

1986

Jennifer Chapman, by and through her guardian,
Teresa Chapman, Robert Chapman and Teresa
Chapman, Individually v. Primary Children's
Hospital, a hospital organized to do business in the
State of Utah, et al. : Brief of Respondent

Utah Supreme Court

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UTAH SUPREME COURT
BRIEF

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IN THE SUPREME COURT OF THE STATE OF UTAH

JENNIFER CHAPMAN, by and through :
her guardian, TERESA CHAPMAN, :
ROBERT CHAPMAN and TERESA :
CHAPMAN, individually, :
 :
Plaintiffs-Appellants, : Appeal No. 860230
 :
vs. :
 :
PRIMARY CHILDREN'S HOSPITAL, a :
hospital organized to do business :
in the State of Utah, et al., :
 :
Defendants-Respondents. :

RESPONDENTS' BRIEF

Appeal from a judgment of the Third Judicial District Court
of Salt Lake County, State of Utah
The Honorable Homer F. Wilkinson, presiding

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Clerk, Supreme Court, Utah

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IDENTITY OF PARTIES

Appellants: JENNIFER CHAPMAN (minor)

TERESA CHAPMAN

ROBERT CHAPMAN

Respondents: PRIMARY CHILDREN'S HOSPITAL, a hospital organized to do business in the State of Utah;

PRIMARY CHILDREN'S MEDICAL CENTER, a hospital organized to do business in the State of Utah;

INTERMOUNTAIN HEALTH CARE, a Utah corporation dba PRIMARY CHILDREN'S HOSPITAL;

IHC HOSPITALS, INC., a Utah corporation dba PRIMAR CHILDREN'S HOSPITAL;

THE HEALTH SERVICES CORPORATION OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS. By uncontested order entered April 1, 1986, the district court redesignated the name of all of the above respondents as "I.H.C. Hospitals Inc., a Utah Corporation dba Primary Children's Medical Center, (R. at 283.)

L. GEORGE VEASY, M.D., KAREN BOWMAN, R.N.;

GARTH MYERS, M.D..

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Was the court below correct in its holding that the appellants' alleged cause of action, which according to the undisputed facts arose in 1973, is barred by the statute of limitations of the Utah Health Care Malpractice Act?

2. Is the Utah Health Care Malpractice Act, and the statute of limitations associated therewith, constitutional?

STATEMENT OF CASE

This action, filed by appellants (plaintiffs) on October 8, 1985, alleges respondents (defendants) were negligent in providing medical care to the minor plaintiff Jennifer Chapman. The plaintiffs claim that two doctors, a nurse and the named hospital entities committed medical malpractice during February 1973, more than twelve years prior to filing their action. Appellants allege that the appropriate statute of limitations should be tolled because the two doctors continued to provide care to Jennifer. Appellants also attempt to toll the statute of limitations by invoking a provision in the Utah Health Care Malpractice Act which provides that if a health care provider affirmatively acts to fraudulently conceal alleged misconduct, the running of the statute is tolled until such time as the plaintiff knew or should have known of the alleged misconduct.

In December 1985, defendant Garth Myer, M.D. filed a motion to dismiss and defendants L. George Veasy, M.D., Karen Bowman, R.N., and the hospital defendants moved for summary judgment and dismissal. (R. 38, 88.) These motions were heard before the Honorable Homer F. Wilkinson on February 5, 1986. After taking the matter under advisement, Judge Wilkinson granted defendants' motions for summary judgment and dismissal. (R. 267-282.) Plaintiffs' appeal followed.

STATEMENT OF FACTS

Jennifer Chapman, now 14-years old, was born on August 10, 1972, and was treated for "blue spells" by doctors in Ogden for the first five to seven months of her life. She was then referred to the Primary Children's Medical Center and was admitted by defendant L. George Veasy, M.D. (R. 141.)

On or about February 14, 1973, an operation to install a device called a Waterston Shunt was performed by a doctor who was not a named defendant. The purpose of that operation was to increase the flow of blood to Jennifer's lungs. The operation "over-corrected" the initial problem and on February 28, 1973 a second operation was performed to modify the shunt. (R. 141.)

A few hours after the operation Jennifer suffered a cardiac arrest while she was in the recovery room. Resuscitation efforts saved Jennifer's life, but it was determined immediately

thereafter that she had sustained severe and irreversible brain damage. (R. 141-142.)

In the months and years following Jennifer's cardiac arrest in 1973, her parents (plaintiffs) had several discussions and considerable correspondence with defendant Veasy. On several of those occasions they alleged that medical negligence during her hospital stay at the Primary Children's Medical Center in February of 1973 caused Jennifer's impaired condition. (R. 107, A-2; R. 256-257, A-20-A-21.) These facts are supported by the affidavit of Dr. Veasy and were not disputed by plaintiffs.

As an example and as evidence of such allegations of negligence made by the Chapmans, Dr. Veasy was able to produce a hand-written letter from Robert Chapman to him which he received sometime prior to May 2, 1977. (See Exhibit "A" to Affidavit of L. George Veasy, M.D., and typed version immediately following Exhibit "A". R. 111, A-6.) Appellant Chapman wrote in his letter that the "negligence is obvious". (R. 117, A-12.)

Frequently since 1973 Dr. Veasy participated in providing or coordinating medical care for Jennifer Chapman at the request of her parents Robert Chapman and Teresa Chapman. Based on his personal conversations and correspondence with the Chapmans, Dr. Veasy said under oath that, "I know and state that continuously since 1973 [the Chapmans] have believed, albeit erroneously, that the episode which Jennifer Chapman experienced

at Primary Children's Medical Center in February 1973 was preventable and resulted from medical negligence by those who attended her." (R. 108, A-3.)

Between November of 1977 and July of 1985, plaintiffs conferred with at least five different attorneys before their present counsel became involved. It is undisputed that various attorneys representing the plaintiffs have contacted the defendants regarding claims now asserted in plaintiffs' complaint (R. 257, A-21), including but not limited to attorney Richard D Burbidge who contacted defendants in November 1977 and attorney Stephen G. Crockett who contacted defendants in January 1979, plus attorneys representing at least five additional law firms thereafter. (R. 108, 109, A-3, A-4.)

The events related in an affidavit of Scott Olsen were also uncontradicted by the appellants. (R. 249, A-14.) Essentially, Mr. Olsen, the manager of Scott Wetzel Services, Inc., an insurance adjustment agency in Salt Lake City, Utah, related that on several different occasions the Chapmans had asserted the same medical malpractice claims as now raised in their present complaint. As he related, on May 27, 1983 he personally met with Robert and Teresa Chapman, with Jennifer also present. At that time the Chapmans alleged that Jennifer had been injured in February 1973 in connection with problems that developed following the second cardiac operation, because there

had not been a prompt response to Jennifer's cardiac arrest.

(R. 250, A-15.)

On July 13, 1983 Robert Chapman again phoned Mr. Olsen again alleging that injury to his daughter Jennifer in connection with heart surgery at Primary Children's Medical Center in February 1973 was the result of negligence by Dr. Veasy, Dr. Myers, Primary Children's Medical Center and/or some of its employees. He was advised that Mr. Olsen's office had set up a file on this matter in 1978 when Dr. Veasy had met with the Chapmans and their attorney, Stephen Crockett, concerning their claims against Primary Children's Medical Center and others; that his office had reviewed the Chapman's claims at that time, and had concluded there was no negligence or liability. (R. 250, A-15.) In both the claims registered by the Chapmans in 1978 and 1983, they alleged the same malpractice, that is, that Jennifer had suffered brain damage by a hypoxic insult that was due to the failure of Nurse Bowman to recognize the alleged cardiac arrest of Jennifer Chapman. (R. 253, A-18.)

In December 1985 after plaintiffs' present counsel filed suit, counsel for defendants moved for summary judgment alleging, among other things, that plaintiffs' alleged causes of action were barred by the applicable statute of limitations contained in the Utah Health Care Malpractice Act. (R. 38,

88.) The court subsequently granted summary judgment in favor of all defendants. (R. 282.)

SUMMARY OF ARGUMENT

In 1976 the Utah Legislature enacted the Utah Health Care Malpractice Act to protect the public from adverse effects of the rising incidents and cost of medical malpractice claims. This Court on several prior occasions has upheld that the constitutionality of the Act, including the statute of limitations.

It is well-settled that it is within the Legislature's prerogative to determine whether a statute of limitations applies or is tolled with respect to minors' claims. Minors have no inherent constitutional exemption from the operation of a statute of limitations. The legislative intent in this instance is unequivocally clear that in the public's interest minors' claims against health care providers must be timely filed. Legislative intent distinguishes this circumstance from the court decisions in other cases upon which appellants rely.

In harmony with federal and foreign state decisions, this Court has consistently applied a rational basis test to determine if a statute unconstitutionally denies guarantees of equal protection and access to courts. The Court has previously determined that the Legislature may properly treat health care providers as a separate class, and it is abundantly clear that

equal treatment of minors and adults with respect to operation of the statute of limitations reasonably furthers the Legislature's objectives. Thus, Utah Code Ann. § 78-14-4 is constitutional. The claims asserted in this lawsuit, commenced more than twelve years after the incident giving rise to the plaintiffs' claims, are barred as a matter of law.

ARGUMENT

I. APPELLANTS' CAUSE OF ACTION IS BARRED BY SECTION 78-14-4 UTAH CODE ANNOTATED (STATUTE OF LIMITATIONS).

Because appellants' claims are premised on allegations of medical negligence, the applicable statute of limitations is set forth in the Utah Health Care Malpractice Act, § 78-14-4 Uta Code Annotated, which states:

(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, except that:

. . . .

(b) In an action where it is alleged that a patient has been prevented from discovering misconduct on the part of a health care provider because that health care provider has affirmatively acted to fraudulently conceal the alleged misconduct, the claim shall be barred unless commenced within one year after the plaintiff or patient discovers, or through the use of reasonable diligence, should have discovered the fraudulent concealment, 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.

Because section 78-14-4 Utah Code Annotated applies "all persons regardless of minority or other legal disability and shall apply retroactively," the only exception that could be claimed here is the provision that:

any action which under former law could have been commenced after the effective date of this act [April 2, 1976] 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.

Section 78-14-4(2).

Accordingly, the maximum extended time within which appellants' claims could be brought by reason of Jennifer Chapman's minority would be through April 2, 1980, or four years after the effective date of the Utah Health Care Malpractice Act.

There remains only the question of whether the appellants had sufficient knowledge or information concerning what they now perceive as "legal injury" to Jennifer to trigger

the running of the statute. The undisputed facts found within Dr. Veasy's affidavits and the appellants' own affidavits and correspondence confirm they were adequately apprised of the "legal injury" they now complain of and that the statute of limitations commenced running as early as February 1973 and no later than May 1977.

The appellants' allegation of fraudulent concealment is a shallow attempt to cover up the stale claim. All of the facts in the complaint filed in 1985 were known or could readily have been known in 1973. An allegation of fraudulent concealment does not toll a statute of limitations if reasonable inquiry on the part of the plaintiffs would have revealed the claimed fraud prior to the time of filing their complaint. Rasmussen v. Olser 583 P.2d 50, 52 (Utah 1978); McConkie v. Hartman, 529 P.2d 801, 802 (Utah 1974).

Further, by its language, § 78-14-4(1)(b) states that even where it is claimed that the patient has been prevented from discovering misconduct of a health care provider because of that provider's affirmative and fraudulent concealment, "the claim shall be barred unless commenced within one year after plaintiff or patient discovers, or through the use of reasonable diligence should have discovered the fraudulent concealment"

(Emphasis added.) Knowledge of the parent-plaintiff is imputed to the minor patient. See Hargett v. Limberg, 598 F.Supp. 152,

155 (D. Utah 1984), reversed on other grounds, ___ F.2d ___ (10 Cir. 1986). The undisputed facts show that plaintiff had sufficient knowledge prior to 1977.

