

1986

Jennifer Chapman, by and through her guardian,
Teresa Chapman, Robert Chapman and Teresa
Chpman, 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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DOCKET NO.

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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,

vs.

PRIMARY CHILDREN'S HOSPITAL,
a hospital organized to do
business in the State of Utah,
et al.,

Defendant-Respondent.

Appeal No. 860230

RESPONDENT'S BRIEF

Appeal From The Judgment Of The Third Judicial District Court
Of Salt Lake County, State Of Utah
The Honorable Homer F. Wilkinson, presiding

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FILED

Clerk, Supreme Court, Utah

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CHAPMAN, ROBERT CHAPMAN, and :
TERESA CHAPMAN, individually, :

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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, was barred by the provisions 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 THE CASE

This case involves a suit initiated by appellants (plaintiffs) on or about October 8, 1985, alleging medical malpractice against respondents (defendants). Plaintiffs claim that the defendants committed malpractice more than twelve years prior to the date the action was filed, but alleged that the statute of limitations should be tolled because of the 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.

On or about December 16, 1985, defendant Garth Myer, M.D., filed a motion to dismiss which was subsequently treated by the lower court as a motion for summary judgment. On or about December 17, 1985, defendants L. George Veasy, M.D., Karen Bowman, R.N., and the hospital defendants moved for

summary judgment and dismissal. These motions were all heard before the Honorable Homer F. Wilkinson on February 5, 1986.

At that hearing, argument was heard from the respective counsel. Counsel for defendants argued that plaintiffs' cause of action could not be sustained under the statute of limitations provision of the Utah Health Care Malpractice Act. Plaintiffs argued that the statute of limitations should be tolled. After hearing the arguments, the matter was taken under advisement by Judge Wilkinson who later granted defendants' motions for summary judgment and dismissal. Plaintiffs' appeal followed.

STATEMENT OF FACTS

Jennifer Chapman 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. 8-9; A. 2.)

On or about February 14, 1973, an operation was performed by a doctor who was not a named defendant to install a "Waterston Shunt." 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. 9; A. 2-3.)

Although the second operation was successful, Jennifer suffered a cardiac arrest a few hours after the

operation. Resuscitative efforts saved Jennifer's life, but it was determined immediately thereafter that she had sustained severe and irreversible brain damage. Defendant Garth Myer, M.D., first became acquainted with Jennifer and her family the day following the cardiac arrest, and had no involvement whatsoever in either the shunt operations or in any treatment before or during the time the brain damage occurred.

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 her condition. These facts are supported by the affidavit of Dr. Veasy and were not disputed by plaintiff in either the court below or in their Appellant's Brief filed in this Court. (A. 3; A. 7-8.)

Between November of 1977 and July of 1985, plaintiffs conferred with at least five different attorneys before finding their present counsel became involved. None of the above-mentioned attorneys filed suit or notices of intent to commence a malpractice action. (A. 8-9.) 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. The Court subsequently granted summary judgment in favor of all defendants.

SUMMARY

Defendant Myers argues herein that he was not involved in the alleged acts of negligence which plaintiffs claim constitute the basis for their cause of action. Defendant Myer was not involved in either of the operations preceding Jennifer Chapman's coronary arrest, nor in the resuscitative efforts following that coronary arrest. Indeed, he did not become involved until the day after the coronary arrest, after the brain damage suffered by Jennifer had already been done.

Defendant further points out that clear and convincing evidence exists that plaintiffs had considerable correspondence with defendant Veasy in the months and years following Jennifer's coronary arrest. As testified to by Dr. Veasy, the plaintiffs indicated to him that they felt negligence on the part of the hospital and its staff was a cause of Jennifer's brain damage. Therefore, it is clear that the plaintiffs did have notice of a possibility of a lawsuit and the possibility of negligence on the part of hospital employees, and cannot now claim that they were not aware of facts to support the possibility of a lawsuit.

Defendant has also argued herein that although plaintiffs have alleged that "defendants" acted to fraudulent conceal information they needed to know of to initiate a

lawsuit, they have only offered facts that tend to show they spoke with one single defendant -- Dr. Veasy. There are absolutely no factual allegations whatsoever to support a claim that defendant Myers did or said anything that could be construed to be fraudulent concealment. As discussed herein, Utah courts have consistently held that in any action based on fraud, the substance of the acts constituting the fraud must be stated with particularity. In this action, plaintiffs have not suggested even one act committed by defendant Myer that might have been fraudulent concealment. In short, plaintiffs have not supported a factual basis to support such a claim against defendant Myer.

Finally, it is alleged herein that the Utah Health Care Malpractice Act and its statute of limitations do not violate constitutional protections. The cases that have addressed this issue have clearly held that the act does not deny rights protected by the equal protection clause of the Constitution, nor does it unconstitutionally deprive minor plaintiffs of access to the courts.

ARGUMENT

POINT I

DEFENDANT MYER DID NOT PARTICIPATE IN EITHER THE ALLEGED
NEGLIGENT ACTS OR THE FRAUDULENT CONCEALMENT CLAIMED
BY PLAINTIFFS.

In the present action, plaintiffs have claimed that negligence on the part of the defendant hospital and its

staff caused the brain damage suffered by Jennifer Chapman. Plaintiffs claim that a heart-monitoring machine malfunctioned or was improperly read in the hospital at the time that Jennifer Chapman suffered a coronary arrest. Plaintiffs allege that the delay in providing proper resuscitative measures led to a lack of oxygen which subsequently caused permanent brain damage.

Defendant Myer stresses to this Court that he was not involved in either of the shunt operations, or with any of the treatment or supervision at the time that Jennifer Chapman suffered her coronary arrest. Defendant did not even become involved in this matter until the day following Jennifer Chapman's coronary arrest. By that time, the severe and irreparable brain damage claimed by plaintiffs had already been done. Dr. Myer only treated Jennifer following the discovery that she had apparently suffered the above-mentioned damage. Although this fact was stressed to the Court by defendant Myer in a motion for summary disposition, plaintiffs filed a response to that motion alleging that Dr. Myer may still somehow be liable.

