

1979

## Zeblen v. White, et al. v. Intermountain Health Care, Inc : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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ZEBLEN V. WHITE, et al.,	)	
	)	
Plaintiffs-	)	
Appellants,	)	
	)	
vs.	)	Case No. 16266
	)	
INTERMOUNTAIN HEALTH	)	
CARE, INC., et al.,	)	
	)	
Defendants-	)	
Respondents.	)	

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BRIEF OF APPELLANTS

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Appeal from Judgment of the Third Judicial District  
Court of Salt Lake County, State of Utah

Honorable Bryant H. Croft, Judge

---

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MAY 18 1979

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BRIEF OF APPELLANTS

---

STATEMENT OF THE CASE

This is an action by Zeblen V. White, an incompetent, by and through his guardian ad litem and natural daughter, Dorene Zundel, for damages for personal injuries suffered as a result of the medical malpractice of Defendants and Respondents.

DISPOSITION IN THE LOWER COURT

The Court below granted a Judgment of Dismissal and Summary Judgment in favor of the Defendants-Respondents. The judgments were based upon the lower court's finding that Plaintiff-Appellant's claim and cause of action were barred by the statute of limitations. (R. 86,87)



## RELIEF SOUGHT ON APPEAL

Plaintiff-Appellant seeks to vacate the judgments granted by the Court below and have this action remanded for trial on the merits.

## STATEMENT OF FACTS

Plaintiff Zeblen V. White is an incompetent residing in Box Elder County, State of Utah, and appears in this action through his duly appointed guardian ad litem, Dorene Zundel, his natural daughter. (R. 9-13) Defendants, Intermountain Health Care, Inc. and The Health Services Corporation of the Church of Jesus Christ of Latter-Day Saints are corporations organized and existing under the laws of the State of Utah, and at all times material hereto said Defendants were the owners of and engaged in managing and operating the McKay-Dee Hospital, hereinafter referred to as the "Hospital", in Ogden, Utah, for the care and treatment of patients. The Defendant, Dr. Peter S. Quintero was at all times material hereto a physician licensed to practice and practicing medicine in the State of Utah. (R. 2, 3, 15, 16 and 26)

On April 15, 1975, Plaintiff was admitted to the Hospital for medical care and treatment. On or about the 18th day of April, 1975, and thereafter, while Plaintiff was confined in said Hospital as a patient and under the treatment and care of said Defendants, Plaintiff sustained injuries and

damages which were proximately caused by the negligent acts and omissions of the Defendants. (R. 305) Plaintiff further claims that he did not give his informed consent to the particular procedures recommended by the Defendants and would not have consented had the dangers and hazards thereof been made known to him. (R. 5, 6)

On the 18th day of April, 1977, an action was filed in the lower court by the above-named Plaintiff against the above-named Defendants and another Defendant, to-wit: Dr. John M. Bender, Civil No. 241935, wherein substantially the same relief was sought as is sought in this action. Said action failed otherwise than upon the merits on the 13th day of January, 1978, when it was dismissed without prejudice pursuant to Rule 41 of the Utah Rules of Civil Procedure. (R. 3, 16, 27)

On the 17th day of January, 1978, an action was filed in the lower court by the above-named Plaintiff against the above-named Defendants, Civil No. C-78-297, wherein the same relief was sought as that which is sought in this action. A motion was filed by the Defendants to dismiss said action on the grounds that the claims set forth therein were barred by the pertinent statute of limitations. Said motion was, on the 15th day of March, 1978, denied on the grounds that the Plaintiff filed that action within one year after the voluntary dismissal of Civil action No. 241935, as aforesaid, and said action was, therefore,

timely filed under the provisions of §78-12-40, Utah Code Annotated, 1953, as amended. Defendants' Motion to Dismiss said action on the grounds that Plaintiff failed to file a Notice of Intent to Commence Action pursuant to the provisions of §78-14-8, Utah Code Annotated, 1953, as amended, was granted on the 15th day of March, 1978, without prejudice to Plaintiff's right to refile after complying with the requirements of said section. (R. 2, 3, 16, 27)

