

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

PATRICK WILLS, PERSONAL REPRESENTATIVE OF THE ESTATE OF AIDEN WILLS; SHERRY SHAFFER PERSONAL REPRESENTATIVE OF THE ESTATE OF LOGAN SHAFFER; WHITNEY STETTLER, a single person; CHRISTOPHER GUNNELL, PERSONAL REPRESENTATIVE OF THE ESTATE OF IAN GUNNELL; NORMA HERNANDEZ, PERSONAL REPRESENTATIVE OF THE ESTATE OF ANNA CHRISTINA VENTURA HERNANDEZ; KATHA HUTT, Guardian Ad Litem for Elizabet Hutt minor child, and individually with MICAH HUTT, father; all on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

SEATTLE CHILDREN’S HOSPITAL, a non-profit Washington Corporation,

Defendant.

No. 19-2-31648-9 SEA

SECOND AMENDED CLASS ACTION COMPLAINT

[PROPOSED]

Plaintiffs allege:

I. INTRODUCTION

1.1 For decades Defendant Seattle Children’s Hospital has been one of the most revered pediatric medical facilities in the country.

1 1.2 In November 2019, Defendant shocked the public by admitting its premises at
2 4800 Sandpoint Way Northeast, Seattle, Washington, had been contaminated with *Aspergillus*
3 mold since 2001 which sickened and caused the death of numerous child patients.

4 1.3 By at least 2005, Defendant knew the transmission of *Aspergillus* into its
5 premises could be related to its air-handling system. At that time in order to win a lawsuit
6 brought by the Patnode family, Defendant hired lawyers and experts in an attempt to disprove
7 that fact.

8 1.4 During the course of that lawsuit troubling information surfaced regarding the
9 Defendant's failure to maintain and staff its air-handling systems. In 2008, Defendant settled the
10 lawsuit and insisted on confidentiality. In the following years the Defendant kept a deadly secret:
11 *Aspergillus* continued to contaminate Seattle Children's Hospital. Defendant engaged in a
12 cover-up designed to reassure its patients, doctors, nurses, and the public that its premises were
13 safe, when in fact they were not.

14 1.5 This Class Action lawsuit is brought on behalf of the child patients of Defendant
15 who became infected by *Aspergillus* mold after they were hospitalized between 2001 and the
16 present time.

17 **II. PARTIES**

18 2.1 Plaintiff Class Representative Patrick Wills, Personal Representative, brings this
19 action on behalf of the estate of Aiden Wills, a three-year-old child patient of Defendant who
20 was hospitalized from August 2008 until his death in March 2009, as well as the Parental claims
21 of Patrick Wills, residing in Pandora, Ohio and Colleen White, residing in New Rochelle, New
22 York.

23 2.2 On December 5, 2019 Patrick Wills was duly appointed as the personal

1 representative of the Estate of Aiden Wills in King County Superior Court Cause no.: 19-4-
2 22440-9-SEA.

3 2.3 Plaintiff Class Representative Sherry Shaffer brings this action on behalf of the
4 estate of Logan Shaffer, an infant child patient of Defendant who was hospitalized in February
5 2005, as well as the Parental claims of Jim and Sherry Shaffer residing in, Auburn, Washington.

6 2.4 On December 5, 2019 Sherry Shaffer was duly appointed as the personal
7 representative of the Estate of Logan Shaffer in King County Superior Court Cause no.: 19-4-
8 22449-2-SEA.

9 2.5 Plaintiff Class Representative Whitney Stettler, was 17 years of age when she was
10 hospitalized. She is now an adult residing in Battleground, Washington.

11 2.6 Plaintiff Class Representative Christopher Gunnell, Personal Representative,
12 brings this action on behalf of the estate of Ian Gunnell, a twelve year old child patient of
13 Defendant who was hospitalized from August 2017 until his death on February 2019, as well as
14 the Parental claims of Christopher and Tanya Gunnell, residing in Lewiston, Idaho.

15 2.7 On December 5, 2019 Chris Gunnell was duly appointed as the personal
16 representative of the Estate of Ian Gunnell in King County Superior Court Cause no.: 19-4-
17 22439-5-SEA.

18 2.8 Plaintiff Class Representative Norma Hernandez, Personal Representative, brings
19 this action on behalf of the estate of Anna Christina Ventura Hernandez, a sixteen year old
20 patient of Defendant who was hospitalized in November and December 2014, as well as the
21 parental claims of Norma Hernandez and Wiler Ventura, residing in Wenatchee, Washington.

22 2.9 Norma Hernandez is being duly appointed as the personal representative of the
23 Estate of Anna Christina Ventura Hernandez in Cause no.: 19-4-23486-2.

1 2.10 Plaintiff Guardian ad Litem Katha Hutt brings this action on behalf of the minor
2 child Elizabeth Hutt, a newborn who was hospitalized from date of birth August 21, 2019, to the
3 present time, and the parents Katha and Micah Hutt also bring their personal claims.

4 2.11 The Plaintiff Class Representatives bring this healthcare negligence and premises
5 liability Class Action against Defendant. Defendant's facilities located at 4800 Sandpoint Way
6 Northeast, Seattle, Washington, should have been, but were not, reasonably safe for the uses
7 intended. The Defendant negligently maintained and tested its facilities, resulting in the
8 transmission of *Aspergillus* mold spores to hospitalized child patients.

9 2.12 Defendant Seattle Children's Hospital is a nonprofit corporation organized under
10 the laws of the State of Washington authorized to do business in the State of Washington.
11 Defendant is a "healthcare provider" within the meaning of RCW 7.70 and was duly authorized
12 to provide healthcare services to Plaintiffs and each class member. There existed a fiduciary
13 health care provider-patient relationship between the parties.

