

1986

her guardian, TERESA CHAPMAN, ROBERT
CHAPMAN and TERESA CHAPMAN
individually v. PRIMARY CHILDREN'S
HOSPITAL, a hospital organized to do business in
the State of Utah, et al. : Brief of Respondent

Utah Supreme Court

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UTAH SUPREME COURT
BRIEF

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DOCKET NO. 860392
IN THE SUPREME COURT OF THE STATE OF UTAH

* * * * *

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

Plaintiffs-Appellants, :

Appeal No. 860392

v. :

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

Defendants-Respondents. :

* * * * *

RESPONDENTS' BRIEF

* * * * *

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

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FILED
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IN THE SUPREME COURT OF THE STATE OF UTAH

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IDENTITY OF PARTIES

Appellants: Jennifer Chapman (Minor)

Teresa Chapman

Robert Chapman

Respondents: SCOTT WETZEL SERVICES, INC., a Utah corporation;

THE HOME GROUP, INC., a foreign corporation.

OTHER PARTY DEFENDANTS NOT INVOLVED IN THIS APPEAL¹

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;

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

GARTH MEYERS, M.D.;

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

JOHN DOE I-X; and

BLACK CORPORATIONS I-V.

¹Appeal No. 860230 from the summary judgment granted as to Plaintiffs' claim, in favor of defendants, Primary Children's Hospital, Primary Children's Medical Center, Intermountain Health Care, IHC Hospitals, Inc., and The Health Services of the Church of Jesus Christ of Latter-Day Saints is presently pending in the Supreme Court of the State of Utah. Appeal No 860230 involves many of the same issues presented by this appeal.

STATEMENT OF ISSUES ON APPEAL

- I. Whether the Trial Court was correct in its holding that, as a matter of law, Scott Wetzel Services, Inc. committed no intentional torts against Plaintiffs.
- II. Whether The Home Group Inc.'s ownership of Scott Wetzel Services, Inc. in and of itself is a sufficient basis for a claim for damages against The Home Group, Inc.
- III. Whether the Trial Court correctly held that plaintiffs' medical negligence claims arising in 1973 are barred by the statute of limitations of the Utah Health Care Malpractice Act.

STATEMENT OF CASE

Plaintiffs commenced this action by filing their Complaint on October 8, 1985. Their Complaint arises out of the injuries of Jennifer Chapman. It is organized in seven Roman numerated sections. The first section, numbered I, simply identifies the parties and sets forth the basic factual circumstances of plaintiffs' claims. Numbers II through IV purport to state claims for medical negligence against defendants, Primary Children's Hospital, Primary Children's Medical Center, Intermountain Health Care, The Health Services Corporation of the Church of Jesus Christ of Latter-Day Saints,² Garth Meyers, M.D., L. George Veasy, M.D.,

²These defendants are collectively referred to herein as the "Hospital defendants."

Karen Bowman, R.N.³ and unnamed defendants. Numbers V through VIII purport to state claims against all defendants including Scott Wetzel Services, Inc. ("Wetzel") and The Home Group, Inc. ("Home Group") for fraud, intentional infliction of emotional distress and negligent infliction of emotional distress.

In December 1985, the Medical and Hospital Defendants moved for summary judgment and dismissal. (R. 38, 88.) The Honorable Homer F. Wilkinson of the Third Judicial District Court of Salt Lake County, State of Utah, heard the motions on February 5, 1986. (R. 384-457.) After taking the matter under advisement, Judge Wilkinson granted the medical and hospital defendants' Motion for Summary Judgment and Dismissal. (R. 280, 282.) Plaintiffs' appeal (Appeal No. 860230) followed.

On April 15, 1986, defendants Wetzel and Home Group filed their Motion for Summary Judgment and Dismissal. (R. 309.) The motions were heard before Judge Wilkinson on May 30, 1986. Judge Wilkinson granted Wetzel and Home Groups' Motion for Summary Judgment from the bench. (R. 380, 381.) This appeal (Appeal No. 860392) followed.

