



# COUNTY OF ERIE

JEREMY A. COLBY  
ERIE COUNTY ATTORNEY

**CHRIS COLLINS**  
COUNTY EXECUTIVE  
DEPARTMENT OF LAW

MARTIN A. POLOWY  
FIRST ASSISTANT COUNTY ATTORNEY

THOMAS F. KIRKPATRICK, JR.  
SECOND ASSISTANT COUNTY ATTORNEY

August 10, 2011

Mr. Robert M. Graber, Clerk  
Erie County Legislature  
92 Franklin Street, 4th Floor  
Buffalo, New York 14202

Dear Mr. Graber:

In compliance with the Resolution passed by the Erie County Legislature on June 25, 1987, regarding notification of lawsuits and claims filed against the County of Erie, enclosed please find a copy of the following:

File Name:	<i>Sheila G. Scott and Richard Scott v. County of Erie, et al</i>
Document Received:	Summons and Complaint
Name of Claimant:	Sheila G. Scott and Richard Scott
Claimant's attorney:	J. Michael Hayes, Esq. 69 Delaware Avenue Suite 1111 Buffalo, New York 14202

Should you have any questions, please call.

Very truly yours,

JEREMY A. COLBY  
Erie County Attorney

By:   
THOMAS F. KIRKPATRICK, JR.  
Second Assistant County Attorney

TFK/dkw  
Enclosure

cc: JEREMY A. COLBY, Erie County Attorney

UNITED STATES DISTRICT COURT

for the

Western District of New York

SHEILA G. SCOTT and  
RICHARD SCOTT, her husband,

Plaintiff

v.

237 LINWOOD AVENUE, INC., WESTERN NEW  
YORK ARTIFICIAL KIDNEY CENTER, INC., et al

Defendant

Civil Action No. 11 CV 0593

AMENDED  
SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address) 237 LINWOOD AVENUE, INC., 237 Linwood Avenue, Buffalo, NY 14209  
WESTERN NEW YORK ARTIFICIAL KIDNEY CENTER, INC., 237 Linwood  
Avenue, Buffalo, NY 14209  
FRESENIUS MEDICAL CARE HOLDINGS, INC., c/o C T Corporation System,  
111 Eighth Avenue, New York, NY 10011  
COUNTY OF ERIE, Rath Building, 92 Franklin Street, Buffalo, NY 14202  
UNITED STATES OF AMERICA, 130 Delaware Avenue, Buffalo, NY 14202

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

J. Michael Hayes, Esq.  
Law Office of J. Michael Hayes  
69 Delaware Avenue, Suite 1111  
Buffalo, New York 14202

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: JUL 19 2011

Michael J. Rolner  
Signature of Clerk or Deputy Clerk

This paper received at the  
Erie County Attorney's Office  
from JAMES ALDRICH on  
the 30<sup>th</sup> day of July, 2011  
at 12:16 a.m./p.m.  
Lissette M. Piro  
Assistant County Attorney

THE UNITED STATE DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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JUL 19 2011

BY: 

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SHEILA G. SCOTT and RICHARD SCOTT,

her husband,

Plaintiffs,

vs.

237 LINWOOD AVENUE, INC.,  
WESTERN NEW YORK ARTIFICIAL KIDNEY CENTER, INC.,  
FRENSENIUS MEDICAL CARE HOLDINGS, INC.,  
COUNTY OF ERIE and  
UNITED STATES OF AMERICA,

Defendants.

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**AMENDED  
COMPLAINT**

Civil Action No.: 11CV 0593

The Plaintiffs, SHEILA G. SCOTT and RICHARD SCOTT, her husband, by their attorneys, J. MICHAEL HAYES, for their Complaint against Defendants, 237 LINWOOD AVENUE, INC., WESTERN NEW YORK ARTIFICIAL KIDNEY CENTER, INC., SIDNEY ANTHONY, COUNTY OF ERIE, NEW YORK and UNITED STATES OF AMERICA herein allege:

#### PARTIES

1. Presently and at all times hereinafter mentioned, the Plaintiffs, SHEILA G. SCOTT and RICHARD SCOTT, her husband, were and are residents of the City of Buffalo, County of Erie and State of New York.
2. Upon information and belief, presently and at all times hereinafter mentioned the Defendant, 237 LINWOOD AVENUE, INC., is a domestic corporation authorized to do business in the State of New York and with offices for the transaction of business located in the County of Erie and State of New York.

