

2009

# Larry Roth v. Peder J. Pedersen : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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LARRY ROTH,  
Plaintiff/Appellant,  
  
vs.  
  
PEDER J. PEDERSEN, M.D.,  
Defendant/Appellee.

**APPELLEE'S BRIEF**

Appeal No. 20090139-CA  
Trial Court No. 0880917484

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Appeal from a Decision of the  
Third Judicial District Court,  
Salt Lake County, Honorable Denise P. Lindberg

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## STATEMENT OF JURISDICTION

The Court of Appeals has appellate jurisdiction over this appeal pursuant to Utah Code Ann. § 78A-4-103(2)(j).

## STATEMENT OF ISSUES AND STANDARD OF REVIEW

1. Did the trial court correctly hold that the statute of limitations had run on Mr. Roth's claims?

Preservation: This was the main issue presented to the trial court by Dr. Pedersen's motion for judgment on the pleadings. (R. 15-24.)

Standard of Review: "The applicability of a statute of limitations and the applicability of the discovery rule are questions of law, which we review for correctness." Russell Packard Development, Inc. v. Carson, 2005 UT 14, ¶ 18, 108 P.3d 741, 745.

2. Did the trial court properly rule that Mr. Roth's Complaint failed to plead a claim of fraudulent concealment?

Preservation: This issue was preserved by Mr. Roth's opposition memorandum. (R. 54-56.)

Standard of Review:

A court may enter judgment on the pleadings when the moving party is entitled to judgment on the face of the pleadings themselves. A reviewing court will affirm a judgment on the pleadings only if, as a matter of law, the nonmoving party could not prevail under the facts alleged. Therefore, this court gives such a ruling no deference and reviews it for correctness. On appeal from the grant of a motion for judgment on the pleadings, this court takes the factual allegations of the nonmoving party as true, considering such facts and all reasonable inferences drawn therefrom in a light most favorable to the non-moving party.

MBNA America Bank, N.A. v. Williams, 2006 UT App 432, ¶ 2, 147 P.3d 536, 537.

**PROVISIONS OF CONSTITUTION, STATUTES,  
ORDINANCES AND RULES**

Utah Code Ann. § 78B-3-404(1) and (2):

(1) A malpractice action against a health care provider shall be commenced within two years after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered the injury, whichever first occurs, but not to exceed four years after the date of the alleged act, omission, neglect, or occurrence.

(2) Notwithstanding Subsection (1):

(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; or

(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.

**STATEMENT OF THE CASE**

**A. NATURE OF THE CASE**

On May 24, 2004, general surgeon Hugh Voorhees, M.D. ("Dr. Voorhees"), was operating on Plaintiff/Appellant Larry Roth ("Mr. Roth"), to remove a portion of his colon, which had been marked by ink tattoos during an earlier polypectomy performed by Ronald Joseph, M.D. ("Dr. Joseph"). During the surgery, Dr. Voorhees asked Appellee Peder J. Pedersen, M.D. ("Dr. Pedersen") to consult in a



failed attempt to identify the tattooed area. Prior to asking Dr. Pedersen to assist in attempting to identify the tattoos, Dr. Voorhees had already removed the portion of Mr. Roth's colon based upon an area described in Dr. Joseph's chart.

After his surgery, Dr. Voorhees advised Mr. Roth that neither he nor Dr. Pedersen could identify the tattooed area. Dr. Voorhees told Mr. Roth, however, that he had removed the correct portion of the colon. During a subsequent colonoscopy on October 13, 2004, however, Dr. Joseph saw the tattoos, told Mr. Roth that a portion of his colon that was to have been removed was not and referred Mr. Roth to another physician. On November 8, 2004, another colonoscopy was performed by Jason Willis, M.D. ("Dr. Willis") who also saw the tattoos. On January 24, 2005, a second surgery was performed to remove the portion of Mr. Roth's bowel that had been designated for removal on May 24, 2004.