On the 4th day of May, 1978, Notice of Intent to Commence Legal Action against the Defendants above named was served on the Defendants, The Health Services Corporation of The Church of Jesus Christ of Latter-Day Saints and Intermountain Health Care, Inc., and on the 5th day of May, 1978, said Notice was served upon Dr. Peter S. Quintero, all pursuant to order of the court, as aforesaid, and §78-14-8, Utah Code Annotated, 1953, as amended; none of the Defendants responded to said Notice. (R. 4, 16, 28)

On Spetember 28, 1978, Plaintiff filed a third Complaint, Civil No. C-78-6121, wherein the same relief was sought as that which was sought in the previous actions. (R. 1) Defendants, on November 20, 1978, filed Motions for Summary Judgment. (R. 24, 33) These Motions were argued before the Honorable Bryant H. Croft on November 30, 1978. (R. 31, 34, 82) Relying primarily on the case of

Vealey v. Clegg, 579 P.2d 919 (Utah 1978), the lower court granted the Defendants' Motions and entered Summary Judgment and Judgment of Dismissal in favor of the Defendants on December 21, 1978. (R. 83, 86, 87) On January 2, 1979, Plaintiff filed a Motion for Order Amending Judgment of Dismissal and Summary Judgment (R. 90), which Motion was argued on January 16, 1979 (R. 96, 110) and denied by the lower court on Order entered January 25, 1979. (R. 110)

On January 22, 1979, Plaintiff filed his Notice of Appeal. (R. 106) In March of 1979, the intention of the Utah State Legislature that §78-14-8 of the Health Care Act not be applied retroactively was confirmed by the adoption of amendments to that section.

Plaintiff-Appellant White was, at the time this cause of action accrued, mentally incompetent, and no legal guardian was appointed for him until the 28th day of September, 1978, the date on which Dorene Zundel was appointed as guardian ad litem for the purpose of these proceedings. (R. 9, 13, 93, 94)

#### POINT I

THE NOTICE REQUIREMENT OF §78-14-8 IS TO BE APPLIED ONLY TO CAUSES OF ACTION ARISING AFTER APRIL 1, 1976.

- A. THE RECENT AMENDMENTS TO UTAH CODE ANNOTATED, 1953, UTAH HEALTH CARE MALPRACTICE ACT, ARE DETERMINATIVE IN THE CASE AT BAR OF THE ISSUE OF NOTICE.

In March of 1979, the Utah State Legislature passed House Bill 164, which bill was subsequently signed into law by Governor Matheson and became effective on the 8th day of May, 1979. This bill amends Utah Code Annotated §78-14-8, as follows:

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

This section shall, for purposes of determining its retroactivity, not be construed as relating to the limitation on the time for

commencing any action, and shall apply only to causes of action arising on or after April 1, 1976. This section shall not apply to third party actions, counterclaims or crossclaims against a health care provider. (The underlined portions were added, the bracketed portions deleted by the amendment.)

The sub-issue at this point is whether the amendment to §78-14-8, is to be applied retroactively; is it to apply to cases pending on appeal? There are two avenues for argument under the facts of the present case but both lead to the same result.

1. Is a new legislative enactment applicable to a pending appeal if it effects only matters of practice and procedure? The answer to this is clearly, yes.

In the case of Petty v. Clark, 113 Utah 205, 192 P.2d 589 (1948), this Court reversed a trial courts ruling because the Judge had used the jury's findings in a foreclosure action in an advisory capacity only. The case was remanded for rehearing as there was at that time no law allowing the jury to be used only in an advisory capacity in these type of actions. However, before the matter was reheard the legislature changed the law so as to allow the jury to be used in an advisory role in such actions. The lower court again used the jury's findings as merely being advisory and ruled for the plaintiff. The defendant appealed arguing that new law should not be applied to a pending case. In rejecting the defendant's argument and affirming the decision this Court cited Boucofski v. Jacobsen, 36 Utah 165 104 P. 117 (1909), which held:

"While it is true that a party's rights in a judgment, as a general rule, may not be affected by legislative acts passed or which become effective after the entry of judgment, the rule does not apply to laws which are merely remedial, and which only effect matters of procedure and practice."

