

2008

Gina M. Arnold and Charlie S. Arnold v. Gary B. White M.D., Uintah Basin Medical Center and David Grigsby, M.D. : Brief of Appellant

Utah Court of Appeals

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IN THE SUPREME COURT OF THE STATE OF UTAH

GINA M. ARNOLD and CHARLIE S.
ARNOLD,

Plaintiffs and Appellees,

vs.

GARY B. WHITE, M.D., UINTAH
BASIN MEDICAL CENTER and DAVID
GRIGSBY, M.D.,

Defendants and Appellants.

BRIEF OF APPELLANTS

Case No. 20080255-SC

APPEAL FROM A JUDGMENT OF THE COURT OF APPEALS OF UTAH

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I.

STATEMENT OF JURISDICTION

This is an appeal from a judgment of the Court of Appeals of Utah, *Arnold v. Grigsby*, 2008 UT App 58, 180 P.3d 188, filed February 28, 2008, reversing the trial court's summary judgment order in favor of David Grigsby, M.D. Therefore, the Utah Supreme Court has jurisdiction pursuant to Utah Code Ann. § 78-2-2(3)(a) (Supreme Court has appellate jurisdiction over "a judgment of the Court of Appeals").

II.

STATEMENT OF ISSUES PRESENTED AND STANDARD OF REVIEW

The issue presented is whether Utah Code Ann. § 78-14-4 (recently recodified as 78B-3-404) is subject to tolling under Utah Code Ann. § 78-12-35 (recently recodified as 78B-2-104).¹ Although the trial court found "that Plaintiffs discovered the alleged injury no later than November 1999, which discovery started the running of the two-year statute of limitations, per Utah Code Ann. § 78-14-4," and that "the statute of limitations for this action against Dr. Grigsby began running more than two years prior to Plaintiffs filing their complaint on December 04, 2001," the Court of Appeals reversed the trial court's summary judgment in favor of Dr. Grigsby, holding that "the tolling statute, *section 78-12-35*, applies to medical malpractice claims otherwise governed by the Malpractice Act", and "the tolling

¹Defendant/Appellant notes that the legislature has recodified Title 78, a change that went into effect on February 7, 2008. Because the renumbering does not change the analysis below, and because any substantive changes do not apply to this analysis, Defendant/Appellant will cite to the version of Title 78 that was cited by the parties in their briefs and in the Court of Appeals' opinion. See *Medel v. State*, 2008 UT 32, n. 2.

statute suspends the running of the statute of limitations during the time a defendant is absent from the state.” *Arnold v. Grigsby*, 2008 UT App 58, ¶ 24.

As both the application of a statute of limitations and the interpretation of statutory provisions present questions of law, the standard of review is one of correctness. *See Russell Packard Dev., Inc. v. Carson*, 2005 UT 14, ¶ 18, 108 P.3d 741 (“The applicability of a statute of limitations . . . [is a] question[] of law, which we review for correctness.”) (quoting *Spears v. Warr*, 2002 UT 24, ¶ 32, 44 P.3d 742); *Sill v. Hart*, 2007 UT 45, ¶ 5, 162 P.3d 1099 (“This case presents an issue of statutory interpretation, a question of law that we review for correctness.”) On certiorari, the Utah Supreme Court reviews the decision of the Court of Appeals of Utah, not the trial court. *John Holmes Constr., Inc. v. R.A. McKell Excavating, Inc.*, 2005 UT 83, ¶ 6, 131 P.3d 199 (“On certiorari, we review the decision of the court of appeals, not the trial court.”) As the decision of the Court of Appeals of Utah rests on questions of statutory interpretation, the Utah Supreme Court reviews the Court of Appeals’ decision for correctness, affording no deference to the Court of Appeals’ legal conclusions. *Fla. Asset Fin. Corp. v. Utah Labor Comm’n*, 2006 UT 58, ¶ 8, 147 P.3d 1189 (“As the decision of the court of appeals rests on questions of statutory interpretation, we review it for correctness, affording no deference to the court of appeals’ legal conclusions.”)

The issues were preserved below in the memoranda filed by the Defendant/Appellant. R. 15-30, 31-33, 143-151, 154-157, 177-198, 233-260, 335-370, 371-381, and 382-405.

III.

DETERMINATIVE CONSTITUTIONAL PROVISIONS AND STATUTES

The following constitutional provisions, statutes and regulations are determinative or important to the resolution of this appeal.

1. United States Constitution, Article I, Section 8, Clause 3. Power of Congress to regulate commerce.

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

2. Utah Code Ann. § 78-12-35. Effect of absence from state.

Where a cause of action accrues against a person when he is out of the state, the action may be commenced within the term as limited by this chapter after his return to the state. If after a cause of action accrues he departs from the state, the time of his absence is not part of the time limited for the commencement of the action.

3. Utah Code Ann. § 78-12-36. Effect of disability.

If a person entitled to bring an action, other than for the recovery of real property, is at the time the cause of action accrued, either under the age of majority or mentally incompetent and without a legal guardian, the time of the disability is not a part of the time limited for the commencement of the action.

4. Utah Code Ann. § 78-14-2. Legislative findings and declarations - Purpose of act.

The legislature finds and declares that the number of suits and claims for damages and the amount of judgments and settlements arising from health care has increased greatly in recent years. Because of these increases the insurance industry has substantially increased the cost of

medical malpractice insurance. The effect of increased insurance premiums and increased claims is increased health care cost, both through the health care providers passing the cost of premiums to the patient and through the provider's practicing defensive medicine because he views a patient as a potential adversary in a lawsuit. Further, certain health care providers are discouraged from continuing to provide services because of the high cost and possible unavailability of malpractice insurance.

In view of these recent trends and with the intention of alleviating the adverse effects which these trends are producing in the public's health care system, it is necessary to protect the public interest by enacting measures designed to encourage private insurance companies to continue to provide health-related malpractice insurance while at the same time establishing a mechanism to ensure the availability of insurance in the event that it becomes unavailable from private companies.

In enacting this act, it is the purpose of the legislature to provide a reasonable time in which actions may be commenced against health care providers while limiting that time to a specific period for which professional liability insurance premiums can be reasonably and accurately calculated, and to provide other procedural changes to expedite early evaluation and settlement of claims.

5 Utah Code Ann. § 78-14-4 Statute of limitations—Exceptions—Application

(1) No malpractice action against a health care provider may be brought unless it is commenced within two years after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered the injury, whichever first occurs.

(2) The provisions of this section shall apply to all persons, regardless of minority or other legal disability under Section 78-12-36 or any other provision of the law, and shall apply retroactively to all persons, partnerships, associations and corporations and to all health care providers and to all malpractice actions against health care providers based upon alleged personal injuries which occurred prior to the effective date of this act, provided, however, that any action which under former law could have been commenced after the effective date of this act may be commenced only within the unelapsed portion of time allowed under former law, but any action which under former law

could have been commenced more than four years after the effective date of this act may be commenced only within four years after the effective date of this act.

IV.

STATEMENT OF THE CASE

This appeal was brought challenging the judgment of the Court of Appeals of Utah, which reversed the district court's summary judgment in favor of the Defendant/Appellant David Grigsby, M.D. (hereinafter "Dr. Grigsby"). Dr. Grigsby moved for summary judgment against Plaintiffs/Appellees Gina M. Arnold and Charlie S. Arnold (hereinafter the "Arnolds") regarding their medical malpractice claim against him because the statute of limitations, set forth in Utah Code Ann. § 78-14-4 of the Utah Health Care Malpractice Act (the "Act"), had run against Dr. Grigsby. R. 576-84.

Following briefing by the parties, the trial court on November 21, 2005, and December 20, 2005, entered its orders granting Dr. Grigsby's motion for summary judgment. R. 853-60, 871-73. In reaching its decision, the trial court determined that the tolling statute, Utah Code Ann. § 78-12-35, did not apply. R. 853-54, 904-05. Although the trial court rejected Defendant/Appellant's argument that the tolling statute did not apply to medical malpractice cases, the trial court nevertheless determined that because Dr. Grigsby could have been served in accordance with Utah's long-arm statute, Utah Code Ann. §§ 78-27-24 to -25, the tolling statute did not work to suspend the running of the Utah Health Care Malpractice Act's two-year limitations period, even though Dr. Grigsby was absent from Utah as he had moved to Tennessee to practice medicine in that state. R. 853-

54, 904-05 In granting the motion for summary judgment, the trial court found “that Plaintiffs discovered the alleged injury no later than November 1999, which discovery started the running of the two-year statute of limitations, per Utah Code Ann § 78-14-4,” and that “the statute of limitations for this action against Dr Grigsby began running more than two years prior to Plaintiffs filing their complaint on December 04, 2001.” R 853-54, 904-05 The court also found that “the plaintiffs’ claim against Dr Grigsby is time-barred on its face.” R 859

The Arnolds appealed the trial court’s decision to the Court of Appeals of Utah. The Court of Appeals reversed the trial court’s summary judgment in favor of Dr Grigsby, holding that “the tolling statute, *section 78-12-35*, applies to medical malpractice claims otherwise governed by the Malpractice Act the tolling statute suspends the running of the statute of limitations during the time a defendant is absent from the state.” *Arnold v Grigsby*, 208 UT App 58 ¶ 24

The Utah Supreme Court granted the Defendant/Appellant’s Petition for Writ of Certiorari to determine whether Utah Code Ann § 78-14-4, the Utah Health Care Malpractice Act’s statute of limitations, is subject to the general tolling statute, Utah Code Ann § 78-12-35

V.

STATEMENT OF FACTS

The following facts are relevant to the issues presented to this Court for review

1 The Arnolds filed their complaint on December 4, 2001, bringing a medical

malpractice action against Dr. Grigsby and others, which action arose from the care provided to Mrs. Arnold on July 22, 1999, and alleged, “The procedure and other care provided to Gina Arnold by Dr. White and/or Dr. Grigsby were performed in a negligent manner. As a result, her colon was perforated and she was otherwise injured.” R. 3.

2. The Arnolds further alleged in their complaint, “Commencing on July 23, 1999, and continuing thereafter, Gina Arnold was a patient of Dr. White’s and/or Dr. Grigsby’s at UBMC [Uintah Basin Medical Center] for the purposes of treating the symptoms and injuries resulting from the perforation of her bowel and the resulting infection. The care provided to her by Dr. White and/or Dr. Grigsby was performed in a negligent manner.” R. 3.

3. Mrs. Arnold was initially discharged from Uintah Basin Medical Center on July 27, 1999, and the Discharge Summary dated July 27, 1999, identifies Dr. Grigsby by name, providing, “It was Dr. Grigsby’s opinion that the air should have stayed there for three or four days before it finally dissipated.” R. 793.

4. Mrs. Arnold was readmitted to Uintah Basin Medical Center and the medical record, including the Operative Report dated August 3, 1999, clearly identifies that Dr. Grigsby was actively involved in the August 3, 1999, surgery. R.795.

5. The medical record contains a consultation report concerning Mrs. Arnold from Dr. Grigsby dated August 5, 1999. R. 797-98.

6. Dr. Grigsby performed another surgery on Mrs. Arnold on August 11, 1999, as indicated in the Operative Report dated August 11, 1999. R. 800.

7. The Arnolds both testified in their depositions that they were aware that Dr. Grigsby was involved in Mrs. Arnold's treatment while she was still at Uintah Basin Medical Center prior to her being transferred to St. Mark's Hospital in Salt Lake City on August 16, 1999. R. 804-07, 812-13.

8. Dr. Grigsby testified that he had a number of conversations with the plaintiffs during the time Mrs. Arnold was at Uintah Basin Medical Center. R. 816-20.

9. Mrs. Arnold testified that in September, 1999, she consulted an attorney because she suspected something had gone wrong with her care between July 22, 1999, and August 16, 1999, stating, "I just knew something hadn't happened right." R. 808-09.

10. By September 28, 1999, Mrs. Arnold was represented by counsel, at which time she signed before a notary public her Authorization for and Request for Release of Medical Information to her attorney, Harold A. Hintze. R. 828.

