

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 Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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

Plaintiffs-Appellants,

-v-

PRIMARY CHILDREN'S HOSPITAL, * Appeal No. 860230
a hospital organized to do *
business in the State of Utah, *
et al., *

Defendants-Respondents.

* * * *

APPELLANTS' 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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IN THE SUPREME COURT OF THE STATE OF UTAH

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through her guardian, TERESA *
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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
PRIMARY CHILDREN'S HOSPITAL;

THE HEALTH SERVICES CORPORATION OF THE
CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS.
By 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, infra at A-2.)

GARTH MEYERS, M. D.;

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

OTHER PARTY DEFENDANTS NOT INVOLVED IN THIS APPEAL

SCOTT WETZEL COMPANY, A Utah corporation;

THE HOME GROUP, INC., a foreign corporation;

JOHN DOE I-X; and

BLACK CORPORATIONS I-V.

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Is the medical malpractice statute of limitations Utah Code Ann. §78-14-4, tolled during a continuing fiduciary relationship between a patient and a health care provider.

2. Was it error for the trial court to grant summary judgment based upon the medical malpractice statute of limitations where there was a material issue of fact as to whether the plaintiffs-appellants (hereinafter sometimes "plaintiffs") were aware of the plaintiffs' "legal injury" within the period of the statute of limitations.

3. Was it error for the trial court to grant summary judgment where there was evidence that the defendants-appellees (hereinafter sometimes "defendants") concealed and misrepresented the cause of plaintiffs injuries and where, by reason of such conduct, the plaintiffs claimed that the defendants were estopped from utilizing the statute of limitations as a defense.

4. Does the Utah medical malpractice statute of limitations U.C.A. §78-14-4 violate equal protection and due process provisions of the Utah Constitution and the Constitution of the United States.

5. Does the Utah medical malpractice statute of limitations U.C.A. §78-14-4 unconstitutionally deprive minor plaintiffs of access to the courts in violation of the Utah Constitution and the Constitution of the United States.

6. Was it reversible error for the trial court to deny all discovery rights to the plaintiffs prior to the summary judgment hearing and decision.

7. Was it reversible error for the trial court to grant defendant's motions for summary judgment when it was alleged that care giving rise to the plaintiffs claims had been rendered within the period of the statute of limitations.

STATEMENT OF THE CASE

Appellants seek review of a ruling from the Third District Court, Salt Lake County, Utah, Judge Wilkinson presiding, which granted Appellees' motions for summary judgment and motions to dismiss based upon the statute of limitations in a medical malpractice action. (R. at 282-284, infra at A-2 through A-3) The presentation of arguments herein has been made considerably more difficult since the Court's order granting summary judgment did not make any specific rulings with respect to the many issues raised in this complex case.

STATEMENT OF FACTS

Plaintiff-Appellant, Jennifer Chapman, (hereinafter sometimes "plaintiff") claims that she suffers from permanent and irreversible brain damage due to the negligence of the Defendants Primary Children's Hospital, Primary Children's Medical Center, Intermountain Health Care, IHC Hospitals, Inc., and The Health Services Corporation of the Church of Jesus Christ of Latter Day Saints (hereinafter sometimes collectively the "Hospital"). It is further claimed that she received substandard care thereafter from Drs. Veasy and Meyers (hereinafter sometimes the "Defendant Physicians") and the Hospital, who continued to provide what is alleged to be substandard medical care for Jennifer for several years after she received her brain injury. Plaintiffs also claimed that the defendants falsely misrepresented the cause of Jennifer's brain damage to them.

Plaintiffs submitted interrogatories to defendants and noticed the depositions of some of the defendants and their employees prior

to the Court's hearing upon the defendants motions, but the Court entered an order staying all of the plaintiffs' discovery and granted the motions of defendants for summary judgment before any discovery could be conducted. The following facts, are therefore gleaned from the affidavits of Jennifer Chapman's parents, Teresa and Robert Chapman which were filed in opposition to defendant's motions below. (R. 140-151, infra. A-5 through A-16)

Jennifer Chapman is now 13 years old and is severely brain damaged. She is permanently disabled, completely incompetent and wholly dependent upon others for all of her bodily functions.

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 then sent her to Dr. Veasy at the Primary Children's Hospital for specialized care. He 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 alter the shunt. After surgery Jennifer recovered from the anesthesia and her family was permitted to visit with her. They observed that she was crying and awake, spent some time with her and left the room. After 10 to 15 minutes had passed, her mother returned to visit her again and found that a heart monitor machine attached to Jennifer had gone off and was sounding an alarm. The nurses in attendance told Mrs. Chapman that the alarm was caused by difficulties with the machine. Mrs. Chapman accepted this

explanation and the machine continued to send its alarm for 10 to 15 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.

Thereafter, Jennifer's parents asked the defendants about the cause of Jennifer's brain damage. These inquiries came while these defendants were still acting as physicians for Jennifer and while a (fiduciary) physician-health care provider/patient relationship existed. During this period, a relationship of considerable trust existed between the Chapmans and the defendants. The Chapmans were told by defendants that there were hospital records and tests which showed that Jennifer's injuries were due to blood clots and that her brain damage was unavoidable and could not be due to the negligence of anyone. Based upon these statements, Jennifer's parents believed that her injuries were in fact caused by blood clots, and were unavoidable. Furthermore, nothing was said to the Chapmans which would indicate that the nurses' statements to Mrs. Chapman that the heart monitor alarm was caused by difficulties with the machine were untrue¹.

Soon after Jennifer was injured suit was filed against the Ogden doctors who had treated Jennifer for the blue spells she had experienced during the first five months of her life. The Chapmans claimed that the Ogden physicians had waited too long to send Jennifer to Dr. Veasy for specialized care.

¹ The trial court was advised that plaintiffs needed further discovery to determine if these statements were false, but no such permission was granted. (R. at 155, 133, 196, 267, 280)

The Chapmans consulted with Defendant Veasy for his professional opinion as to whether the Ogden doctors had been negligent in failing to send Jennifer to him sooner. Dr. Veasy persuaded the plaintiffs that there had been no negligence on the part of the Ogden doctors, that Jennifer's brain damage was due to blood clots, and that it was unavoidable and unrelated to anyone's misconduct. Dr. Veasy recommended dismissal of the suit and Plaintiffs, in reliance of Dr. Veasy's statements to them, dismissed the suit against the Ogden physicians.

After the dismissal of the Ogden case, the defendants continued to provide treatment to Jennifer Chapman and continued to represent to her parents that the medical records and tests showed that the cause of the injuries was blood clots and that Jennifer's brain damage was unavoidable. The Chapmans trusted and believed the defendants until the summer of 1984, when they for the first time were given the medical records which related to Jennifer's injuries. Contrary to the statements of the defendants, the medical records did not contain any test results which would indicate the true cause of the injuries and the records showed uncertainty as to the cause of the injuries. These records were therefore in direct conflict with the statements of Dr. Veasy who had continually represented to the Chapmans that all indications from tests and records showed that the injuries were the result of blood clots, 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. The Chapmans confronted Dr. Veasy with the hospital records and say, at this point, that he admitted that the

blood clots theory was only an assumption on his part and that no tests had been performed which corroborated this assumption. The Chapmans then immediately sought legal advice and a medical opinion concerning the care provided by the defendants. In January of 1985, the Chapmans discovered that in the opinion of a consulting physician, the actual cause of Jennifer's injuries was the negligence of the Hospital's nurses who had failed to recognize Jennifer's critical condition and that the brain injuries she sustained were due to a lack of oxygen, not blood clot, as they had been previously told. Plaintiffs thereafter filed a claim pursuant to the applicable Utah statutes and this lawsuit followed.

Defendants claimed that Jennifer's father, Robert Chapman, was aware of their possible negligence as early as 1973 and provided a letter from Mr. Chapman to Dr. Veasy to substantiate their claim (Ex. 65-72, infra. A-17 through A-24). However, when this letter was written the Chapmans believed the Ogden physicians to have been at fault for failing to refer Jennifer to Dr. Veasy at an earlier time. The letter referred to what the Chapmans believed to be the negligent acts of the Ogden physicians -- not the defendants in this case -- as implied by the defendants in their argument. At the time this letter was written, the Chapmans had been persuaded by Dr. Veasy that Jennifer's injuries were due to blood clots and were unavoidable. Dr. Veasy then set about convincing the Chapmans that they should drop their claim against the Ogden physicians. This effort was successful and the claim was voluntarily dismissed. Defendants now take the

⁵ See Robert Chapman Affidavit Paragraph 4 (R- at 142, infra. A-7)

somewhat inconsistent position that Jennifer's "legal injury" was obvious all along.

Defendants sought summary judgment, claiming that the Utah Medical Malpractice Statute of Limitations barred the medical malpractice claims asserted by plaintiffs. In the Lower Court the defendants did not address the question of their negligence and limited their motion solely to the statute of limitations. Furthermore, defendants focused upon a single act of negligence which occurred in February, 1973. No mention was made by the defendants or the trial court in its order dismissing the case of the fact that the plaintiffs claimed that the defendants' negligence in the care of Jennifer Chapman was ongoing, at least until March or April, 1985.

SUMMARY OF THE ARGUMENT

The court below granted summary judgment when there were material questions of fact on the question of whether the statute of limitations had run in this case. The trial court completely foreclosed discovery over the objections of plaintiffs. Notwithstanding the inability of plaintiffs to obtain crucial information, they demonstrated by affidavits that there were material questions as to whether the defendants had hidden information from them and whether false information had been given to them concerning the cause of the plaintiff's injuries.

These questions of fact created genuine legal issues as to whether the plaintiffs knew of the "legal cause" of the plaintiffs injuries at a time which would have caused the statute of limitations

to run as contended by the defendants and whether the defendants were estopped to raise the running of the statute of limitations as a defense. In addition, the trial court granted summary judgment on the specificity with which the plaintiffs pled the fraud issue when this issue was properly pled and placed into issue by plaintiffs. The trial court also granted summary judgment upon the question of whether care provided by the defendants within the period of the statute of limitations was negligently done. This judgment was granted in the face of the unrefuted allegation that the defendants care was ongoing after the initial act of negligence (at least until early 1985) and that the ongoing care was negligently rendered. Under such circumstances the plaintiffs were entitled to have a jury decide the question of whether the continuing care given by the defendants was substandard and whether injury resulted from it.

The plaintiffs next contend that the Utah Medical Malpractice Statute of Limitations is unconstitutional. This statute denies minors like Jennifer Chapman the equal protection of the laws, due process and access to the courts. This court has held that statutes which deny minors the equal protection of the laws, due process or access to the courts are unconstitutional. The medical malpractice statute of limitations attempts to do just that, and is unconstitutional.

This court should reverse the summary judgment in behalf of defendants entered by Judge Wilkinson below, and Order that the matter proceed to trial.

ARGUMENT

I. PLAINTIFF'S CAUSE OF ACTION IS NOT BARRED BY § 78-14-4 UTAH CODE ANNOTATED (STATUTE OF LIMITATIONS).

In this case, as in others where the statute of limitations may be applicable as an affirmative defense, the courts have placed a heavy burden on the party asserting the defense. In such cases, "(T)he party pleading the statute of limitations has the burden of proving that the action is barred...." Garland v. True Temper Corporation, 354 F.Supp. 328, 330 (D.C.W.Va.1973). See Also, Ray v. Oklahoma Furniture Mfg. Co., d170 Okl. 414, 40 P.2d 663 (1935); Savannah Bank & Trust Co. v. Meldrim, 195 Ga. 765, 25 S.E.2d 567 (1943); Wahl v. Cunningham 320 Mo. 57, 6 S.W.2d 576 (1928). Similarly, Utah Rule of Civil Procedure 8 (c) makes the statute of limitations an affirmative defense.

Furthermore, since the defendants seek summary judgment, all facts and the inferences to be drawn from them must be given the interpretation most favorable to the plaintiffs. Therefore, the facts set forth in the plaintiffs' statement of facts (supra) must, for purposes of the motions in question here be taken as true since they are supported by the affidavits of Robert and Teresa Chapman and are not conclusively refuted by any evidence submitted by the defendants. Utilizing these facts the plaintiffs submitted to the trial court³ a list of both the undisputed facts and the disputed facts

³ See P. 7 and 8 of plaintiffs' memorandum in opposition to defendants' motions for summary judgment (R. at 158-159)

which were gleaned from the record before the trial court. They follow:

Undisputed facts;

1. For the first five months of her life, Jennifer Chapman experienced several blue spells for which she was taken to a hospital in Ogden, Utah for treatment.

2. When Jennifer was approximately five months old, the doctors who had been treating her in Ogden sent her to Dr. Veasy at the Primary Children's Hospital for specialized care.

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

4. Jennifer suffered severe and permanently disabling brain injuries while she was in the recovery room after the second operation.

5. Since February 28, 1973, the Chapmans and Jennifer maintained a continuing doctor-patient relationship with Dr. Veasy and the Hospital which lasted until approximately March or April 1985. A doctor-patient relationship between the Chapmans and Jennifer existed with Dr. Meyers until approximately June, 1983. During these periods Jennifer received treatment for her brain damaged condition and its complications from these defendants.

Disputed facts⁴:

1. Whether the defendants named herein told the Chapmans that there were hospital records and tests which showed that Jennifer's injuries were due to blood clots and that her brain damage was unavoidable and could not be due to the negligence of anyone and whether anything was said to the Chapmans which would indicate that the nurses statements to Mrs. Chapman that the heart monitor alarm was caused by difficulties with the machine were untrue.

