

2009

Larry Roth v. Peder J. Pedersen, M.D. : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LARRY ROTH,

Appellant,

vs.

PEDER J. PEDERSEN, M.D.,

Appellee.

Appellate Case No. 20090139-CA

Trial Court Case No. 080917484

BRIEF OF APPELLANT
ORAL ARGUMENT IS REQUESTED

Appeal from the Ruling of the Third Judicial District Court,
The Honorable Denis P. Lindberg
Granting Motion for Summary Judgment

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UTAH APPEALS

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LIST OF PARTIES

Plaintiff/Appellant: Larry Roth

Defendant/Appellee: Peder J. Pedersen, M.D.

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STATEMENT OF JURISDICTION

The Utah Supreme Court has original jurisdiction under U.C.A. §78A-3-102(3)(j); the Supreme Court transferred this case to the Utah Court of Appeals pursuant to U.C.A. §78A-3-102(4).

ISSUES PRESENTED FOR REVIEW

I. Judgment of the Pleadings

Issue # 1: Did Trial Court Error in Making Its Findings Based Upon Allegations Made Outside the Pleadings?

Preservation of Issue: The Trial Court's findings of course occurred after the pleadings and after the motion and memorandums were filed. Although the Motion was made pursuant to Rule 12(b)(6) *URCP*, the Court recognized that the Defendant/Appellee Dr. Peder J. Pedersen, M.D. (hereinafter referred to as "Dr. Pedersen") had filed his Answer and therefore treated the Motion as one filed pursuant to Rule 12(c) *URCP*. Therefore this issue is preserved upon the filings of the pleadings and in this case the pleadings are limited to the Complaint and Answer.

Issue # 1: Did the trial court err in finding that the statute of limitations had run?

Preservation of Issue: Plaintiff/Appellant Larry Roth's (hereinafter referred to as "Roth") allegations set forth in his Complaint [R. 1-10]¹ are deemed true for purposes of a motion for judgment on the pleadings under Rule 12(c) Utah Rules of Civ. Proc. Roth in his Memorandum in Opposition to Dr. Pedersen Motion to Dismiss argues

¹ References to the trial court record appear as [R. ____].

that Dr. Pedersen bases his position upon subsection (1) of U.C.A. §78B-3-404 while ignoring subsection (2)(b) thereof. Roth further argues in his Opposition Memorandum that subsection (2)(b) is applicable as Dr. Pedersen had a fiduciary duty to his patient Roth and his actions or omissions amounted to fraudulent concealment and that Roth is therefore entitled to apply the Discovery Rule as to the statute of limitations.

Issue #3: Did the Trial Court Error in Finding No Allegations Sufficient under Rule 9, URCP to Raise Issue of Fraudulent Concealment?

Preservation of Issue: The averments set forth in Roth's Complaint are sufficient under Rule 9 to find fraudulent concealment.

STANDARD OF REVIEW

"When reviewing a grant of a motion for judgment on the pleadings, this court accepts the factual allegations in the complaint as true; we then consider such allegations 'and all reasonable inferences drawn therefrom in a light most favorable to the plaintiff.' " Intermountain Sports, Inc. v. Department of Transp., 103 P.3d 716, 718 (Utah App. 2004) citing, Arndt v. First Interstate Bank of Utah, N.A., 1999 UT 91, p 2, 991 P.2d 584 (citation omitted). " '[W]e affirm the grant of such motion only if, as a matter of law, the plaintiff could not recover under the facts alleged.' " *Id.*

The district court's application of a statute of limitations is a question of law, which we review for correctness. Nolan v. Hoopiaina (In re Hoopiaina Trust), 144 P.3d 1129 (UT 2006). The applicability of a statute of limitations and the applicability of the discovery rule are questions of law, which we review for correctness." Spears v. Warr, 44 P.3d 742, 753 (Utah 2002).

DETERMINATIVE LAW

U.C.A. §78B-3-404(2)(b)

(2) Notwithstanding Subsection (1):

(a) (Omitted)

(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.

Supreme Court in Chapman v. Primary Children's Hospital, 784 P.2d 1181, 1184

(Utah 1989) in reference to §78-14-4(1)(b) stated, "...we interpret the "discovery of fraudulent concealment" provision of the statute as incorporating discovery of legal injury as well as discovery of fraudulent concealment."