3. Upon information and belief, presently and at all times hereinafter mentioned, Defendant, WESTERN NEW YORK ARTIFICIAL KIDNEY CENTER, INC., is a domestic corporation that operates a business located at 237 Linwood Avenue, Buffalo, New York.

4. Upon information and belief, presently and at all times hereinafter mentioned, Defendant, FRESenius MEDICAL CARE HOLDINGS, INC., is a domestic corporation that operates a business located at 237 Linwood Avenue, in the City of Buffalo, County of Erie, New York.

5. Upon information and belief, presently and at all times herein mentioned, the COUNTY OF ERIE was a Municipal Corporation existing by virtue of the laws of the State of New York with offices for the transaction of business located in the County of Erie, New York.

6. Defendant, UNITED STATES OF AMERICA, has offices for the transaction of business in the Western District of New York, located in the Department of Justice, 130 Delaware Avenue, Buffalo, New York 14202.

#### **JURISDICTION and VENUE**

7. Upon information and belief, presently and at all times hereinafter mentioned, the Plaintiff, SHEILA G. SCOTT was a recipient of Medicare and Medicaid and her medical expenses, occasioned by the negligence of the Defendants, 237 LINWOOD AVENUE, INC., WESTERN NEW YORK ARTIFICIAL KIDNEY CENTER, INC., and FRENSENIUS MEDICAL CARE HOLDINGS, INC., as hereinafter alleged, were paid by Medicare and Medicaid.

8. This Court has jurisdiction over this lawsuit in that a claim within this suit arises out of a Federal Statute, 42 U.S.C. §1395y(b)(2) wherein THE UNITED STATES OF AMERICA may bring an action for reimbursement and is also governed by 28 U.S.C. §2410, 28 U.S.C. §1346, 28 U.S.C. §1331 and 42 C.F.R. §411, making this exclusively a case of Federal jurisdiction.

9. Venue is proper in the Western District of New York under 28 U.S.C. §1402(b) because this is the District in which the claim arose, it is the District where the Plaintiffs, SHEILA G. SCOTT and RICHARD SCOTT, her husband, reside, it is the District in which the Defendants, 237 LINWOOD AVENUE, INC., WESTERN NEW YORK ARTIFICIAL KIDNEY CENTER, INC. and FRENSENIUS MEDICAL CARE HOLDINGS, INC. and is the County in which the Defendant, COUNTY OF ERIE is located and in which actions against which are mandated by CPLR 504.

10. As Plaintiff, SHEILA G. SCOTT, is a Medicare recipient, the Defendant, UNITED STATES OF AMERICA, claims an absolute right of recovery, that it defines and treats as a "lien" (28 U.S.C. §2410 and 28 U.S.C. §1346), to be taken from any resolution of the above personal injury case by virtue of medical expenses it claims to have incurred and paid, 42 U.S.C. §1395y (b)(2).

#### NECESSARY PARTY

11. Upon information and belief, Defendants, UNITED STATES OF AMERICA and Defendant COUNTY OF EIRE, are necessary parties to this action under FRCP Rules 19 and 20, 28 U.S.C. §2410 and 28 U.S.C. §1346, in that, for and before complete relief may be accorded, Defendant, UNITED STATES OF AMERICA'S claim and Defendant COUNTY OF ERIE'S claim for recovery of medical expenses/liens must be considered, finalized, allocated and determined by way of compromise, settlement, court ordered determination, and/or adjudication.

12. Upon information and belief, the Defendant COUNTY OF ERIE, has provided Medicaid for the treatments of Plaintiff SHEILA G. SCOTT's injuries and said Defendant claims a right of recovery/"lien" out of any resolution in the within action by virtue of medical expenses they

claim to have incurred [New York Social Services Law §104b] and is a necessary party to his action under FRCP Rules 19 and 20.

13. All the claims in this case arise out of a single transaction and occurrence and the questions of law and fact are identical.

14. There is a complete unity of interests between Plaintiffs, SHEILA G. SCOTT and RICHARD SCOTT, and Defendant, UNITED STATES OF AMERICA and Defendant, COUNTY OF ERIE, in that recovery on their respective claims depends entirely upon exactly the same proof and evidence regarding liability against Defendants, 237 LINWOOD AVENUE, INC., WESTERN NEW YORK ARTIFICIAL KIDNEY CENTER, INC. and FRENSENIUS MEDICAL CARE HOLDINGS, INC.