STATEMENT OF FACTS

The factual background has been thoroughly presented in the Medical and Hospital Defendants' Respondents' Brief in Appeal No. 860230. To avoid unnecessary repetition, Wetzel and Home Group

³These defendants are collectively referred to as the "Medical defendants."

adopt the Statement of Facts as found in the Respondents' Brief in Appeal No. 860230 (for the Court's convenience, the Statement of Facts is attached in an addendum to this Brief at pages 1 to 5), with the following additions.

Defendant Wetzel is a wholly-owned subsidiary of Home Group engaged in the business of accident investigation and adjustment.⁴ Wetzel and Home Group are separate corporations. Intermountain Health Care ("IHC") contracted with Wetzel to investigate malpractice claims against IHC and its agents. Pursuant to the contract with IHC, Wetzel investigated plaintiffs' claims. (R. 291-293, A. 6-8.)⁵

Wetzel's involvement with Plaintiffs has been limited. In 1982, Plaintiffs met with Scott Olsen, the manager of Scott Wetzel Services, Inc. At that meeting, Mr. Olsen indicated to Plaintiffs that in his opinion Dr. Veasey and Dr. Meyers were "much too professional to cover anything up" concerning the cause of Jennifer Chapman's injuries. (R. 361.) On May 27, 1983, Mr. Olsen again met personally with Plaintiffs. At that time, Plaintiffs alleged

⁴Defendant Home Group's only involvement in this case is its ownership of Wetzel. Although plaintiffs allege that Home Group insured some of the defendants on these claims, the record clearly establishes that Home Group did not in fact insure any of the defendants at the time plaintiffs' claims arose. (R. 293, 294, A. 7, 8.)

⁵For the Court's convenience, the affidavit of Scott Olsen, the Manager of Scott Wetzel Services, Inc., filed in support of Wetzel and Home Groups Motion for Summary Judgment, is attached hereto in the addendum at pages 6 to 8. The designation "A ____" refers to the addendum to this Brief.

that Jennifer had been injured in February 1973 because there had not been a prompt response to her cardiac arrest. Mr. Olsen's written response to plaintiffs' claims stated that he had checked with the doctors involved in the treatment of Jennifer and that they agreed that the problem she experienced was an emboli reaching her brain causing the seizure and leading to the cardiac arrest. (R. 249-252, A. 9-12.)⁶

On July 13, 1983, Mr. Chapman once again telephoned Mr. Olsen, alleging that the injury to Jennifer in connection with heart surgery in Primary Children's Medical Center in February 1973, was the result of the negligence of the Medical and Hospital Defendants. Mr. Chapman demanded \$350,000 in compensation. Mr. Olsen advised Mr. Chapman that Wetzel had set up a file on the matter in 1978 when Dr. Veasey had met with plaintiffs and their attorney, Stephen Crockett, concerning their claims against the Medical and Hospital Defendants; that his office had reviewed plaintiffs' claims at that time, concluding there was no negligence or liability, and that a recent review of that matter reaffirmed the original conclusions. (R. 249-252, A. 9-12.)

In all of plaintiffs' conversations with Wetzel, they asserted the same medical malpractice claims raised in their present complaint.

⁶For the Courts convenience, the affidavit of Scott Olsen, Manager of Scott Wetzel Services, Inc., filed in support of the medical and hospital defendants Motion for Summary Judgment is attached hereto in the addendum at pages 9-12.

SUMMARY OF ARGUMENT

Plaintiffs' Complaint and Affidavits do not create disputed issues of fact requiring this Court to reverse the Trial Court's judgment on the fraud and intentional infliction of emotional distress claims. The alleged representations of Wetzel giving rise to plaintiffs' claims for fraud and intentional infliction of emotional distress are three statements, wherein, Wetzel's manager, Scott Olsen refuted plaintiffs' claims for medical negligence and reiterated the medical defendants' opinions that Jennifer's injuries were caused by an emboli reaching her brain. This continues to be the position and opinion of these defendants to this date. Representations of opinion and affirmative denials of allegations are insufficient as a matter of law to constitute the basis for a claim for fraud and intentional infliction of emotional distress. Accordingly, the Trial Court correctly ruled that Wetzel committed no intentional torts against plaintiffs.

The uncontroverted evidence establishes that Home Group's only involvement in this action is its ownership of Wetzel. Home Group's ownership of Wetzel is an insufficient basis for a claim for damages against Home Group. Accordingly, the Trial Courts judgment granting Home Group's Motion for Summary Judgment should be affirmed.