Rule 12(c) *URCP* "When reviewing a grant of a motion for judgment on the pleadings, this court accepts the factual allegations in the complaint as true; we then consider such allegations 'and all reasonable inferences drawn therefrom in a light most favorable to the plaintiff.' " Intermountain Sports, Inc. v. Department of Transp., 103 P.3d 716, 718 (Utah App. 2004) citing, Arndt v. First Interstate Bank of Utah, N.A., 991 P.2d 584 (Utah 1999)(citation omitted). " '[W]e affirm the grant of such motion only if, as a matter of law, the plaintiff could not recover under the facts alleged.' " *Id.*

STATEMENT OF THE CASE

This matter arose out of a surgery that Dr. Pedersen and a general surgeon, Dr. Voorhees performed on Roth on May 24, 2004. [R1-10, ¶¶16, 20 & 21] The surgery was

performed in order to remove a polypectomy (this is a site where the GI doctor snipes a polyp in a patients colon) site that was suspect of being cancerous. [R1-10, ¶¶14 & 15]

A Dr. Joseph was the GI doctor that performed the polypectomy. [R1-10, ¶¶11 & 12]

Dr. Joseph was Dr. Pedersen's partner. [R1-10, ¶¶8 & 9] Dr. Joseph informed Dr. Voorhees that he placed tattoo markings above and below the polypectomy site in order to show its location in the colon. [R1-10, ¶17] Dr. Joseph also described the polypectomy site in his medical report at being 15 cm from the anal verge and further described its location in the distal sigmoid portion of the colon. [R1-10, ¶13] During the surgery Dr. Voorhees was unable to locate the tattoos and as Dr. Joseph was unavailable his partner Dr. Pedersen went over Dr. Joseph's medical chart with Dr. Voorhees and then Dr. Pedersen joined Dr. Voorhees in the operating room (OR). [R1-10, ¶¶18, 19 & 20] Before Dr. Pedersen arrived in the OR Dr. Voorhees had removed 25 cm of Roth's distal sigmoid colon. [R1-10, ¶22] Dr. Pedersen knew that general surgeons such as Dr. Voorhees located polypectomy sites based upon anatomical description and in this case he believed the polypectomy was located as described in Dr. Joseph's medical chart as being the distal sigmoid colon and therefore removed this section. [R1-10, ¶27] Dr. Pedersen also knew that he and other gastroenterologists located sites by centimeter measurement and knew that Dr. Joseph described the polypectomy site at 15 cm from the anal verge. [R1-10, ¶¶26 & 27] Dr. Voorhees called Dr. Pedersen to assist him in the operation as he [Dr. Voorhees] was having difficulty in seeing any tattoos or in seeing the polypectomy site. [R1-10, ¶20] Dr. Pedersen scoped the colon 20 cm up to the suture (where Dr. Voorhees removed the distal sigmoid colon). [R1-10, ¶25] Dr. Pedersen was unable to locate the tattoos or the

polypectomy site. [R1-10, ¶24] Dr. Pedersen then agreed with Dr. Voorhees that the polypectomy site had been removed and the surgery was terminated. [R1-10, ¶33]

Roth had follow-up colonoscopies in October 2004 and in November 2004 and in January 2005 a second surgery was performed to remove the polypectomy site. [R1-10, ¶36] [R25-45, ¶7c]

Roth initiated an arbitration claim for malpractice against Dr. Voorhees. [R25-45, ¶7h] During discovery in the arbitration matter Roth took the deposition of Dr. Voorhees on January 26, 2007 and Dr. Voorhees testified at the arbitration proceeding in August 2007 wherein Roth learned for the first time that Dr. Pedersen agreed with Dr. Voorhees that the polypectomy site was removed, that Dr. Pedersen was aware at the time of the surgery that his partner Dr. Joseph was experiencing problems with the new ink dye used for tattooing and did not divulge this critical information to Dr. Voorhees during the surgery and that Dr. Pedersen knew or should have known that the polypectomy site was not removed. [R1-10, ¶¶34 & 40]

After discovering Dr. Pedersen's negligence, Roth initiated his legal action against Dr. Pedersen by serving him with the statutory requisite Notice of Intent to Commence an Action within one year of discovery [R25-45, ¶2] and followed this with filing suit and serving Dr. Pedersen in August 2008. [R 1-10]. Dr. Pedersen filed his Answer. [R 25-45] On the day he filed his Answer Dr. Pedersen filed his Motion for Judgment on the Pleadings and Memorandum in support. [11-14 & 15-24]. Roth filed his Opposition Memorandum [46-57] followed by Dr. Pedersen's Reply Memorandum [58-66]. Trial Court issued its Minute Entry [70-71] which included an order for Dr. Pedersen to prepare order and judgment. Dr. Pedersen prepared an order, judgment and

findings and it was entered January 13, 2009 [72-76]. Roth filed his Notice of Appeal January 22, 2009. [77-78].

STATEMENT OF THE FACTS RELEVANT TO THE ISSUES ON APPEAL²

1. Dr. Pedersen performs professional services as a physician and does business in Salt Lake County, state of Utah.
2. That at all times relevant herein Dr. Pedersen was and is a licensed physician in the state of Utah.
3. That at all times relevant Dr. Pedersen was a shareholder of Gastroenterology Associates, Inc. PC, a Utah professional corporation.
4. That at all times relevant Dr. Ronald Joseph was a shareholder of Gastroenterology Associates, Inc. PC, a Utah professional corporation.
5. That Gastroenterology Associates, PC maintains its offices at 1250 E. 3900 S., Suite 360, Salt Lake City, Utah, which office building connects to St. Mark's Hospital.
6. That Dr. Ronald Joseph performed a colonoscopy on the Roth on April 28, 2004.
7. That Dr. Ronald Joseph removed from the Roth's colon a large polyp of about 2.5 cm in size along with several small polyps measured in terms of millimeters.