In their Appellants' Brief, plaintiffs have alleged that "defendants misrepresented the cause of the plaintiffs' injuries and the plaintiffs' family did not know of Jennifer Chapman's 'legal injury' until July of 1984, and the statute of limitations did not commence running until that time." (Appellants' Brief at p. 14.) This defendant asks the Court to carefully review the pages following this allegation and to

also review those affidavits submitted as support for appellants' brief. On page 15, plaintiffs allege that they:

Had been told by the defendants that the injuries were caused by blood clots and unavoidable injury which was surely, in the eyes of the Chapmans, an act tantamount to an act of God. They were further falsely told that the hospital records and 'tests' confirmed these facts, and that Dr. Veasy 'knew for a fact' that the blood clots had caused her injury.

(pp. 15-16.)

However, the affidavit signed by Teresa Chapman herself clearly states:

I believed that Dr. Veasy, the head of cardiology at the defendant hospital, spoke for the hospital as well as himself during our meetings with him. He represented to my husband and I that there were tests and records which indicated that the cause of our daughter's injuries was a blood clot or shower of blood clots that flooded her brain and that he 'knew for a fact' that the blood clots had caused her injury. In addition, he said that this event was unavoidable and had nothing to do with any negligence on the part of anyone.

Plaintiff further stated in her affidavit as follows:

These [hospital] records were therefore in direct conflict with the statements of Dr. Veasy to us.

In July of 1984, my husband and I confronted Dr. Veasy about the medical records and their conflict with his previous statements to us. He replied that the true cause of Jennifer's injuries had never been established and he admitted that his prior statements to us on this subject were assumptions on his part and not the result of tests which had been performed on Jennifer.

As can be clearly seen, the only support which plaintiffs claim as a basis for their allegations that

information was fraudulently concealed are alleged statements made by Dr. Veasy. Nowhere, either in the affidavits submitted by plaintiffs or in the memoranda filed with the lower court and this court, do plaintiffs offer any factual basis whatsoever as support for their allegation that defendant Myer had anything to do with the alleged "fraudulent concealment." However, even though plaintiffs themselves admit that only defendant Veasy made the statements they allege to be "fraudulent concealment," they nonetheless continue to state that:

Respondents informed Teresa and Robert Chapman that hospital records and tests indicated that Jennifer's brain damage was due to unavoidable blood clots and could not be attributed to the negligence of anyone.

(Appellants' Docketing Statement, p. 4.) In short, there was absolutely no proof whatsoever before the Court below that defendant Myer did or said anything that could be construed as fraudulent concealment. Indeed, no evidence exists before this Court that such is the case. Plaintiffs cannot now, for the first time, allege for the purposes of this appeal that defendant Myer did indeed do something that might be construed as concealment.

The "fraudulent concealment" exception to the statute of limitations provisions of the Utah Health Care Malpractice Act clearly states as follows:

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 claims 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.

(U.C.A. §78-14-4(1)(b.) As can clearly be seen by this statute, it is not enough that a health care provider affirmatively acts to conceal misconduct. The statute requires that the patient be prevented from discovering misconduct on the part of a health care provider "because that health care provider has affirmatively acted to fraudulently conceal" As mentioned above, in the present action, the only claims made by plaintiffs, and the only evidence and factual allegations submitted to support such claims, indicate that the only statements made which could possibly be construed as "fraudulent concealment" were made by defendant Veasy, not by defendant Myer.

POINT II

PLAINTIFFS CANNOT CLAIM FRAUDULENT CONCEALMENT IN THIS ACTION.

Rule 9(b), Utah Rules of Civil Procedure, clearly states that "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." (Emphasis added.) The Utah Supreme Court has interpreted this rule on several occasions. First, plaintiffs cannot assert that the requirement of Rule 9(b) does not apply to this action. In the case of Williams v. State

Farm Ins. Co., 656 P.2d 966 (Utah 1982), the Utah Supreme Court addressed the above-cited rule and held as follows:

"Fraud" or "fraudulent" are terms of uncertain meaning. They are conclusions that must be flushed out by elaboration and by consideration of the context in which they are used. This is why Rule 9(b) requires that the circumstances constituting fraud "shall be stated with particularity" a requirement we have construed to require allegation of the substance of the acts constituting the alleged wrong. The Rule 9(b) requirement should not be understood as limited to allegations of common-law fraud. The purpose of that requirement dictates that it reach all circumstances where the pleader alleges the kind of misrepresentations, omissions, or other deceptions covered by the term "fraud" in its broadest dimension. Consequently, if the pleading had merely alleged that the insured had given "fraudulent" or "deceptive" or "misrepresenting" answers, it would have been insufficient.

Id. at 972 (emphasis added.) In the present action, it is clear that Rule 9(b) applies.

This Court has also set forth other requirements for cases containing allegations of fraudulent conduct. In Pace v. Parrish, 122 Utah 141, 247 P.2d 273 (1952), the court held that the "essential elements" of an action based on fraudulent misrepresentations were:

- (1) That a representation was made; (2) Concerning a presently existing material fact; (3) Which was false; (4) Which the representer either (a) knew to be false or (b) made recklessly, knowing that he had insufficient knowledge upon which to base such representation; (5) For the purpose of inducing the other party to act upon it; (6) That the other party, acting reasonably and in ignorance of its falsity; (7) Did in fact rely upon it; (8) And was thereby

induced to act; (9) To his injury and damage.

(Id. at 274-75).

In Heathman v. Hatch, 13 Utah 2d 266, 372 P.2d 990 (1962), the Court added to this when it held:

It is to be noted that the terms 'fraud,' 'conspiracy' and 'negligence' are but general accusations in the nature of conclusions of the pleader. They will not stand up against a motion to dismiss on that ground. Basic facts must be set forth with sufficient particularity to show what facts are claimed to constitute such charges.

Id. at 991. (Emphasis added.)

In the present action, plaintiffs did not claim the necessary elements of fraud. Even if their general allegations of "fraudulent concealment" could somehow be construed to fulfill that requirement, none of the documents filed with the Court meets the requirement that the "substance of the acts" be set forth with sufficient particularity to show what facts are claimed to constitute and support the allegations made.

Although the above-discussed deficiencies are true as to all defendants, defendant Myer again stresses that they are especially true as to him. No acts are set forth, and no facts whatsoever are given to support plaintiffs' claim that defendant Myer participated in fraudulent concealment. Although plaintiffs attempt to use a catch-all that "the defendants fraudulently concealed information," that claim is not made specifically to defendant Myer and no facts whatsoever are given to support such an allegation as to him.