## **B. COURSE OF PROCEEDINGS**

On May 24, 2006, Mr. Roth initiated an arbitration action by service of a notice of claim against Dr. Voorhees for malpractice. Dr. Pedersen was not named as a Defendant. (R. 44-45.) The claims against Dr. Voorhees were resolved in favor of Dr. Voorhees through an arbitration hearing held on August 22, 2007. (R. 30.) On January 12, 2008, nearly four years after the surgery and almost two years after commencing action against Dr. Voorhees, Mr. Roth served a Notice to Commence Legal Action against Dr. Pedersen. (R. 30.) Following completion of the pre-litigation process, Mr. Roth commenced legal action by filing a Complaint on August 21, 2008. (R. 1-10.)

Dr. Pedersen filed an Answer accompanied by a Motion for Judgment on the Pleadings on the grounds that Mr. Roth's claims were barred by the medical malpractice statute of limitations. (R. 11-14.) On December 23, 2008, the trial court ruled in favor of Dr. Pedersen, holding that Mr. Roth's claims were time-barred. (R. 70-71.) Mr. Roth filed his Notice of Appeal on January 21, 2009.

### **C. STATEMENT OF FACTS**

Dr. Joseph performed a colonoscopy on Mr. Roth on April 28, 2004, during which he removed a polyp from Mr. Roth's colon. (R. 2.) After the colonoscopy, Dr. Joseph advised Mr. Roth that he had placed tattooed markings "above and below the site from which he had removed the polyp and told Mr. Roth that, because the polyp was cancerous, he should have the area of his colon between the tattoos removed. (R.3.) On May 24, 2004, Dr. Voorhees operated to remove the infected portion of Mr. Roth's colon. (R. 3.) During the surgery, Dr. Voorhees was unable to locate the tattoos placed by Dr. Joseph. (R. 3.) Dr. Voorhees contacted Dr. Pedersen, who was on call for Dr. Joseph, to see if he could help identify the tattoos. (R. 3.) Before Dr. Pedersen arrived, Dr. Voorhees had removed 25 cm of Mr. Roth's distal sigmoid colon. (R. 3.) Dr. Pedersen looked for the tattoos, but was unable to locate them. (R. 3.) Dr. Voorhees told Mr. Roth after the May 24, 2004, surgery that neither he nor Dr. Pedersen could see the tattoos, but that he believed he had removed the correct portion of the colon based on Dr. Joseph's Operative Report describing the area that needed to be removed.

The post-surgical conversation between Dr. Voorhees and Mr. Roth is documented in Dr Voorhees' office note of June 8, 2004, and in a letter he wrote the same day to Dr. Joseph. (R. 28; See also Appellant's Brief p. 22 conceding that

“Roth was in fact after the surgery misinformed by Dr. Voorhees that he and Dr. Pedersen removed the cancerous site from Roth’s colon.” (emphasis added)).

On October 13, 2004, Dr. Joseph performed a follow-up colonoscopy. His report described some faint ink marks in the mucosa of Mr. Roth’s colon. (R. 28, Complaint ¶ 37, R. 6.) Dr. Joseph referred Mr. Roth to Randall Burt, M.D. (“Dr. Burt”), at the University of Utah. On November 8, 2004, Dr. Burt, assisted by Dr. Willis, performed a flexible sigmoidoscopy, in which they observed two tattoos. (R. 28, 37-39.) Dr. Burt discussed the findings of the procedure with Mr. Roth and recommended a second surgery to remove the portion of the colon delineated by the tattoo marks. (R. 29, 41-42.) Dr. Burt referred Mr. Roth to Brad Sklow, M.D. (“Dr. Sklow”), a colorectal surgeon at the University of Utah. (Id.) Dr. Sklow performed a second bowel resection on Mr. Roth on January 24, 2005. (R. 6, 29.)