14 2.13 Defendant provided to Plaintiff and each Class member medical care, treatment,
15 and housing within its facilities.

16 2.14 Defendant through its agents, employees, and contractors, acted at all relevant
17 times on behalf of Defendant and within the scope of their employment or agency (whether
18 actual or ostensible).

19 **III. DATE OF OCCURRENCE**

20 3.1 The care in question occurred from the time that the *Aspergillus* mold entered into
21 the Defendant's premises to the present date. By admission of Defendant's Chief Executive
22 Officer Jeff Sperring, MD, that date is 2001 to the present time.

23 3.2 By August 2000, the Defendant knew or should have known of the dangerous

1 condition as a result of internal communication outlining ongoing and systemic problems with
2 the maintenance of the air-handling system.

3 3.3 During 2002 and 2003, Defendant knew of the numerous problems with the air-
4 handling system and risk to patient population due to internal communications and concerns
5 raised by a professional engineering consultant, including lack of formal maintenance program,
6 water leaks, plugged drains, standing water, plugged intake screens, live and dead birds in fan
7 shafts, leaking coils, overall filthy condition of all air handling units, lack of organized blue
8 prints of HVAC system, under-qualified and under-staffed Building and Engineering
9 Department, misallocation of monies from the Building and Engineering Department and failure
10 to test air handling units to determine if operating as designed.

11 3.4 In 2005, Eugene and Clarissa Patnode brought a lawsuit on behalf of their child.
12 The litigation exposed the direct link between inadequate maintenance of the air-handling system
13 and transmission of *Aspergillus* mold into Children's Hospital.

14 3.5 In 2008, Defendant settled the Patnode case on condition of confidentiality. By
15 invoking secrecy and in other ways, Defendant took active steps to hide from the public the
16 existence of *Aspergillus* mold as spread throughout the hospital's air-handling system.

17 3.6 Based upon the evidence discovered in the Patnode case, Defendant knew or
18 should have known by at least August 2000 that its negligent failure to provide safe premises
19 directly caused the transmission of *Aspergillus* to its vulnerable child patients.

20 3.7 Between 2000 and the present time, the Defendant did not notify the public, its
21 doctors, nurses, or its patients or their parents that there were problems with the maintenance of
22 its air-handling system. Even when hospitalized child patients became sickened by *Aspergillus*,
23 Defendant concealed its culpability.

1 3.8 In 2019, after seven infections and one death were connected to the latest
2 outbreak of *Aspergillus* as transmitted by Defendant's air-handling system, Defendant looked
3 back at prior cases and identified seven more illnesses and five deaths between 2001 and 2014.
4 Only then did Defendant admit that *Aspergillus* exposure was evident at the hospital these past
5 18 years.

6 **IV. JURISDICTION AND VENUE**

7 4.1 The Superior Court of King County, State of Washington, has subject matter
8 jurisdiction over this action pursuant to RCW 2.08.010.

9 4.2 Jurisdiction and venue are proper in and for the Superior Court of Washington for
10 King County Seattle Division because the incident occurred at Defendant's place of business in
11 Seattle, King County, Washington.

12 **V. ACTION ALLEGATIONS**

13 5.1 **Class Definition:** Plaintiff brings this Class action pursuant to Washington
14 CR 23(b)(3) on behalf of a Class defined as follows:

15 All former admitted child patients of Defendant who were treated in its premises
16 and affiliated areas starting in 2001 to the present who then contracted any
17 version of *Aspergillus* mold-related illness caused by exposure within
18 Defendant's premises, where such illness resulted in personal injury including
19 death and loss of consortium to the parents.

20 5.2 **Numerosity:** The hospital has not yet attempted to identify all child patients who
21 were exposed to *Aspergillus* and contracted any of the conditions described in paragraphs 6.3.a-b
22 below. Upon information and belief, the Class is so numerous that joinder of all members is
23 impracticable. The disposition of the claims of the Class in a single action will provide
24 substantial benefits to all parties and the Court.

1 5.3 **Commonality:** There are questions of law and fact which are common to the
2 Class, including, but not limited to:

- 3 a. Whether Defendant breached its duty to comply with the standard of care of a
4 pediatric hospital;
- 5 b. Whether Defendant exercised the requisite degree of skill, care and learning
6 expected of a reasonably prudent hospital/healthcare provider;
- 7 c. Whether Defendant fell below its professional standard of care by failing to
8 provide a safe environment within its premises and related facilities;
- 9 d. Whether Defendant failed to obtain informed consent that surgery would not
10 occur in a safe environment and included the risk of contamination by *Aspergillus*
11 mold which could lead to further injury, including death;
- 12 e. Whether Defendant failed to reasonably maintain its air-handling system;
- 13 f. Whether Defendant reasonably monitored its premises and related facilities to
14 ensure that a safe environment existed;
- 15 g. Whether Defendant had a duty to take reasonably prudent measures to prevent
16 *Aspergillus* mold from infecting Plaintiff and each Class member in the
17 Defendant's premises;
- 18 h. Whether Defendant failed to exercise reasonable care to protect its child patient
19 business invitees from injury;
- 20 i. Whether Defendant failed to take reasonable precautions to eliminate the risk of
21 *Aspergillus* transmission from its air-handling system to its child patient business;
- 22 j. Whether Defendant owed a duty of care to its child patient business invitees,
23 including Plaintiff and each Class member, which required it to inspect for
24 dangerous conditions, followed by such repair, safeguards, or warnings as may be

1 reasonably necessary under the circumstances;

2 k. Whether Defendant violated WAC 246-320;

3 l. Whether Defendant concealed the existence of chronic *Aspergillus* contamination
4 in its premises from its patients and the public between 2000 and 2019;

5 m. Whether Defendant violated the CPA; and

6 n. The nature and extent of Class-wide injury and the measure of compensation for
7 such injury.