15. On damages, the required testimony, proof and evidence is necessarily by the same medical physicians on the issues of the injuries, pain and suffering of Plaintiff, SHEILA G. SCOTT, and on medical expenses paid by the Defendant, UNITED STATES OF AMERICA, pursuant to Medicare, 42 U.S.C. §1395y (b)(2)(B). Each damage claim will require sworn testimony by exactly the same witnesses.

16. On damages, the required testimony, proof and evidence is necessarily by the same medical physicians on the issues of the injuries, pain and suffering of Plaintiff, SHEILA G. SCOTT, and on medical expenses paid by the Defendant, COUNTY OF ERIE, pursuant to Medicaid, 42 U.S.C. §1396a(25) and New York Services Law §104(b). Each damage claim will require sworn testimony by exactly the same witnesses.

17. Joinder of all the above named parties and claims as set forth herein will promote case efficiency, convenience and significantly expedite the final determination of the disputes herein.

18. No final resolution of this action may be accomplished until and unless Defendant, UNITED STATES OF AMERICA, resolves its Medicare recovery claim/lien and Defendant COUNTY OF ERIE resolves its Medicaid Recovery claim/lien and agree to the settlement/resolution.

19. The within lawsuit will finally determine the personal injury claims by Plaintiffs, SHEILA G. SCOTT and RICHARD SCOTT, as against Defendants, 237 LINWOOD AVENUE, INC., WESTERN NEW YORK ARTIFICIAL KIDNEY CENTER, INC. and FRENSENIUS MEDICAL CARE HOLDINGS, INC.

20. As the Defendant, UNITED STATES OF AMERICA, has only a subrogation claim [(42 U.S.C. §1395y(b)(2)(B)(iv)] for reimbursement of medical expenditures and the Defendant COUNTY OF ERIE has only a subrogation claim [*Arkansas Dept. of Health and Human Services, et al v. Ahlborn*, 126 U.S. 1752 (2006)] also from Defendants, 237 LINWOOD AVENUE, INC., WESTERN NEW YORK ARTIFICIAL KIDNEY CENTER, INC. and FRENCENIUS MEDICAL CARE HOLDINGS, INC., the disposition of the personal injury action may constitute *res judicata* as to all claims against those Defendants on the common issues of negligence, proximate cause, apportionment of responsibility and comparative negligence.

21. The Defendant, UNITED STATES OF AMERICA and Defendant COUNTY OF ERIE, regardless whether it is represented in this action and/or regardless whether its specific claims of damage /medical expense recovery are presented or preserved, may be bound on both the liability and damage findings upon the personal injury claims.

22. The Defendant, UNITED STATES OF AMERICA, takes the unequivocal position

that New York State Trial Courts have no authority or power to determine, allocate or differentiate causes of action and claims as between personal injuries, pain and suffering and medical expenses paid through Medicare.

23. In certain New York personal injury actions including motor vehicle and no-fault cases, medical expenses are separate and severable and Plaintiffs are barred and precluded from recovering those medical expenses by virtue of New York Insurance Law, 5101 et seq, CPLR 4545 and General Obligations Law 5-335 even though the Plaintiff may be a Medicare recipient.

24. The Defendant, UNITED STATES OF AMERICA, presumes and asserts, under color of law, that all personal injury actions and State Court determinations and rulings relative to settlements, by definition, include recovery of medical expenses which Medicare has a lien upon and is absolutely entitled and empowered to recover, regardless the pleadings, stipulations and/or Orders entered in the State Court action.

25. The Medicare enabling statute, however, only provides that the UNITED STATES OF AMERICA "shall be subrogated to the extent of payments made." 42 U.S.C. §1395y(b)(2)(B)(iv). Upon information and belief, the Defendant, UNITED STATES OF AMERICA, only has a statutory right of subrogation, not a "lien."

26. The Defendant, UNITED STATES OF AMERICA, takes the position that its MSP Manuel (CMS Pub.100-05) chapter 7 §50.4.4 wherein "the only situation in which Medicare recognizes allocations of liability payments to non-medical losses is when payment is based on a Court Order on the merits of the case", regardless the pleadings, stipulations or other Orders entered in the State Court action. But see: *Bradley v. Sebelius*, 2010 WL 3769132, (11<sup>th</sup> Circuit, Sept. 29, 2010)



27. The Defendant, UNITED STATES OF AMERICA, therefore, has transformed and treats their right of subrogation into, in effect, a statutory lien in every single case involving a Medicare recipient, despite the fact that “agency determinations contained in policy statements, manuals and enforcement guidelines are not entitled to force of law. *United States v. R&F properties of Lake County, Inc.*, 433 F.3d 1349, 1357 (11<sup>th</sup> Cir., 2005).