### **SUMMARY OF ARGUMENT**

Mr. Roth knew in May of 2004, as he concedes in his Brief at p. 22, that Dr. Pedersen consulted with Dr. Voorhees during Mr. Roth’s colon surgery. On October 13, 2004, as alleged in the Complaint, Dr. Joseph advised Mr. Roth that Dr. Voorhees had failed to remove the portion of his infected colon delineated by the tattoos. At that time, Mr. Roth knew, or should have known, that his surgery was not successful and that the failure was possibly due to negligence of both Dr. Voorhees and Dr. Pedersen in failing to see the tattoos. Under Utah law, Mr. Roth’s action against Dr. Pedersen accrued on October 13, 2004. In order to do so timely, Mr. Roth needed to bring a claim against Dr. Pedersen by October 14, 2006. His Notice of Intent to Commence Action, however, was not served until

January 12, 2008. The trial court correctly dismissed Mr. Roth's action as time-barred.

Mr. Roth attempts to avoid the obvious untimeliness of his action against Dr. Pedersen by alleging fraudulent concealment. The fraudulent concealment allegation fails in this case, however, for several reasons. First, once the cause of action accrued, *i.e.*, when Mr. Roth discovered or through the use of reasonable diligence should have discovered an injury which is not an accepted result of Dr. Voorhees' surgical procedure, the fraudulent concealment tolling provisions of the Utah Healthcare Malpractice Act did not apply. Mr. Roth knew that the portion of his colon delineated by Dr. Joseph's tattooing had not been removed when Dr. Joseph told him so on October 13, 2004. Indeed, that is why Mr. Roth served Dr. Voorhees with a Notice of Intent to Commence Action in May of 2006. Mr. Roth had all the information needed to file a claim against Dr. Pedersen at the same time he had the information to file his claim against Dr. Voorhees.

Second, Mr. Roth failed to adequately plead fraudulent concealment under Rule 9(b), Utah R.Civ.P., which requires that fraud be plead with particularity. Indeed, Mr. Roth does not plead that Dr. Pedersen had a duty of disclosure to him that he failed to perform. Rather, Mr. Roth alleges only that "it appears" that Dr. Pedersen failed to advise Dr. Voorhees of problems that Dr. Joseph was having with fading ink. Central to the concealment claim is the issue of how Mr. Roth could rely on an alleged failure to communicate to Dr. Voorhees the possibility of fading ink once he knew the ink marks had been seen by subsequent practitioners on October 13, 2004.

Third, Mr. Roth makes no allegation of an affirmative act of fraudulent concealment as required by statute. Mr. Roth does not allege in his Complaint, nor does he argue in his Appellate Brief, that Dr. Pedersen did anything more than fail to tell Dr. Voorhees that Dr. Joseph had expressed to him problems with fading ink. Additionally, Mr. Roth fails to establish any duty that Dr. Pedersen had to discuss a hypothetical fading ink issue with him. As a matter of law, Dr. Pedersen's silence cannot equate to an affirmative act of fraudulent concealment.

The statute of limitations issues were presented to the trial court pursuant to a motion for judgment on the pleadings. Mr. Roth complains that the Court used facts provided in the Answer as a basis for its ruling, apparently arguing that only the allegations of Plaintiff's Complaint could be judged by the Court in ruling on a motion for judgment on the pleadings. However, Rule 12(c) contemplates the potential for a judgment on the pleadings (plural) as distinguished from a motion to dismiss based upon the sole pleading of a complaint. Moreover, none of the facts presented by Dr. Pedersen's Answer contradict the allegations of Mr. Roth's Complaint. Rather, the Answer merely fills in some additional, uncontroverted details of the medical care omitted from the Complaint, particularly those relating to the statute of limitations issue. It was appropriate for the trial court to rely on the facts set forth in the Answer, especially in light of the fact that Mr. Roth did not contest the accuracy of the additional facts provided by the Answer. Moreover, the relevant facts relating to the discovery of injury are conceded by Mr. Roth's. He acknowledges in his Complaint is conceded in Mr. Roth. He acknowledges in his brief on appeal that he knew of Dr. Pedersen's involvement in the Voorhees' surgery, knew of the inability of both Dr. Voorhees and Dr. Pedersen to observe the

tattooing and knew on October 13, 2004 that the tattoos placed by Dr. Joseph were still present after Dr. Voorhees' surgery.