8 5.4 **Typicality.** Plaintiffs' claims are typical of the claims of other members of the
9 Class and Plaintiffs are not subject to any atypical claims or defenses. Defendant did not prevent
10 the transmission of *Aspergillus* into its premises. Plaintiffs were ill when brought to Defendant's
11 hospital, the premises were contaminated, and as a result the patients became sickened by
12 *Aspergillus*. Defendant failed to advise the children's parents that the premises were unsafe and
13 later did not admit to them that the *Aspergillus* infection was caused by Defendant's own
14 negligence. Plaintiffs' claims like those of the Class, arise out of the same common course of
15 conduct by Defendant directed toward Plaintiffs and the Class and are based on the same legal
16 and remedial theories.

17 5.5 **Adequacy:** Plaintiffs will fairly and adequately represent the Class, as they are
18 committed to prosecuting this action, have no conflicts of interest, and have retained competent
19 counsel who are experienced civil trial lawyers with recent significant experience in complex
20 and Class action litigation and trial, including tort litigation. Plaintiffs and their counsel are
21 committed to prosecuting this action vigorously on behalf of the Class and have the financial
22 resources to do so. Neither Plaintiffs nor their counsel have interests that are contrary to or that
23 conflict with those of the proposed Class.

24 5.6 **Predominance:** For years the Defendant has failed to ensure that its premises are
a safe environment for its child patients. Even when challenged directly on the issue between

1 2005 and 2008, Defendant fought the charges and settled the matter confidentially. The common
2 issues arising from this conduct that affect Plaintiffs and members of the Class predominate over
3 any individualized issues. Adjudication of these common issues in a single action has important
4 and desirable advantages of judicial economy.

5 **5.7 Superiority.** Plaintiffs and Class members have suffered and will continue to
6 suffer harm and damages as a result of Defendant’s negligence. Absent a Class action, most
7 Class members likely would find the cost of litigating their claims prohibitive. Class treatment is
8 superior to multiple individual suits or piecemeal litigation because it conserves judicial
9 resources, promotes consistency and efficiency of adjudication, and provides a forum for all
10 claims. There will be no significant difficulty in the management of this case as a Class action.
11 The identity of each Class member is readily identifiable from Defendant’s own records. In fact,
12 unless this matter proceeds as a Class action, many children and young people who were injured
13 by exposure to *Aspergillus* at Defendant’s hospital may not otherwise learn how or why they
14 were injured.

14 **VI. BACKGROUND**



15
16
17
18
19
20
21 6.1 Defendant’s admirable mission is to “provide hope, care and cures to help every
22 child live the healthiest and most fulfilling life possible.” For over 100 years, Defendant has
23 been known to “deliver superior patient care, advance new discoveries and treatments through
24

1 pediatric research and serve as the pediatric and adolescent academic medical center for
2 Washington, Alaska, Montana and Idaho – the largest region of any children’s hospital in the
3 country.” In 2019, *U.S. News & World Report* named Seattle Children’s to its Honor Roll of the
4 10 best children’s hospitals in the country. The Honor Roll designates excellence across a range
5 of pediatric specialties.

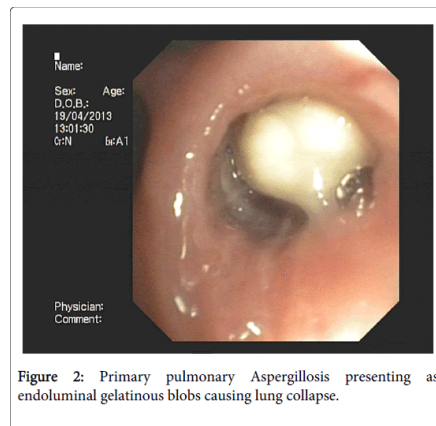
6 6.2 Included within the Defendant’s responsibilities is the requirement that it ensure
7 that its premises are safe for its child patients. This includes ensuring that its premises remain a
8 sterile environment, including, but not limited to, adequately maintaining its air-handling
9 systems, and testing its premises and affiliated areas for the presence of *Aspergillus* mold spores.



10
11
12
13
14
15
16
17
18 *Demonstrative Photo by: Center for Disease Control*

19 6.3 *Aspergillus* is a common mold. People with lung disease or weakened immune
20 systems – especially organ or stem cell transplant patients – are at higher risk of developing
21 aspergillosis. The condition can appear as an allergic reaction, but in more serious cases causes
22 infections in the lungs and other organs. According to the CDC:

- 1 a. Azole-Resistant *Aspergillus fumigatus*: Occurs when one species of *Aspergillus*,
2 *A. fumigatus*, becomes resistant to certain medicines used to treat it. Patients with
3 resistant infections might not get better with treatment.
- 4 b. Aspergilloma: Occurs when a ball of *Aspergillus* grows in the lungs or sinuses,
5 but usually does not spread to other parts of the body. Aspergilloma is also called
6 a “fungus ball.”
- 7 c. Chronic pulmonary aspergillosis: Occurs when *Aspergillus* infection causes
8 cavities in the lungs, and can be a long-term (3 months or more) condition. One or
9 more fungal balls (aspergillomas) may also be present in the lungs.



*Demonstrative Photo from
Journal of Pulmonary and Respiratory Infection (2014)*

- 18 d. Invasive aspergillosis: Occurs when *Aspergillus* causes a serious infection, and
19 usually affects people who have weakened immune systems, such as people who
20 have had an organ transplant or a stem cell transplant. Invasive aspergillosis most
21 commonly affects the lungs, but it can also spread to other parts of the body.
- 22 e. Cutaneous (skin) aspergillosis: Occurs when *Aspergillus* enters the body through
23 a break in the skin (for example, after surgery or a burn wound) and causes

1 infection, usually in people who have weakened immune systems. Cutaneous
2 aspergillosis can also occur if invasive aspergillosis spreads to the skin from
3 somewhere else in the body, such as the lungs.