11. By letter from her attorney dated November 16, 1999, Mrs. Arnold was aware of "complications arising from an initial diagnosis and treatment of her for an intestinal condition" and asserted that "complications following the initial treatment of Mrs. Arnold rendered her totally incapacitated and prohibited her from maintaining gainful employment." By that date, Mrs. Arnold, through her attorney, had begun an investigation into possible medical malpractice claims as indicated in her attorney's letter to Uintah Basin Medical Center that "this office investigates the possibility of claims that may be filed in relation to her initial diagnosis and/or treatment." R. 825-26.

12. Dr. Grigsby moved from Roosevelt, Utah, in July, 2000, to practice medicine

in Oneida, Tennessee R 735, 815, 855

13 Dr Grigsby was not served with a notice of intent to commence action as required by Utah Code Ann § 78-14-8, and no request for a prelitigation panel review as required by Utah Code Ann § 78-14-12 was made until March 18, 2004 R 580

14 After the Plaintiffs' Complaint was filed naming Dr Grigsby on December 4, 2001, and following briefing by the parties and oral argument, on November 21, 2005, and December 20, 2005, the trial court entered its orders granting Dr Grigsby's motion for summary judgment R 853-60, 871-73 In reaching its decision, the trial court determined that the tolling statute, Utah Code Ann § 78-12-35, did not apply R 853-54, 904-05 Although the trial court rejected Defendant/Appellant's argument that the tolling statute did not apply to medical malpractice cases, the trial court nevertheless determined that because Dr Grigsby could have been served in accordance with Utah's long-arm statute, Utah Code Ann §§ 78-27-24 to -25, the tolling statute did not work to suspend the running of the Utah Health Care Malpractice Act's two-year limitations period, even though Dr Grigsby was absent from Utah as he had moved to Tennessee to practice medicine in that state R 853-54, 904-05 In granting the motion for summary judgment, the trial court found "that Plaintiffs discovered the alleged injury no later than November 1999, which discovery started the running of the two-year statute of limitations, per Utah Code Ann § 78-14-4," and that "the statute of limitations for this action against Dr Grigsby began running more than two years prior to Plaintiffs filing their complaint on December 04, 2001 " R 853-54, 904-05 The trial court also found that "the plaintiffs' claim against Dr Grigsby is

time-barred on its face.” R. 859

15 The Arnolds filed a Notice of Appeal on May 22, 2006. R. 907-909

16 Following briefing by the parties and oral argument, the Court of Appeals of Utah, on February 28, 2008, filed its judgment reversing the trial court’s summary judgment order in favor of David Grigsby, M.D. *Arnold v. Grigsby*, 2008 UT App 58, ¶ 24. The Utah Court of Appeals held that the tolling statute, *section 78-12-35*, applies to medical malpractice claims otherwise governed by the Malpractice Act. The tolling statute suspends the running of the statute of limitations during the time a defendant is absent from the state.” *Id.*

17 Dr. Grigsby filed a Petition for Writ of Certiorari with the Utah Supreme Court on March 24, 2008.

18 In an Order entered June 13, 2008, the Utah Supreme Court granted Dr. Grigsby’s Petition for Writ of Certiorari as to the issue of whether Utah Code Ann. § 78-14-4 (recently recodified as 78B-3-404) is subject to tolling under Utah Code Ann. § 78-12-35 (recently recodified as 78B-2-104).”

VI.

SUMMARY OF ARGUMENT

The Arnolds’ medical malpractice action arises out of the care provided to Mrs. Arnold by Dr. Grigsby and others at the Uintah Basin Medical Center between July 22, 1999, and August 16, 1999. R. 1-4. Because this is a medical malpractice action, it is governed by the Utah Health Care Malpractice Act (the Act), Utah Code Ann. § 78-14-1

et seq. The legislature expressly specified that the purpose of the Act is to provide a fixed time to bring malpractice claims: “In enacting this act [Utah Health Care Malpractice Act], it is the purpose of the legislature to provide a reasonable time in which actions may be commenced against health care providers while limiting that time to a specific period for which professional liability insurance premiums can be reasonably and accurately calculated.” Utah Code Ann. § 78-14-2. To achieve this purpose, with regard to the abbreviated statute of limitations for medical malpractice claims, the legislature specified, “The provisions of this section shall apply to all persons, regardless of minority or other legal disability under Section 78-12-36 *or any other provision of the law.*” Utah Code Ann. § 78-14-4(2). (Emphasis added.)

The trial court, the Utah Court of Appeals, the federal district court for Utah, and the Tenth Circuit Court of Appeals have each interpreted Utah Code Ann. § 78-14-4(2) to have a different meaning in reaching different conclusions, indicating the ambiguity of this statute. Given the ambiguity of Utah Code Ann. § 78-14-4(2), the statute should be interpreted as to harmonize its provisions in accordance with the legislative intent and purpose expressly stated in Utah Code Ann. § 78-14-2. Given the legislature’s expressly stated purpose for the Utah Health Care Malpractice Act in Utah Code Ann. § 78-14-2, the statutory language indicating that the fixed statute of limitations for medical malpractice claims shall apply to all persons regardless of any other provision of the law clearly harmonizes with the legislative intent and purpose of the Act. Therefore, medical malpractice actions must be brought within two years regardless of other tolling provisions.

By specific legislative mandate, the commencing of a medical action must “be brought unless it is commenced within two years after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered the injury,” and is not subject to general tolling provisions because “[t]he provisions of this section shall apply to all persons, regardless of minority or other legal disability under Section 78-12-36 *or any other provision of the law*” Utah Code Ann. § 78-14-4 (Emphasis added.) Thus, general tolling provisions, including Section 78-12-35, do not apply to the Arnolds’ medical malpractice claim against Dr. Grigsby. Therefore, the Arnolds’ failure to timely commence their medical malpractice action against Dr. Grigsby within two years after they knew or should have known of a possible injury is not cured by the application of any tolling statute outside the specific mandates of the Utah Health Care Malpractice Act.

Despite having discovered the alleged injury and suspecting negligence no later than November 1999 (and actually even earlier when they encountered an attorney in September, 1999), the Arnolds disregarded the requirements of the Act concerning Dr. Grigsby by filing their complaint on December 4, 2001—more than two years after the statute of limitations had begun to run. R. 853-54, 904-05. Based on established principles of statutory interpretation, the Arnolds’ “claim against Dr. Grigsby is time-barred on its face.” R. 859

VII.
ARGUMENT

I.

**THE UTAH COURT OF APPEALS ERRED IN HOLDING THAT DR. GRIGSBY'S
ABSENCE FROM UTAH TOLLED THE STATUTE OF LIMITATIONS BECAUSE
THE UTAH HEALTH CARE MALPRACTICE ACT'S STATUTE OF
LIMITATIONS IS SUBJECT TO TOLLING UNDER UTAH CODE ANN. § 78-12-35.**

The Court of Appeals of Utah held that the Utah Health Care Malpractice Act's two-year statute of limitations, set forth in Utah Code Ann. § 78-14-4, was subject to the general statutory tolling provision of Utah Code Ann. § 78-12-35. *Arnold v. Grigsby*, 208 UT App 58, 180 P.3d 188. Although the trial court found "that Plaintiffs discovered the alleged injury no later than November 1999, which discovery started the running of the two-year statute of limitations, per Utah Code Ann. § 78-14-4" and that "the statute of limitations for this action against Dr. Grigsby began running more than two years prior to Plaintiffs filing their complaint on December 04, 2001," the Court of Appeals reversed the trial court's summary judgment in favor of Dr. Grigsby, holding that "the tolling statute, *section 78-12-35*, applies to medical malpractice claims otherwise governed by the Malpractice Act . . . the tolling statute suspends the running of the statute of limitations during the time a defendant is absent from the state." *Arnold v. Grigsby*, 2008 UT App 58, ¶ 24.

The Utah Supreme Court has indicated, "When we interpret statutes, our primary goal is to give effect to the legislature's intent in light of the purpose the statute was meant to

achieve ” *Evans v State*, 963 P 2d 177, 185 (Utah 1998) The *Evans* court went on to point out

We therefore look first to the statute’s plain language We need not look beyond its plain language unless we find some ambiguity in it Statutory language is ambiguous if it can reasonably be understood to have more than one meaning

Id (Citations omitted) The issue is whether subsection (2) of Utah Code Ann § 78-14-4 overrides the tolling of the statute of limitations found in the general statutory tolling provision of Utah Code Ann § 78-12-35 ⁷ The trial court, the Utah Court of Appeals, the federal district court for Utah, and the Tenth Circuit Court of Appeals have each interpreted the meaning of subsection (2) of Utah Code Ann § 78-14-4 differently in determining this issue See *Arnold v Grigsby*, 208 UT App 58 180 P 3d 188, *Griffiths-Rast v Sulzer Spoine Tech Inc* , 2005 WL 223765 (D Utah) attached as **Exhibit A**, and *Griffiths-Rast v Sulzer Spoine Tech Inc* , 2007 U S App LEXIS 3607 (10th Cir) attached as **Exhibit B** Therefore, the statutory language of Utah Code Ann § 78-14-4 is clearly ambiguous as it has been understood by these four courts to have more than one meaning

A. Utah Code Ann. § 78-14-4 Is Clearly Ambiguous As the Statute Has Been Understood By Four Different Courts To Have More Than One Meaning.

Utah Code Ann § 78-14-4(1) provides that medical malpractice actions must be brought within two years of the discovery of the injury

⁷ Utah Code Ann § 78-12-35 provides Where a cause of action accrues against a person when he is out of the state, the action may be commenced within the term as limited by this chapter after his return to the state If after a cause of action accrues he departs from the state, the time of his absence is not part of the time limited for the commencement of the action ⁸

(1) No malpractice action against a health care provider may be brought unless it is commenced within two years after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered the injury, whichever first occurs

Subsection (1) is plain and unambiguous. However, the following subsection, Utah Code Ann. § 78-14-4(2), is not plain but is ambiguous as it “can reasonably be understood to have more than one meaning.” *Evans v. State*, 963 P.2d 177, 184 (Utah 1998). Utah Code Ann. § 78-14-4(2) provides:

(2) The provisions of this section shall apply to all persons, regardless of minority or other legal disability under Section 78-12-36 or any other provision of the law

A review of the courts’ holdings in *Arnold v. Grigsby* and *Griffiths-Rast v. Sulzer Spoine Tech, Inc.* demonstrates the ambiguity of Utah Code Ann. § 78-14-4(2).

Although both the Utah Court of Appeals and the trial court determined that the statutory language of Utah Code Ann. § 78-14-4 (2) did not exempt medical malpractice actions from tolling statutes, each court did so by interpreting the statutory provision differently. The trial court’s analysis and the Utah Court of Appeals review of Utah Code Ann. § 78-14-4(2) reveal that this subsection is susceptible to multiple meanings. The Utah Court of Appeals stated:

In its summary judgment order, the trial court determined that *section 78-14-4(2)* did not exempt medical malpractice actions from the reach of the tolling statute. It astutely analyzed the issue as follows:

[I]t is clear to the Court that the language ‘or any other provision of the law’ refers only to other provisions of the law which define ‘legal disability.’