Plaintiffs' Complaint is unclear as to whether Plaintiffs allege claims against Wetzel and Home Group for medical negligence. To the extent such claims are alleged, they are barred by the

limitations provision in the Utah Health Care Malpractice Act. The Utah Health Care Malpractice Act contains a statute of limitations which in this case, bars plaintiffs' medical negligence claims filed after April 2, 1980. Wetzel, as an agent of the Hospital Defendants, is entitled to the same protection under the Utah Health Care Malpractice Act as the Hospital and Medical Defendants. Accordingly, plaintiffs' claims for medical negligence are barred by the statute of limitations of the Utah Healthcare Malpractice Act.

ARGUMENT

I. THE TRIAL COURT PROPERLY RULED, AS A MATTER OF LAW, THAT WETZEL COMMITTED NO INTENTIONAL TORTS AGAINST PLAINTIFFS.

Plaintiffs' Complaint includes claims for fraud, intentional infliction of emotional distress and negligent infliction of emotional distress. The Honorable Homer F. Wilkinson, District Judge in the Third Judicial District Court of Salt Lake County, State of Utah, granted Wetzel and Home Groups' Motion for Summary Judgment on plaintiffs' claims for fraud, intentional infliction of emotional distress and negligent infliction of emotional distress. The Court's decision precluding plaintiffs' claims are correct as a matter of law.

A. The Untroverted Facts Establish That Wetzel Made No Representations That Can Serve as a Basis for a Claim of Fraud.

The Utah Supreme Court in the case of Pace v. Parrish, 247 P.2d 273 (Utah 1952), set forth the elements of the cause of action for fraud:

This being an action in deceit based on fraudulent misrepresentations, the burden was upon Plaintiffs to prove all of the essential elements thereof. These are: (1) that a representation was made; (2) concerning a presently-existing material fact; (3) which was false; (4) which the representor either (a) knew to be false or (b) made recklessly knowing that he had insufficient knowledge upon which to base such representation; (5) for the purpose of inducing the other party to act upon it; (6) that the other party, acting reasonably and in ignorance of its falsity; (7) did in fact rely upon it; (8) and was thereby induced to act; (9) to his injury and damage.

Id. at 275-75. Plaintiffs' claim in this case fails as a claim for fraud because it fails to state the above elements with particularity as required by Rule 9(b) Utah Rules of Civil Procedure, and because the representations alleged by Plaintiffs cannot serve as a basis for a fraud claim as a matter of law.

Plaintiffs' Complaint and Affidavits allege only three representations by Wetzel. The first occurred in a meeting attended by Dr. Veasy, Mr. Chapman and Scott Olsen. According to Mr. Chapman, Mr. Olsen made the statement that Doctors Veasy and Meyers were "much too professional to cover anything up concerning the cause of Jennifer's injury." (R. 361.) The second representation was in a letter written by Scott Olsen to Mr. Chapman. The letter states simply that Wetzel had conducted an investigation of the incident in 1977 and that the doctors were -- and still are -- of the opinion that Jennifer's condition resulted from emboli reaching the child's brain. (R. 249-252, A. 9-12.) Finally, in a telephone conversation on July 13, 1983, Mr. Olsen reaffirmed the original conclusions. (R. 249-252, A. 9-12.)

These representations do not constitute representations of the sort that can give rise to a claim for fraud. They are expressions of opinion which cannot constitute representations of fact for purposes of fraud. Dolson Company v. Imperial Cattle Company, 624 P.2d 993, 996 (Mont. 1981). Because the alleged representations of Wetzel are merely expressions of opinion and not representations of fact, plaintiffs' claim of fraud is insufficient as a matter of law and the Trial Court's ruling on this issue should be affirmed.