4 **Defendant's Knowledge of Its *Aspergillus* Problem from the Patnode Case.**

5
6 6.4 In December 2002, 12 year old Jane Doe Patnode had a brain tumor surgically
7 removed at Defendant's hospital. The child survived the tumor removal, but developed
8 aspergillosis in her brain and spine which rendered her permanently disabled. The family sued
9 Defendant in 2005. Two declarations summarize the nature of Defendant's failures regarding its
10 air-handling systems:

- 11 a. Margaret Brown, had a master's degree in civil engineering and construction
12 management, and had been a Navy civil engineer for 20 years. She had
13 previously been a project manager at Fred Hutchison when they built the Seattle
14 Cancer Care Alliance, and was Director of Engineering at Harborview Medical
15 Center. From October 2002 to March 2003, she was retained by Defendant as a
16 consultant for the Building & Engineering Department (B&E). Ms. Brown stated
17 under oath on August 31, 2007:
- 18 i. She was advised by Defendant's infection control staff that *Aspergillus*
19 was a concern for the B&E Department.
- 20 ii. The operating and maintenance manuals for the air-handling system had
21 been missing for approximately one year.
- 22 iii. The air-handling system was only repaired when it would breakdown.
- 23 iv. Preventative maintenance of the air-handling system was not occurring.

- v. The air-intake systems were in poor condition and it appeared maintenance had not been performed for many years. Dead birds along with copious other debris were lodged in the screens. Air-handling unit water pans were filled with slimy water.
 - vi. B&E employees had no air-handling education.
 - vii. Overall Defendant's B&E Department did not have employees with the skill and knowledge of other B&E staff she had worked with in the past.
 - viii. She had grave concerns about how the hospital's critical care systems impacted Defendant's patient populations.
 - ix. When she brought and explained these concerns to Defendant, it abruptly terminated her services.
- b. Defendant hired Kenneth Johnson as an engineer in the B&E Department in April 1999. He received a promotion to Lead Engineer, but left in September 2003. Mr. Johnson stated under oath that during his time there:
- i. All of the air-handling units were in a filthy condition. Mold accumulated around fan coils and drain pans. Air intake screens were plugged with debris, including dead and live birds and bird droppings.
 - ii. The only preventative maintenance performed was limited to changing filters on the air handling units.
 - iii. It would have taken several years without maintenance for the system to deteriorate to this state.
 - iv. Most of the time the air-handling units and fans had some form of water leak. This is because the system was "rotting out."

- v. The B&E Department tried to put temporary patches on the problems.
- vi. The air-handling system was not tested.
- vii. The maintenance department was understaffed and needed additional funding to complete maintenance, make repairs, and provide for a computerized maintenance management system.
- viii. Defendant's B&E Manager repeatedly expressed concerns in writing by email to Defendant.

6.5 In August 2008, the Patnode lawsuit ended in a secret settlement. The Defendant did not advise its patients or the public that children taken for surgery at its Hospital had been or could be exposed to *Aspergillus* mold through its air-handling system.

6.6 Defendant failed to take adequate steps to address the long-standing *Aspergillus* contamination spread through its air-handling system, including, but not limited to, negligence in the maintenance of that system and negligence in testing its premises for the presence of mold spores.

Class representative Estate of Logan Shaffer



1 6.7 On February 5, 2005, Logan Shaffer was born with only half a heart. Physicians
2 advised that surgery could be performed that would allow the right side to function as a whole
3 heart. Logan’s parents chose Defendant over Stanford University Hospital. Logan experienced
4 a successful surgery on February 10, 2005.

5 6.8 Baby Logan recovered from surgery and went home.

6 6.9 During a later examination by a cardiologist, doctors discovered that Logan had
7 suffered a heart aneurism caused by an *Aspergillus* infection.

8 6.10 Logan returned to Defendant’s hospital in March 2005. There, doctors found
9 systematic bleeding throughout Logan’s body.

10 6.11 Logan died on March 28, 2005.

11 6.12 Exposure to *Aspergillus* while in Defendant’s premises directly caused Logan’s
12 pulmonary infection and death.

13 6.13 The doctors and nurses employed by Defendant who provided care to Logan did
14 not know that Defendant’s premises were unsafe and that transmission of *Aspergillus* was
15 Defendant’s fault.

16 6.14 Defendant failed to notify Logan’s parents that the *Aspergillus* had been
17 contracted directly from its facilities as the result of negligent maintenance of its air-handling
18 system.

19 **Class Representative Estate of Aiden Wills**



1 6.15 In August 2008, three-year-old Aiden Wills became a patient at Defendant's
2 hospital. He suffered from hemophagocytic lymphohistiocytosis, a rare disorder where the body
3 makes too many immune cells. He underwent bone marrow transplant.

4 6.16 In about January 2009, doctors performed bronchoaveolar lavage (a procedure
5 where a bronchoscope is passed into the lungs). He was then diagnosed with *Aspergillus* fungal
6 infection. At the time doctors explained that due to the *Aspergillus* infection:

7 “...we are in a tougher spot than we have been. In the past a fungal infection
8 post-transplant was a fatal condition. However, we do now have medications that
9 can treat fungal infections. The dilemma is that we must prioritize whether to
10 treat the fungus of the VGHD most effectively. If we treat the GVHD (Acute
11 Graft versus Host Disease) most aggressively with a steroid burst and possibly
12 additional medications, we put Aiden at greater risk for the spread of his fungal
13 infection. If we treat the fungus aggressively with immunosuppressants, then we
14 risk a worsening of his GVHD. At present we are choosing to treat the fungus
15 most aggressively with voriconazole and micafungin.