This Court further stated on page 394 of the Petty case, in rejecting the defendant's contention that the appellate court was bound by its previous decisions (law of the case):

But the law of the case doctrine does not apply to a case where the policy of the law has been changed in the meantime by a legislative enactment, in a case where the amended provision deals only with procedure rather than making a change in substantive law.

In holding that pending actions will be governed by newly enacted statutory provisions dealing with matters of procedure and practice, Utah joined with the majority of her sister states who have ruled on this point.

In 111 A.L.R. at page 1334, it states:

"Although in some cases involving questions of evidence and practice, a contrary conclusion has been reached . . . it is quite generally assumed that the appellate court will determine questions of practice and evidence according to the law prevailing at the time of its decision on appeal, and not the time the judgment appealed from is rendered." (Citations omitted.)

In the case of Denison v. Goforth, 454 P.2d 218, (Wash. 1969), the Washington Supreme Court reversed a summary judgment entered by a lower court dismissing a malpractice suit based upon a case which it (Washington Supreme Court) decided during the period after the Denison case had been argued but before the decision was handed down. The issue

dealt with the appropriate time from which the statute of limitations should run. Had the court decided Denison under the law which existed at the time it was heard in the lower courts or even as of the time arguments were heard on appeal, it would have had to affirm the summary judgment. Instead it followed the most recent law available and reversed the summary judgment with leave for all parties to amend their pleadings and advance to trial.

The pertinent question then becomes whether the amendment as adopted by the legislature is procedural. Clearly it is. The entirety of §78-14-8 deals with the notice requirement, when and how it is to be given, and for what causes of action it applies. The notice requirement is a legislatively established pre-requisite to a party-plaintiff proceeding with his common law cause of action. It neither creates nor destroys a substantive nor a vested right.

In §78-14-2 of the Act, the legislature states, " . . . it is the purpose of the legislature to provide a reasonable time in which actions may be commenced against health care providers . . . and to provide other procedural changes to expedite early evaluation and settlement of claims." (Emphasis added.) This Court also states in Vealey, supra, page 920, that limitation and notice requirements are procedural matters.

No substantive rights are created, vested or severed by this amendment; it is purely procedural in nature. Thus,



it is applicable to the pending action. Therefore, neither is the notice requirement to be applied retroactively, nor are the provisions of §78-14-8 to be "construed as relating to the limitation on the time for commencing an action."

2. May a new legislative enactment or change in the law (not just those effecting only practice and procedure) be applied by the court to a pending appeal to aid it in the proper interpretation and application of existing law?

Again, the answer clearly is, yes. As expressed in Okland Construction Company v. Industrial Commission, 520 P.2d 208, (Utah 1974),

"It is a widely accepted principle that where a statutory amendment deals only with clarification and amplification as to how the law should have been understood prior to its enactment, such amendment and the correct interpretation should be given retroactive application."

We are not in this case dealing with the situation where there is a change in the law interjected into the legal structure pending an action on appeal. Instead, we are clearly dealing with the situation where a statutory amendment clarifies and amplifies how the law should have been understood prior to its enactment. We are not dealing with retrospective application of an amendment extending the period of limitations as was the case in Ireland v. MacKintosh, 22 Utah 296, 61 P. 901 (1900), and Greenhalgh v. Payson City, 530 P.2d 799, (Utah 1975).

Neither are we dealing in this case with the situation where a final judgment has been entered. Had this Court already ruled on this particular case, it is concededly doubtful whether a subsequent change in the law or a clarification of the law could effect it. (See Boucofski, supra.) But, here there is of yet no final judgment; the matter is pending.

As the case at bar presents a situation where the amendments do not change existing law but merely clarify and correct errors made in its previous interpretation and application, and there is no prior entry of final judgment herein, the newly enacted amendments are applicable and determinative herein as to the issue of retroactivity of the notice requirement. Therefore, whether applying the amendment directly or merely using it to get a proper interpretation and application of §78-14-8, the result is the same. Said section is not to be applied to causes of action arising prior to April 1, 1976. Also, as per the amendment, neither can the provisions of §78-14-8 be construed as "relating to the limitation on time for commencing an action" as that phrase is used in §78-14-11.