This reading is supported by the fact that this language is contained within a dependent clause which refers back to,

and clarifies the meaning of, the term ‘all persons’ The clause ‘regardless of minority or other legal disability under *Section 78-12-36* or any other provision of [the] law’ is contained within a single set of commas, indicating to this Court that the legislature intended the clause to refer to party status, rather than to removing this provision from the scope of all other provisions of law Therefore, the Court rejects Defendant’s argument on this point

We agree with this structural interpretation of the provision and conclude that the phrase ‘or any other provision of the law’ only refers to other provisions of law relating to ‘minority or other legal disability[ies]’ that might otherwise affect the limitations period

Arnold v Grigsby, 2008 UT App 58, ¶ 14, 180 P 3d 188 (Emphasis added) The highlighted sections of the Court of Appeals’ conclusion clearly indicates that Utah Code Ann § 78-14-4(2) is susceptible to multiple meanings

First, the trial court determined that “it is clear to the Court that the language ‘or any other provision of the law’ refers only to other provisions of the law which define ‘legal disability’ *Id* (Emphasis added) In other words, according to the trial court, the phrase “or any other provision of law” only refers to “legal disability”

However, the Court of Appeals determined that “the phrase ‘or any other provision of the law’ only refers to other provisions of law relating to ‘minority or other legal disability[ies]’” *Id* (Emphasis added) In other words, the Court of Appeals concluded that the phrase “or any other provision of law” refers to both “minority or other legal disability” Therefore, both the trial court and the Court of Appeals have understood Utah Code Ann § 78-14-4(2) to have more than one meaning even if their interpretations of this subsection led to the same conclusion

Similarly, in *Griffiths-Rast v. Sulzer Spoine Tech, Inc.*, 2005 WL 223765 (D. Utah), attached as **Exhibit A**, the federal district court for the district of Utah understood Utah Code Ann. § 78-14-4(2) to have a meaning different than either the trial court's or the Utah Court of Appeals' interpretation of the statute's meaning, which led the federal district court to a different conclusion. In that case, the plaintiff sought to avoid summary judgment on the running of the statute of limitations by asserting that Section 78-12-35 had tolled the two-year statute of limitations set forth in Section 78-14-4 from the time the defendant physician had moved away from the state of Utah. However, the federal district court rejected the plaintiff's arguments, finding that "section 78-12-35 is inapplicable to toll the statute of limitation." *Id.* at 4. The federal district court specified:

The Malpractice Act specifically provides that its two-year limitations period "shall apply to all persons, regardless of minority or other legal disability under Section 78-12-36 or any other provision of the law. . . ." Utah Code Ann. § 78-14-4(2). As the Utah Court of Appeals has explained, "[t]he Utah Legislature has demonstrated that if it seeks specifically to exempt a statute from the tolling statute, it will do so with clear, explicit language." *Bonneville Asphalt v. Labor Comm'n*, 91 P.3d 849, 852 (Utah Ct. App. 2004). **Because the Malpractice Act provides an explicit exception to section 78-12-35 by requiring the two-year statute of limitations to apply to "all persons," section 78-12-35 does not apply in medical malpractice cases.** Thus, Ms. Griffiths-Rast's claim against Dr. Prasad was not tolled.

Id. (Emphasis added.) In other words, the federal district court concluded that the Medical Malpractice Act's statute of limitations is exempt from the tolling statute because the two-year statute of limitations specifically applies to "all persons."

The Tenth Circuit Court of Appeals affirmed the federal district court's conclusion

that Section 78-12-35 does not apply in medical malpractice cases, although with a different emphasis on Utah Code Ann. § 78-14-4(2):

The district court held that medical malpractice actions were excepted from the tolling provision of § 78-12-35 because under § 78-14-4(2) the two-year limitation period “shall apply to all persons, regardless of minority or other legal disability under Section 78-12-36 or any other provision of the law.” (emphasis added). The court held that this provision was an “explicit exception to section 78-12-35” and that the limitation period was not tolled during Dr. Prasad’s absences. We agree.

Griffiths-Rast v. Sulzer Spoiner Tech, Inc., 2007 U.S. App. LEXIS 3607 (10th Cir.), attached as **Exhibit B** (emphasis in original.) The Tenth Circuit Court of Appeals highlighted that the two-year statute of limitations for medical malpractice actions applies to all persons regardless of “any other provision of law.”

In summary, these four different courts determined three different formulations of Utah Code Ann. § 78-14-4(2): the phrase “or any other provision of the law” can be read to (1) modify the term “legal disability”; or (2) modify the phrase “minority or legal disability”; or (3) act as a catch-all phrase. Therefore, Utah Code Ann. § 78-14-4(2) is clearly ambiguous as it can reasonably be understood to have more than one meaning.

B. Because Utah Code Ann. § 78-14-4(2) Is Ambiguous, the Statutory Provisions Must Be Harmonized With the Legislative Purpose to Alleviate Health Care Costs Via the Establishment of a Fixed Window of Time in Which Actions May Be Commenced Against Health Care Providers.

Four different courts have found four different meanings to Utah Code Ann. § 78-14-4(2), which have led to two different conclusions as to whether all medical malpractice actions are excluded from the general tolling statute, Utah Code Ann.

§ 78-12-35. Once again, the Utah Supreme Court has pointed out, “Statutory language is ambiguous if it can reasonably be understood to have more than one meaning.” *Evans v. State*, 963 P.2d 177, 185 (Utah 1998). Clearly, the statutory language of Utah Code Ann. § 78-14-4(2) is ambiguous. Therefore, an analysis beyond the “plain language” of the statute is required.

The Utah Supreme Court has clarified that when a statute is ambiguous, then an analysis of the act in its entirety is required to harmonize its provisions in accordance with the legislative intent and purpose. The *Evans* court indicated:

However, if we find a provision ambiguous, which causes doubt or uncertainty as to its meaning or application, we must analyze the act in its entirety and “harmonize its provisions in accordance with the legislative intent and purpose.”

Id. An analysis of the legislative intent and purpose of the Medical Malpractice Act clearly indicates that the legislature intended to fix the two-year statute of limitations for all persons’ medical malpractice actions regardless of any other provision of the law, including the general tolling provisions of Utah Code Ann. § 78-12-35.

Fortunately, Utah’s legislature clearly indicated the intent and purpose within the Medical Malpractice Act itself. The Utah Supreme Court has indicated that “we ha[ve] no need to speculate as to what purposes the Malpractice Act was intended to serve because the purposes were set forth in § 78-14-2.” *Lee v. Gaufin*, 867 P.2d 572, 580 (Utah 1993). (*See also Allen v. Intermountain Health Care*, 635 P.2d 30, 31-32 (Utah 1981) (“The avowed legislative purpose for treating the class of health providers differently from other defendants is stated in the Act itself.”) Utah Code Ann. § 78-14-2 provides:

The legislature finds and declares that the number of suits and claims for damages and the amount of judgments and settlements arising from health care has increased greatly in recent years. Because of these increases the insurance industry has substantially increased the cost of medical malpractice insurance. The effect of increased insurance premiums and increased claims is increased health care cost, both through the health care providers passing the cost of premiums to the patient and through the provider's practicing defensive medicine because he views a patient as a potential adversary in a lawsuit. Further, certain health care providers are discouraged from continuing to provide services because of the high cost and possible unavailability of malpractice insurance.

In view of these recent trends and with the intention of alleviating the adverse effects which these trends are producing in the public's health care system, it is necessary to protect the public interest by enacting measures designed to encourage private insurance companies to continue to provide health-related malpractice insurance while at the same time establishing a mechanism to ensure the availability of insurance in the event that it becomes unavailable from private companies.

In enacting this act, it is the *purpose* of the legislature to provide a reasonable time in which actions may be commenced against health care providers while limiting that time to a *specific period* for which professional liability insurance premiums can be reasonably and accurately calculated; and to provide other procedural changes to expedite early evaluation and settlement of claims.

Utah Code Ann. § 78-14-2 (emphasis added). The clear intent is to treat medical malpractice claims different from other claims. In the medical malpractice context, the abbreviated two-year statute of limitations applies regardless of any other provision of the law, including general tolling statutes.

The Utah Court of Appeals' decision failed to recognize the legislature's clearly expressed intent in enacting the Utah Health Care Malpractice Act was to limit the time for bringing a malpractice action to a specific period of time. However, the Utah Supreme Court

has often discussed the legislature's clearly expressed intent to limit the time for bringing a malpractice action to a specific period of time as articulated in Utah Code Ann. § 78-14-2. In *Smith v. Four Corners Mental Health Ctr., Inc.*, 2003 UT 23, ¶ 30, 70 P.3d 904, the Utah Supreme Court noted:

According to its own provisions, the purpose of the UHCMA is to “provide a reasonable time in which actions may be commenced against health care providers while limiting that time to a specific period for which professional liability insurance premiums can be reasonably and accurately calculated.” *Id.* § 78-14-2.

In *Dowling v. Bullen*, the Utah Supreme Court pointed out that the purpose of the Utah Health Care Malpractice Act is to ease health care costs by establishing a specific window of time to bring malpractice actions:

However, the stated purpose of the UHCMA is to alleviate health care costs via the establishment of a fixed window of time “in which actions may be commenced against health care providers[,] while limiting that time to a specific period for which professional liability insurance premiums can be reasonably and accurately calculated.”

Dowling v. Bullen, 2004 UT 50, ¶ 11, 94 P.3d 915. Given that the stated purpose of the Utah Health Care Malpractice Act is “to provide a reasonable time in which actions may be commenced against health care providers while limiting that time to a specific period for which professional liability insurance premiums can be reasonably and accurately calculated,” the interpretation of Utah Code Ann. § 78-14-4(2) that clearly harmonizes its provisions in accordance with the legislative intent and purpose is where the two-year limitation period “shall apply to *all persons, regardless* of minority or other legal disability

under Section 78-12-36 or *any other provision of the law*,” including Utah Code Ann § 78-12-35

Instead of attempting to harmonize the provisions of Utah Code Ann § 78-14-4(2) in accordance with the legislative intent and purpose as articulated in Utah Code Ann § 78-14-2, the Utah Court of Appeals simply referenced the legislative history of Utah Code Ann § 78-14-4(2). The Utah Court of Appeals claimed that “the legislative history supports our interpretation of *section 78-14-4(2)*.” *Arnold v. Grigsby*, 2008 UT App 58, ¶ 15, 180 P 3d 188. However, the Utah Supreme Court also analyzed the legislative history of Utah Code Ann § 78-14-4(2) in *Blum v. Stone*, 752 P 2d 898 (Utah 1988). The *Blum* court determined

In 1979, the legislature responded to *Scott* and its progeny by amending section 78-14-4. See 1979 Utah Laws ch. 128, § 1. The amendment evinced the legislature’s determination to apply the medical malpractice statute of limitations to ***all plaintiffs’ claims, including*** those of minors.³ Section 78-14-4(2) thereafter stated: “The provisions of this section shall apply to all persons, regardless of minority or other legal disability under § 78-12-36 or any other provision of law.”

Id. at 900. (Emphasis added.) The Utah Supreme Court has clearly indicated that the legislative history “evinced the legislature’s determination to apply the medical malpractice statute of limitations to all plaintiffs’ claims.” *Id.* (Emphasis added.) Therefore, the legislative history of Utah Code Ann § 78-14-4(2) more closely parallels the federal district

³Defendant Appellants are aware that the Utah Supreme Court determined in *Lee v. Gaufin*, 867 P 2d 572 (Utah 1983), that Utah Code Ann § 78-14-4(2) is unconstitutional as applied to minors. However, that decision does not apply to the present case as it is clear that the Utah Supreme Court confined the unconstitutionality of Utah Code Ann § 78-14-4(2) only to those circumstances when a minor has been injured, which circumstances are not present in the pending matter.

court's determination in *Griffiths-Rast*:

Because the Malpractice Act provides an explicit exception to section 78-12-35 by requiring the two-year statute of limitations to apply to "all persons," section 78-12-35 does not apply in medical malpractice cases.

Griffiths-Rast v. Sulzer Spoine Tech, Inc., 2005 WL 223765 (D. Utah), attached as

Exhibit A.

C. The Court of Appeals' Claim that Its Interpretation of Utah Code Ann. § 78-14-4(2) is Not Contrary to the Legislative Purpose of the Act Because Dr. Grigsby Could Have Merely Appointed an Agent to Receive Service of Process Has Been Rejected by the U.S. Supreme Court as an Unreasonable Burden on Interstate Commerce.

Instead of attempting to harmonize the provisions of Utah Code Ann. § 78-14-4(2) in accordance with the legislative intent and purpose as articulated in Utah Code Ann. § 78-14-2, the Utah Court of Appeals merely concluded "that our interpretation of *section 78-14-4(2)* is not contrary to the purpose of the act." *Arnold v. Grigsby*, 2008 UT App 58, ¶ 19, 180 P.3d 188. Not being contrary is not the same as attempting to harmonize provisions with the legislative intent and purpose.

The Utah Court of Appeals went on to claim its interpretation of Utah Code Ann. § 78-14-4(2) was not contrary to the purpose of the Utah Healthcare Malpractice Act because:

it still substantially limits the statute of limitations period for malpractice actions and still provides the needed predictability for insurance companies in the vast majority of cases. . . . As the Arnolds argue, and as indicated in section II of this opinion, **all medical providers need do to make sure the statute of limitations is not tolled if they leave Utah is appoint an agent within Utah to receive service of process for them.**

Arnold v. Grigsby, 2008 UT App 58, ¶ 19, 180 P.3d 188. (Emphasis added.) Despite the Utah Court of Appeals' claim that its interpretation of section 78-14-4(2) will not affect interstate commerce because Dr. Grigsby merely needed to appoint an agent within Utah to receive service of process for him to toll the statute of limitations, the United States Supreme Court has rejected such claims in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988), and its progeny.