² "When reviewing a grant of a motion for judgment on the pleadings, this court accepts the factual allegations in the complaint as true; we then consider such allegations 'and all reasonable inferences drawn therefrom in a light most favorable to the plaintiff.' " Intermountain Sports, Inc. v. Department of Transp., 103 P.3d 716, 718 (Utah App. 2004)

8. That the Dr. Ronald Joseph did prepare his medical report indicating the removal of these polyps from the Roth's colon and did state that the large 2.5 cm polyp was located at 15 cm from the anal verge.

9. That the April 28, 2004 pathology report for the polyps removed by Dr. Ronald Joseph indicated that the 2.5 cm polyp had cancerous cells touching the cauterized surgical margin where Dr. Joseph had removed this polyp.

10. That Roth was referred to a general surgeon, Dr. Hugh Voorhees, by Dr. Ronald Joseph for the resection of the surgical site where Dr. Ronald Joseph removed the large polyp ("polypectomy site").

11. That Dr. Voorhees performed the surgery upon Roth on or about May 24, 2004.

12. Dr. Ronald Joseph informed Dr. Voorhees before the surgery upon Roth that he had tattooed (ink markings) above and below the polypectomy site.

13. During the surgery referred to in paragraph 11 above, Dr. Voorhees was unable to locate Dr. Joseph's tattoos, so Dr. Voorhees first attempted to contact Dr. Joseph to assist; however, Dr. Joseph was not available and Dr. Voorhees was able to speak to Dr. Joseph's partner, Dr. Pedersen.

14. Being informed of the difficulty that Dr. Voorhees was having Dr. Pedersen went over Dr. Joseph's medical chart with Dr. Voorhees.

15. Dr. Voorhees requested that Dr. Pedersen help him locate the polypectomy site and Dr. Pedersen and an assistant went to the operating room to assist.

16. That commencing on or about May 24, 2004 Dr. Pedersen provided medical care and treatment to Roth during the surgical procedure being performed by Dr. Voorhees.

17. Prior to Dr. Pedersen's arriving to assist in locating the polypectomy site, Dr. Voorhees believing the polypectomy site was in the distal sigmoid colon, removed about 25 cm of distal sigmoid colon.

18. Dr. Pedersen after arriving in the OR and using a sigmoid scope began looking for the tattoos and polypectomy site.

19. Dr. Pedersen was unable to visualize the tattoos or the polypectomy site.

20. Dr. Pedersen inserted the sigmoid scope for a distance measuring 20 cm on the scope to the suture line created by Dr. Voorhees where he removed sigmoid colon.

21. Dr. Pedersen having just gone over Dr. Joseph's medical chart with Dr. Voorhees before arriving at the OR knew that the chart indicated that the area where the polypectomy site was located was both described at being 15 cm from the anal verge and in the distal sigmoid colon.

22. Dr. Pedersen an experienced Gastroenterologist knew that general surgeons performed colon surgeries on areas described by anatomical regions as opposed to measuring in centimeters and based upon Dr. Voorhees removing Roth's distal sigmoid colon an area described in Dr. Joseph's chart, Dr. Pedersen having scoped 20 cm from the anal verge of Roth to the suture line knew that the polypectomy site described by Dr. Joseph at 15 cm from the anal verge was likely not removed.

23. Dr. Pedersen as an experienced Gastroenterologist knew that from the date of the colonoscopy performed by his partner Dr. Joseph to the time of the surgery, nearly one month later that as a result of skimming the polypectomy site may not be visible at time of surgery.

24. At no time during the surgery did Dr. Pedersen inform Dr. Voorhees of such significant facts as the area where the polypectomy site was described as being by Dr.

Joseph remained, that Dr. Voorhees removed an area different than described by Dr. Joseph and that the inability to see the polypectomy site after nearly a month from date of colonoscopy was to be expected.

25. Dr. Pedersen was also aware at the time of the surgery that Dr. Joseph was experiencing some difficulty with the tattoo ink he was using (Brand name SPOT) and in particular that Dr. Joseph had experienced fading of the ink after he injected it in a patient's colon.

26. Dr. Pedersen did not relay this information to Dr. Voorhees during the surgery.

27. Dr. Pedersen also knew that because of Dr. Voorhees having removed a section of colon that he would have difficulty in looking for the polypectomy site and tattoos because he could not fully inflate the area because of concern for the fresh suture made by Dr. Voorhees, coupled with other difficulties a Gastroenterologist faces in the OR as opposed to scoping a patient in their facility, such as the OR bright lights and the colon having stool and other foreign material present.