2. Whether the Chapmans relied on the assurances of the defendants and believed that there were tests and records of the Hospital which showed that Jennifer's injuries were in fact caused by blood clots, were unavoidable, and could not have been caused by any misconduct of the hospital employees or referring physicians and whether they believed Dr. Veasy's assurances to be true.

3. Whether prior to July, 1984 the Chapmans believed the explanations of defendants as to the cause of Jennifer's injuries and whether at or about that time Dr. Veasy changed or altered his statements to the Chapmans on that subject.

4. Whether prior to January, 1985 the Chapmans had no medical evidence that the actual cause of Jennifer's injuries was due to the negligence of the Hospital's employees and was caused by a lack of oxygen and not blood clots as they had previously been told by the defendants.

⁴ Plaintiff pointed out to the trial court that many of these facts have not been mentioned by defendants in their affidavits. Plaintiff therefore observed the these facts must be deemed to be uncontroverted for purposes of the motions and that the facts were placed under the heading of "disputed facts" since Dr. Veasy's affidavit maked the unsubstantiated assumption that "... I know and state that continuously since 1973 they (the Chapmans) have believed ... that the episode ... in February 1973 was preventable and resulted from medical negligence by those who attended her." (Veasy affidavit P. 3. (R. at 159, R. at 108)

A. THE STATUTE OF LIMITATIONS IS TOLLED DURING A CONTINUING FIDUCIARY RELATIONSHIP BETWEEN PATIENT AND PHYSICIAN.

It is well established in Utah that the statute of limitations for a medical malpractice action does not begin to run until the physician-patient relationship between the physician or health care provider and the patient has been terminated. Peteler v. Robison, 17 P.2d 244, 248 (Utah 1932). Under Utah law, the existence of the continuing physician-patient fiduciary relationship tolls the statute of limitations for medical negligence until that relationship is terminated. Peteler at 248. Utah's rule tolling the statute of limitations during the existence of this fiduciary relationship is in line with the majority of jurisdictions which hold that the statute of limitations does not begin to run until the physician-patient relationship terminates. 61 Am.Jur. 2d, Physicians and Surgeons §185 p.312, Schmit v. Esser, 183 Minn. 354, 236 N.W. 622 (1931); Hotelling v. Walther, 169 Or. 559, 130 P.2d 944 (1942); Grazor v. Osborne, 57 Tenn. App. 10, 414 S.W.2d 118 (1966); Ealy v. Sheppeck, 100 N.M.250, 669 P.2d 259 (1983); Sanchez v. South Hoover Hospital, 132 Cal.Rptr. 657, 553 P.2d 1129 (1976).

The Supreme Court of Washington also followed this rule in Samuelson v. Freeman, 454 P.2d 406 (Wash. 1969)⁵. That Court summarized its holding as follows:

"In construing the statute of limitations concerning medical malpractice, we think it a sound rule that, if

⁵ Washington's Supreme Court has restated this rule in the subsequent case of Bixler v. Bowman, 94 Wash.2d 146, 614 P.2d 1290 (1980)

malpractice is claimed during a continuous and substantially uninterrupted course of treatment for that particular illness or condition, the statute does not begin to run until the treatment for that particular illness or condition has been terminated." (citations omitted) Id. at 410.

Since it was uncontested that the defendants and the Chapmans maintained physician-patient relationships with Dr. Veasy and the Hospital until March or April, 1985⁶ 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, and since this case was filed well within the period of the statute of limitations.

B. THE DEFENDANTS MISREPRESENTED THE CAUSE OF THE PLAINTIFF'S INJURIES AND THE PLAINTIFF'S 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.

The defendants relied principally on Section 78-14-4(1)(b) in their attempt to establish that the statute of limitations had run. A portion of that statute provides:

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. (emphasis ours) (The "Utah Health Care Malpractice Act" is reproduced as

⁶ Robert Chapman affidavit, paragraph 10. (R. at 144, infra at A-9)

A-25 through A-33 with supplements reproduced as A-34 through A-41)

In Foil v. Ballinger, this Court held that the statute of limitations in medical malpractice actions begins to run when the injured person knows or should know that he has suffered a "legal injury." This Court held that a person has discovered his "legal injury" when "he knew or should have known that he had sustained an injury and that the injury was caused by negligent action." (emphasis ours) Id. at 148. The Federal District Court has followed the Foil rule in Hargett v. Limberg, 598 F.Supp. 152 (D.C. Utah 1984) in which the Court held:

"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 facts that would lead a reasonable person to conclude that he may have a cause of action against the health care provider." (citations omitted) (emphasis in original) Id. at 155.

This Court's statement in Foil seems appropriate here:

"[W]hen injuries are suffered that have been caused by an unknown act of negligence by an expert, the law ought not to be construed to destroy a right of action before a person even becomes aware of the existence of that right." Id. at 147.

Under the rule of these cases, the Chapmans did not discover the legal injury until July 1984 or later. From the time of the injury to Jennifer on February of 1973, the plaintiffs had been told by the defendants that the injuries were caused by blood clots, an unavoidable injury which was surely, in the eyes of the Chapmans,

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.

Throughout the period in which these assurances were made, the defendants had a physician-patient relationship with the Chapmans and Jennifer and had a fiduciary duty to them. Under such circumstances they had an affirmative fiduciary duty to advise their patients of the complete truth and all of the facts surrounding Jennifer's injury. When the defendants' fiduciary duties demanded that they convey all of the facts and any uncertainties which they may have had, the Chapmans were given false information or information which was calculated to conceal the true cause of the injuries.

In the court below the defendants argued that if the Chapmans "discovered" the injury prior to 1984 they couldn't have been "prevented" from "discovering" it by the defendants. The defendants claimed that a letter written to Defendant Veasy by Robert Chapman evidenced the plaintiffs' discovery of the "legal injury" in 1973. The affidavit of plaintiff Robert Chapman demonstrates the fallacy of defendants' argument⁷. Mr. Chapman's letter must be viewed in correct context and not as presented by the defendants. At the time of the letter, the Chapmans had been consulting with Dr. Veasy to obtain his professional opinion as to whether there was negligence on the part of the doctors from Ogden who treated Jennifer. The Chapmans wanted to know if these doctors were negligent for failing to send Jennifer for care to Dr. Veasy sooner, and whether if she

⁷ Robert Chapman affidavit Paragraph 5. (R. at 142, infra at A-7)

were sent earlier, surgery could have been avoided. Mr. Chapman's statement in his letter that he thought that the negligence was "obvious", refers to the delay of the Ogden doctors in sending Jennifer to Dr. Veasy because they thought that earlier treatment by Dr. Veasy might have lessened or avoided Jennifer's problems. A lawsuit was then pending or about to be pending against the Ogden doctors, but no defendant in this suit was named in that suit. Indeed, the Chapmans were persuaded by defendants that Jennifer's brain damage was due to an unavoidable act of God, and they had no intention of suing these defendants. In summary, the letter from Mr. Chapman to Dr. Veasy has nothing at all to do with this case or of the discovery by the Chapmans of a cause of action against the defendants herein.

The plaintiffs had a right to rely on the expertise and advice of the defendants named herein, particularly when they had a fiduciary duty to keep them fully informed and to protect them from further injury. These defendants should not now be permitted to complain that the plaintiffs should not have believed them or that they had no right to rely upon their statements.

The foregoing discussion discloses that there were genuine issues before the trial court as to when the plaintiffs "discovered" the existence of the "legal injury" and the availability of a cause of action and whether they were prevented from discovering these facts by the defendants. Thus it was error for the trial court to grant summary judgment on this issue.

C. THERE IS A QUESTION OF FACT AS TO WHETHER THE DEFENDANTS ARE ESTOPPED FROM PLEADING THE STATUTE OF LIMITATIONS UNDER THE CIRCUMSTANCES OF THIS CASE.

If it is true that the defendants misrepresented or conspired to misrepresent the true cause of the injuries suffered by Jennifer Chapman, it then follows that there was a wrongful attempt to conceal evidence which would indicate the true cause of Jennifer's injuries. Under such circumstances, a defendant is estopped from asserting the statute of limitations as a defense.

Utah follows the majority of jurisdictions and this Court has found 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 the cause of action. In Rice v. Granite School District, 456 P.2d 159 (Utah 1969) it was held that the defendant could not raise the statute of limitations as a defense where the plaintiff's delay in filing the suit was induced by the defendant. This Court held:

"One cannot justly or equitably lull an adversary into a false sense of security thereby subjecting his claim to the bar of limitations, and then be heard to plead that very delay as a defense to the action when brought. " (citations omitted) Id. at 163.

Several courts have held that defendants are estopped from asserting the statute of limitations as a defense where there is a fiduciary relationship and a failure to disclose material information. These courts have specifically considered the relationship between physicians and their patients in terms of the effect it has on the estoppel issue. For example, the California Supreme Court has ruled

that a defendant is estopped from asserting the statute of limitations as a defense where he conceals material information about the nature of or the cause of the plaintiff's injuries and, as a result, the plaintiff files suit after the statute of limitations has run. Bowman v. McPheeters, 176 P.2d 745 (Cal. 1947); Stafford v. Shultz, 270 P.2d 1 (Cal. 1954). Furthermore, it is widely held that the statute of limitations is tolled by fraudulent or untruthful representation by a physician as to the cause of a particular problem. Emmett v. Easter Dispensary & Casualty Hospital, 130 App. D.C. 50, 396 F.2d 931 (D. C. Cir. 1967); Rodriguez v. Monoil, 9 Ariz. App. 225, 450 P.2d 737 (1969); Proctor v. Schombert 63 So. 2d 68 (Fla. 1953); Groedal v. Westrate, 171 Mich. 92, 137 N.W. 87; Lakeman v. La France, 102 N.H. 300, 156 A.2d 123 (1960).

There was, at the very least, a factual dispute as to whether the defendants, who had fiduciary duties to the Chapmans, had misrepresented or concealed facts in this case. If they did, they are estopped from pleading the statute of limitations. The dispute over this material issue made the granting of summary judgment by the trial court inappropriate.

D. THE CLAIMED NEGLIGENT CARE OF THE PLAINTIFF BY DEFENDANTS WAS ONGOING AND WITHIN THE PERIOD OF THE STATUTE OF LIMITATIONS.

No mention was made by the trial court of the fact that the plaintiffs claimed that after Jennifer Chapman was injured, the defendants continued to provide substandard care to her and that this resulted in damage to her. By granting summary judgment the

trial court completely eliminated this important question of fact, presumably ruling that as a matter of law, no substandard care was rendered to Jennifer during the period within the statute of limitations. The trial court's ruling was made in the face of affidavits from Robert and Teresa Chapman that the defendants provided care to Jennifer until early 1985, well within the period of the statute of limitations⁸. It was patently unfair to the plaintiffs to deny them the right even to obtain the defendants' records concerning the care given to Jennifer (by foreclosing all discovery) and then to rule without the benefit of affidavits or other evidence that the ongoing care given to her was not substandard.

II. PLAINTIFFS PLED FRAUD WITH SUFFICIENT PARTICULARITY TO SATISFY THE REQUIREMENTS OF RULE 9(B) OF THE UTAH RULES OF CIVIL PROCEDURE.

The plaintiffs asserted claims for torts related to the defendants' misconduct in concealing evidence and in violating their fiduciary duties to the plaintiffs. These torts included intentional infliction of emotional distress, outrage, attempt to deprive the plaintiffs of their causes of action⁹, fraud and fraudulent concealment. In the court below the defendants chose to ignore these claims in their motion and singled out plaintiffs' allegations of

⁸ Affidavit of Robert Chapman (R. 140-145, infra A-5 through A-10); Affidavit of Teresa Chapman (R. 146-151, infra A-11 through A-16)

⁹ See Smith v. Los Angeles 198 Cal Rptr 829 (1984) in which the court recognized that it was actionable to spoil or destroy evidence where it significantly prejudiced the plaintiffs case.

fraudulent concealment¹⁰. The defendants claimed that plaintiffs' cause of action for this tort was not pled with enough particularity to satisfy the requirements of Rule 9(b) of the Utah Rules of Civil Procedure. Defendants contended that plaintiffs' cause of action in fraud should be dismissed because the plaintiffs were not able to itemize each act of fraud and/or conspiracy to defraud the plaintiffs. Plaintiffs pointed out to no avail that they had been denied all discovery and that the defendants' Rule 9(b) motion did not seek to dispose of the other claims mentioned above which were being asserted by plaintiffs.

Rule 9(b) should not and has not been so strictly interpreted by the courts. Rule 9(b) merely requires that the "circumstances constituting fraud of mistake shall be stated with particularity." This requirement of the Rule has been met by the plaintiffs in their complaint. These circumstances of fraud are stated with sufficient "particularity" by the plaintiffs in their complaint. All that is required is that the elements of fraudulent concealment be pleaded by plaintiffs. In this regard, the plaintiffs alleged that they had relied on the assurances of the defendants who had continually told them that the injuries were not the result of any negligence on the part of these defendants. The plaintiffs have also pled the incidences

¹⁰ Utah has recognized that a cause of action may lie for fraudulent concealment. In Elder v. Clawson, 384 P.2d. 802 (Utah 1963), the Utah Supreme court spoke to this claim: "The principle is basic in the law of fraud as it relates to nondisclosure that a charge of fraud is maintainable where a party who knows material facts is under a duty, under the circumstances, to speak and disclose this information, but remains silent..."(citations omitted)

when the named defendants used fraudulent means to conceal the true cause of the injuries. Nothing more is required than a pleading of adequate notice of these claims by a setting forth of the elements of these claims and it was error for the trial court to grant summary judgment on this issue¹¹.