It is well established under Utah law that in medical negligence cases the statute of limitation begins running when the claimant has reason to believe that legal injury exists. See Foil v. Ballinger, 601 P.2d 144, 148 (Utah 1979). Under Foil, and its progeny, a legal determination of negligence is not necessary to start the statute of limitations. Rather, the crucial question is whether the plaintiff was aware of the fact that would lead a reasonable person to conclude that he may have a cause of action against the health care provider. See, e.g., Reiser v. Lohner, 641 P.2d 93, 99 (Utah 1982) (knowledge of husband that the wife was suffering disorders as the result of incident, whether temporary or permanent, showed that plaintiff should have known that they had suffered legal injury at the time of the cardiac arrest); Hove v. McMaster, 621 P.2d 694, 696 (Utah 1980).

In Hargett v. Limberg, supra, the court found the mother of an injured minor had not directly accused the treating physician of negligence but had told another doctor she felt the treating physician had been negligent. Such was sufficient to commence the running of the statute and to require diligent followup on the parent's feelings that medical negligence had

caused injury to her child. Similarly, in this case Jennifer Chapman's father wrote to Dr. Veasy in 1977:

Now I am well aware that I am not qualified medically or legally to answer all the questions pertaining to a malpractice suite [sic]. The way I understand the law the burden of proof is on me to prove both negligence and physical damage. The negligence is obvious but to what extent the physical damage can be linked to this negligence only a man of your medical knowledge can know for sure. I do know that besides being mentally and physically handicaped Jennifer also has an enlarge heart making it impossible for her to ever lead any kind of normal active life and eventually will be the cause of her death. She was hurt and hurt bad because of wrong decisions made in her early life. The laws i the state of Utah allow for compensation for pain and suffering Before too long my attorney will be in contact with you and I ask that you realize that he represents Jennirers interests and set aside your feeling toward the legal profession. . . . (Emphasis added, spelling as in original.)

(R. 117-118, A-12, A-13.) 2-3.]

Other undisputed evidence shows appellants discovery o the alleged medical negligence. For example, appellants engaged the services of at least two (and probably more) attorneys prior to April 2, 1980 to evaluate appellants' claims. As agents for appellants, said attorneys had ample opportunity and access to appropriate discovery procedures to make a timely pursuit of appellants' claims or further explore their merit. One attorney filed a medical malpractice action against the doctors who had treated Jennifer before she was transferred to Primary Children Hospital. (R. 143.) Accordingly, appellants were well aware o sufficient facts to commence running of the statute of limitations which now bars their claims.

II. THE STATUTE OF LIMITATIONS IS NOT TOLLED BY ESTOPPEL BY A CONTINUING PHYSICIAN-PATIENT RELATIONSHIP.

Respondents ask the Court to look through appellants' excessively lengthy effort to cloud the key issue presently before the court: namely, whether under the undisputed facts the statute of limitations bars the appellants' action. Appellants have interjected the judicially developed issues of estoppel and a continuing physician-patient relationship in an attempt to avoid the statute of limitations. With regard to such issues, the applicable law in a Utah medical malpractice action has been codified within the Utah Health Care Malpractice Act.

Regarding the principles generally applicable to estoppel, the Utah Medical Malpractice Act now provides that:

(b) In an action where it is alleged that a patient has been prevented from discovering misconduct on the part of a health care provider because that health care provider has affirmatively acted to fraudulently conceal the alleged misconduct, the claim shall be barred unless commenced within one year after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered the fraudulent concealment, whichever first occurs.

Utah Code Annotated §78-14-4(1)(b). The statute takes into account reliance by a patient or plaintiff on the representation of a physician. The language supersedes any general concepts of estoppel that have developed in other jurisdictions.

The statute of limitations is also not tolled by the existence of a continuing medical relationship between a

physician and patient. Appellants, for support, have cited the 1932 decision of Peteler v. Robison, 81 Utah 535, 17 P.2d 244 (Utah 1932). Appellants claim the "majority" of jurisdictions support appellants' theory. Appellants, however, have misunderstood or misstated the general rule and have not read Peteler accurately. The general rule, that continuing physician patient relationship tolls the statute of limitations for medical negligence until that relationship is terminated, only applies where malpractice has been occurring throughout the continuous and substantially uninterrupted course of treatment for a particular illness. It never applies where the patient has discovered, or through the use of reasonable diligence should have discovered, the injury, despite any continuing treatment. See Oliver v. Kaiser Community Health Foundation, 449 N.E.2d 438 443-444 (Ohio 1983); Lopez v. Swyer, 115 N.J. Super. 237, ___, 279 A.2d 116, 123 (1971) ("if a defendant doctor is guilty of negligent conduct, whether of commission or omission, in a continuing course of treatment, the statute does not ordinarily begin to run until the injurious treatment is terminated unless the patient discovered or should have discovered the injury in its causal connection with the negligent treatment before that time.") See also A.L.R. 2d 368, § 6[c] (as supplemented).

Appellants' only specific allegation of negligent treatment occurred in February 1973, from which Jennifer

"suffered from extreme lack of oxygen and sustained permanent brain damage." (R. 6.) Under the undisputed facts, any claimed medical malpractice was thus complete at the time of the February 1973 injury. Even if continuing negligence were adequately alleged, the statute still runs from the time of discovery of the injury and not from the termination of a physician-patient relationship.

Note that even the Peteler court decision relied on by the appellants recognized that where negligent treatment is not continuing, the statute of limitations bar would be complete. See Peteler v. Robison, 81 Utah 535, ___, 17 P.2d at 249. To the extent that Peteler could be read to hold otherwise, it was specifically disapproved in Christiansen v. Rees, 20 Utah 2d 194, 436 P.2d 435 (1968). The statute of limitations thus bars the appellants' action.

III. THE UTAH HEALTH CARE MALPRACTICE ACT AND ITS STATUTE OF LIMITATIONS ARE CONSTITUTIONALLY SOUND.

Appellants have devoted the greater part of their brief to attacking the constitutionality of the Utah Health Care Malpractice Act statute of limitations. A review of pertinent case law will show that every Utah court which has tested the constitutionality of the Act under the theories raised by appellants has rejected the same constitutional arguments which appellants now assert.

A. Utah Case Law Precedents.

In reaching its decision to uphold Utah Code Annotated § 78-14-4, the Court can rely on a long line of Utah Supreme Court decisions which have strongly and consistently upheld the provisions of the Health Care Malpractice Act, including its statute of limitations, against constitutional challenges. See, e.g., Allen v. Intermountain Health Care, Inc., 635 P.2d 30 (Utah 1981); Yates v. Vernal Family Health Center, 617 P.2d 352 (Utah 1980); McGuire v. University of Utah Medical Center, 603 P.2d 786 (Utah 1979); Vealey v. Clegg, 579 P.2d 919 (Utah 1978).

Federal courts reviewing constitutional challenges to the Utah Health Care Malpractice Act have also uniformly upheld the validity of § 78-14-4. See, e.g., Vest v. Bossard, 700 F.2d 600 (10th Cir. 1983); Hargett v. Limberg, 598 F.Supp. 152 (D. Utah 1984).

This Court's decision in Allen v. Intermountain Health Care, Inc., supra, is typical of the support the Court has given to enactments by the Utah Legislature in the area of medical malpractice. In Allen the Court unanimously rejected the plaintiff's argument that the shortened statute of limitations for medical malpractice cases violates constitutional guarantees of equal protection. The Court held that: (1) the Utah "legislature exercised its discretionary prerogative in

determining that the shortening of the statute of limitations . . . would insure the continued availability of health care services,"; and (2) such action does not exceed constitutional prohibitions. 635 P.2d at 32 (footnote omitted).

Appellants apparently acknowledge that Allen was properly decided (Appellants' Brief at 32) and that the Legislature may rationally limit the time for filing malpractice claims as to adults, but argue it may not so limit minor's claims. Appellants' argument overlooks, however, the fundamental principle that the legislature may place minors on equal footing with adults without infringing their constitutional rights. As explained in Vance v. Vance, 108 U.S. 514 (1883):

The Constitution of the United States . . . gives to minors no special rights beyond others, and it is within the legislative competency of the State . . . to make exceptions in their favor or not. The exemptions from the operation of statutes of limitation, usually accorded to infants and married women, do not rest upon any general doctrine of the law that they cannot be subjected to their action, but in every instance upon express language in those statutes giving them time after majority . . . to assert their rights.

Id. at 521. See also Grellet v. City of New York, 504 N.Y.S.2d 671, 673 (A.D.2 Dept. 1986) (medical malpractice action not tolled by plaintiff's infancy); Licano v. Karusnick, 663 P.2d 1066, 1068 (Colo. App. 1983) (the legislature is the primary judge of whether the time period allowed to a minor is reasonable); Rohrabaugh v. Wagoner, 274 Ind. 661, 413 N.E.2d

891, 893 (1980) (legislature is not under any constitutional mandate to suspend operation of statutes of limitation in cases of infancy or incapacity); 51 Am. Jur. 2d 750, Limitation of Actions § 182 (1970) (minority does not per se bestow immunity upon an infant or his guardian without a legislative saving in his favor, and a statute of limitations will ordinarily run against the claims of infants in the absence of a contrary statute).

This principle was reaffirmed by the decision of the United States District Court for the District of Utah in Hargett v. Limberg, 598 F.Supp. 152 (D. Utah 1984). In that decision the federal court granted summary judgment in favor of the defendant health care providers, holding that the minor plaintiff's claim was barred by the medical malpractice statute of limitations. In doing so the court considered and rejected the same constitutional attack the appellants have launched in their opposition to these defendants' motions. The court's opinion recognizes as "universally accepted" the rule that a "legislature may put adults and infants on the same footing with respect to statutes of limitation without affecting constitutional rights." Id. at 156.

Other federal courts have reached the same conclusion with respect to operation of the statute of limitations against minors' claims under the Federal Tort Claims Act. See, e.g.,

Robbins v. United States, 624 F.2d 971, 972 (10th Cir. 1980) ("It is well established that a claimant's minority does not toll the running of the statute of limitations under the Federal Tort Claims Act"); Brown v. United States, 353 F.2d 578, 579 (9th Cir. 1965) (minority does not toll the statute of limitations, and parents or guardians of a minor must preserve a claim by timely action); Pittman v. United States, 341 F.2d 739, 741 (9th Cir.), cert. denied, 382 U.S. 941 (1965) (equal protection guarantees are not violated by applying a shortened statute of limitations to a minor's claim).

Sound state and federal case precedents clearly show that the statute of limitations of the Utah Health Care Malpractice Act, which places adults and minors on equal footing is a constitutional exercise of legislative prerogative and a rational response to the stated legislative purpose of addressing a crisis in the availability of medical malpractice insurance and its attendant effect upon the quality of health care in the State of Utah. Utah Code Ann. § 78-14-2 (1977).

B. Scott v. School Board of Granite School District Did Not Invalidate the Medical Malpractice Statute of Limitations as Applied to Minors' Claims.

The primary thrust of appellants' argument is that the Court has already declared the statute of limitations of § 78-14-4 as applied to minors unconstitutional in Scott v. School Board of Granite School District, 568 P.2d 746 (Utah

1977). The statutory provision at issue in Scott was Utah Code Ann. § 63-30-13 (1977), the notice of claim provision of the Utah Governmental Immunity Act, Utah Code Ann. § 63-30-1 et seq. (1977). Appellants contend that the sweeping dictum "in all cases" contained in the Court's opinion invalidated not only § 63-30-13, but all provisions which limit the effect of the general tolling provision for minor's claims set forth in Utah Code Ann. § 78-12-36(1) (1977).

Appellants' reading of Scott overstates the Court's holding. Scott is not a case of constitutional dimension; it is rather, an example of judicial interpretation of statutes to further the Legislature's intent and objectives.

