, Plaintiffs allege that Defendants violated Plaintiffs’ due process rights by failing to provide them notice of the charges against them and an opportunity to be heard during an open meeting.

In **Count VIII—42 U.S. Code § 1983/Conspiracy**, Plaintiffs allege that Defendants obtaining, distributing, and using the audio recording to accuse Plaintiffs of intentionally violating the OMA was undertaken recklessly and with complete indifference and wanton disregard for the Plaintiffs to be free from violations of the Fourth Amendment. Defendants allegedly entered into, advanced, and executed their conspiracy to silence Trustee dissent to converting the Hospital to an NPO.

In **Count IX—Tortious Interference with a Business Relationship**, Plaintiffs allege that Defendants intentionally interfered with Plaintiffs’ business relationship with the County, the Townships, the Board, their fellow Trustees, the Hospital, and the County residents when Defendants obtained and distributed the audio recording of Plaintiffs’ gathering and falsely accused them of intentionally violating the OMA. Defendants’ alleged tortious interference caused Plaintiff Cox to resign from the Board.

In **Count X—Open Meetings Act**, Plaintiffs allege that the CEO intended to repeatedly and deliberately circumvent the OMA by organizing and chairing so-called “Board Leadership” meetings behind closed doors, without notice to the public, without keeping minutes, and during with the Trustees made decisions he requested, which deprived the entire Board of participating in those decisions.

In **Count XI—Freedom of Information Act**, Plaintiffs allege that the Board has unjustly and unlawfully withheld an unknown number of public records, which were requested by Plaintiff McKinnon, and did not provide complete descriptions of all public records or information in the public records that was separated, deleted, and withheld.



In **Counts I through X**, Plaintiffs allege that as a direct and proximate result of Defendants' alleged wrongdoing, that Plaintiffs have suffered unreasonable search and seizure, retaliation, accusations, defamation, hostility, ridicule, vilification, condemnation, humiliation, embarrassment, pain, mental anguish, emotional distress, anxiety, depression, suffering, sleeplessness, public censorship, damage to reputation, suppression of free speech, denial of due process, and deprivation of their civil rights.

In their **Request for Relief**, Plaintiffs request preliminary, equitable, injunctive, and declaratory relief, including to compel compliance, to enjoin further noncompliance, to void the decisions made during meetings and closed sessions that violated the OMA, publicly releasing minutes and recordings from the meetings and closed sessions that violated the OMA, releasing wrongfully withheld public records, requiring affidavits that describe with particularity each specific public record, or portion of a public record, that was withheld, separating the nonexempt material from the exempt material from the public records requested and releasing the nonexempt material, requiring the requested public records to be provided electronically in their original file format or pdfs; disgorgement of profits; compensatory, actual, statutory, exemplary, and punitive damages; costs, expenses, and attorney fees; and any such other and further relief as this Court deems just and proper.

As you know, Coverys provides professional liability and general liability insurance to Kalkaska County Hospital Authority under policy number 002MI000002213 on a primary basis as well as excess professional liability and umbrella coverage.

Common Policy Terms

Section III. Defined Terms:

- H. EMPLOYEE means a full-time or part-time individual who is on a NAMED INSURED'S payroll and subject to the withholding of taxes by a NAMED INSURED.
- I. EXECUTIVE OFFICER means a person holding any of the officer positions created by a NAMED INSURED'S charter, constitution, bylaws or any other similar governing document.

The named Defendants, as members of the Board of Trustees, would meet the definition of Executive Officers. Similarly, Plaintiffs also meet the definition for the same reason.

Professional Liability Policy

In order to trigger coverage under the professional liability policy, the alleged wrongdoing must involve "professional services." As defined in Section III. Defined Terms, subsection CC, these include "medical, surgical, dental or nursing treatment;...furnishing of supplies;...providing education or training;...home healthcare services;...administrative duties;...peer review or credentialing."

The allegations raised by Plaintiffs do not involve the providing of professional medical services so the professional liability coverage is not triggered.

General Liability Policy

Under the general liability policy, Coverage A provides coverage for bodily injury, property damage, and personal and advertising injury. There are no allegations of bodily injury or property damage raised by Plaintiffs. However, Plaintiffs do raise allegations of personal and advertising injury.

Personal and advertising injury is defined in Section III. Defined Terms:

- X. PERSONAL AND ADVERTISING INJURY means injury, including BODILY INJURY, arising out of one or more of the following offenses:
1. False arrest, detention or imprisonment;
 2. Malicious prosecution;
 3. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
 4. *Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;**
 5. *Oral or written publication, in any manner, of material that violates a person's right to privacy;**
 6. The use of another's advertising idea in a named insured's advertisement; or
 7. Infringing upon another's copyright, trade dress or slogan in your advertisement.
- *emphasis added*

Under Coverage B. Personal and Advertising Injury Liability,

- a. WE will pay on YOUR behalf those sums which YOU become legally obligated to pay as DAMAGES, up to the applicable Limits of Liability stated in the DECLARATIONS, because of a CLAIM for PERSONAL AND ADVERTISING INJURY to which Coverage B applies.