The United States Supreme Court determined that Ohio's tolling statute was unconstitutional as applied to out-of-state corporations that did not have an agent designated for service of process in Ohio. *Id.* at 894. The Court pointed out:

The suggestion that Midwesco had the simple alternatives of designating an agent for service of process in its contract with Bendix or tendering an agency appointment to the Ohio Secretary of State is not persuasive. . . . As we have already concluded, this exaction is an unreasonable burden on commerce.

Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888, 894-895 (U.S. 1988).

Although the facts in *Bendix* dealt with an out-of-state corporation, courts have extended the ruling of *Bendix* to individuals, such as Dr. Grigsby.

For example, in the case of *Tesar v. Hallas*, 738 F. Supp. 240 (N.D. Ohio 1990), the court applied *Bendix* to a statute of limitations tolling claim involving a defendant who had moved from Ohio to Pennsylvania to take a new job. The court determined:

If the events in question here involve an "out-of-state person[] . . . engaged in commerce," *id.*, then this Court must undertake an analysis like the one set forth in *Bendix* The threshold question is whether Hallas can be deemed, in commerce clause terms, to be or to have been "engaged in commerce." Unlike the corporation in *Bendix*, Hallas is not alleged to have been engaged in a business causing him

frequently to ship goods or to travel himself interstate. Instead, the complaint simply states that he lived and worked in Cleveland for the Plain Dealer, and then he moved to Pennsylvania and began a new job there. The United States Supreme Court addressed this issue two and a half score years ago, and held that “the movement of persons falls within the Commerce Clause.” *Edwards v. California*, 314 U.S. 160, 172, 86 L. Ed. 119, 62 S. Ct. 164 (1941). Courts since then have followed suit, holding that interstate commerce is affected when persons move between states in the course of or in search for employment. Following *Bendix*'s holding that requiring foreign corporations to submit to the general jurisdiction of Ohio courts “is an unreasonable burden on commerce,” it seems plainly “unreasonable” for persons who have committed acts they know might be considered tortious to be held hostage until the applicable limitations period expires. Persons in that position, or businesses desirous of hiring them, would be burdened to a greater degree than *Bendix*'s foreign corporations, because Ohio has no procedure that permits a person who wishes to move out-of-state to register with the state for service purposes.

Tesar v. Hallas, 738 F. Supp. 240, 241-242 (N.D. Ohio 1990). Similarly,

Defendant/Appellant is unaware of a statutory procedure in Utah that permits a person who wishes to move out-of-state to register with the state for service purposes. The *Tesar* court held that the tolling statute did not apply to the defendant since he moved to another state for employment. *Id.* at 242. Similarly, it is undisputed that Dr. Grigsby moved from Utah to Tennessee to practice medicine there, which similarly affects interstate commerce.

D. The Court of Appeals' Interpretation of Utah Code Ann. § 78-14-4(2) Would Negatively Impact Commerce and Is Contrary to the Legislative Purpose of the Utah Health Care Malpractice Act.

In addition, the Utah Court of Appeals claims that its interpretation of *section 78-14-4(2)* is not contrary to the purpose of the act because “our interpretation should not cause malpractice insurance rates to increase and will not deter healthcare providers from

leaving Utah.” *Arnold v. Grigsby*, 2008 UT App 58, ¶ 19, 180 P.3d 188. In other words, the Utah Court of Appeals claims that its interpretation of section 78-14-4(2) will not affect commerce, including interstate commerce. However, the Utah Court of Appeals does not provide anything substantial to back up its claim. Instead, other courts have held that similar applications of a tolling statute impact commerce negatively. *See Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988) and *Mcfadden v. Battifora*, 2004 Cal. App. Unpub. LEXIS 595, 14-15 (Cal. App. 2d Dist. 2004) discussed below.

The Utah Supreme Court has pointed out that one of the purposes of enacting the Utah Health Care Malpractice Act was to control the rising costs of health care: “The Utah Health Care Malpractice Act was enacted in 1976 to control the rising cost of medical malpractice insurance.” *Platts v. Parents Helping Parents*, 947 P.2d 658, 661 (Utah 1997). The legislature clearly set forth and codified the intent of the Utah Health Care Malpractice Act, which is to address the commercial impact of health care malpractice claims in Utah Code Ann. § 78-14-2. Exempting health care malpractice actions from the tolling statute’s general application is in keeping with the legislative intent of the Utah Health Care Malpractice Act. However, failing to do so is inconsistent with the legislative intent and by extending the two-year statute of limitations logically increases the length of exposure of malpractice actions and cannot help but increase insurance rates.

In addition, applying this interpretation and exempting health care malpractice actions from the tolling statute’s general application is in keeping with the United States Supreme Court’s holding on the impact of the Commerce Clause on tolling statutes. Under

the Supreme Court's holding in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, and its progeny, absences from a jurisdiction for purposes of interstate commerce may **not** constitutionally stop the running of a period of limitations in that jurisdiction. *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988).

In a medical malpractice case involving a tolling statute and a physician who move to another state to practice medicine, *Mcfadden v. Battifora*, 2004 Cal. App. Unpub. LEXIS 595, 14-15 (Cal. App. 2d Dist. 2004), the court held that because "Dr. Medeiros, a former California resident, moved to Texas to take a new job in 1998, thereby engaging in interstate commerce. . . . Under *Bendix*, section 351 [California's tolling statute] cannot be used to toll the otherwise applicable statute of limitations."⁴ Similarly, Dr. Grigsby moved to Tennessee to take a new job in 2000, thereby engaging in interstate commerce and affording him the protections of the Commerce Clause.

The United States Supreme Court's holding in *Bendix*, and its progeny, is consistent with the legislative intent of the Utah Health Care Malpractice Act, which clearly addresses the commercial impact of health care malpractice claims. The Utah Supreme Court has stated, "we have "a duty to construe a statute whenever possible so as to effectuate legislative intent and avoid and/or save it from constitutional conflicts or infirmities."" *State v. Bell*, 785 P.2d 390, 397 (Utah 1989). This Court should construe the statutory phrase, "or any other provision of law," so as to avoid a conflict with the Commerce Clause and to harmonize the stated purpose of the Utah Health Care Malpractice Act.

⁴A copy of the *Mcfadden v. Battifora* opinion is attached in the addendum as **Exhibit C**.

and to harmonize the stated purpose of the Utah Health Care Malpractice Act.

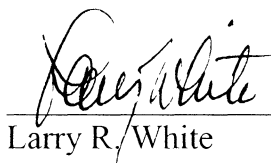
VIII.

CONCLUSION

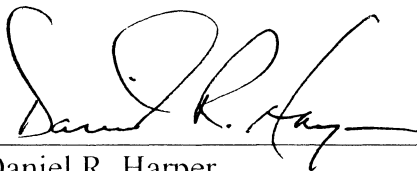
For the reasons set forth above, the Defendant/Appellant Dr. Grigsby respectfully requests that the Utah Supreme Court reverse the judgment of the Utah Court of Appeals and determine that Utah Code Ann. § 78-14-4 is not subject to tolling under Utah Code Ann. § 78-12-35 and uphold the summary judgment of the trial court.

RESPECTFULLY SUBMITTED this 29th day of July, 2008.

BURBIDGE & WHITE, LLC



Larry R. White



Daniel R. Harper
Attorneys for David Grigsby, M.D.

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of July, 2008, I caused to be served by the method indicated below two true and correct copies of the attached and foregoing **BRIEF OF APPELLANTS** to the following:

___ VIA FACSIMILE
___ VIA HAND DELIVERY
☒ VIA U.S. MAIL
___ VIA FEDERAL EXPRESS

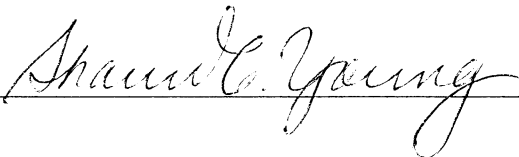
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APPENDIX

- Exhibit A: *Griffiths-Rast v. Sulzer Spoine Tech, Inc.*, 2005 WL 223765 (D. Utah)
- Exhibit B: *Griffiths-Rast v. Sulzer Spoine Tech, Inc.*, 2007 U.S. App. LEXIS 3607 (10th Cir.)
- Exhibit C: *Mcfadden v. Battifora*, 2004 Cal. App. Unpub. LEXIS 595, 14-15 (Cal. App. 2d Dist. 2004)

Exhibit A

3 of 3 DOCUMENTS

**VALERIE ANN GRIFFITHS-RAST, an individual, Plaintiff, vs. SULZER SPINE
TECH, INC., a Minnesota Corporation; and PRAVEEN PRASAD, M.D.,
Defendants.**

Case No. 2:02CV1267 DAK

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH,
CENTRAL DIVISION**

2005 U.S. Dist. LEXIS 46290

**September 14, 2005, Decided
September 14, 2005, Filed**

SUBSEQUENT HISTORY: Affirmed by *Griffiths-Rast v. Sulzer Spine Tech*, 216 Fed. Appx. 790, 2007 U.S. App. LEXIS 3607 (10th Cir., 2007)

COUNSEL: [*1] Valerie Ann Griffiths-Rast, an individual, Plaintiff, Pro se, SALT LAKE CITY, UT.

For Valerie Ann Griffiths-Rast, an individual, Plaintiff:
D. Bruce Oliver, LEAD ATTORNEY, SALT LAKE CITY, UT.

For Sulzer Spine Tech, a Minnesota Corporation, also known as Zimmer Spine, Defendant: Rick L. Rose, LEAD ATTORNEY, Kristine M. Larsen, RAY QUINNEY & NEBEKER (SLC), SALT LAKE CITY, UT; Andrea Michelle Roberts, Thomas G. Stayton, BAKER & DANIELS (IND), INDIANAPOLIS, IN.

For Praveen G. Prasad, an individual, Defendant:
Christian W. Nelson, LEAD ATTORNEY, P. Keith Nelson, LEAD ATTORNEY, Brandon B. Hobbs, RICHARDS BRANDT MILLER & NELSON, SALT LAKE CITY, UT.

JUDGES: DALE A. KIMBALL, United States District Judge.

OPINION BY: DALE A. KIMBALL

OPINION

MEMORANDUM DECISION AND ORDER

This matter is before the court on Defendants' motions for summary judgment on the grounds that Plaintiff's claims are barred by the applicable statutes of limitation. A hearing on the motions was held on September 8, 2005. At the hearing, Plaintiff Valerie Ann Griffiths-Rast ("Ms. Griffiths-Rast") was represented by

D. Bruce Oliver. Defendant Praveen Prasad, M.D. ("Dr. Prasad") was represented by Brandon Hobbs, and Defendant Sulzer Spine Tech, Inc. ("Sulzer Spine") [*2] was represented by Andrea Roberts. Before the hearing, the court carefully considered the memoranda and other materials submitted by the parties. Since taking the motions under advisement, the court has further considered the law and facts relating to the motions. Now being fully advised, the court enters the following Memorandum Decision and Order.

1 Sulzer Spine refers to itself in its memoranda as "Zimmer Spine, Inc." However, for purposes of this Memorandum Decision and Order, it will be referred to as "Sulzer Spine."

I. BACKGROUND

The court finds that the following facts are undisputed. Ms. Griffiths-Rast sustained a back injury at work in February 1997. She was referred to Dr. Prasad by her Worker's Compensation carrier. In August 1997, after reviewing Ms. Griffiths-Rast's MRI scan, Dr. Prasad originally recommended physical therapy; however, during a follow-up visit on March 19, 1998, Dr. Prasad suggested that she undergo a surgical procedure, the BAK Cage implantation, to address her ongoing back pain. The BAK Cage is an interbody fusion device manufactured by Sulzer Spine. Ms. Griffiths-Rast stated that prior to her March 19 visit with Dr. Prasad, she was doing better in physical [*3] therapy and able to lift seventy pounds, but she still had residual pain after physical therapy. She also indicated that Dr. Prasad told her with the surgery she had a ninety-five percent chance of going back to work after a six month healing process.