Therefore, the lower court's granting of defendant Myer's motion to dismiss was completely proper.

POINT III

PLAINTIFFS HAD ADEQUATE NOTICE OF THEIR POTENTIAL CLAIM.

Attached to this brief is a copy of a letter from plaintiff Robert Chapman to defendant Veasy. In that letter, plaintiff acknowledges that "I am not seeking to destroy any doctors or put a hospital out of business." Mr. Chapman then continues as follows:

Now I am well aware that I am not qualified medically or legally to answer all of 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[sic], 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.

(A. 17-18.)

This letter, written in 1977, clearly indicates that Mr. Chapman felt at that time that the cause of his daughter's handicaps was certain acts of negligence in her early life. In the affidavits submitted by the plaintiffs, they further stated:

About ten to fifteen minutes after leaving Jennifer's room, I returned to visit her again. Several nurses were in the room. Jennifer looked peculiar to me but I

believed the nurses were on top of the situation since they were standing with me by her bedside observing her. One of the nurses was working with the heart monitoring machine which was attached to Jennifer. The entire time I was in the room, the nurse kept fighting with the electrode leads on Jennifer's chest. After ten to fifteen minutes had passed, the nurse told me that an alarm on the heart monitor machine was sounding. She told me that the machine was not set properly and that she would have to get someone to help her set it. Before she left the room, I asked her whether the anesthetic was making Jennifer look peculiar. She then examined Jennifer and told me that Jennifer was in cardiac arrest. At that point, she signaled for help and other doctors and nurses arrived shortly.

(A. 21.) It is clear that the plaintiffs felt something was wrong at the time of the alleged negligence by the hospital and its personnel. As stated by the attached exhibit of defendant Veasy, the plaintiffs had "many discussions and considerable correspondence" with him during the months and years immediately following the episode in 1973 which left her impaired. Dr. Veasy further testified that "on several occasions they have alleged that medical negligence during her hospitalization at Primary Children's Medical Center in February of 1973, caused Jennifer's impaired condition." (A. 7.)

Thus, from the facts of the case, the plaintiffs' own admissions and the affidavit filed by defendant Veasy, it is clear that plaintiffs were well aware of the facts which they finally relied on in 1984, as a basis for their suit. Defendant calls the Court's attention to the case of Reiser v. Lohner, 641 P.2d 93 (Utah 1981), in which the plaintiff,

as the plaintiffs in this action have done, claimed that he was not aware of the "legal injury" until after the statute of limitations had run. The court, however, held as follows:

Mr. Riser filed an affidavit wherein he asserted a belief that his wife's disorders were temporary and that he did not become aware of any permanent damage until June, 1972. Such declaration of his belief was not sufficient to raise an issue of fact. Furthermore, the very acknowledgement that his wife was suffering disorders as a result of the incident (whether temporary or permanent) would show that plaintiffs should have known that they had suffered legal injury at the time of the cardiac arrest.

Id. at 100 (Emphasis added). In the present action, such is the exact case. The plaintiffs' affidavits acknowledge that there was something "peculiar" before it was realized that their daughter was in cardiac arrest, and further acknowledged that they were informed of and knew that she had suffered a cardiac arrest and had also suffered permanent and irreversible brain damage. That knowledge was had by plaintiffs immediately after their daughter's cardiac arrest in 1973. Therefore, the plaintiffs' cause of action in this case is barred under the clear provisions of the Utah Health Care Malpractice Act.

POINT IV

PLAINTIFFS HAVE ERRED IN CLAIMING THAT THE STATUTE OF
LIMITATIONS WAS TOLLED BY ESTOPPEL AND A CONTINUING
PHYSICIAN/PATIENT RELATIONSHIP.

On page 18 of their Appellants' Brief, plaintiffs have stated that under the doctrine of estoppel, defendants should be "estopped from asserting the statute of limitations as a defense." Such a claim is completely unsupported by either statute or case law. By making such an allegation, plaintiffs attempt to skirt the clear provisions of the Utah Health Care Malpractice Act. That Act already 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 claims 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.

The above-cited statute fully incorporates the elements of estoppel and takes into account that if there is fraudulent concealment, the plaintiff has obviously relied on the acts of the defendant to his or her detriment.

In their Appellants' Brief, plaintiffs have cited to the case of Rice v. Granite School District, 23 Utah 2d 22, 456 P.2d 159 (1969), for the proposition that "a defendant is estopped from pleading the statute of limitations where the defendant has concealed the existence of material facts which

would put the plaintiff on notice of a cause of action." Plaintiffs completely err in asserting that the facts of Rice apply to the present matter. In the Rice case, an insurance adjuster for the defendant had contacted the plaintiff and "advised her that she would be compensated for her damages as soon as the costs thereof were ascertained." The court also noted that "she was reassured that the insurance company would accept responsibility and that she was not to worry." Id. at 161.

The court further explained that "the question of whether negotiations for the compromise of a claim or debt will give rise to an estoppel against pleading the statute of limitations depends upon the character of the negotiations and the circumstances surrounding the parties." Id. at 163. The court then cited to the case of North v. Culmer, 193 So. 2d 701 (Fla.App. 1967), where a court had held that "acts or conduct which wrongfully induce a party to believe an amicable adjustment of his claim will be made may create an estoppel against pleading the statute of limitations." Id.

In the present action, there was obviously no "admission of liability" or "assurance that the defendants would accept responsibility." To the contrary, plaintiffs' own affidavits indicate that defendant Veasy informed them that he did not feel their daughter's injuries were the result of anyone's negligence. The clear provisions of the Utah Health Care Malpractice Act supersede any general notions of estoppel and are clearly controlling in this case. The statute of

limitations in that Act clearly encompasses any and all elements of estoppel that could be claimed by plaintiffs in this action.

The plaintiffs also err in claiming that the statute of limitations is tolled during a continuing relationship between a patient and a physician. Defendant Myer is unclear whether this argument of plaintiffs applies to him since plaintiffs, in their appellants' brief, have only stated that "since it was uncontested that . . . the Chapmans maintained physician/patient relationships with Dr. Veasy and the hospital until March or April, 1985, this fact should have been dispositive below since the statute of limitations under such circumstances would not begin to run until March or April, 1985. . . ." Because the physician/patient relationship between defendant Myer and the Chapmans terminated much earlier than the dates mentioned, defendant Myer assumes that this argument does not apply to him. However, to the extent that plaintiffs might argue it does apply, defendant Myers offers the following.