A line of Utah cases prior to Scott had held that the tolling provisions of § 78-12-36 did not excuse a minor's failure to timely file the notice of claim required by § 63-30-13 before commencing an action against a political subdivision of the state. See, e.g., Varoz v. Sevey, 29 Utah 2d 158, 506 P.2d 435 (1973).

In 1973, the Utah legislature amended Utah Code Ann. § 10-7-77, a notice of claim provision relating to certain claim against cities or incorporated towns which was similar in content and effect to § 63-30-13.¹ The amendment provided:

¹Section 10-7-77 was later repealed by Laws 1978 ch. 27, § 12.

If the person for whom a claim is made is a minor, the claims covered by this section may be so presented within the time limits specified above or within one year after the person reaches the age of majority, whichever is longer.

In Scott the Court found that this amendment, coupled with the Legislature's enactment of the general tolling provision in § 78-12-36(1), made it "abundantly clear" that the Legislature's general intent at that time was to protect minors' claims against governmental entities. 568 P.2d at 748. Given that legislative intent, and the similarities between the two notice of claim provisions, the Court was unable to find any reason for the 1973 Legislature's failure to similarly amend § 63-30-13. The Court therefore held that the legislative intent which resulted in the amendment of § 10-7-77 also applied to § 63-30-13 and the minor's claim should be preserved. The Court did not declare § 63-30-13 unconstitutional, but simply overruled a prior line of cases in deference to what the Court perceived to be a new expression of legislative grace in favor of minors.

The Scott decision is consistent with the Utah Supreme Court's prior rulings concerning judicial review of legislative enactments. The Court has stated that its primary responsibility and purpose in interpreting statutory enactments is to give effect to the underlying legislative intent. Millett v. Clark Clinic Corp., 609 P.2d 934, 936 (Utah 1980). The Court has also

stated that it will avoid constitutional questions wherever possible:

The right and power of the judiciary to declare whether legislative enactments exceed constitutional limitations is to be exercised with considerable restraint and in conformity with fundamental rules. One such fundamental rule of long-standing is that unnecessary decisions are to be avoided and that the court should pass upon the constitutionality of a statute only when such a determination is essential to the decision in a case. . . . An attack on the validity of a statute cannot be made by parties whose interest have not been, and are not about to be, prejudiced by the operation of the statute.

A further fundamental rule is that the courts do not busy themselves with advisory opinions, nor is it within their province to exercise the delicate power pronouncing a statute unconstitutional in abstract, hypothetical, or otherwise moot cases. It has been found to be far wiser, and it has become settled as a general principle, that a constitutional question is not to be reached if the merits of the case in hand may be fairly determined on other than constitutional issues.

Hoyle v. Monson, 606 P.2d 240, 242 (Utah 1980).

The Scott decision is consistent with these rules of judicial review. The decision interpreted and gave full effect to the perceived legislative intent. It did not, however, invalidate the notice of claim statute, nor did the Court review and pass upon the constitutionality of any other statutory provision not before the Court.

IV. SECTION 78-14-4 IS A CONSTITUTIONALLY PERMISSIBLE ENACTMENT.

A party who challenges a legislative enactment on constitutional grounds bears a heavy burden of proof. Judicial review of a properly enacted law begins with the strong presumption that the law is constitutional. State v. Murphy, 6 P.2d 1220, 1222 (Utah 1983). This Court has consistently observed that it is not the function of the judiciary to second guess the wisdom or propriety of legislation.

But the wisdom or propriety of the legislation is not for us to consider . . . "there is, without doubt, plenty of room, within the pale of the Constitution, for ill-advised legislation. . . . That is a matter between the people and the representatives." . . . Within the limits of the Constitution it is the prerogative of the legislature to control such matters, and the fact that an act may be ill-advised or unfortunate, if such it be, does not give rise to an appeal from the Legislature to the courts for correction. . . . Under our system of government it is important that each branch thereof avoid infringement upon the prerogatives of the other.

Hansen v. Public Employees Retirement Sys. Bd. of Admin., 122 Utah 44, 246 P.2d 591, 599 (1952) [citations omitted]; see also Minnesota v. Cloverleaf Creamery Co., 449 U.S. 456, 101 S. Ct. 715, 66 L.Ed. 2d 659 (1981). By judicial mandate this court must not interfere with the Legislature's exercise of its prerogative unless a constitutional infringement is clearly established. Zamora v. Draper, 635 P.2d 78, 80 (Utah 1981).

A. Standard of Review.

Appellants' challenge the constitutionality of § 78-14-4 as applied to minors on two grounds: (1) the provision violates guarantees of equal protection of laws found within the United States and Utah Constitutions; and (2) the provision violates Article I, Section 11 of the Utah Constitution relating to a litigant's right of access to the courts.² The rational basis standard of review is the appropriate standard for deciding both of appellants' constitutional challenges. See Malan v. Lewis, 693 P.2d 661, 674 n. 14 (Utah 1984) (equal protection rational basis analysis applies to review of rights guaranteed by Article I, Section 11 of the Utah Constitution).

1. Equal protection.

The equal protection clause of the Fourteenth Amendment of the United States Constitution and Article 1, Section 24 of the Utah Constitution embody the same fundamental principle: "Persons similarly situated should be treated similarly, and persons in different circumstances should not be treated as if their circumstances were the same." Malan v. Lewis, supra, at 669.

²Article I, Section 11 provides: "All courts shall be open and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this state, by himself or counsel, any civil cause to which he is a party."

A statute may treat groups differently and still meet constitutional equal protection and access to the courts requirements if: (1) the law applies equally to all persons within a class; and (2) the statutory classifications and different treatment given the classes have a reasonable tendency to further the objectives of the statute. Malan v. Lewis, supra, 670.

The rational basis standard of review cited above has been used by the Utah Supreme Court in all its prior reviews of the medical malpractice statute of limitations. See, e.g., All v. Intermountain Health Care, Inc., 635 P.2d 30, 31 (Utah 1981) (cited in Malan v. Lewis, supra at 670). It is also the standard of review used by nearly all other state appellate courts which have reviewed the constitutionality of their own respective medical malpractice statutes. See American Bank and Trust Company v. Community Hospital, 36 Cal. 3d 359, 204 Cal. Rptr. 671, 683 P.2d 670, 677 n. 10 (1984) (citing 23 states and 3 federal circuits which have applied the rational basis standard of review). The "strict scrutiny" and "means-focus" standards review plaintiffs urge the court to adopt in this case are not applied to legislation which does not create a "suspect class" affect a "fundamental constitutional right." Malan v. Lewis,

supra at 674 n. 17.³ The United States District Court for the District of Utah has already rejected the argument for applying a "means-focus" review to a minor's constitutional challenge to the Utah medical malpractice statute of limitations:

Unlike alienage, illegitimacy or gender, the class of minors with medical malpractice claims does not involve a fundamental interest or a classification of a suspect character. . . .

The correct standard for equal protection analysis to be applied in this case under both the United States and Utah Constitutions is the rational basis test.

Hargett v. Limberg, 598 F.Supp 152, 157 (D. Utah 1984) (citing Schweiker v. Wilson, 450 U.S. 221, 101 S.Ct. 1074, 67 L.Ed.2d 180 (1981); Brubaker v. Cavanaugh, 741 F.2d 318 (10th Cir. 1984); American Bank and Trust Co. v. Community Hospital, 36 Cal.3d 359 204 Cal. Rptr. 671, 683 P.2d 670, 677 n. 10 (1984); and Allen v. Intermountain Health Care, Inc., 635 P.2d 30, 31 (Utah 1981)).

Additional support for the principle that minors are not a "suspect" class is found in nearly every jurisdiction. See, e.g., Halet v. Wend Investment Company, 672 F.2d 1305, 1310 (9th Cir. 1982) ("children are not an 'insular minority'"); Williams v. City of Lewiston, Maine, 642 F.2d 26, 28 (1st Cir.

³The "means-focus" or "heightened scrutiny" analysis adopted by such cases as Carson v. Maurer, 424 A.2d 825 (N.H. 1980), has come under attack by other appellate courts. See e.g., Fitz v. Dolyak, 712 F.2d 330, 333 (8th Cir. 1983) ("We are unpersuaded by the reasoning of Carson and decline to follow it.").

1981) ("Minors are not a 'suspect' class"); Rollison v. Biggs, 567 F.Supp. 964, 972 n.14 (D. Del. 1983) ("courts have applied the traditional rational relation test upon finding that handicapped children do not constitute a suspect class"). Colin K. v. Schmidt, 536 F.Supp. 1375, 1388 (D.R.I. 1982) ("handicapped children do not constitute a suspect class"); Hale v. City of Santa Paula, 159 Cal. 3d 1233, 206 Cal. Rptr. 265, 270 (1984) (rational relationship test is used to determine the validity of a statute since minors are not a suspect class); Faucher v. City of Auburn, 465 A.2d 1120, 1125 (Me. 1983) (since age is not a suspect classification, the legislative scheme should be upheld if it bears some rational relationship to the conceivable legitimate state interest or purpose).

2. Access to courts.

Appellants have additionally challenged the statute of limitations under Article I, Section 11 of the Utah Constitution. These respondents do not believe, however, that the appellants' open court argument is applicable to the facts of this case.

In essence, appellants' arguments simply speak to the general question of whether there is denial of access to court when there is discovery of an injury after a statute of limitations has run, or when a minor does not have a parent or guardian willing or able to bring an action on his behalf.

Appellant has avoided the application of the cited law to the facts in this case. This case is distinguishable from Berry v. Beech Aircraft Corp., 717 P.2d 670 (Utah 1985), since in this case there was discovery several years before the statute ran and parents willing to assert the minor child's claim.

Section 78-14-4 is reasonable in its scope and effect. Appellant argues, though, that it may bar some causes of action before they accrue. Such a result is extremely unlikely since section 78-14-4 expressly excludes from its operation the two fact situations most likely to be discovered more than four years from the date of the treatment: when a foreign object has been wrongfully left within a patient's body, and when the health care provider fraudulently conceals the alleged misconduct. In either case, the cause of action is not barred until after the wrongful action has been or should have been discovered. See § 78-14-4(1)(a)-(b). Since most other forms of wrongdoing are typically discoverable within four years from the date of occurrence, few causes of action are barred before they arise. Thus, when a cause of action is barred by the four-year statute of repose, it is generally not because the claim has gone undiscovered, but because the claimant has simply waited too long to assert it. The Utah Legislature found it necessary in the public interest to bar stale claims so that professional liability insurance premiums could be "reasonably and accurately

calculated." Id. Old claims could be avoided.⁴ A specific period within which claims could be brought was necessary to reduce and stabilize spiraling health care costs and to ensure continued quality health care services.

This same conclusion was reached in Wheaton v. Jack, Civil No. C-82-0039 (D. Utah, Aug. 9, 1982) (attached at A-24). There, the plaintiff filed her action in 1982, complaining of a major surgery performed in 1966. The plaintiff argued that the Utah Health Care Malpractice Act unconstitutionally denied her the right of access to the courts. The federal court found that

[T]he legislature was responding to a medical malpractice crisis that was causing the cost of health care to increase to the point that it threatened to be available only to the rich. The legislature also found that the quality of that care had diminished because health care providers, in response to the numerous suits being filed, were practicing defensive medicine rather than providing the best care possible.

Id. at 9-10 (citation omitted); A-32, A-33. Based on those findings, the court concluded:

The overpowering public necessity of making available the best health care possible justifies the abolition of the right to access to the courts in medical malpractice cases four years after the occurrence of the act, omission, neglect or occurrence which caused the injury. The legislature balanced the conflicting

⁴Limitation periods that have the effect of eliminating stale claims are not improper. See Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 349 (1944); see also Brubaker v. Cavanaugh, 741 F.2d 318, 320-21 (10th Cir. 1984).

interest and determined that there was no less onerous alternative for alleviating the crisis. Therefore, § 78-14-4 does not violate article I, section 11 of the Utah Constitution.

Id. at 10; A-33.