Mr. Roth could have initiated legal action against Dr. Pedersen at the time he did so against Dr. Voorhees. Instead, he chose to attempt to initiate legal action against Dr. Pedersen only after he failed to prevail on his claim against Dr. Voorhees, *i.e.*, when Mr. Roth discovered his injury on October 13, 2004.

### **ARGUMENT**

#### **I. THE TRIAL COURT PROPERLY CONSIDERED INFORMATION PRESENTED IN DR. PEDERSEN'S ANSWER AS PART OF THE "PLEADINGS."**

##### **A. MR. ROTH HAS FAILED TO PRESERVE THIS ISSUE FOR APPEAL.**

Despite his claim to the contrary, Mr. Roth fails to cite to any part of the record where he preserved the argument that the trial court erroneously considered Dr. Pedersen's Answer in ruling on the Motion for Judgment on the Pleadings. It is well-established that a party may not raise a substantive issue for the first time upon appeal. *E.g.*, Loveland v. Orem City Corp., 746 P.2d 763, 767 (Utah 1987). Centennial Inv. Co., LLC v. Nuttall, 2007 UT App. 321, ¶ 26, n. 7, 171 P.3d 458, 464 (declining to address part of attorney fee question not preserved for appeal).

This Court has explained what steps are necessary for preserving a substantive issue for appeal.

To preserve a substantive issue for appeal, a party must timely bring the issue to the attention of the trial court, thus providing the court an opportunity to rule on the issue's merits. Issues not raised in the trial court in timely fashion are deemed waived, precluding the appellate court from considering their merits on appeal. Second, the issue must be specifically raised such that the issue is sufficiently raised to a level of consciousness before the trial court. Third, the party must introduce to the trial court

supporting evidence or relevant legal authority to support its argument.

Hart v. Salt Lake County Commission, 945 P.2d 125, 129-30 (Utah App. 1997) (punctuation, citations omitted). The Hart court noted that merely mentioning an issue in the pleadings or raising an issue in post-trial motions does not preserve the issue for appeal. Id. Further, even if a post-trial motion raised the issue, where the court did not rule on the issue and the party did not point out to the court its failure to rule, the issue is not preserved for appeal. Id.

“When issues are not brought to the trial court’s attention in a timely manner, they are deemed waived, precluding [the appellate] court from considering their merits on appeal.” Holmstrom v. C.R. England, Inc., 2000 UT App 239, ¶ 25, 8 P.3d 281, 288 (punctuation, citation omitted). Nowhere in Mr. Roth’s opposition memorandum or anywhere else in the trial court record is there an argument that the trial court might be considering matters beyond the allegations of the Complaint or that doing so would be improper. Additionally, Mr. Roth never controverted the allegations of the Answer or moved to have the Court treat Dr. Pedersen’s motion as one for summary judgment under Rule 56. As a consequence, Mr. Roth has waived the argument.

**B. THE TRIAL COURT DID NOT CONSIDER ISSUES OUTSIDE OF THE PLEADINGS.**

Mr. Roth complains that the trial court relied on facts set forth in Dr. Pedersen’s Answer rather than focusing solely upon allegations of his Complaint. In doing so, however, he ignores the fact that Rule 12(c) provides for a motion for judgment on the pleadings. It goes without saying, however, that an answer is a pleading. E.g., Turville v. J & J Properties, L.C., 2006 UT App 305, ¶ 27, 145 P.3d

1146, 1151 (answer constitutes a responsive pleading); Rule 7(a), Utah R.Civ.P. (defining “pleadings” as the complaint, answer and other initial filings).