III. THE APPLICABLE STATUTE OF LIMITATIONS IS UNCONSTITUTIONAL

A. HISTORY:

Prior to 1976, the statute of limitations applicable to minors in medical malpractice actions was tolled during the child's minority pursuant to Utah Code Ann. § 78-12-36 (1953). In 1976, the Legislature passed the Utah Health Care Malpractice Act. Section 78-14-4 of that Act purported to "apply to all persons regardless of minority or other legal disability." The following year, this Court rendered its decision in Scott v. School Board of Granite School District, 568 P.2d 746 (Utah 1977), which held that "a minor claimant is justly entitled to the protection afforded by § 78-12-36(1), ... in all cases... to hold otherwise is a denial of due process and equal protection." [Id. at 748 (emphasis added)].

In 1979, the Legislature made a minor amendment to § 78-14-4 in direct response to this Court's holding in Scott v. School Board. As amended, the statute reads in pertinent part: "The provisions of

¹¹ This should be particularly true where as here leave to amend plaintiffs complaint was requested so as to permit plaintiffs to formally incorporate into their complaint those factual averments made in their memorandum in opposition to defendants motion for summary judgment. (R. at 168)

this section shall apply to all persons, regardless of minority or other legal disability under § 78-12-36 or any other provision of the law..."

B. THE MALPRACTICE STATUTE OF LIMITATIONS DENIES EQUAL PROTECTION AND IS UNCONSTITUTIONAL.

The statute of limitations for medical malpractice actions is unconstitutional as applied to minors. The Utah Supreme Court so held by necessary implication in Scott v. School Board of Granite School District, 568 P.2d 746 (Utah 1977), when it held that the tolling provision in U.C.A. § 78-12-36, applied in favor of minors in all cases.

In any event, the medical malpractice statute of limitations denies minor plaintiffs equal protection under any substantive standard of review. There was and is no factual predicate to justify elimination of minors' rights, and there is no evidence that the statute has or will have any tendency to further the legislative purposes of Utah's Health Care Malpractice Act. The statute also denies minor claimants' constitutionally protected right of access to the courts by eliminating minors' causes of action before they ever legally have a chance to assert them. This is especially true in cases such as this where the minor claimant not only suffers from the disability of minority but is wholly incompetent as well.

In Scott v. School Board of Granite School District, 568 P.2d 746 (Utah 1977), the Supreme Court of Utah was presented with the question of whether a minor plaintiff should be barred from suing a school district for failure to comply with the notice provision in Utah's Governmental Immunity Act. U.C.A. § 63-30-13 (1953, as

amended). The specific issue in Scott v. School Board was whether the limitation period (barring a claim unless notice was filed within 90 days of the occurrence) took precedence over the general tolling provision in U.C.A., §78-12-36(1), which provides in pertinent part as follows:

Effect of Disability. -- If a person entitled to bring an action ... is at the time the cause of action accrued...

1. Under the age of majority ...

The time of such disability is not part of the time limited for the commencement of the action.

Scott v. School Board holds:

[A] minor claimant is justly entitled to the protection afforded by said §78-12-36(1)... in all cases including notice requirements of all the type contained in the Utah Governmental Immunity Act. To hold otherwise is a denial of due process and equal protection.

The Court's rationale for protecting the rights of minors demonstrates that its holding is not limited to the facts in Scott, but applies to minors "in all cases." The court stated:

A minor is incapable of giving notice by the very virtue of his minority, nor may he bring an action in his own behalf while a minor. He simply has no standing by statute, [U.C.A. § 15-2-1,] and an action by or against a minor requires the appointment of a guardian ad litem.

The parents, or natural guardians, have no specific legal duty to perform and have no responsibility to their natural off-spring other than their moral obligation.

Consequently, in matters of this kind, when a parent or natural guardian fails for one reason or another to give notice, file suit, or otherwise protect the minor's legal interest, the minor is left completely without a remedy. [Id. at 747-48].

Scott v. School Board expressly reversed Gallegos v. Midvale City, 27 Utah 2d 27, 492 P.2d 1335 (Utah 1972), and Greenhalgh v. Payson City, 530 P.2d 799 (Utah 1975), both of which held that specific limitation periods mentioned in Utah's Governmental Immunity Act took precedence over the general tolling provision for minority. We believe that the argument for unconstitutionality is much stronger in this case than in Scott, which was a case in which the cause of action was a result of legislative grace - that is, waiver of governmental immunity, since this case involves a common law cause of action for negligence.

The Utah Legislature itself recognized the applicability of Scott to medical malpractice actions. In 1979, the Legislature attempted to cure the effect of Scott v. School Board on the malpractice statute of limitations by amending § 78-14-4(2) as follows:

The provision of this section shall apply to all persons, regardless of minority and other legal disability under § 78-12-36 or any other provision of the law, ...
[Emphasis added.]

Therefore the legislature, expressly recognizing the effect of Scott on the statute, amended it in 1979 in an attempt to overrule Scott. The Supreme Court's decision in Scott v. School Board, holding, as a matter of constitutional law, that minors were in all cases entitled to the protection of the tolling provisions in § 78-12-36(1), invalidated the malpractice limitations statute as applied to minors. In Malan v. Lewis, 693 P.2d 661 (Utah 1984), the court stated that, "the general rule from time immemorial is that the ruling of a court is deemed to state the true nature of the law both retrospectively and prospectively." [Id., at 676] Thus, an amendment by the legislature does not overrule or invalidate a court decision, but rather changes the then existing law. It is the legislature's job to "make the law", and that of the judiciary to interpret it. Rampton v. Barlow, 23 U.2d 383, 464 P.2d 378, 383 (1970). It seems apparent that the legislature misread Scott to be a case of merely statutory dimensions. To the contrary, Scott's wellsprings are constitutional, and the legislature cannot circumvent the constitution, as applied by this Court, simply by making its denials of due process and equal protection more explicit. On its face, Scott is a constitutional ruling by the Utah Supreme Court. Thereafter, the legislature was powerless to amend § 78-14-4 to preclude application of § 78-12-36 to the claims of minors¹². The legislature is not free to make its own constitutional interpretations, as that would be an impermissible intrusion upon the primary function of the judicial branch. See

¹² Of significance we found no decisions by the Utah Supreme Court which hold that a statute of limitations can be applied to minors; actions in spite of the express language of § 78-12-36(1).

Rampton v. Barlow, 23 U.2d 383, 464 P.2d 378, 383 (1970) (defining the judiciary's primary function as interpreting the law). The Utah Health Care Malpractice Act statute of limitations purports to apply to all persons regardless of minority or other legal disability. This statute violates Jennifer Chapman's constitutional guarantee of equal protection under the Fourteenth Amendment to the United States Constitution, and Article I, Sections 2 and 24 of the Utah Constitution.

In determining whether a statute violates equal protection, the court must first decide the standard by which the statute is to be judged. Three tests have evolved for the consideration of a statute under equal protection analysis: the "strict-scrutiny" test; the "means-focus: test; and the "rational basis" test.

C. STRICT SCRUTINY TEST

Some states have invalidated statutes limiting the right to recover damages for personal injuries under the strict scrutiny test on the basis that such a right is fundamental. See, Kenyon v. Hammer, 688 P.2d 961 (Ariz. 1984) (Arizona limitations period in medical malpractice case found unconstitutional as applied to minors); and White v. State, 661 P.2d 1272 (Mont. 1983). In White, the Montana Supreme Court invalidated a statute limiting damages recoverable against governmental entities based on Article II, Section 16 of the Montana Constitution which is in all respects identical to Article I, Section 11 of the Utah Constitution.

The Utah Supreme Court has never determined whether the right of a minor to recover damages for personal injuries in a medical malpractice action is "fundamental", but on the basis of the holding in Scott v. School Board (a statute which offends the tolling provision

of §78-12-36 denies minors due process and equal protection), we believe that it will hold that the strict scrutiny test should be applied in this case. Should the Court so hold, it will be defendants' burden to demonstrate the compelling state interests which justify the abrogation of minors' rights.

D. MEANS-FOCUS TEST

The means-focus or "heightened scrutiny" standard of review provides an intermediate level of review for equal protection analysis between strict scrutiny and the rational basis test. The means-focus test has been used in areas where the rights involved are substantial, not merely social policy or economic in nature, but which do not rise to the level of fundamental interests or suspect classifications.

Under the intermediate test for equal protection, there must be a relationship between the statutory classifications created and the purposes sought to be accomplished by the statute. That is, the classification (in this case abrogation of the tolling provisions § 78-12-36(1) for minor victims of medical malpractice only) must be directly and rationally related to the accomplishment of the legislative purpose. The main objectives of Utah's Medical Malpractice Act as set forth in § 78-14-2 were to decrease or stabilize the cost of medical malpractice insurance and thereby decrease or stabilize health care costs generally, as well as to ensure the continued availability of insurance to Utah physicians, and quality health care to Utah citizens.

Our attempts to determine the basis for Utah's medical malpractice legislation in 1976 and 1979 has met with no success. So

far as we can tell, there is none. What little legislative history there is for the Act consists of self-serving declarations from malpractice insurers that there was a "problem." No explanation for the cause of the problem was given the legislators, and the record is devoid of any examples from Utah. With regard to the so-called "long-tail" problem with claims of minors, one New York case is cited.

The only evidence that is available indicates that the "long-tail" or unfilled existing case potential problem with claims of minors, did not and does not exist in Utah, and that the cost of malpractice insurance premiums plays an infinitesimal role in the cost of health care. Where is the "long-tail" problem that motivated the Utah Malpractice Act so that "liability insurance premiums can be reasonably and accurately calculated?" [§ 78-14-2]. The "long-tail" problem, as any reasonable person would expect, was and is non-existent. The parents or guardians of an injured infant will naturally assert its cause of action as soon as possible in most instances. It is only in the very rare case such as this where the child's legal injury is not discoverable for four years, or where the parents are ignorant or unmotivated that infants need the protection of a tolling statute such as § 78-12-36(1).³ Those rare instances will cause no harm to

insurance companies who routinely grossly overestimate future losses in order to offset investment income¹³.

Malpractice awards and defense costs are paid by insurance companies. Insurance companies are not part of the health care system, they are independently operated and immensely successful businesses which, through issuance of malpractice insurance and collection of premiums, play an indirect and insignificant role in health care costs. The occasionally large verdicts and settlements that receive a great deal of publicity and attention are not health care costs. The only cost to health care consumers involved in a million dollar judgment against a physician is the premium that physician pays annually for malpractice insurance.

The fact that an alleged medical malpractice "crisis" never existed, or abated, was the basis for several states' conclusions that their malpractice acts were unconstitutional. In Arneson v. Olson, 270 N.W. 2d 125 (N.D. 1978), the North Dakota Supreme Court struck down that State's entire malpractice act, in part, on the basis of a finding that no crisis existed. The court stated:

¹³ By year-end 1983, the Utah Medical Insurance Association ("UMIA"), Utah's primary malpractice carrier, had paid out a total of \$2.7 million on claims in its five-year history. During the same period it had collected over \$15 million in premiums, and earned \$4.3 million in investment income. Yet, for 1983 alone, UMIA claimed \$3.3 million in unpaid losses (more than its five-year total), to bring its total unpaid losses as of the year-end 1983 to over \$8.5 million. (Sources: UMIA financial statement for 1983, and Best's Insurance Reports for property-casualty companies, 1983 and 1984.) Note that these disproportionate projections all took place during a period when minors' causes of action were statutorily limited to a maximum of four years.

The evidence in the case before us, however, indicates that either the legislature was misinformed or subsequent events have changed the situation substantially. [Id. at 136].

The court in Arneson utilized the intermediate test for equal protection analysis. In Boucher v. Sayeed, 459 A.2d 87 (R.I. 1983), the court utilized the lower-tier rational-basis standard in finding its entire malpractice act unconstitutional. The court stated:

Because no obvious crisis exists to support the challenged legislation, we shall ... decline to speculate about unexpressed or unobvious permissible state interests.

Absent a crisis to justify the enactment of such legislation, we can ascertain no satisfactory reason for the separate and unequal treatment that it imposes on medical malpractice litigants. The statute constitutes special class legislation enacted solely for the benefit of specially defined defendant health-care providers. [Id. at 93].

The Utah Supreme Court has also stated unequivocally that the original factual predicate for a statute and any subsequent change from the situation which prompted the legislation are relevant to equal protection analysis. See, discussion of Malan v. Lewis, *infra*.

The evidence available clearly demonstrates that there is no factual predicate for the discriminatory classification created by § 78-14-4 and that abrogation of minors' rights guaranteed by § 78-12-36(1) will not substantially further the objectives of the malpractice act. Therefore, § 78-14-4 should be found

unconstitutional as a denial of equal protection insofar as the statute applies to minors.

E. THE RATIONAL BASIS TEST

Under the rational basis test for equal protection, a statute will be found constitutional so long as it is rationally related to a legitimate legislative purpose. Allen v. Intermountain Health Care, 635 P.2d 30 (Utah 1981).