As Plaintiff-Appellant's cause of action arose in April of 1975, he was not obligated to give a Notice of Intent to Commence Suit. To hold otherwise would be directly contrary to the clearly expressed intent of the legislature.

B. EVEN IF THE AMENDMENT IS NOT FOUND TO BE DETERMINATIVE OF THE NOTICE ISSUE, THE INTENT OF THE LEGISLATURE IN THE ORIGINALLY ADOPTED SECTION IS CLEAR.

Utah Code Annotated, 1953, §68-3-3, provides, "No part of these revised statutes is retroactive, unless expressly so declared." (See also McCarrey v. Utah Teachers Retirement Board, 111 Utah 251, 177 P.2d 725, (1947); Shupe v. Wasatch Electric Company, 546 P.2d 896, (Utah 1976).) 73 Am. Jur. 2d, STATUTES, §350, p. 487, states:

The question whether a statute operates retrospectively or prospectively only, is one of legislative intent. In determining such intent, courts observe a strict rule of construction against retrospective operation, and indulge in the presumption that the legislature intended statutes, or amendments thereof enacted by it, to operate prospectively only, and not retroactively. However, a contrary determination will be made where the intention of the legislature to make the statute retroactive is stated in express terms, or is clearly, explicitly, positively, unequivocally, unmistakably and unambiguously shown by necessary implication or by terms which permit no other meaning to be annexed to them, and which preclude all question in regard thereto, and leave no reasonable doubt thereof. (Emphasis added.)

By its express terms, the only section of the Utah Health Care Malpractice Act, as originally adopted, to be applied retroactively is §78-14-4. This is clear by the terms of §78-14-4(2), "The provisions of this section . . . shall apply retroactively . . . ." Also, by the terms of §78-14-11:

Act not retroactive - Exception - The provisions of this Act, with the exception of the provisions relating to the limitation on the time for commencing an action, shall not apply to injuries, death or services rendered which occurred prior to the effective date of this Act [April 1, 1976].

Respondents and others in similar positions have argued that §78-14-8, which sets forth the requirement of serving a Notice of Intent to Commence Action, is a provision "relating to the limitation on the time for commencing action," and, thus, should be applied retroactively pursuant to §78-14-11, above quoted. This is an erroneous construction of the statute and an improper application of the existing law as is clear from an application of the rules of construction as discussed below and from the amendment to §78-14-8.

In determining whether an enactment is to be applied retroactively, the legislative intent is paramount. There exists a "strict rule of construction against retrospective operation." The legislature overcomes the rule of construction only by a "clearly, explicitly, positively, unequivocally, unmistakably, and unambiguously" shown intention. This may be by implication, but the terms of the statute must "permit no other meaning . . . and . . . preclude all question in regard thereto and leave no reasonable doubt" as to the intent. 73 Am. Jur. 2d, STATUTES, supra.

The Utah legislature was apparently very conscious of these limits on the retroactivity of newly passed statutes. It went to the effort of setting forth in §78-14-4 that: "The provisions of this section . . . shall apply retroactively . . . ." (Emphasis added.) No other section of this Act contains such a statement except §78-14-11, which

expressly refers to those "provisions relating to the limitation on the time for commencing an action." (Emphasis added.) Had the legislature intended any other section of this Act to be applied retroactively, it could and undoubtedly would have made this intent as clear in the other section(s) as it did in §78-14-4. Also, the legislature used the word "provisions" both in §78-14-4 and §78-14-11 with respect to the "provisions" which were to be given retroactive effect. Although it is not conclusive that "provisions" in §78-14-11 refers to the same "provisions" referred to in §78-14-4, it is some indication of the legislature's intent.

Thus, by straight forward application of the rule of construction against retroactivity, the presumption that statutes are to apply only prospectively and the fact that there is no clear, unmistakable or unambiguous intent shown that §78-14-8 be applied other than prospectively, it cannot be construed to be retroactively applicable. Furthermore, to be applied retroactively, the statute must by its terms "permit no other meaning;" it must leave "no reasonable doubt" as to the intent of the legislature. Obviously, this statute does "permit meanings" other than that it be retroactively applied. In fact, its most plain and logical meaning is that it is for prospective application only. So in the very least, there is a reasonable doubt as to whether §78-14-8 is to be applied retroactively. This, coupled with the above discussion, especially the rule of strict construction against retroactivity, is sufficient to defeat any claim

Respondents may have with regard to the retroactive applicability of the §78-14-8.