What is also significant is that Dr. Pedersen’s Answer did not contradict any facts alleged in Mr. Roth’s Complaint. The Answer merely provides additional facts, which Mr. Roth never sought to controvert, material to the statute of limitations issue. Adopting Mr. Roth’s construction of a motion for judgment on the pleadings would mean that a court would have to treat a Rule 12(c) motion as one based only on a single pleading, the complaint, rather than both the complaint and answer. Doing so would make Rule 12(c) a nullity.

To constitute matters “outside the pleadings,” the information considered by the trial court would have to include documentation or evidence submitted with a memorandum as opposed to information specifically set forth in the answer. E.g., Tuttle v. Olds, 2007 UT App 10, ¶¶ 8-9, 155 P.3d 893, 896 (holding that federal judgment attached to memorandum and not included in an answer was information “outside the pleadings.”)

Mr. Roth had the opportunity to rebut the facts presented by the Answer and have the motion treated as one for summary judgment under Rule 56. He did not because the facts are incontrovertible. For purposes of a judgment on the pleadings, the trial court appropriately considered the uncontroverted facts presented by the Answer.

**II. THE TRIAL COURT CORRECTLY DETERMINED THAT MR. ROTH’S CLAIMS AGAINST DR. PEDERSEN ARE BARRED BY THE RUNNING OF THE STATUTE OF LIMITATIONS.**

Mr. Roth concedes that Dr. Voorhees told him of Dr. Pedersen’s consultation during his surgery on or near May 24, 2004. Mr. Roth admits he knew on October



13, 2004, as a result of the follow-up colonoscopy by Dr. Joseph, that the tattoo marks still remained in his colon and that a second surgery would be required. (Complaint ¶ 37, R. 5-6.) Those two bits of knowledge are sufficient under Utah law for Mr. Roth's action against Dr. Pedersen to have accrued on October 13, 2004.

The statutory language is clear about when a cause of action for medical negligence must be instituted:

A malpractice action against a health care provider shall be commenced within two years after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered the injury, whichever first occurs, but not to exceed four years after the date of the alleged act, omission, neglect, or occurrence.

Utah Code Ann. § 78B-3-404(1).<sup>1</sup>

Under Utah law, the statute of limitations begins to run when a patient knows or should know that he has suffered a legal injury. Foil v. Ballinger, 601 P.2d 144, 147 (Utah 1979). Mr. Roth is correct in stating that “legal injury” involves both discovery of the injury and the negligence causing the injury. (Aplt's Brf p. 17, citing Foil.) He ignores, however, subsequent Utah case law which deals with the issue of discovery of legal injury. Where it is clear that an unexpected outcome resulted from an identifiable medical incident, a patient should know that legal injury was suffered at the time of the medical event. Reiser v. Lohner, 641 P.2d 93, 100 (Utah 1982 (emphasis added)). See also Floyd v. Western Surgical Associates, 773 P.2d 401, 404 (Utah App. 1989) (where the patient can make a connection between his surgery and his subsequent symptoms, he discovered or should have discovered

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<sup>1</sup>Formerly numbered § 78-14-4(1). Because the language is identical, we cite to the current version of the statute.

his injury); Brower v. Brown, 744 P.2d 1337, 1340 (Utah 1987) (Zimmerman, J. concurring in part and dissenting in part) (where a patient receives an injury which is clearly not an expected result of a surgical procedure, that is “enough, as a matter of law, to place her on notice that she had received a legal injury.” (emphasis added)).

Under Utah law, accrual of a cause of action is not postponed until the injured party has discovered the true nature or full extent of the injury. E.g., Avis v. Board of Review of Industrial Commission, 837 P.2d 584, 588 (Utah App. 1992) (rejecting plaintiff’s argument that the statute did not begin to run until he “discovered the full extent of his injury.”) “[A] cause of action accrues when a plaintiff could have first filed and prosecuted an action to successful completion.” DOIT, Inc. v. Touche, Ross & Co., 926 P.2d 835, 843 (Utah 1996) (citations omitted). “Once a claim accrues, it may not be maintained unless it is commenced within the limitations period prescribed by the applicable statute of limitations.” Id.<sup>2</sup>