WE shall have the right and duty to defend any SUIT brought against YOU seeking DAMAGES that are covered by Coverage B as further set forth in and subject to Section IV. Defense, Settlement and Claim Expenses.

Plaintiffs raise allegations that trigger both subsection 4 and subsection 5, above, thereby triggering coverage under the *personal and advertising* provision of the general liability policy. However, Coverage B. Section II. Definition of Insured (cited below) specifies that *none of Kalkaska's employees, which include members of the Board of Trustees ("executive officers"), are covered by the policy for personal injury to another named insured.*

As addressed above, Plaintiffs have raised allegations that constitute personal injury. At the time of the events at issue, Plaintiffs were employees by virtue of being members of the Board of Trustees and were acting in their capacity as such. Likewise, Defendants were also members of the Board of Trustees and were acting in their capacity as such. Therefore, the policy does not provide coverage in this situation wherein a named insured (Plaintiff members of the Board of

Trustees) allege that the actions of other named insureds (Defendant members of the Board of Trustees) resulted in personal injury.

Section II. Definition of Insured

B. Each of the following is also an INSURED under this Coverage Part:

1. The NAMED INSURED'S VOLUNTEERS only while performing duties related to the conduct of that NAMED INSURED'S business, and a NAMED INSURED'S EMPLOYEES, other than a NAMED INSURED'S EXECUTIVE OFFICERS (if the NAMED INSURED is an organization other than a partnership, joint venture or limited liability company) or a NAMED INSURED'S managers (if the NAMED INSURED is a limited liability company), but only for acts within the scope of their employment by that NAMED INSURED or while performing duties related to the conduct of that NAMED INSURED'S business. However, none of these EMPLOYEES or VOLUNTEERS are INSUREDS for:

a. BODILY INJURY or PERSONAL AND ADVERTISING INJURY:

i. To a NAMED INSURED, to a NAMED INSURED'S partners or members (if the NAMED INSURED is a partnership or joint venture), to a NAMED INSURED'S members (if the NAMED INSURED is a limited liability company), to a co-EMPLOYEE while in the course of his or her employment or performing duties related to the conduct of a NAMED INSURED'S business, or to a NAMED INSURED'S other VOLUNTEERS while performing duties related to the conduct of that NAMED INSURED'S business;

Finally, the insurance provided by Coverage B does not apply to intentional acts:

B. The insurance provided by Coverage B of this Coverage Part does not apply to:

Knowing Violation of Rights of Another

PERSONAL AND ADVERTISING INJURY caused by or at the direction of the INSURED with the knowledge that the act would violate the rights of another and would inflict PERSONAL AND ADVERTISING INJURY.

Material Published with Knowledge of Falsity

PERSONAL AND ADVERTISING INJURY arising out of oral or written publication, in any manner, of material, if done by or at the direction of the INSURED with knowledge of its falsity.

Plaintiffs allege that they suffered personal injury when Defendants obtained an audio recording of their gathering, which *intentionally* invaded Plaintiffs' private matters and intruded on Plaintiffs' seclusion and privacy. Plaintiffs also allege personal injury was incurred when insureds *knowingly* aided each other in procuring and distributing the eavesdropped audio recording and that Defendants *knew, or should have known*, that the audio recording and its distribution were

invasions of Plaintiffs' privacy. Plaintiffs allege that Defendants *intentionally* interfered with Plaintiffs' business relationship with the County, the Townships, the Board, their fellow Trustees, the Hospital, and the County residents when Defendants obtained and distributed the audio recording of Plaintiffs' gathering and falsely accused them of intentionally violating the OMA, which resulted in personal injury.

CONCLUSION

As such, Coverys does not have coverage for this matter as outlined above and will not defend or indemnify in this matter. Please take steps immediately to notify your carrier who may have coverage of this matter, particularly your Director E&O carrier. Should you not have coverage please take steps immediately to protect your interests.

Please advise me of any information you have that you believe may affect the determination concerning the lack of coverage available under the Coverys policy. Coverys's position is based upon the facts that have been made available to us to date. The Company expressly reserves the right to modify its determination concerning coverage, or the lack of coverage. Nothing contained in this letter should be deemed a waiver of the terms or conditions of the Coverys policy. The Company expressly reserves the right to rely upon any term or condition of the contract or any other grounds that may be found to limit or preclude coverage.

Should you wish to further discuss, please contact me at 248-515-7706.

Sincerely,



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