As support for plaintiffs' novel suggestion regarding the tolling of a statute by a continuing physician/patient relationship, plaintiffs have cited the case of Pateler v. Robison, 81 Utah 535, 17 P.2d 244 (1932). Although the Pateler case does discuss the effect of a continuing patient/physician relationship, plaintiffs have misstated the applicability of that case to the present action. In Pateler, the court specifically noted:

From the time he undertook to treat the case until he ceased to treat it, he, as alleged, did so in a negligent and unskillful manner. As alleged, the treatments were not separate and distinct acts, separate and distinct causes of action. They constituted an entire course of treatment of a case undertaken by defendant to be treated by him, and the whole thereof constituted but one cause of action.

Id. at 249. As mentioned above, defendant Myer had absolutely nothing to do with the operations or actions preceding or during Jennifer Chapman's coronary arrest. His actions were completely "separate and distinct acts" and cannot be considered with the acts of other defendants to form "one cause of action."

Defendant must strenuously object to plaintiffs' claim that "tolling the statute of limitations during the existence of this fiduciary relationship is in line with the majority of jurisdictions" Plaintiffs have cited 61 Am.Jur. 2d Physicians and Surgeons, §185, p. 312. However, that annotation deals only with implied consent either expressed or implied, and has nothing whatsoever to do with the tolling of the statute of limitation by the existence of a fiduciary relationship. To the contrary, many cases have held that such continuing treatment does not toll the statute of limitations. See, 80 A.L.R. 2d 368, 385 and supplement thereto. In any event, the principle suggested by plaintiffs cannot apply where a plaintiff either discovers, or through the use of reasonable diligence should have discovered, the injury and voluntarily continues to be treated by the physician

in question. Furthermore, it is clear that this principle does not apply to defendant Myer because the "continuing relationship" principle only applies when the doctor who continues the treatment was the one who originally committed acts of negligence. As mentioned above, defendant Myer had nothing to do with the alleged acts of negligence which plaintiffs claim formed the basis for their cause of action in this case.

POINT V

THE UTAH HEALTH CARE MALPRACTICE ACT AND ITS STATUTE OF LIMITATIONS DO NOT VIOLATE CONSTITUTIONAL PROTECTIONS.

A. Utah Code Ann. Section 78-14-4(2) does not deny rights protected by the equal protection clause of the Constitution.

Appellants in this action argue that the medical malpractice statute of limitations is unconstitutional as applied to minors. In making this argument, the appellants rely almost exclusively on the case of Scott v. School Board of Granite School District, 568 P.2d 746 (Utah 1977). While the appellants admit that in response to the Scott decision, the Utah Legislature amended the language of Section 78-14-4(2), they continue to argue that the amendment was to no avail and that the statute should still be found unconstitutional today. This argument has been summarily rejected by courts, including the United States District Court for the District of Utah. In Hargett v. Limberg, 598 F. Supp. 152 (D. Utah 1984), the District Court stated that:

The legislative history of this language (Utah Code Ann. Section 78-14-4(2)) indicates that it was added as an amendment in direct response to the Utah court's pronouncement in Scott of the general policy favoring protection of the causes of minors. In view of the express language of the statute and the legislative history, plaintiffs' argument that Mrs. Hargett's discovery of the legal injury does not bar Nathaniel's claim must be rejected.

Hargett, 598 F. Supp. at 154.

The Hargett court went on to quote part of the floor debate which resulted in the amendment to Section 78-14-4(2). At the floor debate prior to the third reading of H.B. 164, representative C. DeMont Judd stated:

[W]e come to you now with the amendment which suggests that, despite what it says in 78-4, it does not impact 78-12 which is another area of the statute of limitations, and so we are making that change in order to overturn a Supreme Court decision which has recently come down.

(Transcripts of discussion and vote in Utah House of Representatives at third reading of H.B. 164 (February 13, 1979)).

It is clear that the Utah Legislature's intent was to put adults and infants on the same footing with respect to the statute of limitations. As stated in Hargett, "it is universally accepted that a legislature may put adults and infants on the same footing with respect to statutes of limitations without affecting constitutional rights." See, e.g., Petri v. Smith, 453 A.2d 342 (Pa.Super. 1982); De Santis v. Yaw, 434 A.2d 1273 (Pa.Super. 1981); 51 Am.Jur.2d, Limitations of Action, Section 192 (1970).

It must be noted that the Supreme Court of Utah has recently rejected an attack based on the equal protection clause similar to that made by the appellant in this case. In Allen v. Intermountain Health Care, 635 P.2d 30 (Utah 1981), the court set forth the test to be applied in making the determination of whether a statute violates the equal protection clause:

The test to be applied in making such a determination is whether there exists a rational basis to treat health care providers differently from other alleged tort-feasors.

Id. at 31.

The court further identified the general rule to be applied in examining equal protection challenges to a statute:

As to discrimination: an act is never unconstitutional because of discrimination as long as there is some reasonable basis for differentiation between classes which is related to the purposes to be accomplished by the act. And it applies uniformly to all persons within the class.

Id. at 31, citing Hanson v. Public Employees Retirement System, 246 P.2d 591 (Utah 1952).

When the Supreme Court applied these rules, it found that:

The Act (Utah Health Care Malpractice 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 the plaintiff) to shield insurance companies from legitimate claims. The Legislature exercised its discretionary prerogative in determining that the shortening of the statute of limitations . . . would insure the continued availability of adequate health care services. In the absence of a showing to the contrary, we conclude that the

Legislature's determination is not so arbitrary or unreasonable as to exceed constitutional prohibitions.

Id. at 32.

In determining whether the questioned statute is unconstitutional, the proper test for the standard of review is the "rational basis test." Although appellants in this action argue that the "strict scrutiny" test or the "heightened scrutiny" test should be applied, the rational basis standard of review has been used by the Utah Supreme Court in all prior reviews of the medical malpractice statute of limitations. See, e.g., Allen v. Intermountain Health Care, Inc., 635 P.2d 30, 31 (Utah 1981) (cited in Malan v. Lewis, 693 P.2d 661, 670 (Utah 1984)). 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 & Trust Co. v. Community Hospital, 683 P.2d 670, 677 n.10 (Cal. 1984). (Citing 23 states and three federal circuits which have applied rational basis standard of review.) The "strict scrutiny" and "means-focus" standards of review that plaintiffs urge the court to adopt in this case are not applied to legislation which does not create a "suspect class" or affect a "fundamental constitutional right." Malan v. Lewis, supra, at 674, n.17.