The real effect of § 78-14-4 is to single out a tiny minority of injured malpractice victims to bear the entire burden of: reducing the cost of malpractice insurance; preventing the excessive practice of defensive medicine; reducing health care costs generally; making sure physicians stay in Utah; and making sure malpractice insurance remains available in Utah. [See, Utah Code Ann. §78-14-2 (1953, as amended)]. That is a considerable burden for Jennifer Chapman and malpractice victims like her to bear. Since she and others like her had no say whatever in the legislation, this court should look closely at the legislation to see if it is, in fact, rational. This Court has a duty to protect the important rights of individuals, especially individuals, like minors, who are unable to speak for themselves. There is little doubt that the Utah Supreme Court does not consider the rational basis test a rubber-stamp for ill-conceived and ineffective legislation. In Malan v. Lewis, 693 P2d 661 (Utah 1984), the Utah Supreme Court struck down this state's automobile guest statute. Malan provides unambiguous evidence of the Utah Supreme Court's willingness to closely scrutinize a statute whose discriminatory effect is obvious. The Utah court explicitly stated that it is not bound to

apply the federal rubber-stamp analysis under the rational basis test. This court stated:

Although Article I, Section 24 of the Utah Constitution incorporates the same general fundamental principles as are incorporated in the equal protection clause, our constitution and application of Article I, Section 24 are not controlled by the Federal courts' construction and application of the equal protection clause. Case law developed under the Fourteenth Amendment may be persuasive in applying Article I, Section 24 ..., but that law is not binding so long as we do not reach a result that violates the equal protection clause. (Citations omitted.) The different language of Article I, Section 24, the different constitutional contexts of the two provisions, and different jurisprudential considerations may lead to a different result in applying equal protection principles under Article I, Section 24 than might be reached under Federal law. [*Id.*]

It is difficult to determine exactly what test the court applied for equal protection. All indications are that it utilized the rational basis test, although, if that is the case, it is clear that Utah's rational basis test has teeth. The equal protection analysis was based on Article I, Section 24 of the Utah Constitution, which provides: "All laws of a general nature shall have uniform operation." It was explained that Article I, Section 24 was meant to protect against two types of discrimination:

First, law must apply equally to all persons within a class. (Citations omitted). Second, the statutory classifications and the different treatment given the classes must be based on

differences that thave a reasonable tendency to further the objectives of the statute. Citing, Allen v. Intermountain Health Care, other citations omitted.) If the relationship of the classification to the statutory objectives is unreasonable or fanciful, the discrimination is unreasonable. [Id.] (emphasis added).]

The court's holding is clear that a statutory classification must be based on differences which have a reasonable tendency to further the objectives of the statute, and, if the relationship to the statutory objectives is unreasonable or fanciful, the discrimination is unreasonable. Indeed, the majority of the Malan equal protection analysis involves a determination of whether the "classifications established [by the guest statute] provide a reasonable basis for promoting [the statute's] objectives." [Id.] The court goes on to state:

When persons are similarly situated, it is unconstitutional to single out one person or group of persons from among a larger class on the basis of a tenuous justification that has little or no merit. [Id.]

And still further:

Equal protection of the law, both state and federal, "requires more of a state law than non-discriminatory application within the class it establishes." (Citations omitted.) The classification must rest on some difference which "bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis ... [A]rbitrary selection can never be justified by calling it classification." (Citations omitted.) "The

courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose..." (Citations omitted.) [Id.]

Not only is § 78-14-4 as applied to minors unreasonable in light of its purpose, it also irrationally discriminates within the class of tortiously injured minors by applying the shortened statute of limitations only to medical malpractice victims. Significantly, the Utah Supreme Court held the attempt to limit minors' causes of action in governmental immunity cases unconstitutional despite the same policy considerations which allegedly exist on the malpractice area, namely; to limit the cost of insurance and claims, and to decrease the burden on the public who indirectly must pay such increased costs.

F. THE MALPRACTICE STATUTE OF LIMITATION
UNCONSTITUTIONALLY DEPRIVES MINOR PLAINTIFFS OF ACCESS TO
THE COURTS

Article I, Section 11 of the Utah Constitution provides:

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have a 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.
[Emphasis added].

The effect of § 78-14-4 on minors is to bar their cause of action in malpractice cases before they ever legally have a chance to assert it. As such, the open courts provision of the Utah Constitution is plainly violated and the statute should be struck down, at least as it pertains to minors. [See, concurring opinion of Justice Howe in Myers v. McDonald, supra, 635 P.2d 84 (Utah 1981).]

The best example of a case construing an open court's provision in a medical malpractice context is Sax v. Votteler, 648 S.W.2d 661 (Tex. 1983). Sax is identical to this case in all relevant respects. Prior to 1975, Texas law allowed for the tolling of limitations in all tort actions by minors until two years after attaining majority or removal of disabilities. In 1975, the legislature changed the limitations period in malpractice actions to two years from the date of treatment, and specifically provided that, "This section applies to all persons regardless of minority or other legal disability."

Article I, Section 13, of the Texas Constitution (substantially identical to Utah's Art. I, Section 11) provides in relevant part: "All courts shall be open, and every person for an injury done him, ... shall have remedy by due course of law." In determining the constitutionality of the statute under the open courts provision, the Texas court utilized the following test:

We hold, therefore, that the right to bring a well-established common law cause of action cannot be effectively abrogated by the legislature absent a showing that the legislative basis for the statute outweighs the denial of the constitutionally-guaranteed right of redress. In applying this test, we consider both the general

purpose of the statute and the extent to which the litigants' right to redress is effected. [Id. at 665-66].

The Court, with reasoning virtually identical to that of the Utah Supreme Court in Scott v. School Board, held the statute unconstitutional as applied to minors. The Court held:

A child has no right to bring a cause of action on his own unless disability has been removed. (Citations omitted.) If a minor does bring a cause of action in his own behalf, the action is subject to being abated upon a timely plea of the defendant. (Citations omitted.) If the parents, guardians, or next friends of the child negligently fail to take action in the child's behalf within the time provided..., the child is precluded from asserting his cause of action under that statute. Furthermore, the child is precluded from suing his parents on account of their negligence, due to the doctrine of parent-child immunity. (Citations omitted) The child, therefore, is effectively barred from any remedy if his parents fail to timely file suit. Respondents argue that parents will adequately protect the rights of their children. This court, however, cannot assume that parents will act in such a manner. It is neither reasonable nor realistic to rely upon parents, who may themselves be minors, or who may be ignorant, lethargic, or lack concern, to bring a malpractice lawsuit action within the time provided. [Id. at 666-67].

The Utah Supreme Court unequivocally voiced its displeasure at this possibility in Foil v. Ballinger, 601 P.2d 144 (Utah 1979), (see

supra) a case in which the court held that the "discovery rule" applies to medical malpractice actions. With regard to the elimination of a cause of action before it accrues, the court stated:

To say that a cause of action accrues to a person when she may maintain an action thereon and at the same time, that it accrues before she has or can reasonably be expected to have knowledge of any wrong inflicted upon her is patently inconsistent and unrealistic. She cannot maintain an action before she knows she has one. To say to one who has been wronged, "you had a remedy, but before the wrong was ascertainable to you, the law stripped you of your remedy," makes a mockery of the law. [Id. at 148-49 (citations omitted.)]

Under §78-14-4 a minor has a maximum of four years in which to assert a cause of action whether or not his injury is discovered or known to him. The statute, of course, has the same potential effect with adults, with one major difference. An adult has four years in which to discover and file a claim. The adult at least has a chance. A minor cannot file a claim on his own behalf even if a legal injury is discovered. The minor must depend on third persons to assert a claim for him. It begs the question to assert that the statute is saved by its "plaintiff or patient" language. That does nothing to change the fact that there is no one with a legal obligation to protect a minor plaintiff's interests, and a minor, particularly a completely incompetent one, like Jennifer Chapman is powerless to protect his or her own. The reasoning of the Utah Court in Switzer v. Reynolds, 606 P.2d 244, 248-49 (Utah 1980), is completely consistent with this reasoning. In Switzer it was held that the statute of limitations for

wrongful death actions was tolled during a claimant's minority despite the fact that an action could be brought on behalf of the minor by a parent or guardian. This was also the precise rationale for the Arizona Supreme Court's ruling in Barrio v. San Manuel Division Hospital for Magma Copper Company, 692 P.2d 290 (Ariz. 1983). In 1976 Arizona passed its own special statute of limitations for malpractice actions [A.R.S. § 12-564(D)], which said it applied "notwithstanding the provisions of § 12-502" which is Arizona's general tolling provision applicable to minors three years or until the age of ten to bring a cause of action for medical malpractice. Arizona had previously held that the right to maintain a cause of action for personal injuries was fundamental. [Kenyon v. Hammer, 688 P.2d 961 (Ariz. 1984).] Nevertheless, its rationale for striking down the statute of limitations as applied to minors in medical malpractice actions is persuasive under any standard. The court stated:

We have held that "an infant cannot bring or defend a legal proceeding in person." (citations omitted) We are aware, of course, that an action can be brought on behalf of the minor by a next friend, guardian ad litem, or general guardian. No doubt, most claims of minors are so presented. We are well aware that where a chance of substantial recovery exists, there is no lack of advocates willing to undertake appropriate procedures to find and appoint a guardian ad litem or to obtain a "next friend" so that the action may be brought. While the vast majority of claims on behalf of injured minors will still be brought within a relatively short time after the injury occurs, this all depends upon good fortune; the minor himself is helpless,

particularly when under ten years of age. The minor possesses a right guaranteed by the constitution, but cannot assert it unless someone else, over whom he has no control, learns about it, understands it, is aware of the need to take prompt action, and in fact takes such action.

We recognize, also, that some children are without parents or have parents who do not fulfill commonly accepted parental functions. The statute makes no exception for children who have unconcerned parents, children in foster care, or those in institutions; ...

As to parents themselves, some are lazy or frightened or ignorant or religiously opposed to legal redress. Still, they have their remedy available to them if they choose to use it. A child does not. [Id.]

There is no reason why the rationale in Sax and Barrio, which is identical to that utilized by the Utah Supreme Court in Scott v. School Board, should not apply in a medical malpractice case. Section 78-14-4, as applied to Jennifer Chapman denies her access to the courts, and is thereby unconstitutional.

The Utah Supreme Court has held that any statute which purports to deny minors the protection of the tolling provision in Utah Code Ann. § 78-36-12(1) is unconstitutional as a denial of due process and equal protection. The medical malpractice statute of limitations attempts to abrogate that tolling provision and is thereby unconstitutional. The medical malpractice statute of limitations is also unconstitutional on the ground that it denies minors access to the courts as guaranteed by Utah Constitution, Art. I, Section 11.

Very significantly this Court passed upon a constitutional question similar to the one raised in this case in the recent Utah case of Berry v. Beech Aircraft Corp. 717 P.2d 670 (Utah 1985). That case involved the Utah Statute of Repose. Beech Aircraft claimed that the minor plaintiffs claims were barred because they were not asserted within the statutory period since the time periods set forth in the statute had run before plaintiffs claims arose. The trial court awarded Beech summary judgment on all theories of liability on the ground that Section 3 of the Utah Product Liability Act ("Act"), U. C. A., 1953, 7B-15-1, et seq., barred all actions against Beech. Section 3 of the Act, commonly called a statute of repose, provides:

(3) No action shall be brought for the recovery of damages for personal injury, death or damage to property more than six years after the date of initial purchase for use or consumption, or ten years after the date of manufacture of a product, ..."

The plaintiffs made the same claim we make for exactly the same reasons. They relied upon Article I, Section II of the Utah Constitution which declares that an individual shall have a right to a "remedy by due course of law" for injury to one's "person, property, or reputation." and claimed that the statute of repose which deprived the plaintiffs of that right violated that provision.

The plaintiffs claimed that although the statutory provision in question purported to grant a reasonable time for the filing of a claim the plaintiffs claims had expired before their causes of action accrued and they were deprived of that right. In forming its opinion that the statute in question was unconstitutional, the court exhaustively reviewed the historical roots of the constitutional

provision and the decisions construing it and cited the United States Supreme Court's opinion in Wilson v. Iseminger, 185 U. S. 55 (1902). It commented that the Wilson court "noted the fundamental obligation of government to provide reasonable remedies for wrongs done persons" and quoted from the case with approval as follows:

Every government is under obligation to its citizens to affords them all needful legal remedies. . . . A statute could not bar the existing rights of claimants without affording this opportunity (to try rights in the courts); if it should attempt to do so, it would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions. " Id. at 62.

The Berry court went on to quote "the basic rule" from 51 Am. Jur. 2d Limitations of Actions, 28, at 613:

It is not within the power of the legislature, under the guise of a limitation provision, to cut off an existing remedy entirely, since this would amount to a denial of justice, and, manifestly, an existing right of action cannot be taken away by legislation which shortens the period of limitation to a time that has already run.

For the foregoing reasons, the statute in question should be declared unconstitutional.

CONCLUSION

The court below granted summary judgment when there were material questions of fact on the question of whether the statute of limitations had run in this case. Those questions included questions

as to whether the defendants had hidden information from the plaintiffs as to the cause of the plaintiff's injuries and whether false information had been given to plaintiffs. Arising from the questions of fact were issues as to whether the plaintiffs know of the "legal cause" of the plaintiffs injuries and whether the defendants were estopped to raise these issues. In addition the trial court barred all discovery and granted summary judgment on the pleading of the fraud issue by the plaintiff when this issue was properly pled and placed into issue by plaintiffs and upon the question of whether care provided by the defendants within the period of the statute of limitations was negligently done.

