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Pro se for Plaintiff

KENNETH ZAHL, M.D.,  Plaintiff,  v.  Shera Fennes, GOOGLE, Inc.,  John and Jane Does,  Defendants.	) UNITED STATES DISTRICT COURT ) DISTRICT OF NEW JERSEY ) NEWARK VICINAGE ) ) Civil Action No ) ) ) <b>VERIFIED COMPLAINT</b> ) ) <b>AND JURY DEMAND</b> ) <b>JURY TRIAL DEMANDED</b> ) ) )
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2013 OCT -8 P 3:00  
U.S. DISTRICT COURT

**COMPLAINT:**

Now comes plaintiff Kenneth Zahl, M.D. who by way of complaint against the defendants GOOGLE, Inc. and Shera Fennes, alleges on knowledge as to their own acts and upon information and belief as to all other matters as follows:

INTRODUCTION:

1. Plaintiff Kenneth Zahl MD, a male physician, is currently licensed to practice Medicine and Surgery in the Commonwealth of Pennsylvania, and is a resident of New Jersey (NJ).

2. Defendant Shera Fennes (FENNES) an adult female resides at 652 MAIN RD, MONTVILLE, NJ (ZIP Code 07082), and resided there when she became a patient of Plaintiff's practice.

3. At the time this controversy began Plaintiff was a duly licensed Physician in New Jersey, with board certification in pain medicine and anesthesiology, specializing in the medical and interventional treatment of pain. Treatment was rendered at an office in Rockaway Township, NJ.

4. Google, Inc. is a huge international corporation with a principal office at 1600 Amphitheatre Parkway, Mountain View, CA 94043.

5. Google maintains a local office at 76 Ninth Avenue, 4th Floor, New York, NY 10011

6. On information and belief, Google, is the largest provider of Internet World Wide Web search, Internet advertising, and web publishing services. The Internet with its blogging and on-line publication of news material has already supplanted printed media such as newspapers in this country. Patients frequently use Google to locate a physician to treat their illness. Plaintiff relies on Google advertising to promote his medical practice.

7. On information and belief, Google maintains and regulates two extremely popular

blogging services called Blogger.com and Blogspot.com. Blogger.com and Blogspot.com are US based websites regulated by US law.

8. On information and belief, a Blog (short for web blog) is a free service that allows users to publish pages of information, which can be quasi-journalistic, or even a diary of sorts. Blogs have a high ranking on Google Search engines.

9. On information and belief, Blogger allows it's users to create blogs, but purportedly Google doesn't either check or make any claims about the accuracy of the content of these web pages or blogs.

10. On information and belief, Blogger will not remove allegedly defamatory, libelous, or slanderous material from Blogger.com or BlogSpot.com unless required to do so by a court order.

11. Personal jurisdiction and venue is proper in the United States District Court for the District of New Jersey and § 1391(b) because a substantial part of the events giving rise to the Plaintiffs' claims occurred in this district and the Defendants are subject to personal jurisdiction in this district.

12. FENNES (already suffering from chronic pain, depression, and using opioid medications for years) became a patient of Plaintiff's practice on or about August 9, 2004.

13. FENNES at the time executed an irrevocable assignment of benefits (AOB), assigning her billing rights to PLAINTIFF from Horizon Blue Shield of NJ policy she presented. In relevant part the AOB also required her to turn over any and all insurance

checks to Plaintiff, were she be paid directly by that carrier. The agreement also indicated that insurance billing was a courtesy, and that as a non-participating physician Plaintiff was not obligated or required to accept insurance payment in full, if patient forwarded same to him

14. FENNES was always treated at Plaintiff's office, in the presence of licensed female nurses, and was never for a minute alone with Plaintiff. In fact on each procedure, FENNES was treated by a NJ licensed Certified Registered Nurse Anesthetist, and monitored by a licensed nurse appointed by the NJ Board of Medical Examiners to monitor.