C. VEALEY V. CLEGG, SHOULD BE OVERRULED OR CLARIFIED.

Some have interpreted the Vealey case as meaning that §78-14-8 is to be applied retroactively, to actions occurring prior to April 1, 1976. The language of the opinion is, however, unclear and ambiguous. Based upon the preceding discussion, it is clear that the Court erred if it intended the retroactive application of the notice section. Further, Plaintiff-Appellant herein agrees with and endorses the arguments and discussions in plaintiff-appellant Cleghorn's brief in the sister case, No. 16329, which has been consolidated with the case herein for purposes of this appeal.

To avoid repetition, Plaintiff-Appellant White herein will not recite the arguments presented by Cleghorn in his brief in this regard. Instead, the Court is referred to pages 9 through 13 of said brief. Suffice it here to say that it appears the Court, in all due respect, misconstrued the phrase "expiration of the applicable time period" as used in §78-14-8. (See Vealey, supra. p. 920.) If the Court did not interpret this phrase to mean the "effective date" of the statute, i.e., April 1, 1976, the opinion is ambiguous and needs to be clarified. If the Court did interpret the above phrase to mean and be limited to the "effective date" of the statute, such interpretation is clearly erroneous and

must be reversed. (See also appellant McGuire's brief in Case No. 151984, also consolidated herewith for hearing, pages 6 through 13.)

Plaintiff-Appellant White, at this point, would only remind the Court as to that which Chief Justice Crockett so cogently states in State v. Kelbach, 569 P.2d 1100, (Utah 1977):

As a general proposition, the law as established should remain so until changed by the legislature, whose prerogative it is to make and to change the law. This does not mean to say that where there is judgment-made law, which is later observed to be clearly in error, that such error should be so cast in cement that it cannot be remedied. In such circumstances, the court undoubtedly can and should correct it. (Id. at 1102)

## POINT II

§78-14-8 VIOLATES THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION AND ARTICLE I §24 OF THE CONSTITUTION OF UTAH.

Article I, Section 24 of the Constitution of Utah states:

All laws of a general nature shall have uniform operation

This provision is, in effect, Utah's guarantee to equal protection under the law, paralleling Amendment XIV of the United States Constitution. This Court has consistently held that an act is unconstitutional if it, without "reasonable basis," treats one group of persons differently from another group similarly situated. Leetham v. McGinn, 524

P.2d 323, (Utah 1974); Hansen v. Public Employee's Retirement System Board of Administration, 122 Utah 44, 246 P.2d 591 (1952); Gronlund v. Salt Lake City, 113 Utah 284, 194 P.2d 464 (1948).

The U. S. Supreme Court likewise adopts a "rational basis" test in cases dealing with alleged violations of the guarantee of equal protection, except those dealing with fundamental rights or suspect classes (primarily First Amendment rights) in which cases it applies a compelling state interest test. McGowan v. Maryland, 366 U.S. 420, 425-426, 81 S. Ct. 1101, 1105, 6 L.Ed. 2d 393 (1961).

Is there a rational basis to distinguish between plaintiffs in medical malpractice cases and plaintiffs in other personal injury cases, and particularly from plaintiffs in other professional malpractice actions? Why should a plaintiff in a medical malpractice case be required to file a Notice of Intent to Commence Action when other similarly situated plaintiffs are not required to so do?

Although no exact statistical study has been done, the Court should take judicial notice that legal actions, particularly personal injury and all professional malpractice actions, have increased significantly over the past decade. This applies both as to the number of suits filed and the amount of damages sought and recovered. The public has grown litigation conscious. Individuals want recovery for every alleged wrong or injury inflicted on them. The courts have



become the avenue for them to obtain their recoveries.