28. Instead of informing Dr. Voorhees of the issues set forth in paragraphs 24 through 27 above, Dr. Pedersen merely informed Dr. Voorhees that he was unable to see the polypectomy site or the tattoos and concurred with Dr. Voorhees assessment that the polypectomy site was removed and in Dr. Voorhees completing the anastomosis and ending the surgical procedure.

29. Dr. Voorhees in a separate action testified on January 26, 2007 and August, 2007 that he 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.

30. That Roth did not discover until it was pointed out by Dr. Stephen Porter, another Gastroenterologist in July 2007 that Dr. Ronald Joseph's anatomical description of the location of the polypectomy site in Dr. Joseph's medical chart was in a different location than Dr. Joseph's centimeter description in the same medical chart and that it is well known by gastroenterologists that surgeon's used anatomical description for locating surgical sites.

31. Dr. Pedersen's inability to see any tattoos in the rectum is in contrast to and inconsistent with Dr. Randall Burt and Dr. Willis, while performing another colonoscopy on Plaintiff about six months later and subsequent to the routine follow-up by the Dr. Ronald Joseph on October 13, 2004, clearly seeing tattooing above and below a fresh polypectomy site that was located in the rectum at about 15 cm.

32. 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 that the area requiring surgery remained.

33. This discovery of new evidence was not discovered until Dr. Voorhees testimony in a separate legal proceeding on August 22, 2007.

34. That as a result of Dr. Pedersen's partner, Dr. Ronald Joseph, describing to the surgeon, Dr. Voorhees that the polypectomy site was in the distal sigmoid colon, a distinct anatomical colon location, caused Dr. Voorhees to reasonably believe the polypectomy site to be in the distal sigmoid colon and after not being able to locate the

tattoo markings Dr. Joseph claims he made, Dr. Voorhees removed the distal sigmoid colon while Roth was unconscious, sterile, open and on the operating table.

35. That the foregoing treatment and care provided by the Dr. Pedersen to Roth was performed in a careless and negligent manner and not in accordance with the good and accepted standards of medical care and practice, thereby causing the Roth to sustain serious personal injuries and other medical conditions which resulted in severe, serious and permanent injuries and which resulted from the careless, negligent and wanton disregard on the part of the Dr. Pedersen and without any negligence on the part of the Roth contributing thereto.

SUMMARY OF THE ARGUMENTS

This appeal is asking the Utah Court of Appeals to reverse the Trial Court's granting judgment on the pleadings.³ [R72-76] The Trial Court relied on factual allegations that are not found in the pleadings [R1-10 & 25-45] and without such allegations there is nothing in the pleadings that would justify the Trial Court finding that Roth learned of his injury in or about October 2004 as well as a finding of the negligence which resulted in the injury during this time period. Specifically the Trial Court relied on "During a subsequent colonoscopy on October 13, 2004, Dr. Joseph saw the tattoos, told Mr. Roth of the problem and referred him to another physician." [R73]. The pleadings do not reflect this allegation that Dr. Joseph "told Mr. Roth of the problem.." This is important because without this telling Roth there is a problem there is nothing to

³ Although Dr. Pedersen specifically sought relief under Rule 12(b)(6) *URCP*, and Plaintiff responded as if the motion were pursuant to Rule 12(b)(6), the Court recognized that the Motion was pursuant to Rule 12(c) *URCP*, as Dr. Pedersen had filed his Answer herein. The Trial Court granted the Motion as a Judgment on the Pleadings under Rule 12(c).

indicate Roth knew there was a problem, a fact Dr. Pedersen relied heavily on in arguing his position and one the Court assumed without making such finding based upon the pleadings. Rule 12(c) requires findings to be made upon the pleadings.

Roth contends that U.C.A. §78B-3-404(2)(b) is applicable to the case at hand and not subsection (1). [R46-57] That Dr. Pedersen owed a fiduciary duty to Roth as his patient to disclose and inform Roth that the site Dr. Joseph described as the cancerous tumor (polypectomy) site was not removed during surgery. [R46-57] That Dr. Pedersen knew Roth would rely on being informed after surgery by the surgeon that the polypectomy site was removed, which information was inconsistent with what Dr. Pedersen knew. [R25-45, ¶7c] That Dr. Pedersen knew during the May 24, 2004 surgery of Roth that the reason that he could not see the tattoos that were meant to mark the location of the polypectomy site was because Dr. Joseph who supposedly marked the polypectomy site used a new ink dye that occasionally faded or disappeared. [R1-10, ¶30] Dr. Pedersen failed to inform the general surgeon, Dr. Voorhees during his operation of Roth on May 24, 2004 of this fact. [R1-10, ¶31] Dr. Pedersen further failed to inform Roth, his patient of this fact. [R1-10, ¶39] Dr. Pedersen in response states that he could not have affirmatively concealed this information from Roth since he never spoke with Roth.⁴ However, although having a duty to disclose and not revealing this significant medical information is of course one method of concealing something from another.