15. FENNES billed Horizon for consultation and injection services which bills the billing monitor approved and/or did not comment negatively on.

16. On September 24, 2004, FENNES and Plaintiff had a disagreement about her wanting to escalate the use of certain oral pain medications, while Plaintiff wanted to keep her on a steady release patch of pain medication, that were less likely to be abused. Oral pain medications can be crushed snorted or injected.

17. FENNES ceased to be a patient shortly after the disagreement, and never filed any complaints until was taken to collections.

18. On information and belief Horizon issued checks for the above treatment to FENNES, which she cashed.

19. Thus FENNES was balanced billed \$9,510.48 for her medical treatments.

20. FENNES refused to pay any balance and/or a minimum turn over the payments from Horizon. The unpaid bills were sent to a collection agency and then the matter was later dropped without success. There was no further contact between Zahl and FENNES.

21. However about five years later while Zahl's patient KO was at work looking for Zahl's phone number to make a follow-up appointment. Apparently on her PC using Google on June 9, 2011, she came upon a scurrilous blog created and authored by FENNES (found at URL: [intoomuchpain.blogspot.com](http://intoomuchpain.blogspot.com)) on the so-called top ten listings for the search "Kenneth Zahl". This was brought to Plaintiff's attention by his patient KO that day.

22. Plaintiff also accessed the blog for first time that evening and noted it contained false, scurrilous and therefore defamatory allegations such as:

**"He was bent over my backside. Personally, I think he is a pervert. I was embarrassed, humiliated, and I felt violated by this action."**

In point of fact Plaintiff did not bend over her backside to do the procedure on FENNES, rather he stood to her left, while she was on a translucent x-ray table, in the presence of two nurses and an x-ray technologist, all females.

**"He yelled at me and told me that he had spent too much time on me already and that I should just shut up and get the procedure done. He promised that it would make the pain better. "**

In point of fact Plaintiff did not yell at FENNES. In point of fact FENNES, after having the appropriate time to have the indications for the procedure signed an informed consent, which had these clauses:

“Dr. Zahl has explained the nature and purpose of the procedure(s) or treatment, possible alternative methods of treatment, the risks involved, and the possibilities of complications to me. These risks and possible complications include: nerve injury, spinal injury, stroke, bleeding, infection, no pain relief, reaction to x-ray dye, etc.; but are not limited these complications stated above. I certify that I have been given an ample opportunity to discuss the risks, benefits, risk/benefit ratio, and rationale for the procedure(s), and that all my questions have been answered regarding same, and that I am of full age to consent to the procedure”

“I am aware that the practice of pain medicine and surgery is not an exact science, and I acknowledge that no guarantees have been made to me as to the results of the operation, procedure or treatment.”

23. FENNES continues to misstate or try to confuse the facts in the blog entry about the procedure to make a false accusation of fraud. Fennes writes:

“He did not sedate me for this procedure or any other procedure, so I was well aware of what was going on. I had also driven myself there with my daughter in the car with me. She can attest to this fact as well. Mind you, he has billed my insurance company for medicine for sedation.”

In point of fact the patient did not need or get sedation, but one could not predict that before the procedure was done. Rather as she well knows, she consented to the monitoring of her procedure by the CRNA- who was on standby, present with her should the patient need sedation and/or have an untoward reaction to the procedure. At times during spinal procedures patients can have a reaction requiring sedation or resuscitation, thus for safety it is more prudent to have another credentialed anesthetist available especially in a private

clinic setting. Plaintiff did not bill for sedation, rather the anesthesia report prepared by the CRNA, sent to Horizon specifically said "monitored anesthesia care". The report also said the Fennes consented to these additional services. Per Horizon's protocol at the time they paid for monitored anesthesia care at the same rate of reimbursement, if the documentation supported the need for and the rendering of the service. In this case it obviously did meet the criteria. Fennes disingenuously leaves of the fact that she then cashed the checks for the monitored anesthesia care.