16 6.17 By February 17, 2009, the *Aspergillus* was “unchanged.”

17 6.18 Aiden died March 24, 2009.

18 6.19 Exposure to *Aspergillus* while in Defendant's premises directly caused Aiden's
19 pulmonary infection and interfered with his treatment.

20 6.20 The doctors and nurses employed by Defendant who provided care to Aiden did
21 not know that Defendant's premises were unsafe and that transmission of *Aspergillus* was
22 Defendant's fault.

23 6.21 Although Defendant treated Aiden for the infection, it failed to notify his parents
24 that the *Aspergillus* had been contracted directly from its facilities as the result of negligent
maintenance of its air-handling system.

1 **Class Representative Whitney Stettler**



11 6.22 In 2011, Plaintiff Whitney Stettler was a 17-year-old teenager living in Alaska
12 when diagnosed with Leukemia. She flew to Defendant’s hospital for urgent care. She
13 underwent surgery in the operating room where a port (central venous line) was placed. Through
14 the port she received life-saving medication. The goal was to stabilize Whitney so that she could
15 receive a bone marrow transplant.

16 6.23 After the port placement, Whitney became ill in a manner not associated with
17 Leukemia or its treatment. Tests revealed the existence of *Aspergillus* mold in her blood.
18 Whitney went into a coma and remained in-patient for the next month until her condition
19 stabilized.

20 6.24 Exposure to *Aspergillus* while in Defendant’s premises directly caused Whitney’s
21 pulmonary aspergillosis and interfered with her treatment.

22 6.25 The doctors and nurses employed by Defendant who provided care to Whitney
23 did not know that Defendant’s premises were unsafe and that transmission of *Aspergillus* was
24 Defendant’s fault.

1 6.26 Although Defendant treated Whitney for the infection, it failed to notify her that
2 the *Aspergillus* had been contracted directly from its facilities as the result of negligent
3 maintenance of its air-handling system.

4 **Class representative Anna Christina Ventura Hernandez**



14 6.27 In 2014, 16 year old Anna Christina Ventura Hernandez was diagnosed with a
15 brain tumor. Surgery to remove the tumor was successfully performed by doctors at Defendant’s
16 facilities on November 8, 2014. After a week in the hospital Anna returned to her home in
17 Wenatchee.

18 6.28 Anna’s condition worsened and she was airlifted back to Defendant’s facilities on
19 November 25, 2014. Doctors did not understand why she was ill until they received the results
20 of testing which revealed that *Aspergillus* was in Anna’s brain.

21 6.29 Anna died on December 26, 2014

22 6.30 Exposure to *Aspergillus* while in Defendant’s premises directly caused Anna’s
23 brain infection and death.

1 6.31 The doctors and nurses employed by Defendant who provided care to Anna did
2 not know that Defendant's premises were unsafe and that transmission of *Aspergillus* was
3 Defendant's fault.

4 6.32 Although Defendant treated Anna for the infection, it failed to notify her that the
5 *Aspergillus* had been contracted directly from its facilities as the result of negligent maintenance
6 of its air-handling system.

7 **Class representative Estate of Ian Gunnell**



17 6.33 In 2017, eleven year old Ian Gunnell had a previous diagnosis of blastic
18 plasmacytoid dendritic cell neoplasm, a rare form of blood cell cancer. He was admitted to
19 Defendant's hospital for additional chemotherapy. On August 30, 2017, he underwent surgery in
20 the operating room where a port (central venous line) was placed.

21 6.34 Within a few weeks one of his eyes began to swell. By September 15, 2017,
22 uncertain of what was causing the eye symptoms, doctors began performing tests and attempted
23 to treat the unknown infectious disease process which later was verified as *Aspergillus*. Ian
24 complained of pain, subconjunctival hemorrhage was noted, and his eye was swollen shut.

1 Doctors performed surgery to debride (scrape away) black necrotic debris down to bleeding
2 tissue.

3 6.35 Ian died February 15, 2019.

4 6.36 Exposure to *Aspergillus* while in Defendant's premises directly caused Ian's
5 severe eye infection and interfered with his cancer treatment.

6 6.37 The doctors and nurses employed by Defendant who provided care to Ian did not
7 know that Defendant's premises were unsafe and that transmission of *Aspergillus* was
8 Defendant's fault.

9 6.38 Although Defendant treated Ian for the infection, it failed to notify him that the
10 *Aspergillus* had been contracted directly from its facilities as the result of negligent maintenance
11 of its air-handling system.

12 **Class representative Elizabeth Hutt**



23 6.39 On August 21, 2019, Elizabeth Hutt was born at Tacoma General Hospital.

1 6.40 On August 22, 2019, Elizabeth was transferred to Defendant’s hospital for
2 treatment of an underdeveloped left heart and other related conditions.

3 6.41 Elizabeth underwent open heart surgery in Defendant’s premises on
4 August 26, 2019 and developed a complication. On November 7, 2019, Elizabeth underwent a
5 second surgery to address that issue.

6 6.42 During either or both of the August 26 or November 7, 2019 surgeries, Elizabeth
7 became infected by *Aspergillus*.

8 6.43 Elizabeth has lived her entire life inside of Defendant’s premises except for the
9 date of her birth and a period of nine (9) days in October 2019 when Defendant temporarily
10 discharged her to live in the Ronald McDonald house.

11 6.44 Exposure to *Aspergillus* while in Defendant’s premises directly caused
12 Elizabeth’s aspergillus endocarditis, aspergillus mediastinitis and other life-threatening
13 conditions.