B. The Trial Court Correctly Ruled That Plaintiffs Have No Claim for Intentional Infliction of Emotional Distress.

A cause of action for intentional infliction of emotional distress must meet the standards set forth in the decision of the Utah Supreme Court in Samms v. Eccles, 358 P.2d 344 (Utah 1961):

Our study of the authorities and of the arguments advanced, convinces us that, conceding such a cause of action may not be based upon mere negligence, the best considered view recognizes an action for severe emotional distress, though not accompanied by bodily impact or physical injury, where the defendant intentionally engaged in some conduct toward the Plaintiff, (a) with the purpose of inflicting emotional distress, or (b) where any reasonable person would have known that such would result; and his actions are of such a nature as to be considered outrageous and intolerable in that they offend against the generally accepted standards of decency and morality.

Id. at 346-47.

Plaintiffs' claim for intentional infliction of emotional distress rests on their allegations that Defendants concealed "the cause of Jennifer Chapman's injury so that no claim would or could be made against the hospital and physician Defendants . . .".

(Appellants' Brief at p. 16.) As indicated above, Mr. Olsen's statements denying plaintiffs' claims of medical malpractice and reaffirming the medical defendants' opinions as to the cause of Jennifer's injuries are insufficient, as a matter of law, for a claim of fraud or fraudulent concealment. These denials of liability and statements of opinion are also insufficient as the basis for a claim of intentional infliction of emotional distress.

Plaintiffs argue that the evidence must go to the jury for a factual determination. However, the case cited by plaintiffs in support of their argument, Burgess v. Perdue, 721 P.2d 239 (Kan. 1986), requires the Court to make two threshold determinations before the matter is given to the jury. In Burgess, the trial court granted defendants' motion for summary judgment as to plaintiffs' claim for intentional infliction of emotional distress. The Supreme Court of Kansas affirmed the summary judgment and stated:

[2] Liability for extreme emotional distress has two threshold requirements which the court must first determine exist. The requirements are: (1) Whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery; and (2) whether the emotional distress suffered by plaintiff was of such an extreme degree that the law must intervene because the distress inflicted was so severe that no reasonable person should be expected to endure it. If the court determines from the pleadings, stipulations, admissions, and depositions of the parties that reasonable factfinders might differ as to whether defendant's conduct was sufficiently extreme and outrageous and the plaintiff's emotional distress was genuine and so severe and extreme that it caused injury, then it must be left to the jury to determine liability.

Id. at 242.

In this case, reasonable factfinders could not differ as to whether Mr. Olsen's denials of liability and reaffirmations of the medical defendants' opinions constitute extreme and outrageous conduct giving rise to a claim for intentional infliction of emotional distress. Accordingly, the Trial Court's ruling on this issue should be affirmed.

C. The Trial Court Correctly Ruled That Plaintiffs Have No Claim for Negligent Infliction of Emotional Distress.

The Utah Supreme Court has recognized that no claim for negligent infliction of emotional distress exists in the State of Utah. In Samms v. Eccles, supra, the court stated that a claim for emotional distress cannot be based in Utah upon "mere negligence." This view was recently affirmed by the Utah Supreme Court in Reiser v. Lohner, 641 P.2d 93, 100 (Utah 1982). Accordingly, the Trial Court correctly ruled that Plaintiffs have no claim for negligent infliction of emotional distress.

II. PLAINTIFFS HAVE NO CLAIM AGAINST THE HOME GROUP, INC.

Although plaintiffs' Complaint does allege that Home Group insured some or all of the defendants in this case and that Wetzel was acting for Home Group in its investigation for the Hospital Defendants, these allegations, even if true, do not constitute a claim for damages. In fact, these allegations are without basis. The Home Group wrote no insurance covering any of the defendants in the case at the time these claims arose. The undisputed facts are that Wetzel and Home Group are separate corporations. The only

relationship between the two corporations is that Wetzel is a wholly-owned subsidiary of Home Group. The Home Group's ownership of Wetzel is insufficient, as a matter of law, to constitute a claim for damages against Home Group. (R. 293, 294, A. 7,8.) See, e.g., Rick v. RLC Corp., 535 F. Supp. 39, 44 (E.D. Mich. 1981) (applying Mich. law); Bischofshausen, Vasbinder, and Luckie v. D.W. Jaquays Min. and Equipment Contractors, Co., 700 P.2d 902, 907 (Az. App. 1985); Peterick v. State, 589 P.2d 250, 263-265 (Wash. App. 1978). Accordingly, the Trial Court's ruling with respect to Home Group should be affirmed.