24. FENNES continues to misstate the facts:

He also billed for four injections, and he only gave me three injections that day.

In point of fact, billing for facet injections if done per level of facet joint injected. The State monitors did not report to the Board that any injection billed for was not done on this or any occasion.

25. According to the blog's statistics the blog was created by FENNES in March of 2006, but it did not initially have a "top ten Google" listing, thus it was not noticed by Plaintiff, his colleagues or his patients.

26. Apparently over the years, and possibly because there were no other comments the blog was not highly ranked by Google technology.

27. It was not until other comments were made that the ranking of the listing rose to a top ten hit when the search "Kenneth Zahl" is executed. On information and belief, comments on a blog raise the Google ranking. According to the Blog statistics the first comment was made by Google



registered blogger who uses the username "Lauren16" on or about March 16, 2011, which would explain the five year delay in noticing the blog on the first page of a Google search.

28. Plaintiff's pro se efforts to take down the offensive blog with Google have been unsuccessful. Counsel for Google advised that a court order would be needed.

29. Plaintiff's efforts to lower the "Google ranking" over the last two years have been totally unsuccessful. For example Plaintiff engaged the services of "Reputation.com" two years ago, the premier company used by professionals to attempt to lower the ranking such false and malicious blogs or patient ratings. Despite their services, in each monthly report they have sent FENNES' Blog still appears in the top ten Google listings.

30. A search done on October 6, 2013 when finalizing this complaint still found that this blog is number four of ten. For several months the blog came up number two of ten.

31. Zahl's being in solo practice non-hospital based, finds his primary source or new patient referrals is via Internet advertising, some of which he purchases.

32. Over the years numerous patients have reported seeing the Fennes Blog, as have Zahl's employees, family and colleagues.

33. As recently as October 3, 2013 TM a former patient of Plaintiff prior to 2005, returned to the area from Florida. She searched for Plaintiff and said she came upon the blog, and almost did not



make the appointment, until reassured by Plaintiff that the blog is untrue.

34. On Sep 15, 2011, at 6:20 PM, Zahl's former counsel "Paul Verner" <[pwverner@vernersimon.com](mailto:pwverner@vernersimon.com)> noted:

<http://intoomuchpain.blogspot.com/>

35. Verner offered to file a complaint but not without a significant retainer, after he said he was also unsuccessful in contacts to Google, Inc. to have the blog taken down.

36. After the publication of the Blog, Defendant also admittedly began a campaign of disparaging Plaintiff and injuring Plaintiff's reputation and goodwill in the area by making false accusations to at least the following individuals or entities as noted on her blog:

"County Board of Medical Examiners" [sic there is no County Board, this was likely the Morris County Medical Society as they confirmed receiving the complaint],

"the State Board of Medical Examiners, the AMA, the Attorney General, a judge in the Supreme Court, Former Governor [sic] Dick Codey, and that is just to name a few."

37. In point of fact the American Society of Interventional Pain Practitioners (to which Plaintiff is a life member) also received a similar complaint, which they evaluated and in due course dismissed, but not before circulating the complaint before a disciplinary committee and asking for a rebuttal.

38. The Fennes blog contains false and malicious statements attributing conduct and characteristics to Plaintiff that are contrary to customary, ethical and lawful medical practices.

39. Defendant Fennes' false and malicious statements include, without limitation, that (a) Plaintiff is a pervert, (b) Plaintiff is somehow committing insurance fraud, (c) Plaintiff causes patients to get addiction to pain medications; and (d) the Plaintiff forces patients into unnecessary painful procedures which makes the pain worse.

40. Defendant Fennes made these false and malicious statements on the Blog (a) knowing they were false or with a reckless disregard for the truth, (b) without reasonable grounds for the Defendant to believe they were true, and (c) with intent to injure and defame Plaintiff.

41. Since March 2006, these false and malicious statements were communicated to innumerable potential and former patients who likely cancelled their appointments or based upon the vile spewed forth did not make an appointment.