14 6.45 Elizabeth has undergone additional surgeries and is currently fighting for her life.

15 6.46 The doctors and nurses employed by Defendant who provided care to Elizabeth
16 did not know that Defendant’s premises were unsafe, and that transmission of *Aspergillus* was
17 Defendant’s fault.

18 6.47 Defendant failed to notify Elizabeth’s parents that the *Aspergillus* had been
19 contracted directly from its facilities as the result of negligent maintenance of its air-handling
20 system.

21 **Department of Health**

22 6.48 In October 2017, State Department of Health inspectors cited Defendant for
23 serious violations involving its failure to “implement and monitor an effective infection
24 prevention program.”

 6.49 In June 2018, Defendant closed two of its premises and an equipment storage
room for three days after detection of *Aspergillus*.

1 6.50 In May 2019, the Defendant discovered another *Aspergillus* infestation in the air-
2 handling unit. As a result, the Defendant closed all of its premises. State inspectors cited
3 Defendant for failing to adequately maintain its air-handling units and exhaust fans, to wit:

- 4 • **Violation of WAC 246.320.136(5)** requiring that hospital leadership provide safe
5 and appropriate care. Specifically – failure to ensure that all patients have access
6 to safe and appropriate air through effective oversight for quality improvement,
7 infection control and physical environment put patients at risk of harm from
8 pathogenic organisms.
- 9 • Failure of the hospital’s Quality Improvement Steering Committee to approve and
10 implement the hospital’s Infection Prevention Quality Assessment & Performance
11 Improvement plan that received approval from the Infection Prevention Executive
12 Oversight Committee.
- 13 • Failure of the hospital’s Safety Leadership Committee to approve and implement
14 the facility’s draft Water Management Plan.
- 15 • Failure of the hospital’s Quality Program to ensure that facility staff completed
16 preventative maintenance of the hospital’s utility system according to industry
17 standards and manufacturer’s recommendations.
- 18 • **Violation of WAC 246.320.176(1)** by failure to approve an annual infection
19 control plan.
- 20 • **Violation of WAC 246.320.176(4)** by failure to approve and implement a water
21 management plan to prevent exposure to water borne pathogens.
- 22 • **Violation of WAC 246.320.296(9)(e)** by failure of facilities staff to complete
23 preventative maintenance at required intervals for air handlers in the operating
24 room, failure to inspect and calibrate filter performance, air pressure, and airflow
monitoring equipment to ensure accuracy, and failure to maintain written criteria
to assign priority levels and maintenance schedules.

- Notably interview of the Building Operations Manager included:
 - He was unaware what risk assessment or classification the hospital used to identify maintenance strategies for utility equipment
 - He was unable to provide any written documentation that showed completion of a risk assessment or establishment of risk criteria.
 - He stated the department was not currently inspecting, validating, or calibrating equipment used to monitor filter performance, air pressure, or airflow rates within the facility and had not developed schedules as specified in the utilities management plan.

6.51 Defendant claimed to be addressing the issues and reopened the premises on July 4, 2019. Mark Del Beccaro, Defendant’s Chief Medical Officer, informed investigators that the risk to patients was “incredibly low.”

6.52 On November 10, 2019, an inspection revealed *Aspergillus* in three of Defendant’s premises. The Defendant closed these premises.

6.53 For a period of at least 19 years (2000 until July 4, 2019), Defendant failed to adequately maintain the safety of its premises due to negligent maintenance of its air-handling system, and negligent failure to adequately test for mold spores.

6.54 On July 4, 2019, Defendant began to test for mold spores at least once per week. Defendant is also in the process of replacing its air-handling system.

6.55 The Class Plaintiffs did not learn that there was a link between their *Aspergillus* infections and Defendant’s hospital until November of 2019 when they heard through the media, Defendant’s admission of responsibility for the unintended transmission of *Aspergillus* to child patients.

V. MEDICAL NEGLIGENCE

5.1 As a health care provider, Defendant owed to Plaintiffs and each Class member a duty to comply with the standard of care for one of the profession or Class to which it belongs.

1 5.2 Defendant owed a duty to Plaintiffs and each Class member to exercise the degree
2 of skill, care, and learning expected of a reasonably prudent hospital in the State of Washington
3 acting in the same or similar circumstances at the time of the care or treatment in question.

4 5.3 Defendant owed a duty to Plaintiffs and each Class member to take reasonably
5 prudent measures to prevent *Aspergillus* from infecting Plaintiffs and each Class member in its
6 premises.

7 5.4 Defendant violated WAC 284-320, including specifically 246-320-296, partially
8 excerpted as follows:

9 **WAC 246-320-296 - Management of environment for care.**

10 The purpose of this section is to manage environmental hazards and risks, prevent
11 accidents and injuries, and maintain safe conditions for patients, visitors, and staff.

12 (1) Hospitals must have an environment of care management plan that addresses safety,
13 security, hazardous materials and waste, emergency preparedness, fire safety, medical
14 equipment, utility systems and physical environment.

15 (2) The hospital must designate a person responsible to develop, implement, monitor, and
16 follow-up on all aspects of the management plan.

17 (3) Safety. The hospital must establish and implement a plan to:

- 18 (a) Maintain a physical environment free of hazards;
- 19 (b) Reduce the risk of injury to patients, staff, and visitors;
- 20 (c) Investigate and report safety related incidents;
- 21 (d) Correct or take steps to avoid reoccurrence of the incidents in the future;
- 22 (e) Develop and implement policies and procedures on safety related issues such as but
23 not limited to physical hazards and injury prevention; and

24 ...