28. Upon information and belief, unlike the within action, assuming a recovery a by Plaintiff of proceeds for personal injury and medical expenses, the Defendant, UNITED STATES OF AMERICA and Defendant COUNTY OF ERIE, would have, at best, an “equitable lien.” *Sprint Communications Co. v. APPC Services, Inc.*, 544 U.S. 269 (2008).

29. The Defendant, UNITED STATES OF AMERICA, has a *de facto* policy of collecting and recovering the full amount of their claimed expenditures (minus costs of litigation/attorney fees) in every personal injury resolution because of their perceived “lien,” regardless the claims in the lawsuit, pleadings, the language and limitations in the release, settlement or Order of the State Court.

30. Upon information and belief, Defendant, UNITED STATES OF AMERICA, has morphed its right of subrogation [42 U.S.C. §1395y(b)(2)(B)(iv)] and, occasional equitable lien, into a statutory lien that it asserts and enforces in every personal injury recovery.

31. Upon information and belief, in no-fault cases where all medical expenses are paid by the carrier for the motor vehicle up to \$50,000, Defendant, UNITED STATES OF AMERICA, through its Medicare officials, may not permit final resolution until and unless Medicare has reviewed every single no-fault expenditure and until the no-fault policy limit of \$50,000 is exhausted or Plaintiff provides an attested report by a physician to the effect that Plaintiff requires no further treatment for the injuries sustained in the accident.

32. Upon information and belief, Defendant, UNITED STATES OF AMERICA, refuses to issue a final or conditional demand involving a no-fault Medicare recipient until the above conditions are met. In the case of permanent, ongoing injuries where no-fault is not exhausted, Medicare refuses to ever issue the conditional demand which means that the case can never resolve, must remain open and on the Court calendar until the Plaintiff dies, however many years or decades that may be in the future.

33. Upon information and belief, the Defendant, UNITED STATES OF AMERICA, asserts and compels enforcement an absolute statutory "lien" without even formal Congressional authorization or approval. In fact, the UNITED STATES OF AMERICA literally has only a statutory right of "subrogation" and, depending upon the circumstances, perhaps a common law "equitable lien."

34. The within personal injury action cannot be resolved or closed until and unless the Medicare recovery claim [See 42 U.S.C. §1395y(b)(2)(B)(iii)] is addressed, resolved and satisfied or that claim is severed from the personal injury action.

35. Furthermore, the personal injury action cannot be resolved or closed until and unless the Medicaid recovery claim is addressed, resolved and/or satisfied or severed from the within personal injury action. [See *Homan v. County of Cattaraugus Dept. of Social Services*, 74 AD3d, 1754, 905 NYS2d, 387 (4<sup>th</sup> Dept.)].

36. If the Defendant, UNITED STATES OF AMERICA, is not made a party to the action, Upon resolution, Plaintiffs, SHEILA G. SCOTT and RICHARD SCOTT, will be presumed by the Defendant, UNITED STATES OF AMERICA, to have resolved all claims, including medical expense recovery claims against the tortfeasors, 237 LINWOOD AVENUE, INC., WESTERN

NEW YORK ARTIFICIAL KIDNEY CENTER, INC. and FRENSENIUS MEDICAL CARE HOLDINGS, INC., without knowing the exact amount of the claimed "lien" by Medicare.

37. Upon information and belief, Defendant, UNITED STATES OF AMERICA/Medicare refuses to even provide any binding amount of their claim, their interests nor their "lien" amount until, unless and after the case has been resolved by way of settlement or verdict.

38. Plaintiffs, SHEILA G. SCOTT and RICHARD SCOTT, do not know and cannot determine the amount/their share of personal injury recovery in their injury action until after the case is fully resolved, by way of settlement or verdict, and even then, they will not know if they personally will recover any compensation until after Defendant, UNITED STATES OF AMERICA/Medicare has claimed and been paid their "lien."