Roth's averments in his Complaint satisfy and are sufficiently pled per Rule 9(b) *URCP* to demonstrate fraudulent concealment. Dr. Voorhees testified under oath in his

⁴ During the May 24, 2004 surgery performed by Dr. Voorhees and Dr. Pedersen, Roth was unconscious. Pg 6, ¶41 Complaint. [R 1-10].

January 2007 deposition that Dr. Pedersen failed to disclose to him during surgery that the location where the cancer tumor was described as located remained after surgery and Dr. Pedersen instead affirmatively agreed with Dr. Voorhees' assessment that he had removed the area where the cancer tumor was described as being. [R1-10, ¶¶39 & 40] That Dr. Voorhees further testified that Dr. Pedersen failed to disclose to Dr. Voorhees during the surgery that the Gastroenterologist, Dr. Joseph, who claims to have tattooed the area of the cancer site, was having difficulty with the tattoos fading or disappearing. [R1-10, ¶30]. Dr. Pedersen failed to disclose to Roth that he {Dr. Pedersen} that the location where the polypectomy site was described at remained intact following surgery contrary to what he knew Dr. Voorhees would tell Roth and further failed to disclose the problems with the ink dye and consult with Dr. Voorhees during surgery of these facts and explain the reason the polypectomy site likely disappeared. Under the allegations as set forth in Roth's Complaint he did not discover the fraudulent concealment until the earliest January 26, 2007 when Dr. Voorhees testified under oath in his deposition in a related action that Dr. Pedersen failed to disclose to him during surgery that the location where the cancer tumor was described as being remained intact and instead Dr. Pedersen concurred with Dr. Voorhees' assessment that he had removed the area where the cancer tumor was described as being. [R1-10, ¶¶39 & 40] That Dr. Voorhees further testified that Dr. Pedersen failed to disclose to Dr. Voorhees during the surgery that the Gastroenterologist, Dr. Joseph, who claims to have tattooed the area of the cancer site, was having difficulty with the tattoos fading or disappearing. [R1-10, ¶30]. Although Dr. Pedersen knew that Dr. Voorhees had removed a section of Roth's colon that was not the

area described by his partner Dr. Joseph in the medical chart and that the area described as the polypectomy site where the cancerous tumor had been located still remained, Dr. Voorhees in August 2007 testified that Dr. Pedersen had agreed with Dr. Voorhees during the surgery that the site was removed and the surgery was terminated. [R1-10, ¶39].

ARGUMENT

DISMISSAL OF COMPLAINT

A. EVIDENCE SUPPORTING THE DISTRICT COURT'S DISMISSAL

U.C.A. 78B-3-404(1) Statute of limitations -- Application.

The Trial Court granted the motion for judgment on the pleadings based upon, "..., the Court finds that Mr. Roth knew of his legal injury on or about October 13, 2004, and that he failed to commence legal action against Dr. Pedersen within the two years of that discovery. Mr. Roth's claim against Dr. Pedersen, therefore, is time barred." [R70-75] The Court further found that Plaintiff failed to plead fraudulent concealment with sufficient particularity as required by Rule 9 [R 70].

¶36 of the Complaint states, "Dr. Pedersen's inability to see any tattoos in the rectum is in contrast to and inconsistent with Dr. Randall Burt and Dr. Willis, while performing another colonoscopy on Plaintiff about six months latter and subsequent to the routine follow-up by the Dr. Ronald Joseph on October 13, 2004, clearly seeing tattooing above and below a fresh polypectomy site that was located in the rectum at about 15 cm." Although this does not demonstrate Roth knew of his injury after his October 13, 2004 follow-up colonoscopy and after his colonoscopy by Drs. Burt and

Willis, arguably he was on notice and upon inquiry may have discovered his injury. This may meet the “...or through reasonable diligence should have discovered the injury, ...” aspect of U.C.A. §78B-3-404(1). Roth was not able to marshal any portion of the Record and in this case any portion of the pleadings that would support a conclusion that Roth in 2004 discovered or could have reasonably discovered the negligent cause of action that is the subject of his Complaint against Dr. Pedersen.

B. TRIAL COURT ERRED IN MAKING ITS FINDINGS BASED UPON ALLEGATIONS MADE OUTSIDE THE PLEADINGS

There was no oral argument or any discovery in this case. The findings herein are limited to the pleadings pursuant to Rule 12(c) *URCP*. “Our rules provide that complaints and answers constitute pleadings. *See* Utah R. Civ. P. 7(a) (including replies to counterclaims and answers to cross-claims, as well as third-party complaints and answers, within the definition of pleadings). A matter outside the pleadings ‘include[s] any written or oral evidence . . . which . . . substantiat[es] . . . and does not merely reiterate what is said in the pleadings.’ Oakwood Vill., 104 P.3d 1226 (Utah 2004) (second, third, and fourth alterations in original) (quotations and citation omitted).” Tuttle v. Olds, 155 P.3d 893, 896 (UT App 2007). Thus, the Trial Court herein was limited to the Complaint and Answer for its findings.