 (9) Utility systems. The hospital must establish and implement policies, procedures and a
plan to:

- (a) Maintain a safe and comfortable environment;
- (b) Assess and minimize risks of utility system failures;
- (c) Ensure operational reliability of utility systems;
- (d) Investigate and evaluate utility systems problems, failures, or user errors and report
incidents and corrective actions;
- (e) Perform and document preventive maintenance; and
- (f) Educate staff on utility management policies and procedures.

 (10) Physical environment. The hospital must provide:

 ...

1 (c) Ventilation to:
2 (i) Prevent objectionable odors and/or excessive condensation; and
3 (ii) With air pressure relationships as designed and approved by the department when
constructed and maintained within industry standard tolerances;

3 ...

4 5.6 Defendant failed to take reasonably prudent measures to prevent *Aspergillus* from
5 infecting Plaintiffs and each Class member in its premises.

6 5.7 Defendant's failures constitute a breach of the standard of care and negligence.

7 5.8 Defendant is independently liable under the doctrine of corporate negligence.

8 VI. PREMISES LIABILITY

9 6.1 As of at least 2000, Defendant had actual and constructive notice that its
10 negligently maintained air-handling system could cause the transmission of *Aspergillus* mold
11 into its premises.

12 6.2 Defendant failed to properly maintain its air-handling system, resulting in the
13 contamination of its premises.

14 6.3 Plaintiffs and each Class member was a child patient business invitee.

15 6.4 Defendant failed to exercise reasonable care to protect its child patient business
16 invitees, including Plaintiffs and each Class member, from injury.

17 6.5 Defendant failed to take reasonable precautions to eliminate the risk of
18 *Aspergillus* transmission from its air-handling system to its child patient business invitees,
19 including Plaintiffs and each Class member.

20 6.6 Plaintiffs and each Class member was a business invitee.

21 6.7 Defendant owed a duty of care to its child patient business invitees, including
22 Plaintiffs and each Class member, that required it to inspect for dangerous conditions, followed
23 by such repair, safeguards, or warnings as may be reasonably necessary for the Plaintiffs' and

1 each Class member's protection under the circumstances.

2 **VII. RES IPSA LOQUITUR**

3 7.1 Plaintiffs assert *res ipsa loquitur*'s inference of negligence because: a) the
4 occurrence that caused Plaintiffs' and each Class member's injury would not ordinarily happen
5 in the absence of negligence; the instrumentality of agency that caused Plaintiffs' and each Class
6 member's injury was in the exclusive control of the Defendant and c) neither the Plaintiffs nor
7 any Class member contributed to the occurrence.

8 7.2 Defendant's allowance of the transmission of *Aspergillus* mold through its air-
9 handling systems into what should have been safe hospital premises is so palpably negligent that
10 it may be inferred as a matter of law.

11 7.3 The general experience and observation of humankind teaches that the result of
12 *Aspergillus* mold spread through a hospital's air-handling system which then enters into the body
13 of a child patient is a result that would not be expected without negligence.

14 7.4 Proof by experts in the field, including the State Department of Health
15 investigators and Defendant's own investigators, creates an inference that negligence caused the
16 injuries.

17 **VIII. INFORMED CONSENT**

18 8.1 Defendant failed to inform Plaintiffs or any Class member or their parents of
19 material facts relating to their treatment, including but not limited to the substantially increased
20 risk of *Aspergillus* infection at Defendant's Hospital due to its own negligence in failing to
21 maintain safe premises as previously described.

22 8.2 The patients and their parents consented to the treatment without being aware of
23 or fully informed of such material facts and risks.

1 8.3 A reasonably prudent patient under similar circumstances would not have
2 consented to the treatment if informed of such facts and risks, and instead would have sought
3 treatment at a facility without a substantially increased risk of *Aspergillus* infection.

4 8.4 The treatment obtained at Defendant's facilities due to its failure to obtain
5 informed consent caused injury to Plaintiffs and Class members.

6 **IX. DISCOVERY RULE, FRAUD, NEGLIGENT MISREPRESENTATION,
7 NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS**

8 9.1 The Discovery Rule pertaining to the statute of limitations applies.

9 9.2 Defendant has a fiduciary relationship with its patients.

10 9.3 Defendant has a statutory and common law duty to inform patients of the risks of
11 medical care, and all information needed for patients to make informed healthcare decisions.

12 9.4 Defendant was required not only to inform patients about the substantially
13 increased risk of *Aspergillus* infection at its facilities, but in cases where *Aspergillus*-related
14 conditions were diagnosed, that the Hospital itself was the source of infection.

15 9.5 Defendant was required to inform patients that the source of infection was the
16 Hospital's negligently maintained air handling system.

17 9.6 Without that information, Plaintiffs and the Class were deprived of material facts
18 to inform their treatment decisions, including those related to follow-up care.

19 9.7 Defendant knew that in withholding material facts, it was affirmatively
20 misrepresenting information to Plaintiffs and Class members.

21 9.8 Defendant intended for Plaintiffs and Class members to rely on Defendant, and
22 Defendant's concealments, to make informed healthcare decisions.

1 9.9 Plaintiffs and Class members did not know Defendant was concealing material
2 facts and had the right to and did reasonably rely on Defendant to meet its statutory and common
3 law duty to inform them of material facts.

4 9.10 Defendant’s failure to inform Plaintiffs and Class members of the cause of
5 *Aspergillus* infection, in the face of a legal duty to do so, constitutes fraud by concealment.

6 9.11 Plaintiffs and Class members suffered damages as a result of their reasonable
7 reliance on Defendant’s fraud and negligent misrepresentation.

8 9.12 Through its acts and omissions, Defendant allowed Plaintiffs and Class members
9 to believe that *Aspergillus* infection was part of the inherent risks of surgery, was caused by
10 exposure outside the hospital, was an unexplainable or unique phenomenon, or simply bad luck.