This court has held that statutes which deny minors the equal protection of the laws, due process or access to the courts are unconstitutional. The medical malpractice statute of limitations attempts to do just that and is unconstitutional.

In consequence of all of the arguments set forth herein, appellant respectfully requests that this court reverse the summary judgment and dismissal on behalf of defendants entered by Judge Wilkinson below, and Order that the matter proceed to trial.

RESPECTFULLY SUBMITTED this 15 day of August, 1986.

A handwritten signature in cursive script, reading "Robert N. Williams for".

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Robert N. Williams
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Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify, as counsel for Appellant, that four (4) true and correct copies of the foregoing Appellant's Brief were served upon counsel for Respondents by mailing on the 14th day of August, 1986, addressed as follows:

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ADDENDUM

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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	:	ORDER
CHAPMAN, individually,	:	
	:	
Plaintiffs,	:	Civil No. C85-6782
	:	
vs.	:	
	:	
PRIMARY CHILDREN'S HOSPITAL,	:	(HON. HOMER F. WILKINSON)
et al. [Redesignated I.H.C.	:	
HOSPITALS, INC., et al.]	:	
	:	
Defendants.	:	

The motions to modify the designation of the hospital defendants, for summary judgment, and to dismiss of defendants 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 ("hospital defendants") L. GEORGE VEASY, M.D., and KAREN BOWMAN, R.N., and the motion to dismiss of defendant Garth Meyers, M.D., having come on regularly before the above-entitled court on February 5, 1986, the Honorable Homer F. Wilkinson presiding, and the court having reviewed the memoranda, pleadings, affidavits and records on file and having heard oral argument from counsel, and having taken the matter under advisement and finding that good cause has been shown, and that there is no just reason for delaying entry of final judgment herein as to these parties,

IT IS HEREBY ORDERED that: (1) the motion to modify the designation of hospital defendants, being without opposition, is granted and the names of the hospital defendants in this action are removed and I.H.C. Hospitals, Inc., a Utah corporation, d/b/a Primary Children's Medical Center is substituted therefor; and (2) the motions for summary judgment and to dismiss of the defendants L. George Veasy, M.D., Karen Bowman, R.N. and the hospital defendants, and the motion to dismiss of defendant Garth Meyers are granted and final judgment in favor of said defendants and against the plaintiffs is hereby entered with prejudice.

DATED this 1 ^{April} day of ~~March~~, 1986.

ATTEST
H. DIXON HINDLEY
Clerk

By S. A. Shields
Deputy Clerk

Homer F. Wilkinson
HOMER F. WILKINSON
District Judge

Approved as to form:

Robert N. Williams by

Robert N. Williams, Esq.
Attorney for Plaintiffs

Kathryn Collard

Gary B. Ferguson

Gary B. Ferguson, Esq.
Attorney for Defendant Meyers

B. Lloyd Poelman

B. Lloyd Poelman
Attorney for Defendants Veasy, Bowman
and Hospital Defendants

CERTIFICATE OF MAILING

This is to certify that I served a true and correct copy of the foregoing ORDER, by depositing the same in the United States mail, postage prepaid, on this the ____ day of March, 1986 to the following:

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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.

) AFFIDAVIT OF ROBERT
CHAPMAN

Civil No. C85-6782

(HON. H. F. WILKINSON)

000140

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

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

1. 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.

2. 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.

3. Jennifer recovered from the anesthesia and we were permitted to visit with her. I observed that Jennifer was crying and awake. After some 10 to 15 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.

4. My wife 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. 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 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.

5. After our initial meeting with Dr. Veasy, I wrote him a letter. A copy of that letter is attached to the Defendants' Motion for summary judgment. That letter referred to the actions of the Ogden doctors. My reference to "obvious negligence" in that letter was in reference to the actions of the Ogden doctors and had nothing whatsoever to do with the actions of Dr. Veasy or any of the defendants named in this case.

6. 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 persuaded us and our lawyers that although he was critical of the delay on the part of the Ogden doctors in sending Jennifer to him for care, 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. Dr. Veasy 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.

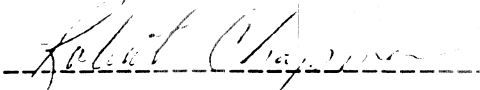
7. After the dismissal of the Ogden case the defendants Veasy, Meyers and the Hospital continued to provide treatment to Jennifer and they continued to represent to us that the medical records and tests showed that the cause of her injuries were blood clots and that it was unavoidable and that any omission on the part of the nurses did not cause Jennifer's brain damage. We trusted and believed the defendants 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 tests 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 statments of Dr. Veasy to us.

8. In July of 1984, I confronted Dr. Veasy about the medical records and their conflicts 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 me on this subject were assumptions on his part and not the result of tests which had been performed on Jennifer.

9. 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 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.

10. 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 and a doctor-patient relationship between us and Jennifer existed with Dr. Meyers until approximately June, 1983. During these periods Jennifer received treatment for her brain damaged condition and its complications from these defendants.

Dated this 15th day of January, 1986.


Robert Chapman

Subscribed and sworn to before me this 15th day of January, 1986.

Liane Duran
Notary Public

My commission expires:

1-18-87

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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
Teresa Chapman

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

Aiane Beru
Notary Public

My commission expires:

1-18-87

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

Dear Dr. Henry

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 deep
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
this letter so that you will have a better under-
standing 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
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 how
Jennie was doing. You asked only to see
how much money and the blood money that we are
getting. I have pondered this in my heart deeply
and in that meeting I was moved in a religious
manner and taught honesty and respect for seeking to
obtain what we have. Our profit has a reward
against accepting filthy money and that money
itself is not evil but the heart that

000006

It 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. Uninsurance premiums are paid to protect
all against hardship in this world. I have to ins-
ure my business against fire, theft, and accident to protect
me as a business man. It is not something that any
doctor pays.

What has brought me to the decision to go on
with the suit 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 been caring
for an uncle who is mentally handicapped. We have
had to take care of his needs and try to bring to
him some sort of happiness in this life. We have now
found it necessary to move after five years of nursing 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.
The nearly five years we have been here not one
relative has offered to help us with this burden.
There have been the center of jealousy and back biting
among religious people here that we are building our
own home it seems that we are doing the wrong
of saving for their damn. The fighting and accusing is
already taking place. It looks as though it might have
to build an extra room in our basement to let
him live in because no one wants him. I can see
in your expression after what has happened here in
last five years that you are a burden to someone.
If something should happen to, I am sure

On Feb 24 of this year my wife and our four children were driving to work when a drunken driver lost 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 obliterating 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 boy. The entire family had to be taken to the hospital and treated. Jessica, 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 four 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. It takes a tremendous amount of patience to care for her and it was I had to do in the kind of proper way that I care for her and she is very well. Because of the accident I only have three days to bring my wife and children back home. Jennifer would have been left in the hospital without the ability to care for herself and it would be just as much of a burden as she would be back home. I was hospitalized for about 10 days in the hospital in four days in doctor's office and it was terrible.

that it can well occur that it is not quite
indirectly or, legally its cause all the questions
pertaining to a most precise rule of the way it should
be the burden of proof is on one to prove the
negligence and physical damage. The negligence is ob-
vious to wit, that the physical damage can be done
the ~~same~~ negligence only a man of your medical knowl-
edge can know for sure it is known that besides being
mentally and physically handicapped for years she has
an enlarged heart making it impossible for her to
ever lead any kind of normal active life and even
live in the course of her death. She was killed
that had become of wrong decisions made on her so
life she has in the state of black widow for
compensation for pain and suffering. The suffering is
full proof for the first few months of her life is
to be turned away by doctors that wouldn't have her
for little girls that could lead their breath at
full breath on her soul at least have a month
and fought for her every life until she was
completely disabled. You told her if she had died
you would have been obligated to take care of her
behalf. A dead person feels no pain and suffers
she is entitled to something for as long as she is
willing to go on struggling for her life. She can
have to be accepted upon the individual merits
and not by what it costs for someone to be
kept in a hospital it is impossible that it is not
worthwhile to display anyone or collect a fortune in her
name. The help provided by the state and federal
governments to the handicapped are a mockery to
the society we live in. It is only a small amount
money and it is nothing for the individual patient it is
no longer depend on other people to care for my child.
She is only living on our home and the financial

Jennifer's future will bring but as to further by
you to consider Jennifer as an individual and not
an insurance because the such best in each hospital.
She is very young and will be in contact with
you and it is not your duty that he represents
Jennifer's interests and not a state your feeling toward the
legal profession. It is important that our in-
formation should answer.

We do hope that we can continue through
life as the best of friends and that we can bring
interest Jennifer's life as you may expect. Thanks

Sincerely

It is indeed very much to be desired
that you should be able to do so.
S.B. Thanks for your time and effort.

And as a last thing, I am very glad to

[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 to 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 jamed 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 unconcious 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 buy me. I had to close up my business to care for her. I takes a tremendous amount of paciance 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.

Waiver.

If no objection is made to jurisdiction of court to which case was transferred by court on its own motion, or to any of the proceedings growing out of order changing place of trial, it is waived; objection comes too late if made for first time in Supreme

Court. *Elliot v. Whitmore*, 10 U. 246, P. 461, applying 2 Comp. Laws 1888, § 3

Collateral References.

Venue ⇨ 74.

92 C.J.S. Venue § 197.

77 Am. Jur. 2d 938, Venue § 88.

78-13-11. Duty of clerk—Fees and costs—Effect on jurisdiction

When an order is made transferring an action or proceeding for trial to another court, the court must transmit the pleadings and papers therein to the court to which it is transferred. The costs and fees therefor and filing papers anew must be paid by the party at whose instance the order is made; provided, that when such order is made for the reason that the cause was commenced in the wrong county, the costs of transfer and filing the papers anew shall be paid by the plaintiff in the action within ten days after the making of such order, or said cause shall be dismissed for want of jurisdiction. The court to which an action or proceeding is transferred shall have and exercise the same jurisdiction as if it had been originally commenced therein.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-13-11.

Collateral References.

Venue ⇨ 79, 80.

92 C.J.S. Venue § 207.

77 Am. Jur. 2d 940, Venue § 90.

Compiler's Notes.

This section is similar to former section 104-4-11 (Code 1943) which was repealed by Laws 1951, ch. 58, § 3.

Power to withdraw or modify or granting change of venue, 59 A. L. R. .

CHAPTER 14**MALPRACTICE ACTIONS AGAINST HEALTH CARE PROVIDERS**

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| Section 78-14-1. | Short title of act. |
| 78-14-2. | Legislative findings and declarations—Purpose of act. |
| 78-14-3. | Definition of terms. |
| 78-14-4. | Statute of limitations—Exceptions—Application. |
| 78-14-5. | Failure to obtain informed consent—Proof required of patient—fenses—Consent to health care. |
| 78-14-6. | Writing required as basis for liability for breach of guarantee, warranty, contract or assurance of result. |
| 78-14-7. | Ad damnum clause prohibited in complaint. |
| 78-14-8. | Notice of intent to commence action. |
| 78-14-9. | Professional liability insurance coverage for providers—Insurance commissioner may require joint underwriting authority. |
| 78-14-10. | Actions under Utah Governmental Immunity Act. |
| 78-14-11. | Act not retroactive—Exception. |

78-14-1. Short title of act.—This act shall be known and may be cited as the "Utah Health Care Malpractice Act."

History: L. 1976, ch. 23, § 1.

Title of Act.

An act relating to malpractice actions against health care providers; providing a definition of health care providers; providing for a shortening of the statute of limitations for malpractice actions; pro-

viding for a prohibition of ad damnum clauses in malpractice actions; providing a requirement for notice prior to filing malpractice actions; providing for periodic payment of future damages awarded in malpractice actions; providing for revision of the collateral source rule in malpractice actions; providing for a c

Whitmore, 10 U. 246, 37
2 Comp. Laws 1888, § 3199.

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§ 197.
1938, Venue § 88.

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for the insurance commissioner to require
a joint underwriting authority; providing
powers to the insurance commissioner to
examine individual professional liability
claim files and to require separate report-
ing of financial data relating to profes-

sional liability insurance for health care
providers; and amending section 31-3-1,
Utah Code Annotated 1953, section 31-5-21,
Utah Code Annotated 1953, as amended
by chapter 45, Laws of Utah 1963, as
amended by chapter 69, Laws of Utah
1971, and section 78-12-28, Utah Code
Annotated 1953, as amended by chapter
212, Laws of Utah 1971.—L. 1976, ch. 23.

78-14-2. Legislative findings and declarations—Purpose of act.—The
legislature finds and declares that the number of suits and claims for dam-
ages and the amount of judgments and settlements arising from health care
has increased greatly in recent years. Because of these increases the in-
surance industry has substantially increased the cost of medical malpractice
insurance. The effect of increased insurance premiums and increased claims
is increased care cost, both through the health care providers passing the
cost of premiums to the patient and through the provider's practicing de-
fensive medicine because he views a patient as a potential adversary in a
lawsuit. Further, certain health care providers are discouraged from con-
tinuing to provide services because of the high cost and possible unavail-
ability of malpractice insurance.

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

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

History: L. 1976, ch. 23, § 2.