Neither is the accrual of a legal injury postponed while a patient investigates who is responsible for the medical injury. McDougal v. Weed, 945 P.2d 175, 177 (Utah App. 1997). In McDougal, the plaintiff named the wrong physician in his statutory notice of intent, pursuing the matter through the prelitigation process. Subsequently, before the trial court and on appeal, he argued that he “did not discover, nor could have discovered through reasonable diligence, the identity of the

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<sup>2</sup>Mr. Roth has never explained how Dr. Pedersen’s failure to discuss a problem of fading ink could constitute fraudulent concealment when he knew he had been injured because the tattooed portion of his colon had not been removed and that both Dr. Voorhees and Dr. Pedersen were involved in the failed search for the tattoos during the surgery. Moreover, once the patient knows of his injury and his cause of action accrues, subsequent concealment, whether fraudulent or not, is legally immaterial. While the statutory discovery rule tolls pending discovery, it does not stop the running of the limitations period where the action has already accrued.

proper party defendant” until informed of the identity by the prelitigation panel after the statute had run. McDougal at 177. This Court disagreed, concluding that, under the statutory language, the action accrued upon discovery of the injury, not the party responsible for the injury.

The statutory language clearly sets the moment the “patient discovers . . . the injury” as the triggering moment for the limitations period. Thus, the only triggering moment contemplated under the statute is the moment of discovery of the legal injury. The discovery of an injury and that the injury was possibly the result of medical malpractice are facts distinct from discovery of the identity of a defendant. Accordingly, an injured person need not determine the identity of the person responsible for his or her injury to determine that he or she has been injured and that the injury was possibly tied to negligence. Thus, we conclude that the statutory discovery rule does not require that the statute of limitations be tolled until the identity of the tortfeasor is discovered or should have been discovered after a reasonably diligent effort to ascertain it.

McDougal at 177.

McDougal is controlling. Mr. Roth knew he had suffered a legal injury by October 13, 2004. That is why he sued Dr. Voorhees. Mr. Roth also knew of Dr. Pedersen’s participation in the surgery in May of 2004. He knew the facts necessary to begin an action against Dr. Pedersen when he initiated his claim against Dr. Voorhees. In fact, Mr. Roth’s notice of claim against Dr. Voorhees specifically references Dr. Pedersen’s involvement. The injury that caused the claim to accrue against Dr. Voorhees was also the injury that caused the claim to accrue against Dr. Pedersen.<sup>3</sup> There was nothing that legally prevented Mr. Roth from instituting

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<sup>3</sup>Mr. Roth is not alleging a different injury was caused by Dr. Pedersen only that the injury was the responsibility of a different physician than the one he first sued.

legal action against Dr. Pedersen when he initiated the litigation against Dr. Voorhees.

Mr. Roth's argument that he did not know he had a claim against Dr. Pedersen until after Dr. Voorhees' deposition was taken is of no avail. Lack of knowledge of whom among several known potential tortfeasors is at fault does not toll the running of the limitations period. Anderson v. Dean Witter Reynolds, Inc., 920 P.2d 575, 578 (Utah App. 1996) ("simple ignorance of or obliviousness to the existence of a cause of action will not prevent the running of the statute of limitations.") Mr. Roth failed to name as a defendant a physician who consulted in the surgery that caused his injury. In doing so he took the risk that he may have sued the wrong defendant or that the defendant he did sue might seek to blame the consulting physician. The fact that Mr. Roth failed in his suit against Dr. Voorhees does not prevent the running of the statute of limitations against Dr. Pedersen.