III. PLAINTIFFS' MEDICAL NEGLIGENCE CLAIMS ARE BARRED BY THE
STATUTE OF LIMITATIONS OF THE UTAH HEALTH
CARE MALPRACTICE ACT

It is unclear from plaintiffs' Complaint whether they have alleged claims for medical negligence against Wetzel and Home Group. To the extent such claims are alleged, they are barred by the limitations provision in the Utah Health Care Malpractice Act. The applicable statute of limitations for claims for medical negligence is set forth in the Utah Health Care Malpractice Act § 78-14-1, et seq., UTAH CODE ANN. It provides:

(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, omissions, neglect, or occurrence, except that:

. . .

(b) In an action where it is alleged that a patient has been prevented from discovering this conduct 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.

(§ 78-14-4, UTAH CODE ANN.)

It is undisputed that the acts upon which the alleged medical negligence claims are based occurred in 1973. Although Jennifer Chapman was a minor at that time, section 78-14-4 UTAH CODE ANN. applies "to all persons regardless of minority or other legal disability and shall apply retroactively . . .". To be timely, plaintiffs' Complaint had to be filed within four years after the effective date of the Utah Health Care Malpractice Act. The effective date of the Utah Health Care Malpractice Act was

April 2, 1976. Accordingly, the last date on which Plaintiffs' claims could have been brought was April 2, 1980, or four years after the effective date of the Utah Health Care Malpractice Act. It is undisputed that Plaintiffs filed their Complaint with the Third Judicial Court of Salt Lake County, State of Utah, on October 8, 1985. Accordingly, plaintiffs' claims for medical negligence are barred by section 78-14-4 UTAH CODE ANN.

A. Wetzel and Home Group Are Health Care Providers as Defined in the Utah Health Care Malpractice Act.

The term "health care provider" is defined in Utah Health Care Malpractice Act:

(1) "Health Care Provider" includes any person, partnership, association, 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 physician, osteopathic physician and surgeon, oidiologist, speech pathologist, certified social worker, social service worker, social service aide, marriage and family counselor, or practitioner of obstetrics, or others rendering similar care and service relating to or arising out of the health care needs of persons or groups of persons, and officers, employees, or agents of any of the above acting in the course and scope of their employment.

§ 78-14-3, UTAH CODE ANN. (emphasis added).

It is undisputed that Wetzel is the agent of the Hospital Defendants; IHC contracted with Wetzel to investigate claims of malpractice against IHC and its agents (R. 291-293, A. 6-8.) In

their Complaint, Plaintiffs admit the agency relationship between IHC and Wetzel:

. . . The reason for the failure to discover such negligence was due to the negligent and/or intentional fraudulent concealment of the cause of plaintiff's injury by defendants and/or their agents or employees including Wetzel and/or The Home Group.

(Plaintiffs' Complaint at ¶ 14.)

Since Wetzel is the agent of the Hospital Defendants -- a fact alleged by Plaintiffs and assumed to be true -- all claims for medical negligence against Wetzel are barred by the statute of limitations in the Utah Health Care Malpractice Act.

B. The Statute of Limitations of the Utah Health Care Malpractice Act Is Not Tolloed by Estoppel.

Plaintiffs attempt to avoid the bar of the statute of limitations by arguing that a disputed factual issue exists regarding misrepresentations by the Hospital and Medical Defendants and Wetzel concerning the true cause of the injury suffered by Jennifer Chapman. The Utah Health Care Malpractice Act provides:

(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.

§ 78-14-4(1)(b), UTAH CODE ANN. In essence, this section requires affirmative action by a health care provider preventing a plaintiff from discovering misconduct on the part of the health care provider.

The undisputed facts in this case establish that Wetzel did nothing to prevent Plaintiffs from discovering the facts underlying their claims for medical negligence.

As set forth above, Plaintiffs allege only three representations by Wetzel; a statement by Mr. Olsen that Drs. Veasy and Meyers were "much too professional to cover anything up concerning the cause of Jennifer's injury", and a letter and telephone conversation denying Plaintiffs' allegations of medical negligence and reaffirming the medical defendants opinion that Jennifer's condition resulted from emboli reaching her brain. (R. 249-252, 361, 362, A. 9-12.)