The same result was reached in Hargett v. Limburg, 598 F. Supp. 152 (D. Utah 1984), when the Honorable Judge David K. Winder stated that "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. Moreover, a minor's interest in redress for medical malpractice is not an interest of "basic importance" as is the interest in an education" Id. at 154.

Accordingly, it is only necessary that the statute in question be rationally related to the stated purpose of the Legislature. The express purpose for the malpractice notice and limitation provisions is "to protect and insure the continued availability of health care services to the public." See Allen v. Intermountain Health Care, Inc., 635 P.2d 30, 32 (Utah 1981). The Legislature found an increasing trend in the number of medical malpractice claims and the amount of settlements and judgments. That trend was causing malpractice insurance premiums to increase to the extent that health care providers were encouraged to practice defensive medicine. The legislature also found that health care services were threatened by the possible unavailability of malpractice insurance. Consequently, the statute of limitations was enacted, "to provide a reasonable time in which actions might be commenced against health care providers while limiting the time to a specific period for which professional liability insurance premiums can be reasonably and accurately calculated" Allen, 635 P.2d at 32.

As stated by Judge Winder in Hargett, 598 F. Supp. at 156, "containment of that perceived crisis is unquestionably a legitimate legislative objective."

While appellants in this action would have this Court believe that the medical malpractice crisis never existed, such is not the case. The American Medical Association recently indicated that:

There is a crisis in professional liability, it will get worse if comprehensive action is not taken The huge continuing increases in premiums, suits and awards are significantly and adversely affecting the cost and availability of health care in the United States. (Emphasis added.)

Responses of the AMA to the ATLA statements Regarding the Professional Liability Crisis, AMA Task Force on Professional Liability and Insurance (August 1985).

The medical malpractice crisis is particularly acute in specialized areas of medical practice. These specialists are being forced to restrict their services and reduce their high-risk case loads which ultimately reduces the quality and availability of health care. AMA Responses at 3. Across all specialties, three times as many claims are filed against physicians as were filed ten years ago. AMA, Socio Economic Monitoring Systems (1984): Malpractice, Balancing the Issues, Ambulatory Care, p. 9 (June, 1985). At least one in every ten doctors is sued each year. P. Danzon, The Frequency and Severity of Medical Malpractice Claims, 1 (1982). The situation in Utah is even worse: an average of thirty malpractice claims are presented each month. Utah

Department of Business Regulation Memorandum, Pre Litigation Medical Malpractice Review (October, 1985 - April, 1986).

Accordingly, seventy percent of physicians now indicate that they have altered their practice of medicine to protect against lawsuits. AMA, Center for Health Policy Research, (April 1985). Current estimates indicate that medical costs related to professional liability, including the defense and medicine, accounted for twenty percent to seventy-five percent of the 69 billion dollars spent on physicians' services in 1983. This amounts to 13.8 to 17.3 billion dollars. National Health Expenditures, 1983; Health Care Financing and Review, Vol. 7, No. 2, Winter of 1984. Increases in malpractice awards also add to the already startling medical malpractice crisis.

Furthermore, the extent of the current professional liability crisis is most accurately revealed by current data, indicating that average expenditures for professional liability insurance arose by 44.8% between 1982 and 1984. American Medical Association, Center for Health Policy Research, 1985. The figure in Utah is significantly greater: two of the major Utah medical professional liability insurers more than doubled premium rates for physicians and surgeons between 1984 and 1985. State of Utah Insurance Department Medical Professional Liability Insurance Premium Revision and State Paul Property and Liability Insurance Company Rate Increase Filings, (December 7, 1984 and December 10, 1985) (reflecting a 109.5% increase from 1984 to 1985; State of Utah Insurance

Department Medical Professional Liability Insurance Premium Rate Revision, UMIA Rate Increase Filings (January 27, 1984 to December 26, 1985) (reflecting a 109% increase from 1984 to 1985).

The extraordinary liability crisis coupled with huge premium increases for physicians, is a problem effecting every physician and patient. In addressing this issue, the Kansas Supreme Court concluded:

[L]ow-risk practitioners need high-risk specialists in order to provide comprehensive care for their patients. Were insurance coverage unavailable for the specialists in high-risk fields, the evidence indicates these professionals would either leave the state or would soon quit the practice, causing a general decline in overall quality of health care available. . .

State Ex Rel Schneider v. Ligget, 576 P.2d 221, 229 (Kan. 1978).

The existing insurance crisis will be exacerbated and the practice of specialized medicine might well become an uninsurable risk if the statute of limitations for medical malpractice actions is tolled on such claims until an infant reaches majority.

As stated by Judge David K. Winder:

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 that least the segment of health care providers that provide services exclusively to minors.

Weighing the needs to contain malpractice insurance costs and the need to insure the availability of health care service crisis against the competing interests of minors and mental incompetencies, the parent as guardian has failed to initiate an action, is particularly appropriate for the legislature, not the courts. The Utah legislature has done so and the statutory provision is reasonably related to accomplish a legitimate legislative purpose. The court therefore concludes that the classification at issue does not amount to a denial of equal protection.

Hargett, 598 F. Supp. at 157.

B. The malpractice statute of limitations does not unconstitutionally deprive minor plaintiffs of access to the courts.

The appellants in this case have challenged the statute based on the open court's provision of the Utah Const. Art. I, Sec. 2. The plaintiffs in Hargett v. Limburg made an identical claim. The court in Hargett stated, however, that "that general issue, however, is not raised by the facts of this case. Indeed, as discussed above, the plaintiff in this action discovered the alleged legal injury before the statute ran." Hargett, 598 F. Supp. 152, 155 (D.Utah 1984).

It is clear that the District Court for the district of Utah held that since the parents of the minor child knew of the injury prior to the time that the statute ran, the open court's provision of the Utah Constitution did not apply. Such

are the facts in the instant case. The appellants knew of the alleged negligence almost immediately after it occurred. Yet those same individuals would now bring a cause of action twelve years later based on the open court's provision.