11 9.13 By misleading Plaintiffs and Class members as to the genesis of the *Aspergillus*
12 infection in relation to its negligently maintained air handling systems, Defendant negligently
13 inflicted emotional distress upon its patients and parents of patients by causing them to believe
14 they could be at fault for transmission of the *Aspergillus* infection, when instead it was
15 Defendant’s fault.

16 9.14 Through its acts and omissions, Defendant deprived Plaintiffs and Class members
17 of the opportunity to discover the role it played in infection, and other factual bases for the
18 causes of action, until 2019.

19 **X. CONSUMER PROTECTION ACT – RCW 19.86 et seq.**

20 10.1 Defendant has engaged in unfair or deceptive acts or practices by engaging in the
21 following courses of conduct:

- 22 a. Making material misrepresentations and omissions about the safety of its premises
23 (in particular that it conforms to the standards required of a hospital facility) to the

1 public, including its business invitees;

2 b. Collecting substantial compensation from its business invitees;

3 c. Injuring its child patient business invitees, but then not notifying them that the
4 transmission of *Aspergillus* occurred due its unsafe premises; and

5 d. Covering up the nature and extent of the deficiencies related to maintenance of its
6 air-handling system in order to avoid exposure to litigation, bad publicity, and
7 damage to its otherwise stellar reputation.

8 10.2 Defendant's unfair and deceptive acts and practices repeatedly occurred in
9 Defendant's trade or business and were capable of deceiving a substantial portion of the public,
10 particularly since Defendant advertised itself as the pre-eminent pediatric hospital in the region.

11 10.3 Defendant's unfair and deceptive acts and practices affect the public interest.

12 10.4 The unfair and deceptive acts and practices were committed in the general course
13 of Defendant's business in Washington and have already injured and resulted in the death of
14 numerous Washington residents and others.

15 10.5 As a direct and proximate cause of Defendant's unfair and deceptive acts and
16 practices, Plaintiffs and the Class have been injured in their business and/or property and are
17 entitled to recover compensatory damages as described below.

18 10.6 Plaintiffs and each of the Class members are entitled to recover treble damages,
19 attorneys' fees, and costs pursuant to RCW 19.86.090.

20 **XI. INJUNCTIVE RELIEF**

21 11.1 Plaintiffs have clear legal or equitable rights as previously set forth, including
22 among many others, the right for hospital leadership to provide access to safe and appropriate
23 care.

1 **XIV. WAIVER OF PRIVILEGE**

2 14.1 Waiver of the physician-patient privilege under RCW 5.60.060(4)(b) does not
3 waive or release any other rights or privileges, including those related to the physician-patient
4 relationship, other than the privilege set out in the above-cited statute.

5 **XV. PRAYER FOR RELIEF**

6 WHEREFORE, Plaintiffs pray for judgment against Defendant in their favor and in favor
7 of the Class and against Defendant, as follows:

8 15.1 Declaring and decreeing that this action is properly maintainable as a Class action
9 pursuant to CR 23(b)(3).

10 15.2 Declaring and decreeing that Defendant violated WAC 246-320.

11 15.3 Declaring and decreeing that Defendant was negligent for introducing the
12 *Aspergillus* mold into what should have been its sterile premises.

13 15.4 Declaring and decreeing that Defendant’s negligence resulted in injury to Plaintiff
14 and each Class member.

15 15.5 For injunctive relief preventing Defendant from re-opening its operating rooms or
16 otherwise providing treatment and housing of high-risk patients upon its premises, unless and
17 until it fully comes into compliance with the applicable WACs, and provides reasonable
18 assurance that its premises are safe and appropriate for at least its high risk child patients.

19 15.6 For special and general damages to Plaintiffs and the Class in amounts to be
20 proven at trial.

21 15.7 For costs and disbursements.

22 15.8 For statutory attorney fees.

1 15.9 If Defendant brings any frivolous or unfounded defenses, for attorneys' fees and
2 costs pursuant to RCW 4.84.185 and/or Rule 11 of the Superior Court Civil Rules.

3 15.10 For statutory interest on the judgment from the date judgment is entered until paid
4 in full.

5 15.11 For prejudgment interest on the special damages.

6 15.12 For prejudgment interest on liquidated damages.

7 15.13 For treble damages, attorneys' fees and costs under the CPA.

8 15.14 For such other and further relief as the Court may deem just and equitable.

9 **DATED** this ____ day of _____, 2020.

10 **STRITMATTER KESSLER**
11 **KOEHLER MOORE**

12 _____
13 Karen K. Koehler, WSBA#15325
14 Brad J. Moore, WSBA#21802
15 Co-Counsel for Plaintiffs and Class

16 **LAYMAN LAW FIRM**

17 _____
18 John R. Layman, WSBA#13823
19 Co-counsel for Plaintiffs and Class

20 **CARNESS LAW FIRM**

21 _____
22 Scott Carness, WSBA # 32284
23 Co-Counsel for Plaintiffs Hutt

CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing document as follows:

Rando B. Wick
Michael B. McDermott
Michelle S. Taft
Johnson Graffe Keay
Moniz & Wick LLP
925 Fourth Ave., Ste. 2300
Seattle, WA 98104
(206) 223-4770

- U.S. Mail
- Fax
- Legal Messenger
- Electronic Delivery

Stephen M. Rummage
Brad Fisher
Rachel Herd
Davis Wright Tremaine LLP
LAW OFFICES
920 Fifth Avenue, Suite 3300
Seattle, WA 98104-1610
206.622.3150 main ·

- U.S. Mail
- Fax
- Legal Messenger
- Electronic Delivery

DATED this day of _____, 2020 at Seattle, Washington

Jesica A. McClure
Paralegal