39. The Insurance Carriers for the Defendants, 237 LINWOOD AVENUE, INC., WESTERN NEW YORK ARTIFICIAL KIDNEY CENTER, INC. and FRENSENIUS MEDICAL CARE HOLDINGS, INC., specifically, and all liability insurance carriers defending personal injury claims involving Medicare recipients generally, refuse to pay resolutions until and unless Defendant, UNITED STATES OF AMERICA/Medicare has issued a "final conditional demand." And until the purported "lien" asserted by Defendant, COUNTY OF ERIE, is satisfied.

40. Liability insurance carriers refuse to resolve claims prior to Defendant, UNITED STATES OF AMERICA's/Medicare's approval due to the statutory risk and potential penalty of double damages [(42 U.S.C. §1395y(b)(2)(B)(iii)].

41. After a case has been resolved, Medicare has specific time standards they themselves have set for resolution. Purportedly, they will issue a decision within sixty-five (65) days after they receive all the documentation they deem they require by fax or regular mail and it has been entered into their system.

42. In actual practice, materials are frequently sent to Medicare/CMS, but for whatever reason not "entered into their system". There is no affirmative notice by Medicare that the submitted documentation did not make it into the system. Nevertheless, if that glitch occurs as it does frequently, the documentation must be resubmitted and an additional sixty-five (65) day clock begins ticking. There is no way to verify that sent materials have been received by Medicare as it may not be formally served or filed by e-mail and, as Medicare only has a post office box as an address, certified mail may not be accepted. Upon information and belief, certified mail requires a location address.

43. Beyond those simple but, in practice, daunting logistical hurdles, Medicare assessments and staff are so far behind that the majority/all submissions presently are taking longer than the allotted sixty-five (65) days. When the allotted sixty-five (65) day time line is exceeded, the case evaluation is referred to a "Supervisor" who is obligated to respond within ten (10) days.

44. Upon information and belief, "Supervisors" are so far behind that they are unable to meet their ten (10) day response requirement. Upon information and belief, cases are now backlogged for over a year with no resolution date in sight and cases are still sitting on the trial Court calendar.

45. Upon information and belief, the net result is that upon a tentative resolution of all personal injury actions involving Medicare and/or Medical payments, they are not and cannot be resolved/finalized and the Plaintiff will not receive his money nor may the case taken off the Court calendar for what amounts to an indefinite and undetermined period of time with no absolute end point. In the interim, the case remains open.

46. Upon information and belief, in motor vehicle cases involving No-Fault, Medicare will NEVER issue permission to resolve the case or permit payments to the injured Plaintiff until all treatment has concluded and/or No-Fault is exhausted.

47. Upon information and belief, in cases involving permanent injuries, those may remain open and on the Courts calendars in perpetuity or until the Plaintiff dies.

48. While the within action might technically resolve, Stipulations of Discontinuance, final and total closure of the file in the Court cannot be accomplished until and unless Defendant, UNITED STATES OF AMERICA/Medicare and Defendant, COUNTY OF ERIE/Medicaid, deems and decrees that its interests are satisfied, resolved, protected and/or paid.

49. Plaintiffs, SHEILA G. SCOTT and RICHARD SCOTT, through their attorney J. Michael Hayes, Esq., herein make no claim for Defendant, UNITED STATES OF AMERICA'S/ Medicare nor for the Defendant, COUNTY OF ERIE, recovery of medical expenses, which were or may have been covered by Defendant UNITED STATES OF AMERICA/Medicare and/or Defendant, COUNTY OF ERIE/Medicaid in that such representation would constitute a violation of the *Professional Rules of Conduct* for attorneys and specifically ethical conflicts as set forth in Rule 1.8(g).

50. Upon information and belief, Defendant, UNITED STATES OF AMERICA/Medicare calculates the amount it is to be recompensed from the net recovery of the injured Plaintiff after attorney fees and disbursements (costs of litigation) have been deducted from the gross settlement.

51. Plaintiff's through their attorney, J. Michael Hayes, Esq., make no claim for recovery of Medicare expenditures nor for Medicaid expenditures arising out of the within incident as to do so would require representation of two or three competing claimants, seeking a single lump sum

resolution and allocating the proceeds between those three claimants while taking a fee on the whole. Such multiple representation constitutes an ethical violation of the *Professional Rules of Conduct* for Attorneys.