Similarly, the appellants strongly argue that now that their minor child has reached the age of majority, she should have the opportunity under the open court's provision of the Utah Constitution to bring an action in her own name. However, it is a fact that Jennifer Chapman is, and will continue to be mentally incompetent and therefore an action must be brought by and through her guardians Teresa and Robert Chapman. It is also a fact that Teresa and Robert Chapman are the same individuals that knew of the negligence prior to the time the statute ran. It is apparent, therefore, that the guardians of Jennifer Chapman, having missed the statute of limitations initially, are now attempting to take a second bite of the apple, even though substantively there is absolutely no difference between the individuals that should have brought the action initially, and those that are now attempting to bring the action.

Finally, it has been concluded by the United States District Court for the District of Utah in Wheaton v. Jack, Civ. No. C-82-0039, Slip Op. (D. Utah August 9, 1982), that the statute in question does not violate the open court's provision.

CONCLUSION

As discussed above, plaintiffs' actions against defendant Myers fails for several reasons. First, plaintiffs have no cause of action against defendant Myers because the defendant was not involved in any of the acts which caused the harm to the plaintiff. Specifically, defendant Myers was not involved in either of the operations preceding Jennifer Chapman's coronary arrest, nor in the resuscitative efforts following that coronary arrest. The defendant's involvement began the day after the coronary arrest, and consequently, after the brain damage had been suffered by Jennifer Chapman.

Second, it is clear from the testimony of Dr. Veasy that the plaintiffs were well aware of the alleged acts of negligence shortly after the negligent acts allegedly occurred. Therefore, it is clear that the plaintiffs had notice of the possibility of a lawsuit and cannot now claim that they were not aware of facts to support the possibility of a lawsuit.


Third, although the plaintiffs allege that the defendant Myer acted fraudulently to conceal information the plaintiffs needed to know in order to initiate a lawsuit, the plaintiffs fail to even suggest one instance in which the defendant Myers said or did anything that could be construed to be a fraudulent concealment.

Finally, the plaintiffs allege that the Utah Health Care Malpractice Act and its accompanying statute of limitations violates constitutional rights of equal protection and access to the courts. It is clear, however, that under the "rational basis" standard of review, plaintiff's arguments must fail.

Based on the above arguments, defendants-respondents pray that this Court uphold the judgment of the Third Judicial District Court of Salt Lake County, State of Utah, granting defendants' motion for summary judgment and dismissal.

DATED this 16th day of September, 1986.

RICHARDS, BRANDT, MILLER
& NELSON



GARY D. STOTT
GARY B. FERGUSON
MICHAEL L. SCHWAB
Attorneys for Respondent Myer

MAILING CERTIFICATE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was mailed, first class, postage prepaid on this 16 day of Sept, 1986, to the following counsel of record:

KATHRYN COLLARD
401 Boston Building
Nine Exchange Place
Salt Lake City, Utah 84111
Telephone: (801) 534-1664

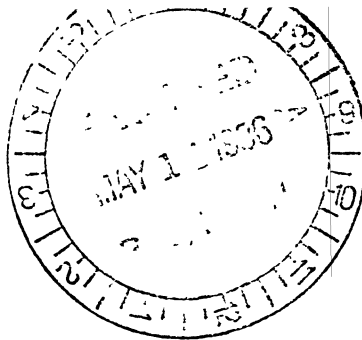
LLOYD B. POELMAN
KIRTON, McCONKIE & BUSHNELL
330 South 300 East
Salt Lake City, Utah 84111
Attorneys for Respondent

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ROBERT N. WILLIAMS
P.O. Box 2608
Jackson, Wyoming 83001
Telephone: (307) 733-8300
Attorneys for Appellants

George T. Nagel

CHAPMAN/MSW
sm09156

Ms. Kathryn Collard
 Attorney at Law
 401 Boston Bldg.
 Salt Lake City, Utah 84111
 (801) 534-1664



P. Richard Meyer
 Robert N. Williams
 Attorneys at law
 165 West Pearl
 Jackson, Wyoming 83001
 (307) 733-8300

Attorneys for Plaintiffs

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

JENNIFER CHAPMAN, by and through)	
her guardian, TERESA CHAPMAN, AND)	
ROBERT CHAPMAN AND TERESA)	
CHAPMAN, individually,)	
)	AFFIDAVIT OF ROBERT
Plaintiffs,)	CHAPMAN
)	
)	Civil No. C85-6782
vs.)	
)	
)	
)	(HON. H. F. WILKINSON)
PRIMARY CHILDREN'S HOSPITAL, et al.,)	
)	
Defendants.)	

STATE OF WYOMING)
) ss
 COUNTY OF TETON)

Robert Chapman, being first duly sworn under oath deposes and says:

1. The contents of this affidavit are true except where stated upon information and belief and, as to such statements, I believe them to be true and I am competent to testify as to the matters and things set forth herein.

2. I am one of the plaintiffs in the above entitled matter. My wife, Teresa, and I are the parents of Jennifer Chapman who was born on August 10, 1972. She is now 13 years old and is severely brain damaged. She will never walk or talk and is permanently and irreversibly disabled, completely incompetent, and wholly dependent upon others for all of her bodily functions.

3. During the first five months of her life, Jennifer experienced several blue spells for which she was taken to a hospital in Ogden, Utah for treatment. The doctors who had been treating her in Ogden had not been able to properly diagnose the problem and then sent her to Dr. Veasy at the Primary Children's Hospital for specialized care. Dr. Veasy diagnosed the illness as a heart problem which he attempted to cure with medication. After medication failed to cure the problem an operation was performed to install a device called a Waterston shunt. The first shunt did not function properly and on February 28, 1973, a second operation was performed to adjust the shunt.

4. Jennifer recovered from the anesthesia and we were permitted to visit with her. I observed that Jennifer was crying and awake. After some 20 to 30 minutes had passed my wife returned

to visit her again and according to my wife she stayed in the room and talked to the nurses for some 15-20 minutes. During that time, according to my wife, a heart monitor machine attached to Jennifer had gone off and was sounding an alarm. The nurses in attendance told my wife that the alarm was caused by difficulties with the machine. My wife was in the room for 15-20 minutes before the nurses noticed that Jennifer was having a coronary arrest. Emergency resuscitative measures saved Jennifer's life, but her brain was permanently damaged.