78-14-3. Definition of terms.—As used in this act:

(1) "Health care provider" includes any person, partnership, associa-
tion, corporation or other facility or institution who causes to be rendered
or who renders health care or professional services as a hospital, physician,
registered nurse, licensed practical nurse, nurse-midwife, dentist, dental
hygienist, optometrist, clinical laboratory technologist, pharmacist, physical
therapist, podiatrist, psychologist, chiropractic physician, naturopathic phy-
sician, osteopathic physician, osteopathic physician and surgeon, audiol-
ogist, speech pathologist, certified social worker, social service worker, so-
cial service aide, marriage and family counselor, or practitioner of obstet-
rics, and others rendering similar care and services relating to or arising
out of the health needs of persons or groups of persons, and officers, em-

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ployees, or agents of any of the above acting in the course and scope of their employment.

(2) "Hospital" means a public or private institution licensed under the Hospital Licensing Act.

(3) "Physician" means a person licensed to practice medicine and surgery as provided in subsection 58-12-3(1).

(4) "Registered nurse" means a person licensed to practice professional nursing as provided in section 58-31-9.

(5) "Licensed practical nurse" means a person licensed to practice as a licensed practical nurse as provided in section 58-31-10.

(6) "Nurse-midwife" means a person licensed to practice nurse-midwifery as provided in section 58-13-17 [58-31-17].

(7) "Dentist" means a person licensed to practice dentistry as defined in section 58-7-6.

(8) "Dental hygienist" means a person licensed to practice dental hygiene as defined in section 58-8-9.

(9) "Optometrist" means a person licensed to practice optometry as defined in section 58-16-11.

(10) "Pharmacist" means a person licensed to practice pharmacy as provided in section 58-17-2.

(11) "Physical therapist" means a person licensed to practice physical therapy as provided in section 58-24-6.

(12) "Podiatrist" means a person licensed to practice chiropody as defined in section 58-5-12.

(13) "Psychologist" means a person licensed to practice psychology as defined in section 58-25-4.

(14) "Chiropractic physician" means a person licensed to practice chiropractic as provided in subsection 58-12-3(3).

(15) "Naturopathic physician" means a person licensed to practice naturopathy as defined in section 58-12-22.

(16) "Osteopathic physician" means a person licensed to practice osteopathy as provided in section 58-12-6.

(17) "Osteopathic physician and surgeon" means a person licensed to practice osteopathy as provided in section 58-12-7.

(18) "Audiologist" means a person licensed to practice audiology as provided in section 58-1-5.

(19) "Speech pathologist" means a person licensed to practice speech pathology as provided in section 58-1-5.

(20) "Certified social worker" means a person licensed to practice as a certified social worker as provided in section 58-35-5.

(21) "Social service worker" means a person licensed to practice as a social service worker as provided in section 58-35-5.

(22) "Social service aide" means a person licensed to practice as a social service aide as provided in section 58-39-8 [58-35-5].

(23) "Marriage and family counselor" means a person licensed to practice as a marriage counselor or family counselor as provided in section 58-39-6.

(24) "Practitioner of obstetrics" means a person licensed to practice obstetrics in this state as provided in subsection 58-12-3(5).

(25) "Patient" means a person who is under the care of a health care provider, under a contract, express or implied.

(26) "Commissioner" means the commissioner of insurance as provided in section 31-2-2.

(27) "Representative" means the spouse, parent, guardian, trustee, attorney-in-fact or other legal agent of the patient.

(28) "Tort" means any legal wrong, breach of duty, or negligent or unlawful act or omission proximately causing injury or damage to another.

(29) "Malpractice action against a health care provider" means any action against a health care provider, whether in contract, tort, breach of warranty, wrongful death or otherwise, based upon alleged personal injuries relating to or arising out of health care rendered or which should have been rendered by the health care provider.

(30) "Health care" means any act, or treatment performed or furnished, or which should have been performed or furnished, by any health care provider for, to, or on behalf of a patient during the patient's medical care, treatment or confinement.

(31) "Future damages" includes damages for future medical treatment, care or custody, loss of future earnings, loss of bodily function, or future pain and suffering of the judgment creditor.

History: L. 1976, ch. 23, § 3.

Cross-Reference.

Hospital Licensing Act, 26-15-54 et seq.

Compiler's Notes.

The bracketed references to section 58-31-17 in subd. (6) and section 58-35-5 in subd. (22) were inserted by the compiler.

78-14-4. Statute of limitations — Exceptions — Application. — (1) No malpractice action against a health care provider may be brought unless it is commenced within two years after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered the injury, whichever first occurs, but not to exceed four years after the date of the alleged act, omission, neglect or occurrence, except that:

(a) In an action where the allegation against the health care provider is that a foreign object has been wrongfully left within a patient's body, 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 existence of the foreign object wrongfully left in the patient's body, whichever first occurs; and

(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

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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 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.

History: L. 1976, ch. 23, § 4.

Compiler's Notes.

This act became effective sixty days after adjournment of the legislature on January 31, 1976.

Cross-Reference.

Separate trial of statute of limitations issue in malpractice actions, 78-12-47.

Collateral References.

Limitation of Actions—31, 40, 55(3); Physicians and Surgeons—18(1½).

53 C.J.S. Limitations of Actions § 74; 54 C.J.S. Limitations of Actions §§ 174, 183 et seq.; 70 C.J.S. Physicians and Surgeons § 60.

61 Am. Jur. 2d 307 et seq., Physicians, Surgeons, and Other Healers § 181 et seq.

Applicability, in action against nurse

in her professional capacity, of statute of limitations applicable to malpractice, 8 A. L. R. 3d 1336.

Medical malpractice: amendment purporting to change the nature of the act or theory of recovery, made after statute of limitations has run, as relating back to filing of original complaint, 70 A. L. R. 3d 82.

Statute of limitations applicable to malpractice action against physician, surgeon, dentist, or similar practitioner, 80 A. L. R. 2d 320.

Statute of limitations relating to medical malpractice actions as applicable to actions against unlicensed practitioner, A. L. R. 3d 114.

When statute of limitations commenced to run against malpractice action based on leaving foreign substance in patient's body, 70 A. L. R. 3d 7.

DECISIONS UNDER FORMER LAW

Foreign object left in body.

Where foreign object was negligently left in body of patient during operation and patient was thus ignorant of right of action for malpractice, cause of action did not accrue until patient learned of presence of such foreign object. *Christiansen v. Rees*, 20 U. (2d) 199, 436 P. 2d 435.

Statutory changes.

Although action against physician arose under 78-12-25 which set a four-year limitation period, the subsequent amendment to 78-12-28 which included physicians and provided a two-year statute of limitations shortened the time for asserting the right of action; plaintiffs had two years from the

effective date of the amendment to assert their cause, which they failed to do so; therefore, the cause of action was barred. *Greenhalgh v. Payson City*, 530 P. 2d 1.

Tolling statute.

Where physician continued to treat patient after removing her tonsils, representing that her throat condition would clear up, defense of limitations was not available to physician in malpractice action since his representations were in nature of fraudulent concealment of plaintiff's cause of action and statute of limitations did not begin to run until falsity of his representations was discovered. *Petele Robison*, 81 U. 535, 17 P. 2d 244.

78-14-5. Failure to obtain informed consent—Proof required of patient—Defenses—Consent to health care.—(1) When a person submits to health

care rendered by a health care provider, it shall be presumed that what the health care provider did was either expressly or impliedly authorized to be done. For a patient to recover damages from a health care provider in an action based upon the provider's failure to obtain informed consent, the patient must prove the following:

(a) That a provider-patient relationship existed between the patient and health care provider; and

(b) The health care provider rendered health care to the patient; and

(c) The patient suffered personal injuries arising out of the health care rendered; and

(d) The health care rendered carried with it a substantial and significant risk of causing the patient serious harm; and

(e) The patient was not informed of the substantial and significant risk; and

(f) A reasonable, prudent person in the patient's position would not have consented to the health care rendered after having been fully informed as to all facts relevant to the decision to give consent. In determining what a reasonable, prudent person in the patient's position would do under the circumstances, the finder of fact shall use the viewpoint of the patient before health care was provided and before the occurrence of any personal injuries alleged to have arisen from said health care; and

(g) The unauthorized part of the health care rendered was the proximate cause of personal injuries suffered by the patient.

(2) It shall be a defense to any malpractice action against a health care provider based upon alleged failure to obtain informed consent if:

(a) The risk of the serious harm which the patient actually suffered was relatively minor; or

(b) The risk of serious harm to the patient from the health care provider was commonly known to the public; or

(c) The patient stated, prior to receiving the health care complained of, that he would accept the health care involved regardless of the risk; or that he did not want to be informed of the matters to which he would be entitled to be informed; or

(d) The health care provider, after considering all of the attendant facts and circumstances, used reasonable discretion as to the manner and extent to which risks were disclosed, if the health care provider reasonably believed that additional disclosures could be expected to have a substantial and adverse effect on the patient's condition; or

(e) The patient or his representative executed a written consent which sets forth the nature and purpose of the intended health care and which contains a declaration that the patient accepts the risk of substantial and serious harm, if any, in hopes of obtaining desired beneficial results of health care and which acknowledges that health care providers involved have explained his condition and the proposed health care in a satisfactory manner and that all questions asked about the health care and its attendant risks have been answered in a manner satisfactory to the patient or his

representative; such written consent shall be a defense to an action against a health care provider based upon failure to obtain informed consent unless the patient proves that the person giving the consent lacked capacity to consent or shows by clear and convincing proof that the execution of written consent was induced by the defendant's affirmative acts of fraudulent misrepresentation or fraudulent omission to state material facts.

(3) Nothing contained in this act shall be construed to prevent a person eighteen years of age or over from refusing to consent to health care for his own person upon personal or religious grounds.

(4) The following persons are authorized and empowered to consent to any health care not prohibited by law:

- (a) Any parent, whether an adult or a minor, for his minor child;
- (b) Any married person, for a spouse;
- (c) Any person temporarily standing in loco parentis, whether formally serving or not, for the minor under his care and any guardian of his ward;
- (d) Any person eighteen years of age or over for his or her parent who is unable by reason of age, physical or mental condition, to provide such consent;
- (e) Any patient eighteen years of age or over;
- (f) Any female regardless of age or marital status, when given in connection with her pregnancy or childbirth;
- (g) In the absence of a parent, any adult for his minor brother or sister; and
- (h) In the absence of a parent, any grandparent for his minor grandchild.

(5) No person who in good faith consents or authorizes health care treatment or procedures for another as provided by this act shall be subject to civil liability.

History: L. 1976, ch. 23, § 5.

Collateral References.

Physicians and Surgeons—15(8), 16.

70 C.J.S. Physicians and Surgeons § 51 Am. Jur. 2d 223 et seq., Physicians and Surgeons, and Other Healers § 105 et

78-14-6. Writing required as basis for liability for breach of guarantee, warranty, contract or assurance of result.—No liability shall be imposed upon any health care provider on the basis of an alleged breach of guarantee, warranty, contract or assurance of result to be obtained from a health care rendered unless the guarantee, warranty, contract or assurance is set forth in writing and signed by the health care provider or an authorized agent of the provider.

History: L. 1976, ch. 23, § 6.

Cross-Reference.

Blood transfusions, procurement and use of blood a service rather than a sale, 26-291.

Collateral References.

Statute of Frauds—37, 97.
37 C.J.S. Statute of Frauds §§ 32, et seq.

Blood transfusion, liability for injury or death from, 45 A. L. R. 3d 1364.

78-14-7. Ad damnum clause prohibited in complaint.—No dollar amount shall be specified in the prayer of a complaint filed in a malpractice action against a health care provider. The complaint shall merely pray for such damages as are reasonable in the premises.

History: L. 1976, ch. 23, § 7.

70 C.J.S. Physicians and Surgeons § 67.

Collateral References.

61 Am. Jur. 2d 359 et seq., Physicians, Surgeons, and Other Healers § 215 et seq.

Physicians and Surgeons § 18(11).

78-14-8. Notice of intent to commence action.—No malpractice action against a health care provider may be commenced unless and until the plaintiff gives the prospective defendant or his executor or successor, at least ninety days' prior notice of intent to commence an action. Such notice shall include the nature of the claim, the persons involved, the date, time and place of the occurrence, the circumstances thereof, specific allegations of misconduct on the part of the prospective defendant, the nature of the alleged injuries and other damages sustained. Notice may be in letter or affidavit form executed by the plaintiff and his attorney. Service shall be accomplished by persons authorized and in the manner prescribed by the Utah Rules of Civil Procedure for the service of the summons and complaint in a civil action. Such notice shall be served within the time allowed for commencing a malpractice action against a health care provider. If the notice is served less than ninety days prior to the expiration of the applicable time period, the time for commencing the malpractice action against the health care provider shall be extended to ninety days from the date of service of notice.

History: L. 1976, ch. 23, § 8.

Collateral References.

Cross-Reference.

Physicians and Surgeons § 18(2).

Service of summons and complaint, Rules of Civil Procedure, Rule 4.

70 C.J.S. Physicians and Surgeons § 59.
61 Am. Jur. 2d 306, Physicians, Surgeons, and Other Healers § 180.

78-14-9. Professional liability insurance coverage for providers—Insurance commissioner may require joint underwriting authority.—If the commissioner finds after a hearing that in any part of this state any professional liability insurance coverage for health care providers is not readily available in the voluntary market, and that the public interest requires, he may by regulation promulgate and implement plans to provide insurance coverage through all insurers issuing professional liability policies and individual and group accident and sickness policies providing medical, surgical or hospital expense coverage on either a prepaid or an expense incurred basis, including personal injury protection and medical expense coverage issued incidental to liability insurance policies.