Appellants have also argued that the status of "minority" deprives minors access to court. It is true that in minor injury cases the claim will have to be brought on the child's behalf by his parent or guardian. However, it is not inequitable or improper to place some responsibility on parents or guardians to protect and preserve a minor's claim for an injury that accompanies a failure to diagnose or treat. After all, parents make daily choices during a child's minority which certainly affect the child's future. Parents choose, on the minor's behalf, the extent of medical intervention and treatment of a child's illnesses. The Utah Legislature recognized this responsibility by enacting § 78-14-4.

The statute of limitations in the Act is not irrational merely because a parent as natural guardian or someone else as guardian ad litem may need to pursue the child's cause of action on the child's behalf. In many instances parents have the primary responsibility to protect, educate and care for their children. Some specific duties now placed on the parent for the child's protection are set forth in Utah Code Ann. §§ 78-11-6 (parent or guardian may sue for death or injury of minor caused by wrongful act or neglect of another); 78-45-3 (every man shall

support his child); 78-45-9 (every man shall support his child) 78-45-9 (an obligee or state department of social services may enforce a child's right of support against parent); 76-7-201 (failure to provide medical care is criminal neglect; see also A.L.R.2d 1047). Compare Wasescha v. Wasescha, 548 P.2d 895 (Utah 1976) (children have a right to support); Ottley v. Hill, 21 Utah 2d 396, 446 P.2d 301 (1968) (parent under legal duty to pay medical care); Gulley v. Gulley, 570 P.2d 127 (Utah 1977) (parent cannot rid himself of duty to support his children by contract) Gawand v. Gawand, 615 P.2d 422 (Utah 1980) (parent has duties to support retarded child). See also 34 A.L.R.2d 1460 (right of child against parent for support).⁵ Further, the Utah Supreme Court has long recognized that a statute of limitations may run against a minor where rights are vested in a parent or guardian Trinnaman v. Clinger, 26 Utah 2d 111, 485 P.2d 1043, 1044 (1971) Parr v. Zions First National Bank, 13 Utah 2d 404, 375 P.2d 461 (1962); Dignan v. Nelson, 26 Utah 186, 72 P. 936 (1903).

⁵Note also that parents are natural guardians of minor children. 39 Am. Jur. 2d, Guardian and Ward § 5, and that a guardian has not only a right, but a duty, to institute and prosecute litigation necessary to maintain and preserve a ward's rights. A guardian may also be liable for a loss caused by the guardian's neglect or for breach of duty. Id. at §187. Parents are not exempt from this duty. As natural guardians of the child, they are the trustees of the child's rights which are vested in the parents for the benefit of the child. Id. at § 8. They have a duty to protect and preserve the rights and welfare of the children, id. at § 14, and are charged with the care and management of the children's estates. Id. at § 48.

B. Application of Standard of Review.

The statute of limitations of the Utah Health Care Malpractice Act, section 78-14-4, must be held to be a constitutional exercise of the Utah Legislature's prerogative unless appellants can clearly establish that the statute does not meet the two-part test of the rational basis standard of review. To meet that test the statute must, first, apply equally to all members of the created class. Malan v. Lewis, supra. The class created and protected by the Act is health care providers. See Allen v. Intermountain Health Care, Inc., 634 P.2d 30, 31 (Utah 1981) ("The test . . . is whether there exists a rational basis to treat health care providers differently from other alleged tort feasons"). Section 78-14-4 applies equally to all health care providers and therefore complies with the first prong of the rational basis test. The statute also treats equally the affected group, those persons including minors who have personal injury claims against health care providers.

Second, to pass equal protection review the different treatment afforded the protected class must have a "reasonable tendency" to further the legislative objective. Malan v. Lewis, 693 P.2d 661, 670 (Utah 1984).

In Allen v. Intermountain Health Care, Inc., 635 P.2d 30 (Utah 1981), the Utah Supreme Court reviewed the legislative objective behind the Utah Health Care Malpractice Act in upholding

the Act and its statute of limitations against constitutional challenges.

It is therefore seen that the Act was premised upon the need to protect and insure the continued availability of health care services to the public, and not (as asserted by plaintiff) to shield insurance companies from legitimate claims. The legislature exercised its discretionary prerogative in determining that the shortening of the statute of limitations (along with requiring notice of intention to sue), would insure the continued availability of adequate health care services.

635 P.2d at 32;⁶ see Utah Code Ann. § 78-14-2 (1977).

Appellants' main challenge to the Act is to simply question the 1976 Legislature's wisdom in enacting the Utah Health Care Malpractice Act. Appellants' argument is inappropriate in this forum. Judicial review of legislation does not include a re-evaluation of the facts the Legislature could have considered to determine the necessity for the enactment. The constitutionality of a measure under the equal protection clause does not depend on a court's hindsight assessment of the empirical success or failure of the measure's provisions. As Justice Brennan explained in Minnesota v. Cloverleaf Creamery Co., 449 U.S. 456, 466, 101 S. Ct. 715, 66 L.Ed. 2d 659 (1981): "whether in fact the Act will promote the [legislative

⁶The Allen decision is cited by the court in Malan v. Lewi as supporting for the second prong of the equal protection--rational basis test. 693 P.2d at 670.

objectives] is not the question: the Equal Protection Clause is satisfied by our conclusion that the [state] Legislature could rationally have decided" that the means chosen will promote the legislative objectives. (Emphasis added.) Where there was evidence before the legislature which, if believed to be true, supported the creation of the statutory classification, a plaintiff cannot invalidate the statute by asking the court to accept an argument that the legislature may have been mistaken. Id. The prior evidence before the Legislature cannot now be received.

Many of the materials, reports and statistics which were presented to the 1976 Utah Legislature prior to the enactment of the Utah Health Care Malpractice Act are assuredly no longer available.⁷ Even the scattered reports available, as reported in previous decisions of the Court, however, provide ample support for the Legislature's belief that tort reform in

⁷One primary reason for not going back into the "evidence" on which the Legislature based its judgment is the typical unavailability of the data and discussion surrounding a particular piece of legislation. The bulk of material that was accumulated on the Health Care Malpractice Act was presented and discussed in hearings before the Interim Social Services Committee. A report of that material was apparently made available to the Legislature. Although the hearings were recorded, that material is routinely destroyed by the archives department after several years. It is therefore impossible for any party to present to the court all of the data relied upon by the Legislature in making its informed decision.

the medical malpractice area was needed to insure the continued availability of quality health care, and that the shortening of the statute of limitations for medical malpractice claims would further that objective. In Allen this Court so concluded. 635 P.2d 31-32.

The Legislature's justification for creating a shortened statute of limitations for medical malpractice claims remains equally valid today. One of the purposes of the statute of limitations is to encourage prompt presentation of claims so that the alleged tortfeasor has a fair opportunity to defend. United States v. Kubrick, 444 U.S. 111, 100 S. Ct. 352, 62 L.Ed 259 (1979). One court explained the problems with delay:

When any alleged tortfeasor is required to defend a claim long after the alleged wrong has occurred, the ability to successfully do so is diminished by reason of dimmed memories, the death of witnesses, and lost documents. As the years between injury and suit increases so does the probability that the search for truth at trial will be impeded and contorted to the benefit of the plaintiff. This harm can be exacerbated where the injured party continues to grow, develop and change, both physically and mentally, after the injury complained of has occurred.

Johnson v. St. Vincent Hospital, Inc., 273 Ind. 374, 404 N.E.2d 585, 604 (1980). The Utah Supreme Court has likewise acknowledged that protection is needed against the filing of tardy claims, and that the medical malpractice statute of limitations has the salutary effect of "adequately shielding health care providers from claims against which it may be

difficult to defend because of the lapse of time" Foil v. Ballinger, 601 P.2d 144, 149 (Utah 1979).

The Legislature properly recognized the need to treat medical malpractice claims differently from other general tort actions with respect to the operation of the statute of limitations. Tolling a statute of limitations in a medical malpractice case would create an insurmountable problem of trying to determine the applicable standard of care long after the treatment and injury occur. Advances in knowledge and technology occur so rapidly in medicine that state-of-the-art treatment today is likely to be considered substandard in the very near future. It is unreasonable to assume that a court or jury can determine the applicable standard of care with any degree of fairness ten or fifteen years after the fact. It would be impossible for jurors to fairly assess the physician's actions based upon an ancient standard of care without taking into account their personal knowledge of advances which have occurred during the ensuing decades which make older techniques of treatment seem inappropriate.

These practical problems of presenting a case more than a decade old are compounded in this case since Jennifer is not only a minor but a mental incompetent. Even after Jennifer reaches majority she will still be unable and legally incompetent to make decisions concerning her own legal rights. She will

remain unable to initiate legal proceedings in her own behalf. If one accepts appellants' argument that the statute of limitations should be tolled until an injured minor is competent to bring an action on his own behalf, the statute of limitations for a medical malpractice claim for Jennifer and others similarly situated may never commence to run, and an action on their behalf could be instituted decades after the cause of action arises. The potential liability of a health care provider and the exposure of his liability insurer in that situation becomes indefinite; the setting of insurance rates and reserves becomes an exercise in futility. It was the spectre of this unjust burden which led the Federal District Court for Utah to conclude

[T]he exclusion of minors and legally incompetent persons from the generally tolling provisions [Utah Code Ann. § 78-12-36] is rationally related to the stated purpose of containing the malpractice insurance crisis. That rationality is particularly evidenced by the facts of the present case. Serious permanent injuries to children are often cases of large potential damages. If the period in which such claims could be brought were tolled until the young child reached the age of majority, a heavy burden would be placed on insurance carriers in evaluating and defending against the claim, establishing appropriate reserve requirements, and setting rates. The percentage of medical malpractice claims brought by minors is far from insignificant. Moreover, the uncertainty inherent in tolling the period in which such claims may be brought could drastically affect insurance rates of at least this segment of health care providers that provide services exclusively to minors.

Hargett v. Limberg, 598 F.Supp. at 158.

The federal court further stated that the burden of weighing the need to contain malpractice insurance costs and thereby to ensure the availability of health care services against the competing interests of minors and mental incompetents whose parents or guardians fail to timely initiate an action is a problem to be handled by the legislature, not the courts. Id. The reasons for leaving the balancing process to the legislature are important:

Furthermore any possible harm that may be suffered by a minor whose parents or guardians fail to initiate the action against a potential tortious wrongdoer within the appropriate time period may be outweighed by the chaos, uncertainty, and severe prejudice which will occur to those accused of tortious conduct, their insurance carriers, and ultimately to the insurance carriers' rate payers when lawsuits are permitted to be initiated decades after the occurrence of the incident giving rise thereto. Before such a sweeping change is made the question of "reserve requirements" imposed on insurance carriers and the resulting effect on insurance rates as well as many other issues must be addressed. The Legislature, not the courts, is the proper forum for the resolution of such issues.

De Santis v. Yaw, 290 Pa. Super. 535, 434 A.2d 1273, 1279 (1981)

Based upon the authorities cited above, appropriate principles of judicial review, and the legislative objectives behind the enactment of the Act and its statute of limitations, it is clear that § 78-14-4 complies with state as well as federal guarantees of equal protection of laws and does not deny these appellants access to the courts. Other jurisdictions which have

analyzed equal protection and due process attacks by minor plaintiffs against medical malpractice statutes of limitations have reached similar results. See, e.g., Donabedian v. Manzer, 153 Cal. 3d 592, 200 Cal. Rptr. 597 (1984); Kite v. Campbell, 14 Cal. 3d 793, 191 Cal. Rptr. 363 (1983) (statute providing that medical malpractice actions by a minor must be commenced within three years from the date of the alleged wrongful act did not deny a minor's right to due process under law; as a matter of constitutional law, a statute of limitation is remedial in nature and does not destroy fundamental rights); Wheeler v. Lenski, 8 Kan. App. 2d 408, 658 P.2d 1056 (1983) (statute which shortens period of limitation for minors and incapacitated persons in medical malpractice actions did not violate equal protection or due process); Petri v. Smith, 307 Pa. Super 261, 453 A.2d 342 (1982) (the settled rule is that it is not violative of any constitutional rights to hold minors bound equally with adults to the prescribed statutory periods within which legal causes of action may be brought); Reese v. Rankin Fite Memorial Hospital, 403 So.2d 158 (Ala. 1981) (statute of limitations did not violate due process and equal protection provisions of state or federal constitutions on ground that statute treated minors injured through medical malpractice differently from minor victims of other torts); Thomas v. Niemann, 397 So.2d 90 (Ala. 1981) (minor's medical malpractice action was barred by the statute of

limitations and was properly dismissed); Johnson v. St. Vincent Hospital, Inc., 273 Ind. 374, 404 N.E.2d 585 (1980) (time limitation affecting medical malpractice claim for death of a minor child was not contrary to due process and equal protection); Rohrbaugh v. Wagoner, 274 Ind. 661, 413 N.E.2d 891 (1980) (court held that the legislature was not constitutionally mandated to suspend application of statutes of limitation in cases of infancy or incapacity and dismissed appeal which challenged constitutionality of statute of limitations of medical malpractice act).