For purposes of the findings, the factual allegations set forth in the Complaint are true and are considered in the light most favorable to the non-moving party, Roth in this case. Intermountain Sports, Inc. v. Department of Transp., at 718, *id.*

The Trial Court states in its Order Granting Dr. Pedersen’s Motion for Judgment

on the Pleadings (“Order”) that, “The Court finds the facts alleged in the pleadings establish ...” Specific findings made by the Trial Court made at page 2 of the Order: [R 72-76]

1.) “After surgery Dr. Voorhees advised Mr. Roth that neither he nor Dr. Pedersen could identify the tattooed area, but that he (Dr. Voorhees) had removed the correct portion of the colon.” [R73] This is not to be found in Roth’s Complaint. [R1-10] This allegation is found at ¶7, Dr. Pedersen’s Answer [R25-45]

2.) “During a subsequent colonoscopy on October 13, 2004, Dr. Joseph saw the tattoos, told Mr. Roth of the problem and referred him to another physician.” [R73] Except for reference to the October 13, 2004 colonoscopy the remainder of the findings are not to be found in Roth’s Complaint [R1-10] and the “...Dr. Joseph saw the tattoos, told Mr. Roth of the problem ...” is not only not found in Mr. Roth’s filings, it is not found in Dr. Pedersen’s Answer. [R1-10 & 25-45].

Assuming the foregoing “finding” number 2) is excluded as Roth contends it must as not being found in the Pleadings, all that remains are facts showing: There was a surgery performed on Roth on May 24, 2004 by Drs. Voorhees and Pedersen. That Dr. Joseph performed a follow-up colonoscopy on October 13, 2004. That Jason Willis performed another colonoscopy on November 8, 2004, who saw the tattoos. Roth initiated an arbitration action against Dr. Voorhees on May 24, 2006 and did not name Dr. Pedersen. Arbitration in favor of Dr. Voorhees and on January 12, 2008 Roth initiated action against Dr. Pedersen. [73]. It is significant that Dr. Voorhees informed Roth that he and Dr. Pedersen removed the cancerous site (a matter which Dr. Pedersen

knew not to be true and a matter Dr. Voorhees probably thought was true based upon his reliance on Dr. Pedersen concurring that the polypectomy site had been removed during surgery). {R 1-10 & 25-45] This failure on the part of Dr. Pedersen to speak the truth as Roth's physician and fiduciary led to Roth having a false sense of a successful surgery and the removal of his cancerous tumor. Roth submits that the Trial Court could not find that Roth discovered his injury based upon the limited facts set forth in this paragraph.

Even setting aside the obvious and that is the Trial Court had no factual findings that would support the "finding" that Roth knew of his injury in October 2004 or thereabouts, Foil v. Ballinger, 601 P.2d 144, 148 (Utah 1979), is clear that discovery of the injury under the statute of limitations refers to both discovery of the injury and the negligence. There are no findings in the pleadings and none espoused by the Trial Court in its findings that Roth discovered the negligence of Dr. Pedersen before he learned of this negligence through Dr. Voorhees' testimony on January 26, 2007 and August 2007. [R1-10 & 25-45].

A careful reading of Foil v. Ballinger certainly leads one to the inescapable conclusion that the Court when it concluded at page 148 *id.*, "Accordingly, we hold that the term discovery of "injury" in § 78--14--4 means discovery of injury and the *negligence which resulted in the injury*[".]” meant that Roth in the case at hand would have had to have known of Dr. Pedersen's negligence – the “negligence which resulted in the injury.” This meaning is derived from a reading of the Foil v. Ballinger Court's following dialogue that precedes the “negligence which resulted in the injury...” conclusion.

Furthermore, to adopt a construction of § 78--14--4 that encourages a person who experiences an injury, dysfunction or ailment, and has no

knowledge of its cause, to file a lawsuit against a health care provider to prevent a statute of limitations from running is not consistent with the unarguably sound proposition that unfounded claims should be strongly discouraged. One of the chief purposes of the Utah Health Care Malpractice Act was to prevent the filing of unjustified lawsuits against health care providers, with all the attendant costs, economic and otherwise, that such suits entail.

It would also be imprudent to adopt a rule that might tempt some health care providers to fail to advise patients of mistakes that have been made and even to make efforts to suppress knowledge of such mistakes in the hope that the running of the statute of limitations would make a valid cause of action nonactionable. A rule that provides that the limitations period shall run from the date of the act or omission tends to foster that result. The law should foster a fulfillment of the duty to disclose so that proper remedial measures can be taken and damage ameliorated.

Foil v. Ballinger, at 148, *id.*

It is this last paragraph above that refers to a statute of limitations that should be construed so as to avoid a healthcare provider to fail in his or her *duty to disclose* in hopes that he or she could file a motion applying the 2 year statute of limitations and escape liability. (Emphasis added). That is exactly what Dr. Pedersen has done. He failed in his duty to disclose and waited the two years out and now proceeds with his motion to apply the two year statute of limitations.