5. My wife and I consulted with Dr. Veasy and representatives of the Hospital. During one of our meetings in 1982, Scott Olsen, representing defendant Scott Wetzel an affiliate of the Home Group was present. ^{Prior to F.C.} ~~During~~ this meeting Dr. Veasy represented to my wife and I that there were tests and records which indicated that the cause of our daughter's injuries was a blood clot or shower of blood clots that flooded her brain, and that he "knew for a fact" that the blood clots had caused her injury. that this event was unavoidable and could have nothing to do with any negligence on the part of anyone. On the date of the meeting Scott Olsen advised me that Dr. Veasy and Dr. Meyers were "much too professional to cover anything up" concerning the cause of Jennifer's injuries. Following the meeting defendant Wetzel forwarded a letter to us which stated that their review of the case had shown that the cause of Jennifer's injuries was a blood clot which entered Jennifer's brain and that her injuries were unrelated to anything which had been done by the Hospital. Apparently by accident, we received not only the letter which was intended for us but a copy of the letter which was intended for the

Hospitals' administrator, Charles Done, as well. That letter contained a written note which said "Charles; this should get the Chapmans' off your back -- if they call you please refer them to me". I confronted Mr. Done with the letter and he told me that he was "embarrassed" by it but did not deny that Wetzel had written it or that Wetzel was authorized to write it.

6. We trusted and believed the defendants (including the statements made by Wetzel-Home Group) and believed that Jennifer's injuries were due to blood clots and were unavoidable, until the summer of 1984, when we received medical records of the Hospital which related to Jennifer's injuries. Contrary to the statements of the defendants, I discovered that the medical records did not contain any test results which would indicate the true cause of Jennifer's injuries and they showed uncertainty as to the cause of the injuries. These records were therefore in direct conflict with the aforesaid statements of the defendants to us.

7. Upon receiving the medical records in July of 1984 and after talking to Dr. Veasy, I suspected that we had been deceived. Therefore, we sought a second medical opinion. It was not until January of 1985 that we finally discovered that the defendants had not given us full disclosure of the true cause of Jennifer's injuries and very likely had misrepresented that to us. At that time I discovered that the cause of her injuries was probably not related to blood clots and that the injuries were caused by a lack of oxygen which occurred during the Hospital's delay in providing resuscitative care to her.

8. As a result of the statements of the defendants, including defendants Wetzel-Home Group we delayed in filing a claim against the Hospital and in bringing this action.

DATED this 12 day of May, 1986.

Robert Chapman
Robert Chapman

Subscribed and sworn to before me this 12 day of May, 1986.

[Signature]
Notary Public



My commission expires:

1-16-87

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

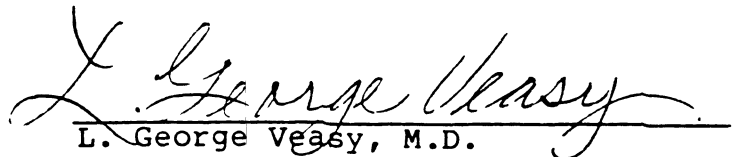
November 1985

Plus co-counsel from Wyoming

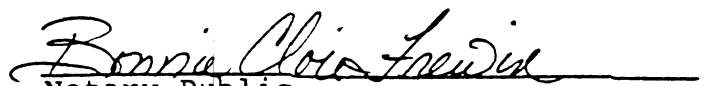
November 1985

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 7th 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 Vining
Primary Childrens Hospital
Salt Lake City, Utah

17.3

Dear Dr. Vining

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 Jennys
behalf. Since that meeting I have given daily
thought and prayer as to which direction I should
go in promoting Jennys 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 Jenny
could obtain. We sat and talked for probably an
hour and a half and never once did you ask if
Jenny was doing. You asked only to those
exam. letters and the blood money that I was
asking. I have pondered this in my heart daily
since that meeting. I was raised in a religious
home and taught honesty and respect for working to
obtain what we have. Our prophet has warned us
against accepting filthy money and that money in
itself is not evil but the honesty and
what we obtained is the evil in it.

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 insure
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 this decision to go ahead
with the suit 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 an uncle who is mentally handicapped. 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 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 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. Mr. Johnson, though we might have
to build an extra room in our basement to let
him live in because no one wants him. We can not
imagine anyone after what has happened here in the
last five years leave Jennifer as a burden to someone
family of something should happen to Jennifer before
she is gone. The burden and responsibility is on her shoulders.

On Feb 24th of this year my wife and our four 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 four days before being released. While they were there the nurses found it so difficult to care for Jennifer that in four days they fed her exactly $\frac{1}{2}$ of one meal. That $\frac{1}{2}$ 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. I had to close up my business to care for her. It takes a tremendous amount of patience to care for her and it 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 that I have been thankful Jennifer would have been left in this world without the ability to care for herself and not would be just in matter of time before she would be back to the stage we bought her home from the hospital in four years ago in doctor Meyer put it in a vegetable.

Now I can well agree that I am not qualified
indirectly or directly to answer all the questions
pertaining to a small practice such as the way it involves
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
this ~~is~~ negligence only a man of your medical know-
can know for sure. I do know 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 even
worse is the cause of her death. She was heart-
hearted because of wrong decisions made in her ear-
ly 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 on-
ly to be thrown away by doctors that claim to have done
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, not suffering
she is entitled to recovery for as long as she is
willing to go on struggling for her life. The case
has to be weighed upon its individual merits
and not by what it costs for insurance for each
bed in a hospital. It is commonplace that we are 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
money and do nothing for the individual patient. I am
no longer dependent on other people to care for my daughter.
She is only blind in one sense and the financial burden
is to great for me to bear alone. I don't have a lot

Jennings future will bring but as far further it beg
you to consider Jennings as an individual and not
an insurance burden to each bed in each hospital.
Before too long my attorney will be in contact with
you and it asks that you realize that he represents
Jennings interests and not want 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 it can always
interest Jennings life in your very capable hands

Sincerely

Robert Chapman

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 handicapped 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 hospital. 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 too great for me to bare alone. I don't know what Jennifer's 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 attorney will be in contact with you and I ask that you realize that he represents Jennifer's interests and set aside your 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 I can always intrust Jennifer's life in your very capable hands.