CONCLUSION

In light of the above, these respondents respectfully request the Court to affirm the lower court's determination that the appellants' discovery of the complained of injury occurred at least prior to November 1977 and triggered the statute of limitations, which now bars their complaint. Further, the Court should find that the action of the Utah Legislature in enacting the Utah Health Care Malpractice Act and its statute of limitations is an appropriate response to a legitimate and real concern. It is, after all, the public which ultimately pays the cost of professional liability insurance and benefits from the continued availability of such coverage when injuries are suffered. In the furtherance of that objective, the Legislature

reasonably required all persons, including minors, to present claims timely, which is essential to give health care providers and their insurers a reasonable opportunity to anticipate and plan for losses in an extremely volatile insurance market. The Legislature also perceived that in medicine, where advances in procedures, knowledge and technology occur so rapidly, a long delay in the prosecution of an action seriously and detrimentally affects a health care provider's ability to defend care that may have been standard when rendered, but which may seem ineffectual or even harmful in retrospect.

Respondents respectfully urge the Court to affirm the lower court's decision.

DATED this 25th day of September, 1986.

KIRTON, McCONKIE & BUSHNELL

By David B. Erickson
B. Lloyd Poelman
David B. Erickson
Attorneys for Respondents
Veasy, Bowman and
Hospital Entities
330 South Third East
Salt Lake City, Utah 84111
Telephone: (801) 521-3680

PROOF OF SERVICE

The undersigned, attorney for respondents Veasy, Bowma and Hospital Entities, hereby certifies that on September 25, 1986 he caused to be served the foregoing Respondents' Brief on all parties to this appeal by mailing four (4) copies thereof by first-class mail, postage prepaid, addressed to their attorneys follows:

Kathryn Collard, Esq.
401 Boston Building
Salt Lake City, Utah 84111

P. Richard Meyer, Esq.
Robert N. Williams, Esq.
P. O. Box 2608
Jackson, Wyoming 83001

Gary B. Ferguson, Esq.
Gary D. Stott, Esq.
RICHARDS, BRANDT, MILLER & NELSON
P. O. Box 2465
Salt Lake City, Utah 84110

DATED: 25 Sept 1986

David B. Erickson.

B. Lloyd Poelman
David B. Erickson
Attorneys for Respondents
Veasy, Bowman and
Hospital Entities
330 South Third East
Salt Lake City, Utah 84111

Addendum

ADDENDUM

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FILED

DEC 18 1985

H. Dixon Hindley, Clerk 3rd Dist. Court
By S. A. Childs
Deputy Clerk

B. Lloyd Poelman - A2617
David B. Erickson - A3788
KIRTON, McCONKIE & BUSHNELL
Attorneys for Defendant
330 South Third East
Salt Lake City, Utah 84111
Telephone: (801) 521-3680

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

JENNIFER CHAPMAN, by and through
her guardian, TERESA CHAPMAN,
ROBERT CHAPMAN AND TERESA
CHAPMAN, individually,

Plaintiffs,

vs.

PRIMARY CHILDREN'S HOSPITAL, a
hospital organized to do business
in the State of Utah; PRIMARY
CHILDREN'S MEDICAL CENTER, a
hospital organized to do business
in the State of Utah; INTERMOUNTAIN
HEALTH CARE, a Utah corporation dba
PRIMARY CHILDREN'S HOSPITAL; IHC
HOSPITALS, INC., a Utah corporation
dba PRIMARY CHILDREN'S HOSPITAL;
THE HEALTH SERVICES CORPORATION
OF THE CHURCH OF JESUS CHRIST OF
LATTER-DAY SAINTS, a former or
present Utah corporation dba
PRIMARY CHILDREN'S HOSPITAL; GARTH
MEYERS, M.D.; L. GEORGE VEASY, M.D.,
KAREN BOWMAN, R.N.; SCOTT WETZEL
COMPANY a Utah corporation; THE
HOME GROUP, INC., a foreign
corporation; JOHN DOE I-X; and
BLACK CORPORATIONS I-V,

Defendants.

AFFIDAVIT OF
L. GEORGE VEASY, M.D.

Civil No. C85-6782

(HON. HOMER F. WILKINSON)

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

The undersigned L. George Veasy, being first duly sworn under oath deposes and says:

1. I am a defendant in the above-entitled matter. I am a licensed physician and surgeon under the laws of the State of Utah.

2. In February 1973, on referral from another doctor, I was the admitting physician in connection with the hospitalization of Jennifer Chapman at Primary Children's Medical Center, although I did not perform the two heart surgeries she underwent during that admission. Approximately six hours following her second surgery Jennifer Chapman experienced a generalized seizure (convulsion) following which her heart stopped (cardiac arrest). This episode left Jennifer Chapman immediately and severely handicapped with both physical and mental impairments for which she has been under continuous medical supervision and care to this date.

3. In the months and years immediately following the episode in February 1973 that left her impaired, I have had many discussions and considerable correspondence with Teresa Chapman and Robert Chapman, parents of Jennifer Chapman. On several occasions they have alleged that medical negligence during her hospitalization at Primary Children's Medical Center in February 1973 caused Jennifer's impaired condition.

4. As an example and as evidence of such allegations made by the Chapmans, I attach hereto as Exhibit "A" a copy of an undated, hand-written letter from Robert Chapman to me which I received sometime prior to May 2, 1977. [For convenience, a typed copy of said letter, without spelling or gramatical corrections, is also attached.]

5. Frequently since 1973 I have participated in providing or coordinating medical care for Jennifer Chapman at the request of her parents Robert Chapman and Teresa Chapman. Based on my personal conversations and correspondence with Teresa and Robert Chapman, I know and state that continuously since 1973 they have believed, albeit erroneously, that the episode which Jennifer Chapman experienced at Primary Children's Medical Center in February 1973 was preventable and resulted from medical negligence by those who attended her.

6. I am informed and believe that plaintiffs have consulted with various attorneys concerning what they believed to be a claim for medical negligence against one or more of the defendants named above including, but probably not limited to, the following attorneys:

Richard D. Burbidge, Esq. 22 East 100 South Salt Lake City, Utah	November 1977
--	---------------

Stephen G. Crockett, Esq. Salt Lake City, Utah	January 1979
---	--------------

[an additional Salt Lake City attorney whose name is not presently recalled]	1979 or 1980
--	--------------

Jack C. Helgesen, Esq.
HELGESEN & WATERFALL, P.C.
2650 Washington Boulevard
Ogden, Utah 84401

October 1984

Fred R. Silvester, Esq.
BLACK & MOORE
261 East Broadway
Salt Lake City, Utah 84111

July 1985

Kathryn Collard
Attorney at Law
401 Boston Building
Salt Lake City, Utah 84111

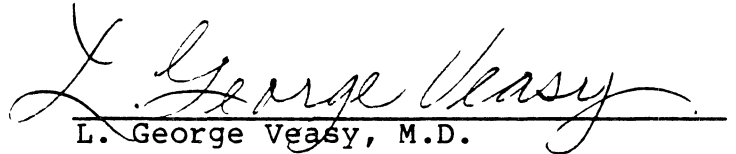
November 1985

Plus co-counsel from Wyoming


November 1985

7. I do not believe there are any significant matters learned by plaintiffs in July 1984 concerning the allegations in the complaint herein that were not known to plaintiffs in 1977 or which were not then readily discoverable by them through acting with reasonable diligence on their strongly held belief that Jennifer was injured by medical negligence in 1973.

8. I declare the foregoing matters to be true of my own knowledge except as to matters set forth upon information and belief, and as to such matters I believe them to be true.


L. George Veasy, M.D.

SUBSCRIBED AND SWORN to before me this 17th day of
December, 1985.


Notary Public
Residing at Salt Lake City, Utah

My Commission Expires:

4/25/89

CERTIFICATE OF MAILING

This is to certify that I served a true and correct copy of the foregoing AFFIDAVIT OF L. GEORGE VEASY, M.D., by depositing the same in the United States mail, postage prepaid, on this the 17th day of December, 1985 to the following:

Kathryn Collard, Esq.
401 Boston Building
Salt Lake City, Utah 84111

P. Richard Meyer, Esq.
Robert N. Williams, Esq.
P. O. Box 2608
Jackson, Wyoming 83001

Gary B. Ferguson, Esq.
RICHARDS, BRANDT, MILLER & NELSON
P. O. Box 2465
Salt Lake City, Utah 84110

Bonnie Freuden

EXHIBIT A

Dr. George Vinary
Primary Children Hospital
Salt Lake City, Utah

1903

Dear Dr. Vinary

Some time ago I sat in your office and asked
the you advise me and help me to make a
decision concerning a malpractice suit in Jennie's
behalf. Since that meeting I have given daily
thought and prayer as to which direction I should
go in promoting Jennie's with security for the
time she will be here on earth. I am writing
the letter so that you will have a better under-
standing of my situation and why I am making
the decision that I am.

First of all in our meeting you seemed
more concerned about what our attorney would
benefit from the case rather than what Jennie
could obtain. We sat and talked for probably an
hour and a half and never once did you ask if
Jennie was doing. You seemed only to think
of our lawyer and the blood money that it was
bringing. I have pondered this in my heart since
that meeting. I was raised in a religious
home and taught honesty and respect for working to
obtain what we have. Our people have warned us
against accepting filthy money and that money in
itself is not evil but the honesty with which
it is obtained is the important factor. (A-6)

I would at this time like to assure you
that obtaining filthy lucre or blood-money as you
have called it is not my intention I am not
seeking to destroy any doctor or put a hospital out
of business. Insurance premiums are paid to protect us
all against hardship in this world. I have to secure
my business against fire, theft, and accidents to protect
me as a business man. It is not something that only
doctors pay.

What has brought me to the decision to go abroad
with the wife are two events that have happened
in our life and I would like to explain them
to you so you can understand our feelings.

First of all in our home we have living with
us a uncle who is mentally handicapped. We live our
lives to take care of his needs and try to bring him
some sort of happiness in this life. We have now found
it necessary to move after five years of caring for
this man we find that the cost of housing is increasing
so rapidly and our family is growing so quickly that
we have no alternative but to get our own home. In
the nearly five years we have been here not one
relative has offered to help us with this burden. We
have become the center of jealousy and back biting
among religious people. Now that we are building our
own home it seems that we are under the responsibility
of caring for Uncle John. He is fighting and accusing us
already taking place. All I can see though is might have
to build an extra room in our basement to let
him live in because no one wants him. I can not
imagine any more after what has happened here in the
last five years leave Jennifer as a burden to someone
family if something should happen to Jennifer or her
she is gone. The burden and responsibility is on her. The burden.