Dr. Prasad performed the surgery on August 3, 1998. Prior to surgery, Ms. Griffiths-Rast signed a consent form that authorized Dr. Prasad to perform the surgery, and it identified the name of device to be implanted in

her spine. Following the surgery, Ms. Griffiths-Rast experienced complications and remained in the hospital for twelve days.

During her deposition, Ms. Griffiths-Rast indicated that she was aware of a problem with the BAK Cage implantation immediately after the surgery during her hospital recovery. When asked if she "felt like there was a problem with the cage implantation" and "with what Dr. Prasad did," she answered affirmatively and further testified that "[e]verything went wrong." She also indicated that she attributed the pain she experienced after surgery "to something Dr. Prasad did or didn't do during the procedure" or "to some problem with the . . . cage device." Ms. Griffiths-Rast stated that she retained counsel [*4] a couple of weeks after her surgery "[w]hen [she] wasn't getting any better."

On November 10, 1998, Ms. Griffiths-Rast received an SI injection from a doctor at Parkview Radiology who informed her that "there was a healing defect on the left side of [the] cage." Ms. Griffiths-Rast admits in her response to Dr. Prasad's motion for summary judgment that the earliest point where she could reasonably be aware of medical malpractice was during this visit to Parkview Radiology.

On November 26, 2001, Dr. Prasad was deposed in a case against another patient. During that deposition, Dr. Prasad indicated that he had moved out of Utah in September 2000. Dr. Prasad also intimated that while he was on Sulzer Spine's advisory board from 1998 to 2000, he may have periodically been out of the state teaching the BAK Cage procedure to his peers around the country.

Also on November 26, 2001, Ms. Griffiths-Rast served Dr. Prasad a Notice of Intent to Commence Action ("Notice") as required by the Utah Health Care Malpractice Act. *See Utah Code Ann. § 78-14-8* (2002) ("No malpractice action against a health care provider may be initiated unless and until the plaintiff gives the prospective defendant or his [*5] executor or successor, at least ninety days' prior notice of intent to commence an action."). Ms. Griffiths-Rast further claims that she did not discover the name of the manufacturer of the BAK Cage until a meeting with Dr. Prasad on October 4, 2002.

On November 26, 2002, a year after serving Dr. Prasad Notice, Ms. Griffiths-Rast filed a complaint against both Dr. Prasad and Sulzer Spine alleging medical malpractice and products liability respectively. On January 30, 2003, Ms. Griffiths-Rast filed an amended complaint to include certain factual allegations but her claims against both Dr. Prasad and Sulzer Spine remained the same. However, she did not serve Sulzer Spine with the amended complaint until February 11, 2004.

II. DISCUSSION

1. Standard of Review

A motion for summary judgment under *Rule 56 of the Federal Rules of Civil Procedure* is appropriate when the pleadings, depositions, and affidavits on file show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The movant bears an initial burden to demonstrate an absence of evidence to support an essential element of the non-movant's case. If the movant carries [*6] this initial burden, the burden then shifts to the non-movant to make a showing sufficient to establish that there is a genuine issue of material fact regarding the existence of that element. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

The non-movant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). While the non-movant is entitled to the benefit of whatever reasonable inferences there are in its favor, the reasonableness of those inferences is scrutinized in light of the undisputed facts. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A genuine dispute exists only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. "By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there is no *genuine* issue of *material* fact." *Anderson*, 477 U.S. at 247-48 (emphasis in original).

2. Dr. Prasad's Motion

Dr. Prasad argues [*7] that Ms. Griffiths-Rast's claims against him are barred by the Utah Healthcare Malpractice Act ("Malpractice Act") which provides that "[n]o malpractice action against a health care provider may be brought unless it is commenced within two years after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered the injury, whichever occurs first." *Utah Code Ann. § 78-14-4(1)* (2002). The discovery of a legal injury occurs "when the injured person knew or should have known of an injury and that the injury was caused by a negligent act." *Collins v. Wilson*, 1999 UT 56, 984 P.2d 960, 966 (Utah 1999). Furthermore, "[d]iscovery of a legal injury, therefore, encompasses both awareness of physical injury and knowledge that the injury is *or may be attributable to negligence*." *Id.* (quoting *Chapman v. Primary Children's Hosp.*, 784 P.2d 1181, 1184 (Utah 1989)).

Because Ms. Griffiths-Rast served Dr. Prasad with Notice on November 26, 2001, she must have necessarily discovered her legal injury on or after November 26, 1999 in order to pursue her claim. However, Dr. Prasad asserts that at Ms. Griffiths-Rast's deposition she admitted to discovering her injury immediately [*8] after surgery, which was on August 3, 1998, and thus well before November 26, 1999. Dr. Prasad further asserts that the latest possible date on which Ms. Griffiths-Rast discovered or should have discovered her legal injury was November 10, 1998 when a doctor at Parkview Radiology informed her of a "healing defect on the left side of [the] cage." Accordingly, Dr. Prasad concludes that Ms. Griffiths-Rast's claims are barred by the Malpractice Act's statute of limitations whether her cause of action accrued in August 1998 or in November 1998 because she served Notice well after the limitations period expired for either date.

Ms. Griffiths-Rast concedes that the earliest she could have discovered her legal injury was November 10, 1998. However, she argues that Dr. Prasad's absence from Utah in September 2000 and his periodic absences between 1998 and 2000 tolled the two-year statute of limitations under *Utah Code section 78-12-35*. This statute provides:

Where a cause of action accrues against a person when he is out of the state, the action may be commenced within the term as limited by this chapter after his return to the state. If after a cause of action accrues he departs from the state, [*9] the time of his absence is not part of the time limited for the commencement of the action.

Utah Code Ann. § 78-12-35. Ms. Griffiths-Rast concludes that the time between September 2000, when Dr. Prasad left Utah, and November 26, 2001, when he was served with Notice, should not be computed against her. She also requests further discovery pursuant to *Federal Rule of Civil Procedure 56(f)* in order to establish other periods of time Dr. Prasad was absent from Utah during 1998 to 2000.

However, the court agrees with Dr. Prasad's argument that *section 78-12-35* is inapplicable to toll the statute of limitations. The Malpractice Act specifically provides that its two-year limitations period "shall apply to all persons, regardless of minority or other legal disability under *Section 78-12-36* or any other provision of the law" *Utah Code Ann. § 78-14-4(2)*. As the Utah Court of Appeals has explained, "[t]he Utah Legislature has demonstrated that if it seeks specifically to exempt a statute from the tolling statute, it will do so

with clear, explicit language." *Bonneville Asphalt v. Labor Comm'n*, 91 P.3d 849, 852, 2004 UT App 137 (*Utah Ct. App.* 2004). Because the Malpractice Act provides an explicit exception [*10] to *section 78-12-35* by requiring the two year statute of limitations to apply to "all persons," *section 78-12-35* does not apply in medical malpractice cases.² Thus, Ms. Griffiths-Rast's claim against Dr. Prasad was not tolled. Therefore, whether Ms. Griffiths-Rast discovered or should have discovered her legal injury in August 1998 or November 10, 1998 is immaterial because both dates are well before the date she served Dr. Prasad Notice on November 26, 1999. Accordingly, Dr. Prasad's motion for summary judgment is granted.

2 However, the Utah Supreme Court in *Lee v. Gaufin*, 867 P.2d 572 (*Utah* 1993), held that *section 78-14-4(2)* is unconstitutional as applied to minors because they have no standing to commence a lawsuit before they reach majority. *See id.* at 579. That reasoning is not applicable in the instant case because Ms. Griffiths-Rast was not a minor when her cause of action accrued.

3. Sulzer Spine's Motion

Sulzer Spine asserts that Ms. Griffiths-Rast's claims are barred by the Utah Product Liability Act's ("UPLA") statute of limitations, which provides that a plaintiff must commence a product liability claim within two years of the date that plaintiff "discovered, or in the exercise [*11] of due diligence should have discovered, both the harm and its cause." *Utah Code Ann. § 78-15-3*. The harm is the physical injury or illness suffered by the plaintiff as a result of the defendant's conduct. *McKinnon v. Tambrands, Inc.*, 815 F. Supp 415, 418 (*D. Utah* 1993). In *Aragon v. Clover Club Foods Co.*, 857 P.2d 250 (*Utah Ct. App.* 1993), the Utah Court of Appeals interpreted the phrase "and its cause" to mean that the limitations period did not begin to run "until the plaintiff discovers, or in the exercise of due diligence should have discovered, the identity of the manufacturer." *Id.* at 253. The court "reasoned that lacking such information, a plaintiff could not know the cause of his or her injury." *Bank One Utah, N.A. v. West Jordan City*, 54 P.3d 135, 2002 UT App 271 (*Utah Ct. App.* 2002) (discussing *Aragon* and distinguishing the differences between the Malpractice Act's statute of limitations and the UPLA's statute of limitations). Relying on this language from *Aragon*, Ms. Griffiths-Rast asserts that her products liability claim against Sulzer Spine was tolled by her inability to discover the identity of the BAK Cage manufacturer prior to her meeting with Dr. Prasad on October 4, 2002.

"Generally, [*12] the question of when a plaintiff knew, or with reasonable diligence should have known, of a cause of action is a question of fact for the jury."

McCollin v. Synthes Inc., 50 F. Supp. 2d 1119, 1123 (D. Utah 1999). However, this determination can be made as a matter of law when the evidence is such that no issue of material fact exists. *Id.* "What constitutes due diligence 'must be tailored to fit the circumstances of each case. It is that diligence which is appropriate to accomplish the end sought and which is reasonably calculated to do so.'" *Aragon*, 857 P.2d at 253 (citations omitted).

Ms. Griffiths-Rast offers no evidence to suggest that she made the required due diligence inquiry to determine the manufacturer of the BAK Cage prior to meeting with Dr. Prasad. She argues that an affidavit of her counsel's paralegal, Jason Jensen, indicates that the nurse paralegal he contracted with to research the claims against Dr. Prasad provided internet literature for the LT-Cage rather than the BAK Cage and that, because of this, they were led to believe the LT-Cage was the device used. However, this does not demonstrate "due diligence." While Ms. Griffiths-Rast knew the name of the device implanted [*13] in her spine prior to her surgery, and she retained counsel to pursue her claim within a couple of weeks of the surgery, neither she nor her counsel undertook any effort to identify the BAK Cage manufacturer prior to meeting with Dr. Prasad. "The discovery rule does not allow plaintiffs to delay filing suit until they have ascertained every last detail of their claims." *McCollin*, 50 F. Supp. 2d at 1124; see also *McKinnon*, 815 F. Supp. at 421. "All that is required [to trigger the statute of limitations] is . . . sufficient information to apprise [the plaintiffs of the underlying cause of action] so as to put them on notice to make further inquiry if they harbor doubts or questions" about the defendant's actions. *McCollin*, 50 F. Supp. 2d at 1124 (quoting *United Park City Mines Co. v. Greater Park City Co.*, 870 P.2d 880, 889 (Utah 1993)). [*14] Because Ms. Griffiths-Rast had sufficient information immediately after her surgery to put her on notice that she may have a cause of action against the manufacturer of the BAK Cage, and she did not exercise due diligence in discovering the name of the manufacturer, her claim against Sulzer-Spine was not tolled by her failure to discover its identity.

Ms. Griffiths-Rast also asserts that her claim against Sulzer Spine was tolled by its status as a foreign corporation. Specifically, she contends that because

Sulzer Spine is a foreign corporation and, at the time of Ms. Griffiths-Rast's surgery, did not have a registered agent in Utah pursuant to *Utah Code section 78-27-21*, it is not entitled to assert a statute of limitations defense. However, the case cited by Ms. Griffiths-Rast to support this assertion expressly rejected this argument. See *Clawson v. Boston Acme Mines Development Co.*, 72 Utah 137, 269 P. 147 (1928). The plaintiffs in *Clawson* argued that because the defendant failed to comply with Utah law authorizing foreign corporations to conduct business in Utah, it was not entitled to use a statute of limitations defense. *Id.* at 151. The Utah Supreme Court rejected this argument [*15] and held that foreign corporations may assert a statute of limitations defense even if the corporation failed to register an agent or otherwise comply with statutes governing foreign corporations. *Id.* at 151-52. The court further stated that under the applicable Utah statute, a foreign corporation is only barred from "prosecuting or maintaining any action, suit, counterclaim, or cross-complaint in any court of the state. It does not prohibit such corporation from defending an action brought against it." *Id.* at 152. The court concluded that "[t]here is no condition tolling the statute [of limitations] as to foreign corporations." *Id.* Therefore, Sulzer Spine's status as a foreign corporation did not toll the statute of limitations, and Ms. Griffiths-Rast's claim is untimely. Accordingly, Sulzer Spine's Motion for Summary Judgment is granted.

III. CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED that Defendants' Motions for Summary Judgment [docket # 54 and docket # 58] are GRANTED. Because there are no remaining claims against any Defendants, this action is hereby DISMISSED.

DATED this 14th day of September, 2005.

BY THE COURT:

/s/ Dale A. Kimball

DALE A. KIMBALL

United States District [*16] Judge

Exhibit B

1 of 3 DOCUMENTS

**VALERIE ANN GRIFFITHS-RAST, Plaintiff-Appellant, v. SULZER SPINE TECH,
a Minnesota corporation also known as Zimmer Spine; PRAVEEN G. PRASAD, an
individual, Defendants-Appellees.**

No. 05-4279

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

216 Fed. Appx. 790; 2007 U.S. App. LEXIS 3607

February 15, 2007, Filed

NOTICE: [**1] PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

SUBSEQUENT HISTORY: Motion denied by *Griffiths-Rast v. Sulzer Spine Tech, Inc.*, 2008 U.S. Dist. LEXIS 26674 (D. Utah, Mar. 31, 2008)

PRIOR HISTORY: (D.C. No. 2:02-CV-1267-DAK). (D. Utah). *Griffiths-Rast v. Sulzer Spine Tech, Inc.*, 2005 U.S. Dist. LEXIS 46290 (D. Utah, Sept. 14, 2005)

DISPOSITION: AFFIRMED.

COUNSEL: For VALERIE ANN GRIFFITHS-RAST, Plaintiff-Appellant: David B. Oliver, Salt Lake City, UT.

For SULZER SPINE TECH, a Minnesota corporation also known as Zimmer Spine, Defendant-Appellee: Rick L. Rose, Brent D. Wride, Kristine Larsen, Ray, Quinney & Nebeker, Salt Lake City, UT; Andrea Roberts, Baker & Daniels, Indianapolis, IN; Cecilia M. Romero, Ray, Quinney & Nebeker, Salt Lake City, UT.

For PRAVEEN G. PRASAD, an individual, Defendant-Appellee: Christian W. Nelson, Holly Bierkan Platter, Brandon B. Hobbs, Richards, Brandt, Miller & Nelson, Salt Lake City, UT.

JUDGES: Before HARTZ, HOLLOWAY, and BALDOCK, Circuit Judges.

OPINION BY: Bobby R. Baldock

OPINION
[*791]

ORDER AND JUDGMENT *

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G)*. The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with *Fed. R. App. P. 32.1* and *10th Cir. R. 32.1*.

[**2] Plaintiff-appellant Valerie Ann Griffiths-Rast appeals the district court's grant of summary judgment to defendants-appellees Sulzer Spine Tech (Sulzer) and Praveen G. Prasad, M.D. Ms. Griffiths-Rast underwent a back surgery on August 3, 1998, during which Dr. Prasad implanted a "BAK Cage" manufactured by Sulzer into Ms. Griffiths-Rast's spine. Ms. Griffiths-Rast subsequently served Dr. Prasad with a notice of intent to commence action on November 26, 2001, and filed her complaint on November 26, 2002, alleging a violation by Dr. Prasad, of the Utah Health Care Malpractice Act, *Utah Code Ann. §§ 78-14-1 through 78-14-16* (1998), and a violation by Sulzer of the Utah Product Liability Act, *Utah Code Ann. §§ 78-15-1 through 78-15-6* (1998). The district court granted summary judgment to Dr. Prasad on the ground [*792] that the claim against him was barred by the two-year statute of limitation found in § 78-14-4(1) and that the limitation period in that statute was not tolled by application of 78-12-35. The district court granted summary judgment to Sulzer on the ground that the claim against it was barred by the two-year statute of limitation [**3] found in § 78-15-3. Ms. Griffiths-Rast appealed, and we exercise our jurisdiction under 28 U.S.C. § 1291 and affirm.

A. Standard of Review

"We review the district court's grant of summary judgment de novo, applying the same legal standard used

by the district court." *Simms v. Okla. ex rel. Dep't of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1326 (10th Cir. 1999). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a summary judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. A statute of limitation defense is an affirmative defense. *See Fed. R. Civ. P. 8(c)*. Where a defendant seeks summary judgment on the basis of an affirmative defense,

[t]he defendant . . . must demonstrate that no disputed material fact exists regarding the affirmative defense asserted. If the defendant meets this initial burden, the plaintiff must then demonstrate [**4] with specificity the existence of a disputed material fact. If the plaintiff fails to make such a showing, the affirmative defense bars his claim, and the defendant is then entitled to summary judgment as a matter of law.

Hutchinson v. Pfeil, 105 F.3d 562, 564 (10th Cir. 1997) (citations omitted).

B. Claim Against Dr. Prasad

Under § 78-14-8:

No malpractice action against a health care provider may be initiated unless and until the plaintiff gives the prospective defendant or his executor or successor, at least ninety days' prior notice of intent to commence an action.

Ms. Griffiths-Rast served Dr. Prasad a notice of intent to commence action on November 26, 2001. The district court granted Dr. Prasad summary judgment on the ground that the two-year malpractice statute of limitation barred Ms. Griffiths-Rast's claim because she should have discovered her legal injury prior to November 26, 1999. It further held that the limitation period was not tolled by any periods of time during which Dr. Prasad was absent from the state of Utah. Ms. Griffiths-Rast argues that the grant of summary judgment was improper because a reasonable jury could [**5] have found (1) that the two-year statute of limitation should not have begun to run until July 2, 2001, the date she claims she discovered her legal injury, and (2) that the limitation period was tolled by § 78-12-35.

1. Discovery of Legal Injury

Under § 78-14-4(1):

No malpractice action against a health care provider may be brought unless it is commenced within two years after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered the injury, whichever first occurs, but not to exceed four years after the date of the alleged act, omission, neglect or occurrence.

The two-year statute of limitation in this section begins to run when "the injured person knew or should have known that [she] had sustained an injury and that the injury was caused by negligent action." *Foil v. Ballinger*, 601 P.2d 144, 148 (Utah 1979). "[D]iscovery of legal injury, therefore, encompasses both awareness of physical injury and knowledge that the injury is or may be attributable to negligence." *Collins v. Wilson*, 1999 UT 56, 984 P.2d 960, 966 (Utah 1999) (quotation omitted). "[A]ll that is [**793] required [**6] to trigger the statute of limitations is sufficient information to put plaintiff[] on notice to make further inquiry if [she] harbors doubts or questions." *Macris v. Sculptured Software, Inc.*, 2001 UT 43, 24 P.3d 984, 990 (Utah 2001).

Ms. Griffiths-Rast testified in her deposition that "immediately after the [August 3, 1998, surgical] procedure," while she was still in the hospital recovering, she felt that there was a problem with the cage implantation, and there was a problem with what Dr. Prasad did, and that "[e]verything went wrong." *Aplt. App.*, Vol. 1 at 77-78, 80. Ms. Griffiths-Rast also testified that she contacted a lawyer about the problems with her back surgery "a couple of weeks after [her] surgery" when she "wasn't getting any better," and that she signed an agreement retaining the attorney's services at that time. *Id.* at 104. Further, on November 10, 1998, another doctor informed Ms. Griffiths-Rast that there was a defect with the cage implantation. *Id.*, Vol. 2 at 204-05, 210. Ms. Griffiths-Rast produced no evidence in response to Dr. Prasad's summary judgment motion to refute these facts, admitting that she had discovered [**7] the malpractice in November 1998. *See Aplt. App.*, Vol. 2 at 210.¹

¹ The argument presented in her response was that she discovered the malpractice in November 1998. *See Aplt. App.* at 210.

Nevertheless, Ms. Griffiths-Rast argues that she did not discover her legal injury until July 2, 2001, when she received a report from a Dr. Stephen Wood stating that he had been told by the Utah Malpractice Insurance

association that "there have been numerous malpractice suits filed due to complications resulting from 'The Cage' . . . [and that he] ha[d] been told that the procedure is no longer recommended." *Aplt. App.* at 200. Ms. Griffiths-Rast argues that the determination of when she discovered her legal injury is a factual question not suitable for summary judgment.

Ms. Griffiths-Rast misinterprets the summary judgment standard. The question is whether there is a "genuine issue as to any material fact," *Fed. R. Civ. P. 56(c)* (emphasis added), and "an issue of [**8] material fact is genuine only if the nonmovant presents facts such that a reasonable jury could find in favor of the nonmovant," *Garrison v. Gambro, Inc.*, 428 F.3d 933, 935, 150 Fed. Appx. 819 (10th Cir. 2005). Here, no reasonable jury could find that Ms. Griffiths-Rast did not have sufficient information to put her on notice to conduct a further inquiry into whether there was malpractice until after November 26, 1999. In fact, she admitted that she believed that there was something wrong with Dr. Smith's performance immediately after the August 1998 surgery and that she hired an attorney a couple of weeks later to conduct an inquiry into possible malpractice.

2. Tolling of Statute of Limitation

Ms. Griffiths-Rast argues in the alternative that even if she was aware of her legal injury prior to November 26, 1999, the limitation period should have been tolled for some of that time because (1) Dr. Prasad conducted business outside of Utah for periods of time between her surgery and September 2000, and (2) Dr. Prasad moved from Utah to California in September 2000. Under § 78-12-35:

Where a cause of action accrues against a person when he is out of the state, the action may [**9] be commenced within the term as limited by this chapter after his return to the state. If after a cause of action accrues he departs from the state, [*794] the time of his absence is not part of the time limited for the commencement of the action.

Ms. Griffiths-Rast argues that it is a disputed genuine issue of fact whether Dr. Prasad was absent for enough time so that tolling the statute of limitation for that period of time would result in the statute not being violated. She argues that the district court should have conducted a separate trial to decide this issue.

The district court held that medical malpractice actions were excepted from the tolling provision of § 78-12-35 because under § 78-14-4(2) the two-year limitation period "shall apply to all persons, regardless of minority

or other legal disability under *Section 78-12-36 or any other provision of the law.*" (emphasis added). The court held that this provision was an "explicit exception to *section 78-12-35*" and that the limitation period was not tolled during Dr. Prasad's absences. We agree.

Ms. Griffiths-Rast argues on appeal that the tolling provision in § 78-12-35 is applicable despite the language in § 78-14-4(2). [**10] She first directs us to *Jensen v. IHC Hosps., Inc.*, 944 P.2d 327, 333 n.3 (Utah 1997). In that footnote, the Utah Supreme Court noted that the family of a woman who allegedly died of malpractice argued that they should be able to file her suit outside the two-year statute of limitation because under § 78-12-37:

[I]f a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by [her] representatives after the expiration of that time and within one year from [her] death.

The Utah Supreme Court ruled against the family on the ground that the statute of limitation had run prior to the woman's death. *Jensen* therefore does not support Ms. Griffiths-Rast's argument. A ruling that § 78-12-37 did not apply because the limitation period expired prior to the decedent's death, is *not* the same as ruling that § 78-12-37 *would* have applied if the limitation period had not expired. There is no indication that the court even considered the effect of § 78-14-4(2) on § 78-12-37.

Ms. Griffiths-Rast also argues that the Utah Supreme [**11] Court found that § 78-14-4(2) was unconstitutional as applied to minors. In *Lee v. Gaufin*, 867 P.2d 572, 580-81 (Utah 1993), the court found that § 78-14-4(2) created an exception to § 78-12-36, which generally tolls limitation periods as to claims of minors until the minor reaches the age of majority. Since Ms. Griffiths-Rast's brief does no more than note that *Lee* found § 78-14-4(2) unconstitutional in that it nullified § 78-12-36, we can only assume that she is asserting, without argument, that it is also unconstitutional when applied to nullify to § 78-12-35. We disagree.