C. TRIAL COURT ERRED BY NOT APPLYING U.C.A. §78B-3-404(2)(b)

The Medical Malpractice statute of limitations, U.C.A. §78B-3-404, provides as follows:

(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) (Omitted)

(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.

“Because the question of plaintiffs' knowledge of their cause of action is of paramount concern, we begin our review mindful of the proposition that ‘the issue of when a plaintiff knew or with reasonable diligence should have known of a cause of action is a question of fact.’” Allred v. Chynoweth, 990 F. 2d 527 (10th Cir. 1993) citing Maughan v. SW Servicing, Inc., 758 F.2d 1381, 1387 (10th Cir.1985). A fact finder could certainly determine Plaintiff acted reasonably in not bringing suit within the two year period under the statute of limitations. It is true that determining when a plaintiff should reasonably have discovered the facts sufficient to establish a cause of action and whether a plaintiff acted reasonably under the circumstances are both fact-intensive inquiries that "preclude [judgment as a matter of law] in all but the clearest of cases." In re Malualani B. Hoopiaina Trusts, 118 P.3d 861, 867, *Aff'd* 144 P.3d 1129, 1135 (Utah 2006), citing, Berenda v. Langford, 914 P.2d 45, 54 (Utah 1996). Roth submits that this is not one of the “clearest of cases” for a determination to be made upon a motion for judgment on the pleadings and that there are sufficient facts for a jury to find fraudulent concealment as to Dr. Pedersen. “...‘close calls are for juries, not judges, to make,’ ” Berenda, 914 P.2d at 54 (quoting Chapman v. Primary Children's Hosp., 784 P.2d 1181, 1186 (Utah 1989)). Unless the Court found the factual allegations in the pleadings were so clear that no reasonable juror could find fraudulent concealment, it was inappropriate for the Court to make the determination that the two year statute of limitation applied. See Russell v. Packard, 108 P.2d at 752, *id.* The very fact that the parties are arguing over whether the facts are sufficient to establish fraudulent

concealment itself is a strong indication that this is a matter for the trier of fact.

The Court in Charlesworth v. Reynolds, 113 P.3d 1031, 1037 (UT App. 2005) stated, “A fiduciary's breach of the 'duty to speak the truth' is sufficient to establish fraudulent concealment. Russell/Packard Dev., Inc. v. Carson, 78 P.3d 616, *aff'd as to result*, 108 P.3d 741, 752 (quoting Chapman v. Primary Children's Hosp., 784 P.2d 1181, 1186 (Utah 1989)). Courts have long characterized the duty physicians have to their patients as fiduciary. Sorensen v. Barbuto, M.D., 177 P.3d 614, 618 (Utah 2008) citing, *e.g.*, Doe v. Cmty. Health Plan-Kaiser Corp., 268 A.D.2d 183, 709 N.Y.S.2d 215, 217 (2000).

Subsection (b) of the Act is clear that the statute of limitations *runs for one year from the date the patient discovers or should have discovered the misconduct or fraudulent concealment*, not just the *injury*. (Emphasis added). The Utah Supreme Court in Chapman v. Primary Children's Hospital, 784 P.2d 1181, 1184 (Utah 1989) in reference to §78-14-4(1)(b) stated, “...we interpret the “discovery of fraudulent concealment” provision of the statute as incorporating discovery of legal injury as well as discovery of fraudulent concealment.”

The general rule for extending a statute of limitations is more concisely set forth in the following case dealing squarely with concealment as a means of tolling a statute of limitations. While a statute of limitations generally begins running when a plaintiff has a completed cause of action, the discovery rule may nonetheless operate to toll a statute of limitations until the time at which a party discovered or reasonably should have discovered "facts forming the basis for the cause of action." Russell Packard Dev., Inc. v. Carson, 108 P.3d 741, 746 (UT 2005) (citations and internal quotation marks omitted).

Roth's Complaint sets forth the facts that clearly delineate when he discovered

fraudulent concealment of Dr. Pedersen. For instance, Roth states at ¶39 of his Complaint: “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 for the polypectomy site could not be seen and that the area requiring surgery remained.” Roth goes on to allege in his ¶40 of the Complaint that “This discovery of new evidence was not discovered until Dr. Voorhees testimony in a separate legal proceeding on August 22, 2007.”