On Feb 24th of this year my wife and our four children were driving to pick me up for work when an international event went out of control and ran into the back of our car. At this point there were some minor injuries but everyone seemed to be okay because of the impact the doors were jammed and they could not get out of the car. While they were waiting for help a semi truck and trailer went out of control and hit them again knocking them a hundred and fifty feet down the highway and completely demolishing our vehicle. When the police arrived they found my wife unconscious in the back seat of the car and my eight year old boy administering first aid to Jennifer and our baby Cory. The entire family had to be taken to the hospital and treated. Teresa, Jennifer and Cory were admitted because of their injuries. They were there for a period of five days before being released. While they were there the nurses found it so difficult to care for Jennifer in four days they fed her exactly $\frac{1}{2}$ of one meal. The $\frac{1}{2}$ of a meal took a nurse over 1 $\frac{1}{2}$ hours to get down her. The rest of the meals were fed to her by me. We had to close up my business to care for her. It takes a tremendous amount of persistence to care for her and it can't leave her to die in the back of people who don't care for her and love her. This is what we do. Because of the accident I realize how close come to losing my wife and children that I have been helped Jennifer would have been left in this world without the ability to care for herself and it would be just a matter of time before she would be back to a stage we brought her home from the hospital in four years ago in doctor Meyer put it in my table.

How is it an accident that I am not qualified
indirectly or legally to answer all the questions
pertaining to a real practice such as the way it involves
the law the burden of proof on me to prove both
negligence and physical damage. The negligence is obvious
but to what extent the physical damage can be linked to
this ~~same~~ negligence only a man of your medical knowledge
can know for sure it is known that besides being
mentally and physically handicapped Jennifer also has
an enlarged heart making it impossible for her to
ever lead any kind of normal active life and a stroke
was the cause of her death. She was heart and
heart bad because of wrong decisions made in her early
life. She lives in the state of ill health allow for
compensation for pain and suffering. She suffered and
felt pain for the first five months of her life only
to be turned away by doctors that didn't have time
for little girls that could not breathe she
felt death in her heart at least twice a month
and fought for her very life only to have it
completely destroyed. You told me if she had died
you would have been obligated to testify on her
behalf. A dead person feels no pain and suffering
she is entitled to something for as long as she is
willing to go on struggling for her life. This case
has to be weighed upon its individual merits
and not by what it costs for insurance for each
but in a hospital it is expensive that it is not
seeking to destroy anyone or collect a fortune in that
manner. The help provided by the state and federal
governments to the handicapped are a mockery to
the society we live in. I beg only private organizations
more and do nothing for the individual patient as we
no longer depend on other people to care for my daughter.
She is only loved in our home and the financial burden
is the great for me to bear alone it don't have what (A-

Jennifer's future will be very bright as far as her father is by
you to consider Jennifer as an individual and not
an insurance burden to each bed in each hospital
life to long my attorney will be in contact with
you and we ask that you realize that he represents
Jennifer's interests and not make you feeling toward the
legal profession. It is imperative that we have
honest factual answers.

I do hope that we can continue through
life as the best of friends and that we can always
entrust Jennifer's life in your very capable hands

Sincerely

R. J. T. O'Brien

P.S. Thanks for your time

[Typed copy of Exhibit "A"]

Dr. George Veasy
Primary Childrens Hospital
Salt Lake City, Utah

Dear Dr. Veasy:

Some time ago I sat in your office and asked that you advise me and help me to make a decission concerning a malpractice suite in Jennifers behalf. Since that meeting I have given daily thought and prayer as to which dirrection I should go in providing Jennifer with security for the time she will be here on earth. I am writing this letter so that you will have a better understanding of our situation and why I am making the decision that I am.

First of all in our meeting you seemed more concerned about what our attorney would bennifit from the case rather than what Jennifer could obtain. We sat and talked for probably an hour and a half and never once did you ask how Jennifer was doing. You refered only to those damn lawers and the blood money that I was seeking. I have pondered this in my hart daily sience that meeting. I was raised in a religious home and taught honesty and respect for working to obtain what we have. Our profit has warned us against accepting filthy lucre and that money in of itself is not evil but the honesty and (undecipherable) in which we obtain it is the important fact.

I would at this time like to assure you that obtaining filthy lucre or blood money as you have called it is not my intention. I am not seeking to destroy any doctors or put a hospital out of business. Insurance premiums our paid to protect us all against hardship in this world. I have to insure my business against fire, theft, and accident to protect me as a business man. It is not something that only doctors pay.

What has brought me to the decision to go ahead with the suite are two events that have happened in our lives and I would like to explain them to you so you can understand our feelings.

First of all in our home we have living with us an uncle who is mentally handicaped. We live with him to take care of his needs and try to bring him some sort of happiness in this life. We have now found it necessary to move after five years of caring for this man. We find that the cost of housing is increasing so

rapidly and our family is growing so quickly that we have no alternative but to get into our own home. In the nearly five years we have been here not one relative has offered to help us with this burden. We have become the center of jealousy and back biting among religious people. Now that we are building our own home it seems that no one wants the responsibility of caring for Uncle Lynn. The fighting and accusing is already taking place. It looks as though I might have to build an extra room in our basement to let him live in because no one wants him. I can not in good conscience after what has happened here in the last five years leave Jennifer as a burden to someones family if something should happen to Teresa or I before she is gone. The burdens and responsibilities have been tremendous.

On Feb. 24th of this year my wife and our five children were driving to pick me up from work when an International Scout went out of control and ran into the back of our car. At this point there were some minor injuries but everyone seemed to be okay. Because of the impact the doors were jammed and they could not get out of the car. While they were waiting for help a semi truck and trailer went out of control and hit them again knocking them a hundred and fifty feet down the highway and completely demolishing our vehicle. When the police arrived they found my wife unconscious in the back seat of the car and my eight year old boy administering first aid to Jennifer and our baby Cory. The entire family had to be taken to the hospital and treated. Teresa, Jennifer and Cory were admitted because of their injuries. They were there for a period of five days before being released. While they were there the nurses found it so difficult to care for Jennifer that in five days they fed her exactly 1/2 of one meal. That 1/2 of a meal took a nurse over 1-1/2 hours to get down her. The rest of the meals were fed to her by me. I had to close up my business to care for her. I take a tremendous amount of patience to care for her and I can't leave her to die in the hands of people who don't care for her and love her the way we do. Because of the accident I realize how close I came to losing my wife and children. Had Teresa been killed Jennifer would have been left in this world without the ability to care for herself and it would be just a matter of time before she would be back to the stage we brought her home from the hospital in four years ago as doctor Myer put it, a vegetable.

Now I am well aware that I am not qualified medically or legally to answer all the questions pertaining to a malpractice suite. The way I understand the law the burden of proof is on me to prove both negligence and physical damage. The negligence is obvious but to what extent the physical damage can be linked to this negligence only a man of your medical knowledge can know for

sure. I do know that besides being mentally and physically handicaped Jennifer also has an enlarged heart making it impossible for her to ever lead any kind of normal active life and eventually will be the cause of her death. She was hurt and hurt bad because of wrong decisions made in her early life. The laws in the state of Utah allow for compensation for pain and suffering. She suffered and felt pain for the first five months of her life only to be turned away by doctors that didn't have time for little girls that could hold their breath. She felt death in her soul at least twice a month and fought for her very life only to have it completely destroyed. You told me if she had died you would have been obligated to testify in her behalf. A dead person feels no pain and suffering. She is entitled to security for as long as she is willing to go on struggling for her life. This case has to be weighed upon its individual merits and not by what it costs for insurance for each bed in a hopsital. I reemphasize that I am not seeking to destroy anyone or collect a fortune in blood money. The help provided by the state and federal governments to the handicapped are a mockery to the society we live in. They only provide administrative moneys and do nothing for the individual patient. I can no longer depend on other people to care for my daughter. She is only loved in our home and the financial burden is to great for me to bare alone. I don't know what Jennifers future will bring but as her father I beg you to consider Jennifer as an individual and not an insurance burden to each bed in each hospital. Before too long my atorney will be in contact with you and I ask that you realize that he represents Jennifers interests and set aside your feeling toward the legal profession. It is imparative that we have honest factual answers.

I do hope that we can continue through life as the best of friends and that I can alway intrust Jennifers life in your very capable hands.

Sincerely,

Robert Chapman

P.S. Thanks for your time.

FILED IN CLERKS OFFICE
SALT LAKE COUNTY, UTAH

FEB 4 1 18 PM '86

H. DIXON
CLERK
BY *James P. [Signature]*

B. Lloyd Poelman - A2617
David B. Erickson - A3788
KIRTON, McCONKIE & BUSHNELL
Attorneys for Defendant
330 South Third East
Salt Lake City, Utah 84111
Telephone: (801) 521-3680

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

JENNIFER CHAPMAN, by and through	:	
her guardian, TERESA CHAPMAN,	:	
ROBERT CHAPMAN AND TERESA	:	AFFIDAVIT OF
CHAPMAN, individually,	:	SCOTT OLSEN
	:	
Plaintiffs,	:	Civil No. C85-6782
	:	
vs.	:	
	:	
PRIMARY CHILDREN'S HOSPITAL, a	:	(HON. HOMER F. WILKINSON)
hospital organized to do business	:	
in the State of Utah, et al.	:	
	:	
Defendants.	:	

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

The undersigned Scott Olsen, being first duly sworn on oath deposes and says:

1. I am the manager of Scott Wetzel Services, Inc., an insurance adjustment agency in Salt Lake City, Utah, which for many years has represented Primary Children's Medical Center and its predecessors in matters of legal liability claimed against the hospital and its agents. I have been employed by Scott

Kirton, McConkie
& Bushnell
Professional Corporation
130 S. 300 EAST
SALT LAKE CITY
UTAH 84111

Wetzel Services, Inc. since 1976 and I am familiar with this agency's records relating to claims by Jennifer Chapman and her parents against Primary Children's Medical Center and others relating to surgery performed on Jennifer Chapman in February 1973.

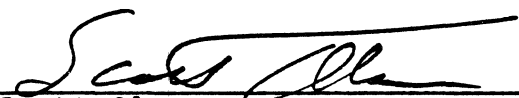
2. On May 27, 1983 I met personally with Robert and Teresa Chapman, with Jennifer also present. At that time the Chapmans alleged that Jennifer had been injured in February 1973 in connection with problems that developed following a second cardiac operation, because there had not been a prompt response to Jennifer's cardiac arrest. On June 17, 1983 I wrote a letter to Robert Chapman, a copy of which is attached hereto as Exhibit "A".

3. On July 13, 1983 Robert Chapman telephoned me, again alleging that injury to his daughter Jennifer in connection with heart surgery at Primary Children's Medical Center in February 1973 was the result of negligence by Dr. Veasy, Dr. Meyers, Primary Children's Medical Center and/or some of its employees. He demanded \$350,000 in compensation. I again advised him that we had set up a file on this matter in 1978 when Dr. Veasy had met with the Chapmans and their attorney, Stephen Crockett, concerning their claims against Primary Children's Medical Center and others; that we had reviewed their claims at that time, concluding there was no negligence or liability; and

that again more recently we had reviewed the matter and reaffirmed our original conclusions. Mr. Chapman became very abusive to me over the telephone.

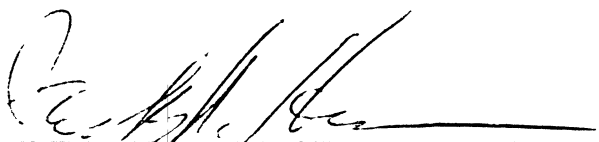
4. On July 23, 1985 I sent a letter to Black & Moore, attorneys for the Chapmans, a copy of which is attached hereto as Exhibit "B". Before sending that letter I again carefully reviewed the files of our offices. The statements in Exhibit "B" accurately reflect the results of that review of our file on this claim.

5. I have read the foregoing and declare the content thereof to be true of my own knowledge, except as to matters set forth upon information and belief, and as to such matters I believe them to be true.



Scott Olsen

SUBSCRIBED AND SWORN to before me this ____ day of
February, 1986.