Sincerely,

Robert Chapman

P.S. Thanks for your time.

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Attorneys for Plaintiffs

FILED IN CLERK'S OFFICE
SALT LAKE COUNTY, UTAH

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H. DION HINDLEY CLERK
3RD DIST. COURT

Linda Simpson
CLERK

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

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

Plaintiffs,

vs.

PRIMARY CHILDREN'S HOSPITAL, et al.,

Defendants.

AFFADAVIT OF TERESA
CHAPMAN

Civil No. C85-6782

(HON. H. F. WILKINSON)

STATE OF UTAH)
 : ss.
COUNTY OF _____)

The undersigned Teresa Chapman, being first duly sworn under oath deposes and says:

1. I am one of the plaintiffs in the above titled matter. I am competent to testify to the matters and things set forth in this affidavit and things are true except those things which are set forth on my information and belief and, as to those things, I believe them to be true.

2. My husband, Robert, I and are the parents of Jennifer Chapman. She was born on August 10, 1972, and is now 13 years old. Jennifer is severely brain damaged. She will never walk or talk and is permanently disabled. She is completely incompetent, and wholly dependent on others for all of her bodily functions.

3. Jennifer, who seemed otherwise normal to us experienced several blue spells in the first five months of her life. My husband and I took her to some doctors in Ogden, Utah for treatment of these blue spells. Those doctors failed to completely diagnose her condition and they referred us to Dr. Veasy at the Primary Children's Hospital for specialized treatment.

4. Dr. Veasy diagnosed the illness as a heart problem which he attempted to stabilize with medication until an operation could be performed. An operation was subsequently performed to install a device called a Waterston shunt. The first shunt did not function properly and on February 28, 1973, a second operation was performed to adjust the shunt.

5. After the second operation, Jennifer recovered from the anesthetic and we were permitted to visit her. She was crying and awake when my husband and I left the room.

6. About 10 to 15 minutes after leaving Jennifer's room, I returned to visit her again. Several nurses were in the room. Jennifer looked peculiar to me but I believed the nurses were on top of the situation since they were standing with me by her beside observing her. One of the nurses was working with the heart monitoring machine which was attached to Jennifer. The entire time I was in the room the nurse kept fidgeting with the electrode leads on Jennifer's chest. After 10-15 minutes had passed, the nurse told me that an alarm on the heart monitor machine was sounding. She told me that the machine would not set properly and that she would have to get someone to help her set it. Before she left the room I asked her whether the anesthetic was making Jennifer look peculiar. She then examined Jennifer and told me that Jennifer was in cardiac arrest. At that point, she signaled for help and other doctors and nurses arrived shortly. Emergency resuscitative measures saved Jennifer's life, but she became permanently brain damaged.

7. My husband and I consulted with our physician, Dr. Veasy, in whom we had great trust, to see if he thought there had been negligence on the part of the doctors in Ogden for failing to send our daughter to him sooner. I believed that Dr. Veasy, the Head of Cardiology at the defendant Hospital, spoke for the Hospital as well as himself during our meetings with him. He represented to my husband and I that there were tests and records which indicated that the cause of our daughter's injuries was a blood clot or shower of

blood clots that flooded her brain and that he "knew for a fact" that the blood clots had caused her injury. In addition, he said that this event was unavoidable and had nothing to do with any negligence on the part of anyone.

8. Soon after Jennifer received her brain damage we filed suit against the Ogden doctors who had treated Jennifer for the blue spells she had experienced during the first five months of her life. We claimed that the Ogden physicians had waited too long to send Jennifer to Dr. Veasy for specialized care. Dr. Veasy was critical of the delay on the part of the Ogden doctors in sending Jennifer to him for care, but he persuaded us and our lawyers that he knew for a fact" that Jennifer's brain damage was due to blood clots, that it was unavoidable and unrelated to anyone's misconduct. He recommended dismissal of the suit. Based upon Dr. Veasy's statements we dismissed the suit against the Ogden physicians. At that time and at all times up until July, 1984, we believed and trusted Dr. Veasy and relied upon the statements he made to us.

9. After the dismissal of the Ogden case the defendants Veasy, Meyers and the Hospital continued to provide treatment to Jennifer and they continued to represent to us that the medical records and tests showed that the cause of her injuries were blood clots and that it was unavoidable and that any omission on the part of anyone caused Jennifer's brain damage. No one associated with any of the defendants ever told me that the nurse's statements to me, that the heart monitor was functioning incorrectly, were false.

10. We trusted and believed the defendants until the July of 1984, when we received medical records of the Hospital which

related to Jennifer's injuries. Contrary to the statements of the defendants, we discovered that the medical records did not contain any tests results which would indicate the true cause of Jennifer's injuries. In fact they showed uncertainty as to the cause of the injuries. These records were therefore in direct conflict with the statements of Dr. Veasy to us.

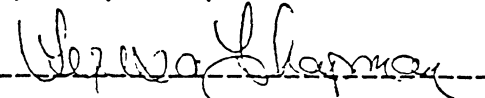
11. In July of 1984, my husband and I confronted Dr. Veasy about the medical records and their conflict with his previous statements to us. He replied that the true cause of Jennifer's injuries had never been established and he admitted that his prior statements to us on this subject were assumptions on his part and not the result of tests which had been performed on Jennifer.

12. Upon receiving the medical records in July of 1984 and after talking to Dr. Veasy, I suspected that we had been deceived. Therefore, we sought a second medical opinion. It was not until January of 1985 that we finally discovered that Dr. Veasy and the other medical defendants had not given us full disclosure of the true cause of Jennifer's injuries. At that time, we discovered that the cause of her injuries was probably not related to blood clots and that the injuries were probably caused by a lack of oxygen which occurred during the Hospital's delay in providing resuscitative care to her.

12. Since February 28, 1973, we and Jennifer maintained a continuing doctor-patient relationship with Dr. Veasy and the Hospital until approximately March or April 1985 and Jennifer received ongoing care from them. The doctor-patient relationship between us and Dr. Meyers existed until approximately June, 1983.

During these periods Jennifer received treatment for her brain damaged condition and its complications from all of these defendants.

Dated this 16th day of January, 1986.



Teresa Chapman

Subscribed and sworn to before me this 17th day of January, 1986.



Notary Public

My commission expires:

1-18-87