52. The interpretation and application of Rules and the practice of compelling, mandating and requiring Plaintiff's Attorney(s) to sue for medical expense recovery in addition to suing for Plaintiff's personal injuries when medical expenses are a subrogation claim/right owned by another entity that then claims a portion or all of the settlement proceeds, often to the detriment and prejudice of the Plaintiff's while according the Attorney a full fee on the entire recovery compels that the attorney commit an ethical violation, is a conflict of interests that deprives Plaintiff of her property without Due Process of Law in violation of Due Process Clause of the Fourteenth Amendment of the United States Constitution.

#### UNDERLYING FACTS

53. Upon information and belief, at all times hereinafter mentioned, the Defendant, 237 LINWOOD AVENUE, INC. was the owner of a certain property located at 237 Linwood Avenue, Buffalo, New York.

54. Upon information and belief, at all times hereinafter mentioned, the Defendant, 237 LINWOOD AVENUE, INC. was the lessor of a certain property located at 237 Linwood Avenue, Buffalo, New York.

55. Upon information and belief, at all times hereinafter mentioned, the Defendant, WESTERN NEW YORK ARTIFICIAL KIDNEY CENTER, INC. was the owner of a certain property located at 237 Linwood Avenue, Buffalo, New York.

56. Upon information and belief, at all times hereinafter mentioned, the Defendant, WESTERN NEW YORK ARTIFICIAL KIDNEY CENTER, INC. was the lessor of a certain property located at 237 Linwood Avenue, Buffalo, New York.

57. Upon information and belief, at all times hereinafter mentioned, the Defendant, FRENSENIUS MEDICAL CARE HOLDINGS, INC., was the owner of a certain property located at 237 Linwood Avenue, Buffalo, New York.

58. Upon information and belief, at all times hereinafter mentioned, the Defendant, FRENSENIUS MEDICAL CARE HOLDINGS, INC., was the lessor of a certain property located at 237 Linwood Avenue, Buffalo, New York.

59. Upon information and belief, on or about November 3, 2010, and prior thereto, Defendants, 237 LINWOOD AVENUE, INC., WESTERN NEW YORK ARTIFICIAL KIDNEY CENTER, INC. and FRENSENIUS MEDICAL CARE HOLDINGS, INC., through their officers, agents, servants and/or employees were responsible for the design, construction, maintenance, upkeep, operation, control, lighting, marking, signing and inspection of the aforesaid premises at 237 Linwood Avenue, Buffalo, New York, including but not limited to, entrance/exit doors, handicap ramp and railings, floorings, coverage, approaches, walkways, steps, entrances and exits thereto and/or a part thereof.

60. Upon information and belief, the aforementioned premises at 237 Linwood Avenue, Buffalo, New York, the entrance thereto and exits therefrom were negligently, carelessly and recklessly improperly or inadequately designed, constructed, protected, maintained, inspected, lighted, marked, signed ramped, covered, nailed and caused and permitted dangerous, unsafe and defective conditions to exist at the exit/entrance of the premises thereby permitting the continuance and/or causing and creating dangerous and hazardous conditions.

61. Upon information and belief, Defendants, 237 LINWOOD AVENUE, INC., WESTERN NEW YORK ARTIFICIAL KIDNEY CENTER, INC. and FRENSENIUS MEDICAL CARE HOLDINGS, INC., constructed the aforementioned ramp and entrance way without proper or any building permits or inspection.
62. Upon information and belief, Defendants, 237 LINWOOD AVENUE, INC., WESTERN NEW YORK ARTIFICIAL KIDNEY CENTER, INC. and FRENSENIUS MEDICAL CARE HOLDINGS, INC., built and constructed the aforementioned ramp and entrance in violation of existing building and handicap codes, rules and regulations.
63. Upon information and belief, the Defendants, 237 LINWOOD AVENUE, INC., WESTERN NEW YORK ARTIFICIAL KIDNEY CENTER, INC. and FRENSENIUS MEDICAL CARE HOLDINGS, INC., individually and/or through their officers, agents, servants and/or employees, had actual and/or constructive notice of the aforesaid conditions and failed to remedy same within a reasonable period of time.
64. On or about the 3<sup>rd</sup> day of November, 2010, Plaintiff, SHEILA G. SCOTT, was lawfully upon the premises located at 237 Linwood Avenue at the entranceway/doorway/ramp thereto in Buffalo, New York, when she was caused to fall.
65. Upon information and belief, the aforementioned incident was caused or contributed to due to the negligence and careless conduct on the part of the Defendants, 237 LINWOOD AVENUE, INC., WESTERN NEW YORK ARTIFICIAL KIDNEY CENTER, INC. and SIDNEY ANTHONI, their officers, agents, servants and/or employees.
66. Upon information and belief this action falls within one or more of the exceptions set forth in Article 16 of CPLR of the State of New York and/or the aforesaid provisions of said article do not apply to the within action.