These representations do not constitute representations of the sort that can give rise to a claim of fraudulent concealment. All are mere expressions of opinion denying plaintiffs' accusation of wrongdoing and cannot, therefore, "constitute fraudulent concealment" for the purpose of tolling the statute of limitations. Clark v. Airesearch Manufacturing Company of Arizona, Inc., 673 P.2d 984, 987 (Ariz. App. 1983).

Even if these representations could constitute a fraudulent concealment, it is clear that Plaintiffs were not deceived by these representations. An allegation of fraudulent concealment does not toll a statute of limitations if reasonable inquiry on the part of Plaintiffs would have revealed the claimed fraud prior to the time of filing their complaint. Rasmussen v. Olsen, 583 P.2d 50, 52 (Utah 1978); McKonkie v. Hartman, 529 P.2d 801, 802 (Utah 1974). Plaintiffs' belief that medical malpractice occurred existed prior

to and continued through and after plaintiffs' conversations and correspondence with Mr. Olsen. All of the facts in the complaint filed in 1985 were known or could readily have been known in 1973. Since at least 1977, Plaintiffs were represented by six different attorneys employed with respect to the malpractice alleged in this case. (R. 108, 109 and 257.) In addition, Mr. Chapman wrote a letter on or about May 2, 1977, suggesting that Mr. Chapman believed he had a claim for malpractice against the Medical Defendants in this case. (R. 111-118.) These facts indicate that well before the representations were made by Mr. Olsen, Plaintiffs believed that they had a claim for malpractice against the Medical and Hospital Defendants in this case. Accordingly, Wetzel's representations do not, as a matter of law, toll the statute of limitations of the Utah Health Care Malpractice Act.

C. The Utah Health Care Malpractice Act and Its Statute of Limitations Are Constitutional.

The constitutionality of the statute of limitations in the Utah Health Care Malpractice Act has been thoroughly briefed by the Medical and Hospital Defendants in the Respondents' Brief in Appeal No. 860230. To avoid unnecessary repetition, Wetzel and Home Group adopt the argument presented in Respondent's Brief (for the court's convenience, Respondents argument on this issue is attached in the Addendum at pages 13-38.)

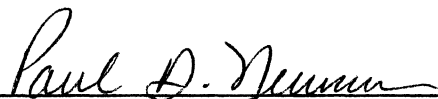
CONCLUSION

The Trial Court properly ruled that the statute of limitations in the Utah Health Care Malpractice Act bars

plaintiffs' medical negligence claims and that the representations of Wetzel are an insufficient basis, as a matter of law, for claims of fraud and intentional infliction of emotional distress. In addition, the Trial Court properly ruled that Utah law does not provide a claim for negligent infliction of emotional distress or a claim for damages against a corporation based solely on its ownership of a subsidiary corporation. Accordingly, this Court should affirm the summary judgment granted in favor of Wetzel and Home Group.

DATED this 24th day of November, 1986.

RAY, QUINNEY & NEBEKER



Stephen B. Nebeker
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Group, Inc.

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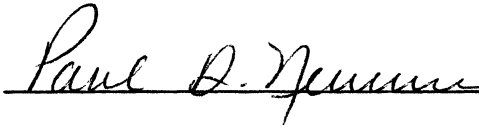
PROOF OF SERVICE

The undersigned, attorney for Respondents Scott Wetzel Services, Inc. and The Home Group, Inc., hereby certifies that on November __, 1986, he caused to be served the foregoing Respondents' Brief on all parties to this Appeal by mailing four (4) copies thereof by first-class mail, postage prepaid, addressed to their attorneys as follows:

KATHRYN COLLARD, ESQ.
401 Boston Building
Salt Lake City, Utah 84111

P. RICHARD MEYER, ESQ.
ROBERT N. WILLIAMS, ESQ.
P.O. Box 2608
Jackson, Wyoming 83001

DATED this 24th day of November, 1986.



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ADDENDUM INDEX

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

STATEMENT OF FACTS

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

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

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

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

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

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

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

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

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

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

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

(R. 250, A-15.)