**D. THE TRIAL COURT ERRED IN GRANTING MOTION TO DISMISS
BECAUSE THE ALLEGATIONS ARE DEEMED TRUE UPON A
MOTION TO DISMISS AND ROTH PLED FRAUD WITH SUFFICIENT
PARTICULARITY TO WITHSTAND A MOTION TO DISMISS**

In his Opposition to Dr. Pedersen’s Motion for Judgment on the Pleadings, Roth set forth ample facts in his pleading, that for purposes of a motion for judgment on the pleadings are deemed true, that establish fraudulent concealment on the part of Dr. Pedersen. As such, U.C.A. 78B-3-404(2)(b) applies to the case at hand and Roth had one year from the date he reasonably discovered the fraudulent concealment to file this action. Under the allegations as set forth in Roth’s Complaint he did not discover the fraudulent concealment until the earliest January 26, 2007 when Dr. Voorhees testified under oath in his deposition in a related action that Dr. Pedersen failed to disclose to him during surgery that the location where the cancer tumor was described as being remained intact and instead Dr. Pedersen concurred with Dr. Voorhees’ assessment that he had removed the area where the cancer tumor was described as being. [R1-10, ¶¶39 & 40] That Dr. Voorhees further testified that Dr. Pedersen failed to disclose to Dr. Voorhees during the

surgery that the Gastroenterologist, Dr. Joseph, who claims to have tattooed the area of the cancer site, was having difficulty with the tattoos fading or disappearing. [R1-10, ¶30]. Although Dr. Pedersen knew that Dr. Voorhees had removed a section of Roth's colon that was not the area described by his partner Dr. Joseph in the medical chart and that the area described as the polypectomy site where the cancerous tumor had been located still remained, Dr. Voorhees in August 2007 testified that Dr. Pedersen had agreed with Dr. Voorhees during the surgery that the site was removed and the surgery was terminated. [R1-10, ¶¶24-31 & 33]. As these facts are deemed truthful for the purpose of the motion to dismiss, the question becomes are these facts sufficient to establish fraudulent concealment. Similar to the averments made in Chapman at 1185-86, *id.* where the Supreme Court found such sufficient under Rule 9(b) *URCP*, the averments made in this case by Roth are sufficient. Roth was in fact after the surgery misinformed by Dr. Voorhees that he and Dr. Pedersen removed the cancerous site from Roth's colon. Although it was not Dr. Pedersen himself telling Roth that the cancerous site was removed, he would have anticipated that the surgeon would talk with the patient following surgery and he further would anticipate that Dr. Voorhees would misinform Roth that the site had been removed. Dr. Pedersen's misconduct during the surgery as set forth above, was withheld from Roth by Dr. Pedersen by his failure to speak, a fiduciary duty Dr. Pedersen owed Roth. Silence in this case was the concealment. And like the failure to speak the truth in Charlesworth v. Reynolds at 1037 *id.*, here Dr. Pedersen failed to inform Roth that the cancerous tumor remained in his colon, that the reasons the surgeon was having difficulty in surgery was that the polypectomy site likely became invisible because of skinning and that Dr. Joseph was experiencing fading and

disappearing of a new ink he was using to tattoo polypectomy sites.

If there is any doubt...concerning questions of fact, the doubt should be resolved in favor of the [non-moving] party.” Wilkinson v. Union Pac. Railroad Co., 975 P. 2d 464 (Utah 1998); Young v. Felornia, 244 P.2d 862, cert. denied, 344 U.S. 886, 73 S. Ct. 186, 97 L. Ed. 685 (1952). The factual allegations set forth in the Complaint are true and are considered in the light most favorable to the non-moving party, Roth in this case. Intermountain Sports, Inc. v. Department of Transp., at 718, *id.*

CONCLUSION

The Trial Court found that Roth discovered his injury in October 2004. This was based primarily on a factual allegation that Dr. Joseph “told Mr. Roth of the problem” in October 2004; however, there is nothing in the pleadings that would justify this finding. The Trial Court’s finding and conclusion was that Roth discovered his “legal” injury in October 2004. There is nothing in the pleadings that would justify a finding that Roth discovered the negligence which resulted in the injury before 2007 and certainly not in 2004.

Roth’s averments of fraudulent concealment are sufficient under Rule 9(b) Utah Rules of Civil procedure and subsection (2)(b) of the statute of limitations U.C.A. §78B-3-404 applies to the case at hand. Roth did not discover and could not have discovered until at the earliest January 26, 2007 (Dr. Voorhees testimony) Dr. Pedersen’s misconduct as he fraudulently concealed such from Roth. Roth’s serving his Notice of Intent to Commence an Action against Dr. Pedersen was served within one year of the discovery of Dr. Pedersen’s misconduct and therefore the Trial Court’s Judgment on the

Pleadings should be reversed and Roth allowed his right to trial on the merits.

Dated this 5th day of May, 2009.

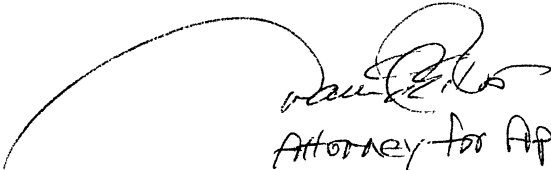
David E. Ross II
Attorney for Plaintiff/Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he mailed a true and correct copy of the foregoing BRIEF OF APPELLANT to the following by U.S. Mail, first class, postage prepaid, this 5th day of May 2009:

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No Addenda Required


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