42. Defendant Fennes false and malicious statements, when considered alone and without innuendo, have (a) negatively impacted Plaintiff's trustworthiness and character, (b) caused Plaintiff to be subjected to distrust, ridicule, contempt, and disgrace, and (c) injured Plaintiff's reputation and goodwill in the community of his practice located in Northeast Pennsylvania and nationwide.

43. Similarly Defendant Goggle could have easily and permanently taken this site down over two years ago, when it likely became

44. As a result of the Defendants actions or failure to act, the Plaintiff has suffered damages for which the Defendants should compensate Plaintiff for spreading these falsehoods.

45. Plaintiff is entitled to practice medicine free of false, defamatory, libelous, malicious complaints to his colleagues or medical boards, and/or free of slanderous comments and publications.

### **DAMAGES**

46. As a direct and proximate result of the actions of the Defendants as detailed above, Zahl has incurred financial damages and incalculable damages to his reputation

47. Plaintiff has performed all conditions precedent to the bringing of this action.

### **First Count against Google Inc. and Fennes**

#### **(LIBEL)**

48. Plaintiff repeats and re-alleges each and every allegation of the background of the complaint as if fully set forth herein at length.

49. The majority of statements contained in the "intoomuchpain" Blog published by Google

Inc., are false, and others are so misleading to the point of creating a false impression of Plaintiff.

50. Shera Fennes knew the statements to be false and acted intentionally in causing the Blog to be published.

51. GOOGLE, Inc. was negligent or acted recklessly in failing to determine whether the statements contained in the blog were true after publishing it and it was brought to their attention on or about June 10, 2011. Google negligently allowed the blog to be republished and searched daily by its search bots to achieve a daily top ten ranking for over two years and ongoing.

**SECOND COUNT AGAINST FENNES (Conversion)**

52. Fennes entered into an irrevocable assignment of benefits and has failed to comply with the terms of the AOB by converting the insurance proceeds to her

own use in violation of *THEFT BY FAILURE TO MAKE*

*REQUIRED DISPOSITION. OF PROPERTY RECEIVED. (N.J.S.A. 2C:20-9*

53. Wherefore Plaintiff demands entry of a judgment for **\$9,510.48** plus interest from Defendant Fennes

WHEREFORE, PLAINTIFF prays:

That this Court enter judgment in his favor on all counts of this complaint;

That this Court award him damages in the amount of \$1,000,000.00 plus costs of suit;

That this Court further award him punitive damages and attorney's fees; and

That this Court enter a permanent injunction against Fennes from further disparaging Plaintiff in any format or means

That this Court award him, any and all other relief to which he may appear entitled.

**JURY DEMAND**

Plaintiff demands trial by jury on all issues so

triable.

**CERTIFICATION PURSUANT TO LOCAL CIVIL RULE 11.2**

I certify that the matter in controversy is not the subject matter of any action pending in any Court, or in any arbitration or administrative proceeding.

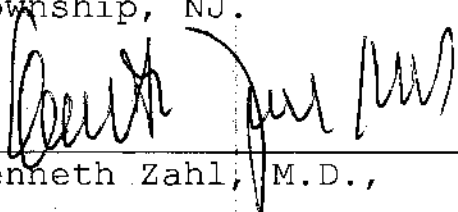
**VERIFICATION OF COMPLAINT**

1. I, Kenneth Zahl, M.D. of full age, am a physician previously licensed to practice medicine in the State of New Jersey, and I am the Plaintiff named in this Verified Complaint.

2. I have reviewed this Verified Complaint, and I declare that all of the factual statements declared herein, with the exception of those stated to be upon information and belief, are true, and are personally known by me to be true. With respect to factual allegations stated to be upon information and belief, while I do not have first-hand knowledge that they are true, I reasonably believe them to be true, based upon information known by me at the time this verification was executed.

3. I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 8th of October, 2013 in Morris Township, NJ.

  
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Kenneth Zahl, M.D.,