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

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

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

SUMMARY OF ARGUMENT

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

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

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

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SALT LAKE COUNTY

James F. [Signature]

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ANTHONY B. QUINN (A2672) of
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P. O. Box 45385
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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

-----oo0oo-----

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

Plaintiffs, :

AFFIDAVIT OF SCOTT OLSEN

v. :

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

Civil No. C-85-6782

Honorable Homer F. Wilkinson

corporation; THE HOME GROUP, :
INC., a foreign corporation;
JOHN DOE I-X; and BLACK CORPOR- :
ATIONS I-V, :

Defendants. :

-----oo0oo-----

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

Scott Olsen being first duly sworn deposes and states that:

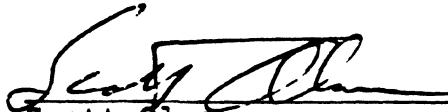
1. He is the manager of the Salt Lake office of Scott Wetzel Services, Inc.
2. Scott Wetzel Services, Inc. was incorporated in the State of Washington on January 29, 1971.
3. One hundred percent of the stock of Scott Wetzel Services, Inc. was purchased by The Home Group, Inc. on January 11, 1973.
4. The document attached hereto as Exhibit "A" is the copy of the contract between Scott Wetzel Services, Inc. and the Intermountain Health Care which was in effect at the time the file was opened in this matter.
5. All of the efforts of Scott Wetzel Services, Inc. done in connection with the investigation of the Chapmans' claim were done pursuant to the agreement attached hereto as Exhibit "A". None of the investigative or other services performed by Wetzel were performed on behalf of The Home Group, Inc.

6. The Home Group, Inc. did not issue any insurance policy covering any of the defendants named in the Complaint at the time the claim arose.

7. The predecessor of Intermountain Health Care was covered by two policies in 1973: one issued by Reserve Insurance Company and the other by Appalachian Insurance Company.

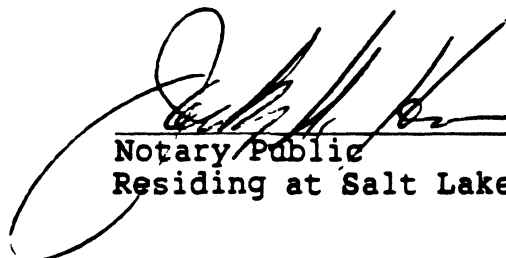
8. The predecessor of Intermountain Health Care had a self-insured retention of \$25,000 at the time the claim arose.

DATED this ____ day of April, 1986.



Scott Olsen

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



Notary Public
Residing at Salt Lake County, Utah

My Commission Expires:

12-9-87

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SALT LAKE COUNTY COURT

Chapman
DEPUTY CLERK

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

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

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

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

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

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

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

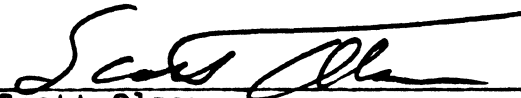
2. On May 27, 1983 I met personally with Robert and Teresa Chapman, with Jennifer also present. At that time the Chapmans alleged that Jennifer had been injured in February 1973 in connection with problems that developed following a second cardiac operation, because there had not been a prompt response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

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

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

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

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



Scott Olsen

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



Notary Public

My Commission Expires:

12-9-87

Residing at Salt Lake City, Utah



Scott Wetzel Services Incorporated

An Affiliate of The Home Group, Inc

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

Phone (801) 322-2541

June 17, 1983

Robert Chapman
597 South 1100 West
Riverdale, Utah 84403

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

Dear Mr. Chapman:

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

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

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

Very truly yours,

Scott Olsen

SO/11

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

EXHIBIT "A"

A-12
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"suffered from extreme lack of oxygen and sustained permanent brain damage." (R. 6.) Under the undisputed facts, any claimed medical malpractice was thus complete at the time of the February 1973 injury. Even if continuing negligence were adequately alleged, the statute still runs from the time of discovery of the injury and not from the termination of a physician-patient relationship.

Note that even the Peteler court decision relied on by the appellants recognized that where negligent treatment is not continuing, the statute of limitations bar would be complete. See Peteler v. Robison, 81 Utah 535, ___, 17 P.2d at 249. To the extent that Peteler could be read to hold otherwise, it was specifically disapproved in Christiansen v. Rees, 20 Utah 2d 199, 436 P.2d 435 (1968). The statute of limitations thus bars the appellants' action.