Notary Public

My Commission Expires:

12-9-87

Residing at Salt Lake City, Utah



Scott Wetzel Services Incorporated

An Affiliate of The Home Group, Inc

833 East 400 South, Suite 104 • Salt Lake City, Utah 84102

Phone (801) 322-2541

June 17, 1983

Robert Chapman
4597 South 1100 West
Riverdale, Utah 84403

RE: Insured: Primary Children's Medical Center
 Claimant: Jennifer Chapman (minor)
 D/Loss: 2-28-73
 Our File: 112-47-73

Dear Mr. Chapman:

I enjoyed the visit we had on May 27, 1983 with you and your wife and Jennifer. I was able to go back in our files and find that a claim had been set up concerning your child back in 1977. We at that time, checked with the doctors involved in the treatment of Jennifer and they all agreed that the problem that she experienced was caused by an emboli reaching your child's brain which caused the seizure and that led to the cardiac arrest. They have not changed their opinion at this time, so as you can see, I have to rely on the doctor's diagnosis of your child's problem.

As to the other things we spoke of during the meeting, I feel that it will be necessary for you to follow-up with therapy and any other treatment that your child does now or should receive.

I don't know what else I can do at the present time to help you, but I will be more than happy to listen to whatever suggestions you may have. Please feel free to call at any time at the above number.

Very truly yours,

Scott Olsen

SO/11
c/c Charles Doane, Primary Children's Medical Center

EXHIBIT "A"



Scott Wetzel Services Incorporated

An Affiliate of The Home Group, Inc

833 East 400 South, Suite 104 • Salt Lake City, Utah 84102

Phone (801) 322-2541

July 23, 1985

Black & Moore
Attorneys at Law
Suite 300, 261 East Broadway
Salt Lake City, UT 84111

Attention: Fred R. Silvester, Esq.

Re: Insured: Primary Children's Medical Center
Your Client: Jennifer Chapman (minor)
D/Incident: 2/28/73
Our File: 112-47-73

Dear Mr. Silvester:

We received your Notice of Intent dated June 13, 1985. It contains errors which I think should be straightened out. The child's birth, to the best of my knowledge, was August 10, 1972. This was not when the incident occurred. The incident you are speaking of in your Notice of Intent occurred on February 28, 1973.

Also, it may be to your benefit to know that a claim was presented by your clients, Mr. and Mrs. Chapman, in September of 1977 which was investigated by this office and denied in 1978. Again, in 1983, another claim was presented by your clients which was denied on July 13, 1983. In both these claims, they alleged the same malpractice that you speak of in your letter, that is, that the child suffered brain damage by a hypoxic insult that was due to the failure of Nurse Bowman to recognize the alleged cardiac arrest of your client.

Your clients have written a number of letters indicating the same allegation to the hospitals over a period of time. As a matter of fact, they hired an attorney in 1978 to pursue the claims they felt they had against McKay-Dee Hospital and against Primary Children's Medical Center. Their attorney evidently advised them they had no claim and refused to pursue it.

EXHIBIT "B"

Fred R. Silvester, Esq.

July 23, 1985

Page 2

Also, in reviewing the chart once again, there is ample indication that the child was seizing some time before the arrest, which would indicate that there was an insult to the brain probably in the form of an emboli that indeed caused the tragic situation that your client now finds herself in.

We will again deny this claim in its entirety and defend any action against Primary Children's Hospital to the fullest. It may be well for you to have the chart and information that you can acquire reviewed by an expert before you proceed with a law suit.

Very truly yours,

Scott Olsen
Manager

SO/jh

cc: Scott Kelly, IHC
Charles Doane, Primary Children's Medical Center

000434

FILED

FILED IN CLERKS OFFICE
SALT LAKE COUNTY, UTAH

FEB 4 1 18 PM '86

H. D. VEASY, CLERK
SALT LAKE COUNTY

James P. Veasy

B. Lloyd Poelman - A2617
David B. Erickson - A3788
KIRTON, McCONKIE & BUSHNELL
Attorneys for Defendant
330 South Third East
Salt Lake City, Utah 84111
Telephone: (801) 521-3680

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

JENNIFER CHAPMAN, by and through	:	
her guardian, TERESA CHAPMAN,	:	
ROBERT CHAPMAN AND TERESA	:	SUPPLEMENTAL AFFIDAVIT
CHAPMAN, individually,	:	OF L. GEORGE VEASY, M.D.
	:	
Plaintiffs,	:	Civil No. C85-6782
	:	
vs.	:	
	:	
PRIMARY CHILDREN'S HOSPITAL, a	:	(HON. HOMER F. WILKINSON)
hospital organized to do business	:	
in the State of Utah, et al.	:	
	:	
Defendants.	:	

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

The undersigned, L. George Veasy, being first duly sworn under oath deposes and says:

1. I am a defendant in the above-entitled matter. This affidavit supplements my previous affidavit dated December 7, 1985 filed herein.

2. On September 9, 1977 I had a conference with Mr. and Mrs. Robert Chapman, the parents of Jennifer Chapman in which

they stated their belief that there was negligence in the intensive care unit of Primary Children's Medical Center shortly after Jennifer returned from her second surgery on February 28, 1973. Mrs. Chapman said that Jennifer had been seizing for five minutes before that fact was recognized by the nurses.

3. On September 13, 1977 I sent a letter to Don Poulter, Administrator of Primary Children's Medical Center, a copy of which is attached hereto as Exhibit "B". The content thereof is true according to my best knowledge, belief and information.

4. In February 1978 I met with Robert and Teresa Chapman along with their attorney Stephen Crockett. The subject of that conversation was whether the Chapmans had grounds for legal action (a) against McKay-Dee Hospital and Drs. Richard Nilsson and Arthur M. Davenport for their treatment of Jennifer prior to February 28, 1973, or (b) against Primary Children's Medical Center and members of its medical and nursing staffs, relating to resuscitation of Jennifer following her second surgery on February 28, 1973. In that discussion Teresa Chapman and Robert Chapman again said they believed there had been negligence in failure by a nurse to make timely detection of Jennifer's cardiac arrest and provide prompt resuscitation efforts.

5. I have read the foregoing and declare the content thereof to be true of my own knowledge except as to matters set forth on information and belief, and as to such matters I believe them to be true.


L. George Veasy, M.D.

SUBSCRIBED AND SWORN to before me this 3rd day of February, 1986.


Notary Public

My Commission Expires:

4/25/89

Residing at Salt Lake City, Utah

September 13, 1977

Don Poulter, Administrator
Primary Children's Medical Center

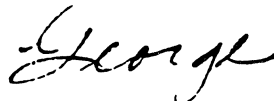
Dear Don,

On Friday, September 9th, I had a conference with Mr. and Mrs. Robert Chapman, the parents of Jennifer Chapman. I have talked with you previously about the likelihood that these people might be initiating a suit which most likely will be at Dr. Richard Nilsson and Dr. Davenport in Ogden. I am not certain whether or not they want to initiate a suit against us.

They do believe there was negligence in the Intensive Care Unit right after she returned from her second surgery. Mrs. Chapman maintains that the patient had been seizing for five minutes and that this was not recognized by the nurses. This is at variance with the nursing story and certainly with the records. If indeed she had been seizing a long time before her actual cardiac arrest occurred, this would tend to implicate a cerebrovascular insult before her cardiac arrest. This little girl, as you know, remains a very hopeless neurologic cripple. The parents are concerned about the continued expense they have in the care of this young lady plus the fact that should anything happen to the mother, which nearly did occur when she was in an automobile accident, there would be no one to care for Jennifer.

I don't know just exactly what action the Chapman's intend to take, but I think we should notify our legal council. I, likewise, would like to turn over to them my personal records on Jennifer and would like an opinion as to whether or not this should be turned over to them. I don't believe there is anything in the record that they would not be welcome to see. Actually, we don't have anything to hide. This has been a real tragedy for this beautiful little girl and I am sympathetic and can understand the parents feelings in this regard.

Sincerely yours,



L. GEORGE VEASY, M.D.

LGV/dm

EXHIBIT "B"

Don Poulter did not file this letter

FILED
UNITED STATES
DISTRICT COURT
DISTRICT OF UTAH

AUG 9 1 58 PM '82

PAUL L. BADGER
CLERK

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

MAXINE WHEATON,

Plaintiff,

-vs-

JOSEPH E. JACK, M.D.,

Defendant.

MEMORANDUM DECISION
AND ORDER

Civil No: C-82-0039

This matter is before the court on plaintiff's motion to strike defendant's defense that this action is barred by the applicable statute of limitations. This motion was argued June 7, 1982. W. Brent Wilcox represented the plaintiff and Francis J. Carney represented the defendant. Following the hearing, the court took the matter under advisement and has since reviewed the memoranda of counsel, the authorities cited therein and other relevant material. Based upon the foregoing, the court renders the following decision.

On or about March 7, 1966 defendant performed major surgery on plaintiff in order to relieve plaintiff's upper abdominal pain with radiation of the back and substernal distress in the form of heartburn and acid indigestion. Plaintiff alleges that the surgery was unnecessarily and negligently performed and that this was fraudulently concealed from plaintiff. Plaintiff apparently became aware of this sometime during July of 1981. According to Utah's statute of limitation for malpractice actions against health care providers, a case of this nature, absent the claim of fraudulent concealment, must be "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" Utah Code Ann. § 78-14-4(1) (hereinafter referred to as "§ 78-14-4").^{1/} Therefore, absent the concealment claim, the latest this case could have been commenced was March 1970. If this were a case where the surgeon wrongfully left a foreign object in the patient's body, the limitation period would not foreclose the action until "one year after the plaintiff or patient discover[ed], or through the use of reasonable diligence should have discovered, the existence of the foreign object" Utah Code Ann. § 78-14-4(1)(a). Plaintiff argues that these two provisions arbitrarily and unreasonably discriminate between those who are injured by foreign objects left in the patient's body by health care providers and those who suffer other injuries at the hands of health care providers. The claim is that this violates the equal protection clause of the Fourteenth Amendment of the United States Constitution and sections 2 and 24 of article I of the Utah Constitution.^{2/} Plaintiff also argues that, although wrongful death is not an element of this case, § 78-14-4 is unconstitutional because it, in violation of equal protection, discriminates between claimants for wrongful death caused by health care providers and claimants for wrongful death

^{1/} Although referred to as a statute of limitation, § 78-14-4 is both a statute of limitation and a statute of repose. The two year period is a statute of limitation in that it procedurally limits the time in which a suit may be filed but does not determine the substantive right to bring the suit in the first place. The four year period is a statute of repose in that it cuts off any right of action after passage of a certain period of time. This in essence is a substantive determination of a right to bring an action. Turner, The Counter-Attack to Retake the Citadel Continues: An Analysis of the Constitutionality of Statutes of Repose in Products Liability, 46 J. Air L. & Com. 449, 476 (1981).

^{2/} Sections 2 and 24 of art. I of the Utah Constitution are essentially equal protection provisions which read as follows:

"All political power is inherent in the people; and all free governments are founded on their authority for equal protection and benefit, and they have the right to alter or reform their government as the public welfare may require." Utah Const. art. I § 2.

"All laws of a general nature shall have uniform operation." Utah Const. art. I § 24.

caused by other tortfeasors. Under the repose provision of § 78-14-4, see, n. 1 supra, health care providers liable in wrongful death actions cannot be sued more than four years after the death regardless of whether the fact of death or its cause has been ascertained. Any other tortfeasor, according to plaintiff, and in reliance on Myers v. McDonald, 635 P.2d 84 (Utah 1981), remains liable for wrongful death until two years after the discovery of the fact and circumstances of the death. Plaintiff's final argument is that the four year repose provision of § 78-14-4 denies her the right of access to the courts in violation of equal protection and Utah Const. art. I § 11 which provides that "[a]ll courts shall be open and every person, for any injury done to him . . . shall have remedy by due course of law, which shall be administered without denial. . . ."