## INJURIES

67. As a direct and proximate result of the Defendant's negligence, Plaintiff, SHEILA G. SCOTT has suffered the following personal injuries and damages to her right knee and right shoulder including bodily injuries and physical impairment, pain and suffering past and future including right knee hemotoma which occasioned two surgeries to date for evacuation and surgical debridement, resultant scarring, increased risk, susceptibility and potential need for total knee replacement, increased risk of deep vein thrombosis, arthritis, further surgery and possible loss of the affected limb and/or death.

68. As a direct and proximate result of the Defendants, 237 LINWOOD AVENUE, INC., WESTERN NEW YORK ARTIFICIAL KIDNEY CENTER, INC. and FRENSENIUS MEDICAL CARE HOLDINGS, INC., negligence. Plaintiffs, SHEILA G. SCOTT and RICHARD SCOTT, claim actual damages for the injuries, pain and suffering only, in the amount of \$1,000,000.

## AS AND FOR A SECOND

### CAUSE OF ACTION, PLAINTIFFS ALLEGE:

69. The Plaintiffs repeat and reallege those allegations set forth in Paragraphs "1" through "68" of the Complaint with the same force and effect as fully set forth herein at length.

70. As a result of the negligence and carelessness as aforesaid, Plaintiff, RICHARD SCOTT, has and will sustain a loss of consortium of his wife, SHEILA G. SCOTT, both in the past and future and loss of household services of his wife, SHEILA G. SCOTT, in the past and future as actual damages in the amount of \$200,000.

## JURY DEMAND

71. Plaintiffs, SHEILA G. SCOTT and RICHARD SCOTT, her husband, respectfully assert their right to a trial by jury of all issues triable.

## REQUEST FOR RELIEF

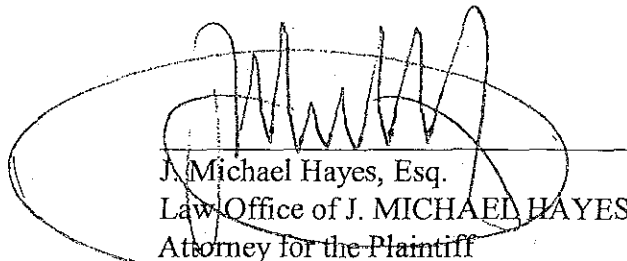
72. Wherefore, for the reasons set forth above, Plaintiff demands judgment against the Defendants, 237 LINWOOD AVENUE, INC., WESTERN NEW YORK ARTIFICIAL KIDNEY CENTER, INC. and FRENCENIUS MEDICAL CARE HOLDINGS, INC., as follows:

- a. Actual damages for injuries pain and suffering in the amount of One Million One Dollars (\$1,00,000.00) on the first cause of action and Two Hundred Thousand Dollars (\$200,00.00) on the second cause of action.
- b. Plaintiffs, SHEILA G. SCOTT and RICHARD SCOTT, her husband, specifically exclude medical expenses from the amounts sought from the Defendants, 237 LINWOOD AVENUE, INC., WESTERN NEW YORK ARTIFICIAL KIDNEY CENTER, INC. and FRENCENIUS MEDICAL CARE HOLDINGS, INC.;
- c. Costs of this suit;
- d. Pre-judgment and post-judgment interests;
- e. All other relief the Court deems appropriate.
- f. Allocation/resolution/severance of the Defendant, THE UNITED STATES OF AMERICA'S claim regarding Medicare repayment/recovery separate and apart from Plaintiff's claims for personal injuries, pain and suffering;

g. Allocation/resolution/severance of the Defendant, COUNTY OF ERIE's claim regarding Medicaid repayment/recovery separate and apart from Plaintiff's claim for personal injuries, pain and suffering.

DATED: BUFFALO, NEW YORK  
July 19, 2011

Yours Respectfully,



J. Michael Hayes, Esq.  
Law Office of J. MICHAEL HAYES  
Attorney for the Plaintiff  
69 Delaware Avenue - Suite 1111  
Buffalo, New York 14202  
TEL: (716) 852-1111