The Utah Supreme Court's holding in *Lee* was premised on the fact that, since minors had no legal capacity to sue in Utah, application of § 78-14-4(2) in some cases would result in the statute of limitation running prior to the minor coming of age and being legally able to bring his or her action. *Lee*, 867 P.2d at 580. Consequently, application of § 78-14-4(2) would deprive some minors of access to the court system. *Id.* Here, there is no such problem. Considering the provisions of *Fed. R. Civ. P. 4(e)*, *Utah R. Civ. P. 4*

[**12] , and Utah's long-arm statute, § 78-27-24,² it is clear [*795] that a potential defendant's flight to another state will not immunize him from suit. Dr. Prasad was himself served with process after he moved to California.

2 Under *Fed. R. Civ. P. 4(e)*:

Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed . . . may be effected in any judicial district of the United States:

(1) pursuant to the law of the state in which the district court is located, or in which service is effected, for the service of a summons upon the defendant in an action brought in the courts of general jurisdiction of the State; or

(2) by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

Under the pertinent parts of *Utah R. Civ. P. 4(d)(1)*:

(d)(1) Personal service. The summons and complaint may be served in any state or judicial district of the United States If the person to be served refuses to accept a copy of the process, service shall be sufficient if the person serving the same shall state the name of the process and offer to deliver a copy thereof. Personal service shall be made as follows:

(d)(1)(A) Upon any individual . . . by delivering a copy of the summons and the complaint to the individual personally, or by leaving a copy at the individual's dwelling house or usual place of abode with some person of

suitable age and discretion there residing, or by delivering a copy of the summons and the complaint to an agent authorized by appointment or by law to receive service of process[.]

Under the pertinent parts of § 78-27-24:

Any person . . . whether or not a citizen or resident of [Utah], who in person or through an agent does any of the following enumerated acts, submits himself, and if an individual, his personal representative, to the jurisdiction of the courts of [Utah] as to any claim arising out of or related to:

(1) the transaction of any business within this state;

(2) contracting to supply services or goods in this state;

(3) the causing of any injury within this state whether tortious or by breach of warranty;

[**13]

3 Ms. Griffiths-Rast also raises a brief argument that under § 78-14-8 she was entitled to a 120-day enlargement of the four-year limitation period imposed by the statute of repose found in § 78-14-4(1). This argument is meritless. First, the district court held that Ms. Griffiths-Rast's action was barred under the malpractice act's two-year statute of limitation, not the four-year statute of repose. Second, under § 78-14-8, a malpractice action may not be commenced unless the prospective defendant is given notice of the plaintiff's intent to commence an action at least ninety days prior to the filing of the suit. If the notice is served "less than ninety days prior to the expiration of the applicable time period, the time for commencing the malpractice action against the health care provider shall be extended to 120 days from the date of service of the notice." *Id.* Ms. Griffiths-Rast served her notice of intent in November of 2001. Ms. Griffiths-Rast *admitted* that she discovered her legal injury in November of 1998. Therefore, even if the date that she admitted discovery is used, the two-year statute of limitation period ran in November 2000, a year prior to the filing of her notice.

[**14] C. Claim Against Sulzer

Under § 78-15-3, a legal action under the Utah Product Liability Act: "shall be brought within two years from the time the individual who would be the claimant in such action discovered, or in the exercise of due diligence should have discovered, both the harm and its cause." The Utah Court of Appeals has held that because the statute of limitation in § 78-15-3 runs from the time the plaintiff discovered or should have discovered both the harm and its "cause," the reference to "cause" in that section "tolls the running of the statute of limitation until the plaintiff discovers, or in the exercise of due diligence should have discovered, the identity of the manufacturer." *Aragon v. Clover Club Foods Co.*, 857 P.2d 250, 253 (Utah Ct. App. 1993). Because Ms. Griffiths-Rast did not file her complaint until November 26, 2002, [*796] her claim is barred unless she did not discover, or in the exercise of due diligence should not have discovered, that the BAK Cage had injured her and that Sulzer manufactured the BAK Cage until after November 26, 2000.

Ms. Griffiths-Rast testified that she felt as if there was a problem with the cage implantation while [*15] she was in the hospital immediately after her surgery on August 3, 1998; that the BAK Cage hurt and "felt" like it was "defective"; and that she had been able to feel that the BAK Cage was defective since its implantation. Aplt. App., Vol. 1 at 80-81, 101-02. Because all that is required to start the running of the limitation period is information sufficient to put the plaintiff on notice to make further inquiry," *Macris*, 24 P.3d at 990, we don't believe a reasonable jury could find that Ms. Griffiths-Rast should not have discovered with the exercise of due diligence that the BAK Cage had injured her until after November 26, 2000.

The more difficult question is whether, as a matter of law, through the exercise of due diligence, she should have discovered that Sulzer was the manufacturer of the BAK Cage prior to November 26, 2000. The district court correctly noted in another case that "[g]enerally, the question of when a plaintiff knew, or with reasonable diligence should have known, of a cause of action is a question of fact for the jury." *McCollin v. Synthes Inc.*, 50 F. Supp. 2d 1119, 1123 (D. Utah 1999). As noted above, however, the relevant [*16] question is whether there is a "genuine issue as to any material fact," *Fed. R. Civ. P. 56(c)* (emphasis added), and "an issue of material fact is genuine only if the nonmovant presents facts such that a reasonable jury could find in favor of the nonmovant," *Garrison*, 428 F.3d at 935. The district court held that no reasonable jury could find that Ms. Griffiths-Rast had exercised due diligence in discovering that Sulzer was the manufacturer of the BAK Cage, and that "her claim against Sulzer-Spine was not tolled by her failure to discover its identity." Aplt. App., Vol. 2 at 361.

On appeal, Ms. Griffiths-Rast argues again that she

did not discover that she had a legal injury until July 2, 2001, when Dr. Wood's letter told her about other malpractice claims that had been raised. Once she discovered that she had a legal injury, she "first commenced the medical malpractice portion of her suit before proceeding with the products liability aspect" of her suit. Br. of Aplt. at 35. She alleges that she did not begin her product liability case at the same time as her medical malpractice case because "she needed confirmation from [*17] Dr. Prasad [regarding] who the manufacturer was." *Id.* She argues that given the "fact" that she did not discover her legal injury until July 2, 2001, and that she did not discover that Sulzer manufactured the BAK Cage until October 4, 2002, "[a] reasonable jury [could] find . . . that she did not reasonably discovery [sic] the name of the manufacturer of the BAKTM Cage until October 2002." Br. of Aplt. at 39-40.

We disagree. As properly noted by the district court, "[w]hat constitutes due diligence must be tailored to fit the circumstances of each case. It is that diligence which is appropriate to accomplish the end sought and which is reasonably calculated to do so." *Aragon*, 857 P.2d at 253 (quotation omitted). It seems clear that in a normal case a reasonable jury could not find that it would take over two years to determine the manufacturer of a trademarked medical device when the party knows the correct name of that device. ⁴ [*797] The question then becomes whether Ms. Griffiths-Rast presented evidence that would allow a reasonable jury to find that even if she had used "diligence which is appropriate to accomplish the end sought and which is reasonably [*18] calculated to do so," *Aragon*, 857 P.2d at 253, she should not have ascertained the identity of the manufacturer prior to November 26, 2000. She presented no such evidence.

4 Sulzer presented the consent form signed by Mr. Griffiths-Rast showing that she was going to have spinal fusion surgery with "BAK cages." Aplt. App., Vol. 2 at 332, 341. In Ms. Griffiths-Rast's appellate brief, she notes that one of the "assumptions" that she had made, that Dr. Prasad eventually corrected, was that the "BAK" in BAK Cage was a typographical error for the word "back." Br. of Aplt. at 35.

In fact, Ms. Griffiths-Rast presented the district court with the affidavit of a paralegal that worked for her attorney to help explain why it had taken four years to determine the manufacturer of the BAK Cage. The paralegal averred that the firm had contracted with an outside "nurse paralegal" who "was employed to research the claims against the doctor." Aplt. App. at 316. According to the affiant, the nurse paralegal "provided [*19] some internet literature" for a "LT-Cage," and that Ms. Griffiths-Rast's attorney was "led to believe that the LT-Cage was a recently approved Cage from the

same manufacturer of the BAK Cage." *Id.* According to Ms. Griffiths-Rast, she and her attorney went to the October 2002 meeting with Dr. Prasad, "with literature concerning a the [sic] LT-Cage product manufactured by different [sic] company believing that was the product implanted into her," and Dr. Prasad informed them that they had the wrong device.

Consequently, the evidence presented to the district court did not show that because of the circumstances of the case a reasonable jury could have found that with the exercise of due diligence she should not have discovered that Sulzer manufactured the BAK Cage until after November 26, 2000. It showed instead that because the outside nurse paralegal led her attorney to the misunderstanding that the "LT-Cage" and the BAK Cage were made by the same company, she misidentified the manufacturer and proceeded under that misidentification until the October 2002 meeting with Dr. Prasad.

It is true that Ms. Griffiths-Rast noted in the district

court that Sulzer had gone through a [**20] number of company name changes and was a foreign corporation without a registered agent in Utah. She made no argument, however, that these facts impeded her ability to identify Sulzer as the manufacturer of the BAK Cage. Consequently, we see no error in the district court's grant of summary judgment on this issue.

D. Conclusion

For the reasons set forth above, the district court's grant of summary judgment to Dr. Prasad and Sulzer is AFFIRMED.

Entered for the Court

Bobby R. Baldock

Circuit Judge

Exhibit C

1 of 1 DOCUMENT

**LORNA McFADDEN, Plaintiff and Appellant, v. HECTOR A. BATTIFORA et al.,
Defendants and Respondents.**

B160895

**COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT,
DIVISION FOUR**

2004 Cal. App. Unpub. LEXIS 595

January 23, 2004, Filed

NOTICE: [*1] NOT TO BE PUBLISHED IN OFFICIAL REPORTS CALIFORNIA RULES OF COURT, RULE 977(a), PROHIBITS COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY RULE 977(B) THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF RULE 977

PRIOR HISTORY: APPEAL from a judgment of the Superior Court of Los Angeles County, Jan A Plum, Judge Los Angeles County Super Ct No BC242047

DISPOSITION: Affirmed

COUNSEL: Law Offices of Michels & Watkins and Steven B Stevens for Plaintiff and Appellant

Fonda & Fraser and Peter M Fonda for Defendants and Respondents

JUDGES: CURRY, J We concur EPSTEIN, J, Acting P J, HASTINGS, J

OPINION BY: CURRY

OPINION

Appellant Lorna McFadden appeals from a judgment entered after a jury found that the statute of limitations barred appellant's medical malpractice action against respondents Hector Battifora, M D , and Jeffrey Medeiros, M D We affirm

FACTUAL AND PROCEDURAL BACKGROUND

Certain facts are not in dispute In May 1997, appellant Lorna McFadden went to see her doctor, Tadao Fujiwara, M D , to investigate a lump in her left breast Dr Fujiwara ordered a mammogram and [*2] biopsy After the biopsy, a nurse from Dr Fujiwara's office

called appellant and told her that she was to come in for a mastectomy Later that same day, however, Dr Fujiwara telephoned appellant to tell her she did not have cancer and repeated his assurances in person the next day

In June 1999, appellant, having moved to Las Vegas, went to have her breast examined at a new clinic in connection with a lump she felt at that time ¹ She underwent a mammogram and biopsy in August of that year This time the diagnosis was cancer, and in September 1999, appellant underwent a mastectomy, including removal of several lymph nodes In addition, she underwent chemotherapy from November 1999 to February 2000

1 There was a dispute of fact concerning the location of the lump felt in 1999, and whether it was in the same location as the lump felt in 1997

In February 2000, appellant contacted a lawyer The complaint for medical malpractice was filed on December 19, 2000, naming respondents, among others ² It was proceeded [*3] by the "Notice of Intent to Commence Action" required by statute whenever suit is brought against a health care provider (See *Code Civ Proc* , § 364 subd (a)) The notice was served October 13, 2000

2 Due to the truncated nature of the proceedings, there is no evidence in the record explaining how respondents were involved in appellant's medical care Dr Medeiros is described in the briefs as a former pathologist for the City of Hope who diagnosed the tissue sample from the 1997 biopsy as non-cancerous

Several defendants, including respondents herein, sought a bifurcated trial on the statute of limitations as permitted by *Code of Civil Procedure section 597.5* ³ Trial commenced on the statute of limitations defense The only witness called was appellant herself After hearing her testimony and reviewing certain medical

records introduced as exhibits, the jury answered the following questions in the affirmative: "Did [appellant] suspect, prior [*4] to October 13, 1999, that the alleged misdiagnosis was caused by someone's wrongdoing?" and "Would a reasonable person have suspected, prior to October 13, 1999, that the alleged misdiagnosis was caused by someone's wrongdoing?"