The facts of this case are analogous to those in McDougal, where the plaintiff was in discovery with the wrong party when he discovered the identity of the proper defendant based upon the testimony of the defendant he had named. Here, Mr. Roth was in discovery in his claim against Dr. Voorhees when he "discovered" evidence of a problem of fading ink, which the failure to disclose is now claimed to be negligence on the part of Dr. Pedersen. He could have named Dr. Pedersen from the outset, but did not.<sup>4</sup>

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<sup>4</sup>We note also that Mr. Roth made no attempt to amend his complaint against Dr. Voorhees to include Dr. Pedersen as a defendant. Instead, he ignored the information he possessed and decided after the fact to commence litigation separately against Dr. Pedersen.

### III. THE COMPLAINT FAILS TO PROPERLY ALLEGE A CLAIM OF FRAUDULENT CONCEALMENT FROM MR. ROTH BY DR. PEDERSEN AND WAS PROPERLY DISMISSED.

The substance of Mr. Roth's fraudulent concealment claim consists of a single paragraph:

Upon information and testimony provided to Plaintiff within the year it appears that Dr. Pedersen concealed the fact that he failed to properly consult with Dr. Voorhees in May 2004 as to the reasons the tattooing may not have been identified, the reasons the polypectomy site could not be seen and the area requiring surgery remained.

(Complaint ¶ 39, R. 6 (emphasis added).) Nowhere in his Complaint does Mr. Roth allege that Dr. Pedersen failed to speak with him or that he concealed any information from him. The sole allegation of his Complaint references only what Mr. Roth thinks Dr. Pedersen should have told Dr. Voorhees.

Additionally, where fraudulent concealment is alleged, the circumstances forming the basis for the allegation must be stated with particularity. Rule 9(b), Utah R.Civ.P. To avoid this requirement, Mr. Roth argues that his Complaint should be liberally construed in his favor. The rule of liberal construction, however, does not apply to allegations of fraudulent conduct which must be pled with particularity under Rule 9. DeBry v. Noble, 889 P.2d 428, 443 (Utah 1995). Mr. Roth states only that "it appears" that Dr. Pedersen concealed information from Dr. Voorhees, an allegation that falls well short of pleading with particularity.<sup>5</sup>

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<sup>5</sup>We note that pleading fraud based on information and belief may satisfy Rule 9, but only "as long as it includes the facts upon which the belief is based." Kuhre v. Good fellow, 2003 UT App 85, ¶ 24, 69 P.3d 286, 292 (citation omitted). There are no such facts included in Mr. Roth's Complaint.

Moreover, nothing in the Complaint alleges that Dr. Pedersen acted affirmatively to fraudulently conceal a cause of action against Mr. Roth, a requirement clearly delineated by the Utah Healthcare Malpractice Act:

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

Utah Code Ann. § 78B-3-404(2)(b) (emphasis added). A plaintiff, to avail himself of the tolling provision, must adequately plead at least two elements: (1) that the health care provider acted affirmatively and (2) that the provider fraudulently concealed his/her misconduct. Mr. Roth's Complaint fails on both counts. Moreover, Mr. Roth has failed to allege that he used any reasonable diligence in discovering the alleged fraud or that the nondisclosure would have reasonably made a difference in any decision he made.

Mr. Roth also seeks to avoid the requirements to plead affirmative acts of fraudulent concealment by arguing that Dr. Pedersen had a "fiduciary duty" to disclose to him that he failed to disclose material information to Dr. Voorhees. This Court in McDougal v. Weed, 945 P.2d 175 (Utah App. 1997) reviewed the elements of fraudulent concealment and concluded that mere silence is insufficient to form the basis of a claim. "The party's silence must amount to fraud, *i.e.*, silence under the circumstances must amount to an affirmation that a state of things exists

which does not exist<sup>6</sup>, and the uninformed party must be deprived to the same extent as if a positive assertion has been made.” McDougal at 179.