History: L. 1976, ch. 23, § 9.

separate financial data pertaining to professional liability insurance, 31-5-21.

Cross-References.

Commissioner to examine insurer's files, etc., 31-3-1.

Collateral References.

Insurance § 11.1.

Governmental entities may purchase liability insurance, 63-30-28 to 63-30-34.

44 C.J.S. Insurance § 64.

Insurers' annual statements to contain

43 Am. Jur. 2d 108 et seq., Insurance § 51 et seq.

78-14-10. Actions under Utah Governmental Immunity Act.—The provisions of this act shall apply to malpractice actions against health care providers which are brought under the Utah Governmental Immunity Act in so far as they are applicable; provided, however, that this act shall in no way affect the requirements for filing notices of claims, times for commencing actions and limitations on amounts recoverable under the Utah Governmental Immunity Act.

History: L. 1976, ch. 23, § 10.

Cross-Reference.

Utah Governmental Immunity Act, 63-30-1 et seq.

78-14-11. Act not retroactive—Exception.—The provisions of this act, with the exception of the provisions relating to the limitation on the time for commencing an action, shall not apply to injuries, death or services rendered which occurred prior to the effective date of this act.

History: L. 1976, ch. 23, § 14.

Compiler's Notes.

This act became effective sixty days after adjournment of the legislature on January 31, 1976.

Separability Clause.

Section 15 of Laws 1976, ch. 23, provided: "If any provision of this act, or the

application of any provision to any person or circumstance, is held invalid, the remainder of this act shall not be affected thereby."

Collateral References.

Statutes—261 et seq.

82 C.J.S. Statutes § 412 et seq.

73 Am. Jur. 2d 485 et seq., Statutes § 347 et seq.

CHAPTER 15

PRODUCT LIABILITY ACT

Section 78-15-1. Short title of act.

78-15-2. Legislative findings and declarations—Purpose of act.

78-15-3. Statute of limitations—Application.

78-15-4. Prayer for damages.

78-15-5. Alteration or modification of product after sale as substantial contributing cause—Manufacturer or seller not liable.

78-15-6. Defect or defective condition making product unreasonably dangerous—Rebuttable presumption.

78-15-1. Short title of act.—This act shall be known and may be cited as the "Utah Product Liability Act."

History: C. 1953, 78-15-1, enacted by L. 1977, ch. 149, § 1.

Title of Act.

An act enacting sections 78-15-1 through 78-15-6, Utah Code Annotated 1953; relating to product liability; creating a Utah Product Liability Act; setting forth the purpose and intent of the act; establishing a statute of limitations for product liability cases; providing for exceptions to the statute; granting limited immunity to

manufacturers or sellers of products against actions based on personal injury, death or damage to property resulting from the use of products; providing tests for determining whether or not the product shall be deemed to be defective or unreasonably dangerous; establishing rebuttable presumptions of freedom from defects; and precluding certain evidence from admission in civil actions.—L. 1977, ch. 149.

78-15-2. Legislative findings and declarations—Purpose of act.—(1) The legislature finds and declares that the number of suits and claims for

78-13-6. Arising without this state in favor of resident.**Option to choose where to bring action.**

Where Utah plaintiff sued defendant corporation, which had its principal place of business in Weber County, Utah, on a transitory cause of action arising without Utah,

the plaintiff had the option under this section to choose where to bring suit, and where he chose to bring suit in his county of residence the district court had no prerogative to change venue to Weber County upon defendant's request. *Jorgensen v. John Clay & Co.* (1983) 660 P 2d 229.

78-13-11. Duty of clerk — Fees and costs — Effect on jurisdiction.**Cross-References.**

Fee of clerk on change of venue, 21-2-2.

Adjustment of costs between counties for change of venue, 17-15-19.

CHAPTER 14**MALPRACTICE ACTIONS AGAINST HEALTH CARE PROVIDERS****Section**

- 78-14-4. Statute of limitations — Exceptions — Application.
- 78-14-4.5. Amount of award reduced by amounts of collateral sources available to plaintiff
 - No reduction where subrogation right exists — Collateral sources defined
 - Procedure to preserve subrogation rights — Evidence admissible — Exceptions.
- 78-14-7.5. Limitation on attorney's contingency fee in malpractice action.
- 78-14-8. Notice of intent to commence action.
- 78-14-12. Department of Business Regulation to provide panel — Procedures established by department — Procedures for requesting panel — Notice — Statute of limitations tolled — *Composition of panel* — *Members to receive per diem and travel expenses* — Department authorized to set license fees of health care providers to cover costs of administering panel
- 78-14-13. Proceedings — Authority of panel — Rights of parties to proceedings — Jurisdiction of panel.
- 78-14-14. Decision and recommendations of panel — No judicial or other review.
- 78-14-15. Evidence of proceedings not admissible in subsequent action — Panelist may not be compelled to testify — Immunity of panelist from civil liability.
- 78-14-16. Proceedings considered a binding arbitration hearing upon written agreement of parties — Compensation to members of panel.

78-14-1. Short title of act.**Law Reviews.**

A New Perspective — Has Utah Entered the Twentieth Century in Tort Law?, 1981 Utah L. Rev. 495.

78-14-4. Statute of limitations — Exceptions — Application. (1) No malpractice action against a health care provider may be brought unless it is commenced within two years after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered the injury, whichever first occurs, but not to exceed four years after the date of the alleged act, omission, neglect or occurrence, except that:

(a) In an action where the allegation against the health care provider is that a foreign object has been wrongfully left within a patient's body, 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 existence

of resident.

plaintiff had the option under this section to choose where to bring suit, and where to bring suit in his county of residence. The district court had no prerogative to venue to Weber County upon defendant's request. *Jorgensen v. John Clay & Co.* 660 P 2d 229.

Effect on jurisdiction.

of clerk on change of venue, 21-2-2.

MALPRACTICE ACTIONS AGAINST HEALTH CARE PROVIDERS**Collateral sources.**

collateral sources available to plaintiff exists — Collateral sources defined — Evidence admissible — Exception.

Malpractice action.

the panel — Procedures established by panel — Notice — Statute of limitations — Members to receive per diem and travel license fees of health care providers

Parties to proceedings — Jurisdiction.**Judicial or other review.**

subsequent action — Panelist may not be removed from civil liability.

hearing upon written agreement of parties.

— **Application.** (1) No malpractice action shall be brought unless it is commenced within the statute of limitations, or through the use of reasonable diligence, whichever first occurs, but not later than the date of the act, omission, neglect or occurrence.

the health care provider is that the patient's body, the claim shall be barred unless the plaintiff or patient discovered, or should have discovered, the existence

of the foreign object wrongfully left in the patient's body, whichever first occurs; and

(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.

History: L. 1976, ch. 23, § 4; 1979, ch. 128, § 1.

Compiler's Notes.

The 1979 amendment inserted "under section 78-12-36 or any other provision of law" near the beginning of subsec. (2); and made a minor change in punctuation.

Constitutionality.

This section does not violate equal protection of the law requirements of Art. I, § 24 of the state Constitution, and it is not an unconstitutional "special law" in violation of Art. I, § 26. *Allen v. Intermountain Health Care, Inc.* (1981) 635 P 2d 30.

Provision of this section that statute of limitations is not tolled because of injured party's minority does not violate equal protection of laws; does not violate due process of law; and does not violate open courts provisions of state constitution, art. I, § 2. *Hargett v. Limberg* (1984) 598 FSupp 152.

Discovery of "injury."

In this section the term discovery of "injury" means discovery of injury and the negligence which resulted in the injury; i.e., "injury" means legal injury. *Foil v. Ballinger* (1979) 601 P 2d 144.

78-14-4.5. Amount of award reduced by amounts of collateral sources available to plaintiff — No reduction where subrogation right exists — Collateral sources defined — Procedure to preserve subrogation rights — Evidence admissible — Exceptions. (1) In all malpractice actions against health care providers as defined in Subsection 78-14-3 (29) in which damages are awarded to compensate the plaintiff for losses sustained, the court shall reduce the amount of such award by the total of all amounts paid to the plaintiff from all collateral sources which are available to him; however, there shall be no reduction for collateral sources for which a subrogation right exists as provided in this section nor

Minors.

Medical malpractice action against a doctor for alleged negligent diagnosis and treatment of a child was barred by this section's statute of limitations where action was brought by child's mother individually and as guardian ad litem for child more than two years after mother discovered legal injury to child. *Hargett v. Limberg* (1984) 598 FSupp 152.

When statute begins to run.

Statute begins to run when an injured person knows or should know that he has suffered a legal injury. *Foil v. Ballinger* (1979) 601 P 2d 144.

Statute of limitations provided in this section begins to run when plaintiff is aware of facts that would lead a reasonable person to conclude that he may have a cause of action against health care provider; a legal determination of negligence is not necessary to start statute of limitations running. *Hargett v. Limberg* (1984) 598 FSupp 152.

Law Reviews.

Recent Developments in Utah Law, 1980 Utah L. Rev. 649.

shall there be a reduction for any collateral payment not included in the award of damages. Upon a finding of liability and an awarding of damages by the trier of fact, the court shall receive evidence concerning the total amounts of collateral sources which have been paid to or for the benefit of the plaintiff or are otherwise available to him. The court shall also take testimony of any amount which has been paid, contributed, or forfeited by, or on behalf of the plaintiff or members of his immediate family to secure his right to any collateral source benefit which he is receiving as a result of his injury, and shall offset any reduction in the award by such amounts. No evidence shall be received and no reduction made with respect to future collateral source benefits except as specified in Subsection (4).

(2) For purposes of this section "collateral source" means payments made to or for the benefit of the plaintiff for:

(a) medical expenses and disability payments payable under the United States Social Security Act, any federal, state, or local income disability act, or any other public program, except the federal programs which are required by law to seek subrogation;

(b) any health, sickness, or income disability insurance, automobile accident insurance that provides health benefits or income disability coverage, and any other similar insurance benefits, except life insurance benefits available to the plaintiff, whether purchased by the plaintiff or provided by others;

(c) any contract or agreement of any person, group, organization, partnership, or corporation to provide, pay for, or reimburse the costs of hospital, medical, dental, or other health care services, except benefits received as gifts, contributions, or assistance made gratuitously; and

(d) any contractual or voluntary wage continuation plan provided by employers or any other system intended to provide wages during a period of disability.

(3) To preserve subrogation rights for amounts paid or received prior to settlement or judgment, a provider of collateral sources shall serve at least 30 days before settlement or trial of the action a written notice upon each health care provider against whom the malpractice action has been asserted. The written notice shall state the name and address of the provider of collateral sources, the amount of collateral sources paid, the names and addresses of all persons who received payment, and the items and purposes for which payment has been made.

(4) Evidence is admissible of government programs that provide payments or benefits available in the future to or for the benefit of the plaintiff to the extent available irrespective of the recipient's ability to pay. Evidence of the likelihood or unlikelihood that such programs, payments, or benefits will be available in the future is also admissible. The trier of fact may consider such evidence in determining the amount of damages awarded to a plaintiff for future expenses.

(5) No provider of collateral sources is entitled to recover the amounts of such benefits from a health care provider, the plaintiff, or any other person or entity as reimbursement for collateral source payments made prior to settlement or judgment, including any payments made under Chapter 19, Title 26, except to the extent that subrogation rights to amounts paid prior to settlement or judgment are preserved as provided in this section. All policies of insurance providing benefits affected by this section are construed in accordance with this section.

History: C. 1953, 78-14-4.5, enacted by L. 1985, ch. 237, § 1.

rights; and providing an effective date. — Laws 1985, ch. 237.

Enacts: 78-14-4.5.

Title of Act.

An act relating to health care malpractice actions; prohibiting compensation to plaintiff for costs or expenses that were paid from a collateral source in the absence of subrogation rights; requiring notice of subrogation

Effective Date.

Section 2 of Laws 1985, ch. 237 provided: "This act takes effect on July 1, 1985."

ayment not included in the award awarding of damages by the trier ing the total amounts of collateral fit of the plaintiff or are otherwise stimony of any amount which has ehalf of the plaintiff or members any collateral source benefit which l offset any reduction in the award and no reduction made with respect cified in Subsection (4).
source" means payments made to

ts payable under the United States income disability act, or any other which are required by law to seek

ity insurance, automobile accident come disability coverage, and any nsurance benefits available to the provided by others;
n, group, organization, partnership, the costs of hospital, medical, den- its received as gifts, contributions,

uation plan provided by employers during a period of disability.
nts paid or received prior to settle- sources shall serve at least 30 days itten notice upon each health care has been asserted. The written notice ler of collateral sources, the amount sses of all persons who received pay- vment has been made.
programs that provide payments or benefit of the plaintiff to the extent ; to pay. Evidence of the likelihood , or benefits will be available in the consider such evidence in determin- iff for future expenses.
itled to recover the amounts of such intiff, or any other person or entity ts made prior to settlement or judg- pter 19, Title 26, except to the extent r to settlement or judgment are pre- ies of insurance providing benefits lance with this section.

ts, and providing an effective date. — s 1985, ch. 237.
nacts: 78-14-4.5.

Effective Date.

ection 2 of Laws 1985, ch. 237 provided: his act takes effect on July 1, 1985."

78-14-5. Failure to obtain informed consent, etc.

Cross-References.