3 Section 597.5 provides that "in an action against a physician" and other types of professional health care providers "based upon the person's alleged professional negligence" if a statute of limitations defense is raised and either party so moves, "the issues raised thereby must be tried separately and before any other issues in the case are tried."

Following the verdict, the parties briefed the issue of whether the limitations statute should have been tolled with respect to Dr. Medeiros due to his absence from the state since May 1998, when he moved to Texas to take a new job. The court ruled that there was no basis for tolling, and judgment was entered in favor of respondents on July 8, 2002. This appeal followed.

DISCUSSION

I

The parties agree that the governing [*5] statute of limitations is found in *Code of Civil Procedure section 340.5*, which provides in relevant part: "In an action for injury or death against a health care provider based upon such person's alleged professional negligence, the time for the commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first." As explained in *Kitzig v. Nordquist* (2000) 81 Cal.App.4th 1384, 1391, this statute "sets forth two alternate tests for triggering the limitations period: (1) a subjective test requiring actual suspicion by the plaintiff that the injury was caused by wrongdoing; and (2) an objective test requiring a showing that a reasonable person would have suspected the injury was caused by wrongdoing. [Citation.] The first to occur under these two tests begins the limitations period."

Appellant contends that the essence of the underlying statute of limitations defense was that appellant "should have known, sometime between August 10 and October 13, 1999, that she was misdiagnosed in 1997, because [*6] Dr. Fujiwara's nurse told her in that year that she had cancer" and that respondents' position "rests solely on the belief that the nurse's comment -- corrected by her physician hours later -- should have triggered a suspicion of wrongdoing two years later." Selectively quoting from closing argument, appellant implies that this fact was "the linchpin of

[respondents'] affirmative [statute of limitations] defense."

Appellant misperceives the evidence that supported the jury's findings. The evidence demonstrated that appellant went to see Dr. Fujiwara about a lump in her left breast in May 1997. He ordered a mammogram and biopsy and, having received the results and consulted with other physicians, told her she did not have cancer. Two years later, in the summer of 1999, a new doctor diagnosed cancer in the same breast. Appellant underwent a mastectomy in September 1999. That is the point at which a reasonable person should have been suspicious of the original diagnosis of no cancer. Yet appellant did not submit the required statutory notice to her health care providers until October 2000, more than a year later. ⁴

4 If the statutory notice is submitted within the last 90 days of the limitations period, it extends or tolls the statute for up to 90 days depending on the precise day it was served within the limitations period. (*Code Civ. Proc.*, § 364, *subd. (d)*; *Davis v. Marin* (2000) 80 Cal.App.4th 380, 385.)

[*7] The significance of the call from Dr. Fujiwara's nurse was not that it should have made appellant immediately suspicious of her doctor's 1997 diagnosis. A patient is entitled to believe reassuring news from her doctor or another physician. In *Kitzig v. Nordquist*, *supra*, for example, the patient sought a second medical opinion and was assured in 1994 that she was being treated appropriately. She brought suit in 1996, within a year of being told by other physicians that something was going wrong. The court held that she was not obligated to bring suit within one year of her initial suspicion since a patient should not be "placed in the position of conducting a full investigation" to determine whether litigation is appropriate after "the second doctor confirms that the first doctor is doing everything right." (81 Cal.App.4th at p. 1393.)

To a similar effect is the decision in *Artal v. Allen* (2003) 111 Cal.App.4th 273, discussed in appellant's reply brief. There, appeal was taken from a judgment in favor of defendant based on a statute of limitations defense after the initial phase of a bifurcated nonjury trial. The facts indicated that [*8] plaintiff awoke after pelvic surgery in May 1998 with severe and persistent throat pain. Plaintiff saw at least 20 specialists in the next 18 months and was given numerous conflicting diagnoses. In May 1999, she stated on a medical form that she believed her continuing pain was due to "some sort of trauma [that was] caused during intubation [for anesthesia during the surgery]." (*Id.* at p. 276, *italics omitted*.) In November 1999, plaintiff underwent exploratory surgery and was told that there was a fracture

in her thyroid cartilage, but not that it was or may have been caused by the intubation during the 1998 surgery. Nevertheless, the diagnosis caused plaintiff to attribute the fracture to the intubation. She filed her complaint against the anesthesiologist on October 27, 2000. The Court of Appeal concluded that the evidence did not support the finding that plaintiff knew, or by reasonable diligence should have known, that her throat pain was caused by professional negligence until the 1999 exploratory surgery. The court noted that "[plaintiff] was a model of diligence" in that "she consulted at least 20 specialists in the 18 months following the May 8, 1998, surgery" [*9] and "was given some two dozen possible diagnoses, including tonsil infection, cancer, lupus, emotional and/or mental problems and asthma." (*Id. at p. 281.*) Because "the necessary facts could not be ascertained without exploratory surgery" and diligence did not require plaintiff to immediately resort to surgery, the court could not agree that plaintiff's claim was untimely. (*Ibid.*)

Appellant here admits that her suspicions of negligence were aroused after the 1999 diagnosis of cancer as soon as Dr. Fujiwara's diagnosis of no cancer in the same breast crossed her mind. To support her position that she did not have any misgivings prior to February 2000, she testified that the earlier diagnosis was driven from her head by the 1999 cancer diagnosis, surgery, and followup chemotherapy treatments, and that she "never thought about" the 1997 diagnosis until February 2000 when she was "reminded" of it by a friend. The nurse's call was significant because it cast doubt on appellant's testimony that she did not think about the 1997 diagnosis until February 2000. In response to appellant's theory, counsel for respondents argued in closing: "There are certain things in your [*10] life that you never forget. Being told you have cancer, thinking your are going to die, having the dark cloud surround you as [appellant] talked about, having the light shine back upon you, you never forget." Counsel further pointed out that appellant had been able to provide the doctors in Las Vegas with the names of her prior physicians and releases so that they could obtain her medical records, and told them about the prior biopsy. On those facts, the jury was entitled to believe that appellant was being untruthful when she claimed to have forgotten the traumatic occasion on which she was initially told she had breast cancer and then, a few hours later, told she did not. Accordingly, the jury had ample ground to believe that appellant's suspicion of wrongdoing was or should have been aroused in the summer of 1999, when she was diagnosed with cancer by the Las Vegas doctors and suffered the removal of her left breast.

II

The remaining issue has to do with tolling under

section 351 of the Code of Civil Procedure (section 351) which provides in relevant part: "If, when the cause of action accrues against a person, he is out of the State, the action [*11] may be commenced within the term herein limited, after his return to the State, and if, after the cause of action accrues, he departs from the State, the time of his absence is not part of the time limited for the commencement of the action." ⁵ Because Dr. Medeiros moved to Texas in May 1998, prior to the accrual of the one-year statute of limitations, appellant maintains that the statute has not run as to him. ⁶

5 Despite its language, courts have held that a defendant "need not 'enter' or 'return' to the state in order for the plaintiff to commence an action which takes advantage of the tolling provisions of *section 351*." (*Green v. Zissis (1992) 5 Cal.App.4th 1219, 1223.*) In 1979, the California Supreme Court held that the modern availability of alternate methods of service in place of personal delivery of a summons and complaint, such as substituted service and service by publication, had no impact on *section 351*'s continued viability. (*Dew v. Appleberry (1979) 23 Cal.3d 630, 634-636, 153 Cal. Rptr. 219.*)

6 Appellant devotes a considerable portion of her brief to the issue of whether *section 351* can ever be applied to toll the one-year medical malpractice limitations period due to a restriction on tolling found in *Code of Civil Procedure section 340.5*. Respondents concede that it can.

[*12] In *Bendix Autolite Corp. v. Midwesco Enterprises (1988) 486 U.S. 888, 100 L. Ed. 2d 896*, the United States Supreme Court held that an Ohio tolling statute similar to *section 351* unnecessarily burdened interstate commerce because it barred foreign corporations from asserting a statute of limitations defense unless they maintained a presence in Ohio, but served no weighty state interest due to the fact that Ohio's long-arm statute permitted service on foreign corporations at any time. *Bendix* was applied to *section 351* by the Ninth Circuit in *Abramson v. Brownstein (9th Cir. 1990) 897 F.2d 389*, which involved a Massachusetts resident who had entered into an agreement with two California residents. The California residents sued for breach of contract and fraud long after the fact, and relied on *section 351* to establish that otherwise applicable statutes of limitations had been tolled. The Ninth Circuit held that applying *section 351* to the situation would impermissibly burden interstate commerce, reasoning that "[*section 351*] forces a nonresident individual engaged in interstate commerce to choose between being present in California for several [*13] years or forfeiture of the limitations defense, remaining subject to suit in California in perpetuity." (*Id. at p. 392.*)

In *Filet Menu, Inc. v. Cheng* (1999) 71 Cal.App.4th 1276, this court considered whether section 351 was constitutionally sound when its provisions were applied to a California resident engaged in interstate commerce. In *Filet Menu*, California resident Warren Cheng was sued for breach of contract and other related claims. The complaint alleged that Cheng was absent from California for periods sufficient to toll the running of the applicable statutory period, but did not allege the specific reasons for Cheng's out-of-state travel. We concluded that "section 351 imposes a special burden on residents who travel in the course of interstate commerce that is not shared by residents involved solely in 'local business and trade . . .'" (*Id.* at p. 1282, quoting *Bendix Autolite Corp. v. Midwesco Enterprises, supra*, 486 U.S. at p. 891.) "Residents engaged in interstate commerce often travel outside the state to facilitate this activity, unlike residents who are otherwise occupied or employed. Thus, section [*14] 351 poses a hard choice to residents who engage in interstate commerce and who face potential liability arising out of this economic activity that section 351 does not pose to other residents. Residents occupied in interstate commerce must curtail their travel outside the state in the course of interstate commerce to avoid the tolling provisions of section 351, or endure extended exposure to litigation because of their travel in the course of interstate commerce." (*Filet Menu, Inc. v. Cheng, supra*, 71 Cal.App.4th at p. 1283.) At the same time, we found no state interest to outweigh this burden since "residents are equally subject to service, regardless of their reasons for traveling out of state." (*Ibid.*)

We found support for our conclusion in the case of *Tesar v. Hallas* (N.D. Ohio 1990) 738 F. Supp. 240, in which the court had held that "interstate commerce is affected when persons move between states in the course of or in search for employment" in applying *Bendix* to a

case involving a defendant who had moved from Ohio to Pennsylvania to take a new job. Relying on numerous cases that held that interstate commerce is impacted when persons [*15] move between states to search for employment (*id.* at p. 242, and cases cited therein), the court concluded that there was no justification in forcing people to choose between an out-of-state job and enjoying the protections of the various statutes of limitations when Ohio's long-arm statute provided jurisdiction over all those alleged to have engaged in wrongful activity in the state (*ibid.*).

We see no reason to depart from the views expressed in *Filet Menu*. Dr. Medeiros, a former California resident, moved to Texas to take a new job in 1998, thereby engaging in interstate commerce. He has been fully amenable to service under California's long-arm statute since that time. There is no sound basis for imposing a burden on him that would not have been imposed had he remained a California resident, or forcing him to choose between a new job in a different state and unlimited exposure to litigation arising from his work in California. Under *Bendix*, section 351 cannot be used to toll the otherwise applicable statute of limitations.

DISPOSITION

The judgment is affirmed.

CURRY, J.

We concur:

EPSTEIN, J., Acting P.J.

HASTINGS, J.