Dr. Pedersen’s alleged failure to Dr. Voorhees’ advise on the issue of fading ink is not the equivalent of “positive assertion.” There was no affirmative act of concealment, much less “fraudulent” concealment by Dr. Pedersen. He didn’t speak with Mr. Roth after the surgery because Dr. Voorhees, the surgeon, did. There is no allegation that Mr. Roth or anyone on his behalf ever spoke with Dr. Pedersen about the surgery. Dr. Pedersen had no subsequent involvement with Mr. Roth and had no reason to speak with him or anyone else about the surgery. As far as he knew the surgery had been a success. These circumstances simply fail to satisfy the requirements of an affirmative act to fraudulently conceal which would toll the limitations period.

Mr. Roth’s reliance on Russell Packard Development, Inc. v. Carson, 2005 UT 14, 108 P.3d 741 is misplaced. Russell Packard dealt with an element of the equitable discovery rule that doesn’t apply where a statute provides a discovery rule. As recognized by this Court, “[t]he equitable discovery rule applies only where a statute of limitations does not, by its own terms, already account for such circumstances – *i.e.*, where a statute of limitations lacks a discovery rule.” Moore v. Smith, 2007 UT App 101, ¶ 26, 158 P.3d 562, 571 (punctuation omitted, citing Russell Packard ¶ 25 at 747).

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<sup>6</sup>One wonders how the question of fading ink could after the existence of tattoos that were subsequently seen by Dr. Joseph, Dr. Willis, Dr. Bart and Dr. Sklow.

Nowhere in the Complaint did Mr. Roth allege that Dr. Pedersen had a duty to tell him the information he allegedly didn't convey to Dr. Voorhees.<sup>7</sup> While the alleged duty was discussed in memoranda, the issue here isn't whether a plaintiff can cure a defect in a complaint by creative legal argument in a memorandum. Looking solely at the face of the complaint, it is apparent that no claim for fraudulent concealment has been adequately alleged.

Moreover, it is impossible for Plaintiff to resolve Dr. Pedersen's failure to disclose a fading ink problem with facts that make fading ink irrelevant and immaterial, *i.e.*, that subsequent observers saw the tattoos. How could Dr. Pedersen's failure to discuss with Dr. Voorhees, Dr. Joseph's alleged problems with fading ink constitute concealment of a material fact when the tattoos were subsequently seen?

### CONCLUSION

The trial court properly considered matters established by the pleadings and did not rely on material outside of them. The Complaint, as supplemented by the Answer, clearly establishes that Mr. Roth knew or should have known of his legal injury on October 13, 2004. Indeed, the Complaint alone is sufficient to establish this fact. At the time his cause of action accrued against Dr. Voorhees it also accrued against Dr. Pedersen.

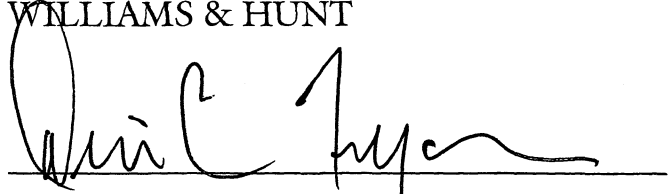
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<sup>7</sup>One of the many inconsistencies with Mr. Roth's argument is his fact statement that Dr. Voorhees "discussed in June 2004 with Dr. Joseph his concern of not being informed prior to the surgery he performed on Roth that Dr. Joseph had experienced problems such as fading of the SPOT tattoos. If Dr. Pedersen didn't mention the ink fading problem, how did Dr. Voorhees know to discuss it with Dr. Joseph?"



RESPECTFULLY SUBMITTED this 8 day of June, 2009.

WILLIAMS & HUNT

A handwritten signature in black ink, appearing to read "Dennis C. Ferguson", is written over a horizontal line.

DENNIS C. FERGUSON  
Attorneys for Defendant/Appellee

**CERTIFICATE OF MAILING**

I hereby certify that on this 8 day of June, 2009, I caused two (2) copies of the foregoing **APPELLEE'S BRIEF** to be mailed, postage prepaid, to the following:

David E. Ross, II  
1912 Sidewinder Drive, Suite 209  
Park City, Utah 84060

A handwritten signature in black ink, appearing to read "David E. Ross, II", is written over a horizontal line.

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