Abortion, informed consent requirements, 76-7-305, 76-7-305.5.

Blood donation by minor over eighteen, parental consent not required, 15-2-5.

Sterilization, informed consent for procedure, 64-10-1.

Venereal disease, minor's power to consent to treatment, 26-6-18.

Pregnancy and childbirth.

Where married pregnant woman is in full possession of her faculties, she alone has the

power to submit to surgical procedures upon herself; husband's consent to such medical procedures are not required. *Reiser v. Lohner* (1982) 641 P 2d 93.

Law Reviews.

California Supreme Court Expands the Informed Consent Doctrine; Physicians Have a Duty to Obtain an Informed Refusal: *Truman v. Thomas*, 1980 B.Y.U. L. Rev. 933.

78-14-7.5. Limitation on attorney's contingency fee in malpractice action.

(1) In any malpractice action against a health care provider as defined in Section 78-14-3, an attorney shall not collect a contingent fee for representing a client seeking damages in connection with or arising out of personal injury or wrongful death caused by the negligence of another which exceeds 33-⅓ % of the amount recovered.

(2) This limitation applies regardless of whether the recovery is by settlement, arbitration, judgment, or whether appeal is involved.

History: C. 1953, 78-14-7.5, enacted by L. 1985, ch. 67, § 1.

Enacts: 78-14-7.5.

Title of Act.

An act relating to health care malpractice; providing limitations on amounts of contingent fees an attorney may collect in malpractice action; and providing an effective date. — Laws 1985, ch. 67.

Effective Date.

Section 2 of Laws 1985, ch. 67 provided: "This act takes effect on July 1, 1985."

78-14-8. Notice of intent to commence action. No malpractice action against a health care provider may be initiated unless and until the plaintiff gives the prospective defendant or his executor or successor, at least ninety days' prior notice of intent to commence an action. Such notice shall include a general statement of the nature of the claim, the persons involved, the date, time and place of the occurrence, the circumstances thereof, specific allegations of misconduct on the part of the prospective defendant, the nature of the alleged injuries and other damages sustained. Notice may be in letter or affidavit form executed by the plaintiff or his attorney. Service shall be accomplished by persons authorized and in the manner prescribed by the Utah Rules of Civil Procedure for the service of the summons and complaint in a civil action or by certified mail, return receipt requested, in which case notice shall be deemed to have been served on the date of mailing. Such notice shall be served within the time allowed for commencing a malpractice action against a health care provider. If the notice is served less than ninety days prior to the expiration of the applicable time period, the time for commencing the malpractice action against the health care provider shall be extended to 120 days from the date of service of notice.

This section shall, for purposes of determining its retroactivity, not be construed as relating to the limitation on the time for commencing any action, and shall apply only to causes of action arising on or after April 1, 1976. This section shall

not apply to third party actions, counterclaims or crossclaims against a health care provider.

History: L. 1976, ch. 23, § 8; 1979, ch. 128, § 2.

Compiler's Notes.

The 1979 amendment, in the first paragraph, substituted "initiated" for "commenced" in the first sentence; inserted "a general statement of" after "shall include" in the second sentence; substituted "or his attorney" for "and his attorney" in the third sentence; added "or by certified mail * * * date of mailing" to the fourth sentence; substituted "120 days" for "ninety days" in the last sentence; and added the second paragraph.

Constitutionality.

The 1979 amendment of this section did not violate constitutional requirement that acts embrace no more than one subject; title of a bill need not describe each and every change contained in the bill, and the title of an act amending a previous act is sufficient if it simply specifies the section to be amended. *McGuire v. University of Utah Medical Center* (1979) 603 P 2d 786.

The 1979 amendment of this section is not unconstitutional as being a special law; the amendment clearly operates uniformly upon a class of persons consisting of all those having a cause of action arising prior to the effective date of the Health Care Malpractice Act whether they have been filed or not. *McGuire v. University of Utah Medical Center* (1979) 603 P 2d 786.

This section does not constitute unconstitutional special legislation. *Yates v. Vernal Family Health Center* (1980) 617 P 2d 352.

This section does not violate Art. I, § 24 or Art. I, § 26 of the state Constitution. *Allen v. Intermountain Health Care, Inc.* (1981) 635 P 2d 30.

Action not timely filed.

Where plaintiff experienced complications from breast surgery necessitating a second operation on November 2, 1976, and then

filed a notice of intent under this section on August 17, 1978, but did not file the action until January 18, 1979, the action was properly dismissed since the action had to be filed within 120 days of the filing of the notice of intent (December 15, 1978). *Millett v. Clark Clinic Corp.* (1980) 609 P 2d 934.

Applicability.

The 90-day period following the giving of notice under this section is not a statutory prohibition under § 78-12-41 so as to toll the statute of limitations during the 90-day period since the specific provision of this section controls the general provision of 78-12-41. *Millett v. Clark Clinic Corp.* (1980) 609 P 2d 934.

Failure to comply.

The notice provisions of this section were not complied with where plaintiff's husband, rather than plaintiff herself, filed the notice; however, such failure to comply was not an adjudication on the merits, but merely a procedural defect that did not relate to the merits of the basic action, and plaintiff was entitled to serve a proper notice and file another complaint pursuant to the requirements of 78-12-40. *Yates v. Vernal Family Health Center* (1980) 617 P 2d 352.

Notice.

Filing of the complaint did not satisfy the notice requirement as this section required notice be given ninety days before filing. *Vealey v. Clegg* (1978) 579 P 2d 919, decided prior to 1979 amendment.

Retroactive effect of amendment.

The 1979 amendment of this section was retroactive; the notice of intent to sue provision is not applicable to causes of action arising before enactment of the Malpractice Act (April 1, 1976) and does not determine when an action is "commenced." *Foil v. Ballinger* (1979) 601 P 2d 144; *McGuire v. University of Utah Medical Center* (1979) 603 P 2d 786.

DECISIONS UNDER FORMER LAW

Application.

Notice requirements applied to causes of actions arising before and filed after the effective date of this section. *Vealey v. Clegg* (1978) 579 P 2d 919, decided prior to 1979 amendment.

When action is commenced.

Filing of complaint without the notice required by this section prior to its amendment in 1979 was sufficient to commence the action, since dismissal (due to absence of notice) was without prejudice and thus not an adjudication on the merits. *Foil v. Ballinger* (1979) 601 P 2d 144.

crossclaims against a health care

tice of intent under this section on 7, 1978, but did not file the action until January 18, 1979, the action was proposed since the action had to be filed 90 days of the filing of the notice of intent (December 15, 1978). *Millett v. Clark* (1980) 609 P 2d 934.

ality.

day period following the giving of notice under this section is not a statutory period under § 78-12-41 so as to toll the statute of limitations during the 90-day period. The specific provision of this section controls the general provision of *Millett v. Clark Clinic Corp.* (1980) 609 P 2d 934.

to comply.

ice provisions of this section were applied with where plaintiff's husband, not plaintiff herself, filed the notice; such failure to comply was not an error on the merits, but merely a procedural error that did not relate to the merits of the basic action, and plaintiff was not to serve a proper notice and file a complaint pursuant to the requirements of § 78-12-40. *Yates v. Vernal Family Center* (1980) 617 P 2d 352.

if the complaint did not satisfy the requirement as this section required, given ninety days before filing. *Clegg* (1978) 579 P 2d 919, decided 79 amendment.

ve effect of amendment.

9 amendment of this section was made; the notice of intent to sue provided was applicable to causes of action arising from enactment of the Malpractice Act (1976) and does not determine when the action is "commenced." *Foil v. Ballinger* (1979) 601 P 2d 144; *McGuire v. University of Utah Medical Center* (1979) 603 P 2d 786.

3 LAW

ion is commenced.

of complaint without the notice required by this section prior to its amendment in 1979 was sufficient to commence the action and dismissal (due to absence of notice) is without prejudice and thus not a bar to refiling on the merits. *Foil v. Ballinger* (1979) 601 P 2d 144.

78-14-12. Department of Business Regulation to provide panel — Procedures established by department — Procedures for requesting panel — Notice — Statute of limitations tolled — Composition of panel — Members to receive per diem and travel expenses — Department authorized to set license fees of health care providers to cover costs of administering panel. (1) The Department of Business Regulation shall provide a hearing panel in alleged medical malpractice cases against health care providers as defined in Section 78-14-3 filed after July 1, 1985. The department shall establish procedures for prelitigation consideration of personal injury and wrongful death claims for damages arising out of the provision of or alleged failure to provide health care. The proceedings are informal and nonbinding, but are compulsory as a condition precedent to commencing litigation. Proceedings conducted under authority of this section are confidential, privileged, and immune from civil process.

(2) The party initiating a medical malpractice action shall file a request for prelitigation panel review with the Department of Business Regulation within 60 days after the filing of a statutory notice of intent to commence action under Section 78-14-8. The request shall include a copy of the notice of intent to commence action. The request shall be mailed to all health care providers named in the notice and request.

(3) The filing of a request for prelitigation panel review under this section tolls the applicable statute of limitations for a period of 60 days following the issuance of an opinion by the prelitigation panel. The opinion shall be sent to all parties by certified mail, return receipt requested.

(4) The department provides for and appoints an appropriate panel or panels to accept and hear complaints of negligence and damages, made by or on behalf of any patient who is an alleged victim of negligence. The panels are composed of:

(a) one member appointed from a list provided by the commissioners of the Utah State Bar, who is a resident lawyer currently licensed to practice law in this state who shall serve as chairman of the panel;

(b) one member who is licensed under Section 78-14-3, who is practicing in the same specialty as the proposed defendant, appointed from a list provided by the professional association representing the same area of practice as the health care provider; or in claims against only hospitals or their employees, one member who is an individual currently serving in hospital administration and appointed from a list submitted by the Utah Hospital Association; and

(c) a lay panelist who is not a lawyer, doctor, hospital employee, or other health care provider, and who is a responsible citizen of the state, selected and appointed by a unanimous decision of the members comprising the panel.

(5) Each person selected as a panel member shall certify, under oath, that he or she is without bias or conflict of interest with respect to any matter under consideration.

(6) Members of the prelitigation hearing panels shall receive per diem compensation and travel expenses for attending panel hearings as established by rules of the Department of Business Regulation.

(7) In addition to the actual cost of administering the licensure of health care providers, the Division of Registration of the Department of Business Regulation is authorized to set license fees of health care providers within the limits established by law equal to their proportionate costs of administering prelitigation panels. None of the costs of administering the prelitigation panel shall be borne by the claimant, except as provided under Section 78-14-16.

History: C. 1953, 78-14-12, enacted by L. Title of Act.
1985, ch. 238, § 1.

An act relating to health care malpractice actions; establishing a prelitigation panel

appointed by the Department of Business Regulation for prelitigation consideration of personal injury and wrongful death claims; establishing procedures; and providing an effective date. — Laws 1985, ch. 238.

Enacts: 78-14-12, 78-14-13, 78-14-14, 78-14-15, 78-14-16.

Effective Date.

Section 6 of Laws 1985, ch. 238 provided: "This act takes effect on July 1, 1985."

78-14-13. Proceedings — Authority of panel — Rights of parties to proceedings — Jurisdiction of panel. (1) No record of the proceedings is required and all evidence, documents, and exhibits are returned to the parties or witnesses who provided the evidence, documents, and exhibits at the end of the proceedings. The hearing panel has the authority to issue subpoenas and to administer oaths, and any expenses incurred by the panel in this regard are paid by the requesting party, including, but not limited to, witness fees and mileage. The proceedings are informal and formal rules of evidence are not applicable. There is no discovery or perpetuation of testimony in the proceedings, except upon special order of the panel, and for good cause shown demonstrating extraordinary circumstances.

(2) A party is entitled to attend, personally or with counsel, and participate in the proceedings, except upon special order of the panel and unanimous agreement of the parties. The proceedings are confidential and closed to the public. No party shall have the right to cross-examine, rebut, or demand that customary formalities of civil trials and court proceedings be followed. The panel may, however, request special or supplemental participation of some or all parties in particular respects. Communications between the panel and the parties, except the testimony of the parties on the merits of the dispute, are disclosed to all other parties.

(3) The Department of Business Regulation shall appoint a panel to consider the claim and set the matter for panel review immediately upon receipt of request. A panel retains jurisdiction of any claim for 90 days from the date of filing the request. The jurisdiction of the panel may be extended and the proceedings may continue for 30-day periods upon written agreement of all parties and the members of the panel.

(4) Parties may be represented by counsel in proceedings before a panel.

History: C. 1953, 78-14-13, enacted by L. 1985, ch. 238, § 2.

78-14-14. Decision and recommendations of panel — No judicial or other review. The panel shall render its opinion in writing not later than 30 days after the end of the proceedings. The panel shall determine on the basis of the evidence whether each claim against each health care provider has merit or has no merit, and, if meritorious, whether the conduct complained of resulted in harm to the claimant.

There is no judicial or other review or appeal of the panel's decision or recommendations.

History: C. 1953, 78-14-14, enacted by L. 1985, ch. 238, § 3.

78-14-15. Evidence of proceedings not admissible in subsequent action — Panelist may not be compelled to testify — Immunity of panelist from liability. Evidence of the proceedings conducted by the medical review panel, its results, opinions, findings, and determinations are not admissible as evidence in an action subsequently brought by the claimant in a court of competent jurisdiction. No panelist may be compelled to testify in a civil action subsequently brought with regard to the subject matter of the panel's review. A panelist has immu-