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

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

A. Utah Case Law Precedents.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

stated that it will avoid constitutional questions wherever possible:

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

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

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

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

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

A party who challenges a legislative enactment on constitutional grounds bears a heavy burden of proof. Judicial review of a properly enacted law begins with the strong presumption that the law is constitutional. State v. Murphy, 674 P.2d 1220, 1222 (Utah 1983). This Court has consistently observed that it is not the function of the judiciary to second guess the wisdom or propriety of legislation.

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

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

A. Standard of Review.

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

1. Equal protection.

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

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

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

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

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

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

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

Hargett v. Limberg, 598 F.Supp 152, 157 (D. Utah 1984) (citing Schweiker v. Wilson, 450 U.S. 221, 101 S.Ct. 1074, 67 L.Ed.2d 186 (1981); Brubaker v. Cavanaugh, 741 F.2d 318 (10th Cir. 1984); American Bank and Trust Co. v. Community Hospital, 36 Cal.3d 359, 204 Cal. Rptr. 671, 683 P.2d 670, 677 n. 10 (1984); and Allen v. Intermountain Health Care, Inc., 635 P.2d 30, 31 (Utah 1981)).

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

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

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

2. Access to courts.

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

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

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

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

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

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

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

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

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

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

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

Id. at 10; A-33.

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

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

support his child); 78-45-9 (every man shall support his child); 78-45-9 (an obligee or state department of social services may enforce a child's right of support against parent); 76-7-201 (failure to provide medical care is criminal neglect; see also 12 A.L.R.2d 1047). Compare Wasescha v. Wasescha, 548 P.2d 895 (Utah 1976) (children have a right to support); Ottley v. Hill, 21 Utah 2d 396, 446 P.2d 301 (1968) (parent under legal duty to pay medical care); Gulley v. Gulley, 570 P.2d 127 (Utah 1977) (parent cannot rid himself of duty to support his children by contract); Gawand v. Gawand, 615 P.2d 422 (Utah 1980) (parent has duties to support retarded child). See also 34 A.L.R.2d 1460 (right of child against parent for support).⁵ Further, the Utah Supreme Court has long recognized that a statute of limitations may run against a minor where rights are vested in a parent or guardian. Trinnaman v. Clinger, 26 Utah 2d 111, 485 P.2d 1043, 1044 (1971); Parr v. Zions First National Bank, 13 Utah 2d 404, 375 P.2d 461 (1962); Dignan v. Nelson, 26 Utah 186, 72 P. 936 (1903).

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

B. Application of Standard of Review.

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

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

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

the Act and its statute of limitations against constitutional challenges.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

analyzed equal protection and due process attacks by minor plaintiffs against medical malpractice statutes of limitations have reached similar results. See, e.g., Donabedian v. Manzer, 153 Cal. 3d 592, 200 Cal. Rptr. 597 (1984); Kite v. Campbell, 142 Cal. 3d 793, 191 Cal. Rptr. 363 (1983) (statute providing that medical malpractice actions by a minor must be commenced within three years from the date of the alleged wrongful act did not deny a minor's right to due process under law; as a matter of constitutional law, a statute of limitation is remedial in nature and does not destroy fundamental rights); Wheeler v. Lenski, 8 Kan. App. 2d 408, 658 P.2d 1056 (1983) (statute which shortens period of limitation for minors and incapacitated persons in medical malpractice actions did not violate equal protection or due process); Petri v. Smith, 307 Pa. Super 261, 453 A.2d 342 (1982) (the settled rule is that it is not violative of any constitutional rights to hold minors bound equally with adults to the prescribed statutory periods within which legal causes of action may be brought); Reese v. Rankin Fite Memorial Hospital, 403 So.2d 158 (Ala. 1981) (statute of limitations did not violate due process and equal protection provisions of state or federal constitutions on ground that statute treated minors injured through medical malpractice differently from minor victims of other torts); Thomas v. Niemann, 397 So.2d 90 (Ala. 1981) (minor's medical malpractice action was barred by the statute of

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

CONCLUSION

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