The correct standard for equal protection analysis to be applied to the facts of this case under both the United States and Utah Constitutions is the minimal scrutiny or rational basis test. McGowan v. Maryland, 366 U.S. 420 (1961); Leetham v. McGinn, 524 P.2d 323, 325 (Utah 1974); Hansen v. Public Employees Retirement System, 122 Utah 44, 246 P.2d 591 (1952). Under this test the courts

ask only whether it is conceivable that the classification bears a rational relationship to an end of government which is not prohibited by the Constitution. So long as it is arguable that the other branch of government had such a basis for creating the classification the Court will not invalidate the law.

J. Nowak, R. Rotunda, J. Young, Constitutional Law 524 (1978).

In Foil v. Ballinger, 601 P.2d 144 (Utah 1979), the Utah Supreme Court in discussing what § 78-14-4(1) meant by "discovery of the injury" commented that "[w]e see no basis for making a legal distinction between having no knowledge of an injury . . . and no knowledge that a known injury was caused by unknown negligence." Id. at 148. Arguably, the statute makes such a distinction when liability for a "foreign

objects" injury exists until one year after the date of discovery while liability for any other type of medical malpractice injury whose cause is undiscovered is absolutely cut off after four years. It must be remembered that Foil dealt with the running of the two year period of § 78-14-4 and not the absolute four year bar provided in the same section. The Foil court was not called upon to determine whether there is a rational basis for making such a distinction under the four year rule. However, the court acknowledged the four year maximum period and implied that such a provision was necessary to protect health care providers "from claims against which it may be difficult to defend because of the lapse of time," particularly in light of the more liberal discovery rule adopted in that case. Id. at 149.

Plaintiff further questions the propriety of tolling the time in which a person injured by "foreign object" malpractice can initiate a suit until the injury is discovered but not doing so for those who suffer a different type of injury. Both questions are subsets of a larger issue: is there a rational basis for distinguishing between those injured by "foreign object" medical malpractice and those injured by another form of medical malpractice.

In Allrid v. Emory University, 285 S.E.2d 521 (Ga. 1982), the court was faced with a similar statute and the same question. The court found the statute to be constitutional as bearing a fair and substantial relation to a legitimate legislative objective.

The purpose of the legislature in making a distinction between the two types of medical malpractice was to allow the plaintiff's claim which does not rest on professional diagnostic judgment or discretion to survive until actual discovery of the wrongdoing. In such situations, the danger of belated, false or frivolous claims is eliminated. The foreign object in the patient's body is directly traceable to the doctor's malfeasance.

Id. at 524; see, Comment, An Analysis of State Legislative Responses to the Medical Malpractice Crisis, 1975 Duke L.J.

1417, 1435-1436 (1975). The very nature of the two injuries provides a rational basis for treating them differently. By drawing such a distinction, the Utah legislature limited the potential for frivolous and undeserving claims to be asserted thereby reducing the ultimate cost of health care via medical malpractice insurance premiums and hopefully improving patient care by reducing a health care providers fear that the patient is a potential adversary, Utah Code Ann. § 78-14-2, This is accomplished while preserving those claims which are obviously legitimate. This statute was enacted in an effort to combat the crisis of ever increasing medical costs which has existed in this country and this state for several years. This is a legitimate state interest which the statute is designed to achieve. The distinction drawn by Utah Code Ann. § 78-14-4 between those who suffer by reason of a foreign object medical malpractice and those who suffer from other medical malpractice is not unreasonable nor arbitrary and is therefore constitutional.

The distinction created by § 78-14-4 between claimants for wrongful death caused by health care providers and claimants for wrongful death caused by non health care providers is not unconstitutional. Plaintiff misconstrues the holding of Myers v. McDonald, 635 P.2d 84 (Utah 1981). Myers specifically recognizes that in cases of wrongful death caused by someone other than a health care provider "a cause of action accrues upon the happening of the last event necessary to complete the cause of action." Id. at 86. The court went on to say that the statute was tolled until the fact of death was discovered. They did not rule that the statute was tolled until the cause was discovered. Furthermore, Myers was limited to the facts of that case. Therefore, wrongful death outside the Health Care Malpractice Act and wrongful death within the act are both subject to limitation periods of two years. Utah Code Ann. § 78-12-28(2). The only time a claimant for wrongful death who falls outside of § 78-14-4 is treated more favorably than one who is covered

thereby is in the rare situation when the fact of death is unknown. Even this limited distinction is not unconstitutional.

The Utah Supreme Court has expressly held that the creation of a special statute of limitations for health care providers does not violate equal protection under the Utah Constitution. Allen v. Intermountain Health Care, Inc., 635 P.2d 30 (Utah 1981). Although Allen involved a personal injury claim rather than wrongful death and was based only upon Utah Const. art. I § 24, the equal protection analysis of that case is directly applicable to this case under both sections 2 and 24 of art. I of the Utah Constitution and the Fourteenth Amendment to the United States Constitution. Allen effectively outlines the legitimate state interests to be achieved by the act which have been discussed supra, and explains that the act is reasonably calculated to achieve those interests which has also been discussed supra. The absolute four year bar established by § 78-14-4 is not unconstitutional on the basis of equal protection.

Although the Utah Supreme Court held in Allen that § 78-14-4 was constitutional, they were dealing only with the two year statute of limitation and not the four year statute of repose and were not faced with the question of denial of access to the courts (sometimes referred to as open courts).

In a concurring opinion in Myers, Justice Howe suggests that a claimant may unconstitutionally be denied access to the courts when he is foreclosed from suing even before the injury is ascertainable.

There is merit to the position of refusing to make an exception to plain wording of the statute which makes no allowance for the legal disability of a child, or in this case, for learning of the death after the statute of limitations had run. We should be careful not to encroach upon legislative prerogative. However, there may well be a denial of constitutional rights in foreclosing persons from access to the court under these unusual circumstances.

Myers v. McDonald, 635 P.2d at 88 (Howe, J., concurring).

This is the most that has ever been said by the Utah courts on this matter.

Several other states have found similar statutes to be constitutional but, like Allen, they were not faced with the question of access to the courts. See, e.g., Anderson v. Wagner, 79 Ill. 2d 295, 402 N.E.2d 560 (1979); Landgraff v. Wagner, 26 Ariz. App. 49, 546 P.2d 26 (1976); Dunn v. Felt, 379 A.2d 1140 (Del. Super. 1977) (dealth with due process but not access); Owen v. Wilson, 260 Ark. 21, 537 S.W.2d 543 (1976).

Georgia, on the other hand, was faced with the access question but both the movant and the court treated it as a due process claim. Allrid, 285 S.E.2d at 525. It has long been recognized that due process deals with accrued rights. Pritchard v. Norton, 106 U.S. 124, 132 (1882). It does not prevent a legislature from abrogating an unvested right. Silver v. Silver, 280 U.S. 117, 122 (1929). Once the Allrid court found the right in question to be unvested its abrogation did not violate due process. However, this court questions the propriety of treating due process and access as the same, at least in states that have both a due process provision and an access provision in their constitution. To do so would ignore the express language of the provisions and create a redundancy. Note, The Utah Product Liability Limitation of Action: An Unfair Resolution of Competing Concerns, 1979 Utah L. Rev. 149, 156 n.42 (1979)

Although the effect of a state constitutional open court mandate on statutes of repose is uncertain in the medical malpractice area, it has been extensively discussed in the area of building construction. Several states which have identical or similar access provisions as Utah, have found their statutes of repose to be constitutional. See,

e.g., Freezer Storage, Inc. v. Armstrong Cork Co., 476 Pa. 270, 382 A.2d 715, 721 (Pa. 1978); Reeves v. Ille Electric Co., 170 Mont. 104, 551 P.2d 647, 650-51 (1976); Joseph v. Burns, 491 P.2d 203, 207-08 (Ore. 1971). A reading of these cases reveals that they, like Allrid, improperly treated access as a due process claim.

Utah too has found such a statute to be constitutional. Good v. Christensen, 527 P.2d 223, 225 (Utah 1974). However, the court did not provide any analysis nor did they identify the basis of the constitutional challenge. They stated only the following: "[t]he plaintiffs also attack the constitutionality of the statute, but the claim is without merit." Id. As such, the case is of no benefit in deciding the issue before this court.

Both Florida and Kentucky have addressed the access question and properly treated access as a distinct guarantee separate from due process. Both states found that the statutes of repose in question unconstitutionally denied access to the courts. Overland Construction Co., Inc. v. Sirmons, 369 So.2d 572 (Fla. 1979); Saylor v. Hall, 497 S.W.2d 218 (Ky. 1973). The difference between these cases and those that find statutes of repose constitutional is the finding that the guarantee of open courts applies to the legislature as well as the courts coupled with the treatment of access as something different than due process. Turner, The Counter-Attack to Retake The Citadel Continues: An Analysis of the Constitutionality of Statutes of Repose in Products Liability, 46 J. Air L. & Com. 449, 474-75 (1981). Once it is determined that access applies only to the courts, the legislatures are bound only by the principle of due process. As discussed supra, the legislatures are then free to abolish any right which has not yet vested or is not protected by the constitution. Even if the open courts guarantee is found to be applicable to legislatures the ensuing result

would be the same if the guarantee is treated like due process.

It has already been stated that this court views due process and access as being two distinct guarantees. The question then becomes whether the access guarantee of the Utah Constitution applies to the Utah legislature. This question has been answered affirmatively. Brown v. Wightman, 47 Utah 31, 151 P. 366, 366-67 (1915); Lewis v. Pingree National Bank, 47 Utah 35, 151 P. 558, 565 (1915). These two conclusions place Utah on the side of Florida and Kentucky. This however does not ipso facto mean that § 78-14-4 unconstitutionally denies certain claimants access to the courts.

The Supreme Court of Florida recognized that the requirements of society, and the ever-evolving character of the law make an absolute prohibition against legislative change untenable. Kluger v. White, 281 So.2d 1, 4 (Fla. 1973). Balancing this against the open courts guarantee they have held that

'the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such a right, and no alternative method of meeting such public necessity can be shown.'

Overland Construction Co., Inc. v. Sirmons, 369 So.2d at 573.

This is the standard to be used in determining whether § 78-14-4 is unconstitutional.

Section 78-14-2 of the Utah Code sets forth the purpose of the Health Care Malpractice Act and the legislative findings and declarations relating thereto. In passing the act, the legislature was responding to a medical malpractice crisis that was causing the cost of health care to increase to the point that it threatened to be available only to the rich. Comment: An Analysis of State Legislative Responses to the Medical Malpractice Crisis, 1975 Duke L.J. 1417 (1975). The legislature also found

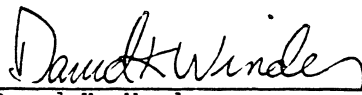
that the quality of that care had diminished because health care providers, in response to the numerous suits being filed, were practicing defensive medicine rather than providing the best care possible. The overpowering public necessity of making available the best health care possible justifies the abolition of the right to access to the courts in medical malpractice cases four years after the occurrence of the act, omission, neglect or occurrence which caused the injury. The legislature balanced the conflicting interests and determined that there was no less onerous alternative for alleviating the crisis. Therefore, § 78-14-4 does not violate article I, section 11 of the Utah Constitution.

Although this court finds § 78-14-4 to be constitutional, this case cannot be dismissed. An exception to the statute is provided when health care providers fraudulently conceal their negligence as has been alleged by plaintiff. Utah Code Ann. § 78-14-4(1)(b). Whether or not defendant fraudulently concealed the alleged negligence is a fact question which cannot be decided on the record before this court.

Accordingly,

IT IS ORDERED that plaintiff's motion to strike the third defense of defendants answer is denied.

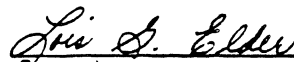
Dated this 9th day of August, 1982.


David K. Winder
United States District Judge

Mailed a copy of the foregoing Memorandum Decision and Order to the following named counsel this 9th day of August, 1982.

W. Brent Wilcox, Esq.
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Secretary