The Utah legislature set forth the purpose of the Utah Health Care Malpractice Act in §78-14-2:

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

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

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

The legislature finds that there is an increase in the number of suits and claims for damages and in the amount of judgments and settlements. As a result, insurance

premiums have increased, which costs have been passed on to the public. It finds that this has resulted in "providers [of health care] practicing defensive medicine," and that "providers are discouraged from continuing to provide services because of the high cost and possible unavailability of malpractice insurance."

Plaintiff-Appellant contends that this is no different from other professions supplying services to the public. Any attorney who has recently looked at the increased premiums he or she must pay for legal malpractice insurance faces the same situation as the health care providers. Insurance premiums have substantially increased in cost, and they, like the cost in the medical profession, are passed on to the public. These costs are also so significantly high as to cause some attorneys to "go bare" and discourage others from continuing to provide legal services.

Likewise, attorneys and other professionals also must practice "defensively" just as drivers of vehicles must practice "defensive driving." There is no burden in this but rather an implied duty to do so. Health care providers should not be exempt from this duty of practicing defensively, nor is such a duty unique to them. Health care providers are simply in no different position than other providers of professional services.

There exists, therefore, no rational basis for distinguishing between plaintiffs in medical malpractice actions

and plaintiffs in other professional malpractice actions. It cannot realistically be argued that plaintiffs in medical malpractice actions are more frivolous and less reasonable than plaintiffs in other professional malpractice actions.

In addition to there being required a "reasonable basis" for a differentiation to be constitutional, the "reasonable basis" must be related to the purposes to be accomplished by the act. Abrahamsen v. Bd. of Review of Industrial Commission of Utah, 3 Utah 2d 289, 283 P.2d 213 (1955); Leetham, supra.; Hansen, supra. Chief Justice Berger states that ". . . the Equal Protection Clause does enable us to strike down discriminatory law . . . where . . . the classification is justified by no legitimate state interest, compelling or otherwise." Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 92 S. Ct. 1406, 31 L.Ed 2d 768 (1972). The purposes (i.e., the state interest) sought to be accomplished by this act are set forth in the third paragraph of §78-14-2 as quoted above. This in effect pre-supposes that the present notice requirement will reduce the number and amounts sought in medical malpractice cases. Were this true, and there is absolutely no indication that it is, why not require such notice in all other cases?

There does not appear by statistic or logic any indication that the 90-day notice period will expedite early

evaluation and settlement of claims. If anything, the opposite is true. The notice requirement gives the provider an additional 90 days to sit on the claim and, if he is of the nature to do so, destroy or otherwise make unavailable records which may be critical to the case. Also, the provider may hide his assets or leave the jurisdiction, thus jeopardizing the plaintiff's position. A suit filed with the court would also be more motivation for a provider to promptly evaluate and settle a claim and would protect the just causes of action of the injured plaintiff.

Defendant-Appellants have argued that other courts have upheld pre-suit procedural requirements. This is true, but most, if not all, of these deal with some type of mandatory arbitration and/or pre-submission of claims to a medical panel. Eastin v. Broomfield, 570 P.2d 744 (Ariz. 1977); State v. Ex. Rel. Strykowski v. Wilkie, 261 N.W. 2d 442 (Wisc. 1978). And even these statutes providing for arbitration are not upheld by all courts. As stated in Graley v. Satayatham, 343 N.E. 2d at 837 (Ohio 1972), speaking of special requirements for medical malpractice actions:

There is no satisfactory reason for this separate and unequal treatment. There obviously is 'no compelling governmental interest' unless it be argued that any segment of the public in financial distress be at least partly relieved of financial accountability for its negligence. To articulate the requirement is to demonstrate its absurdity, for at one time or another every type of profession or business undergoes difficult times, and

it is not the business of government to manipulate the law so as to provide succor to one class, the medical, by depriving another, the malpracticed patients, of the equal protection mandated by the constitution. Even remaining within the area of the professions, it is notable that the special consideration given to the medical profession by these statutes is not given to lawyers or dentists or others who are subject to malpractice suits.

Additionally, assuming a valid legislative purpose to enact laws relating to protection of the public's health, this legislation may be counter-productive. The extending of special litigation benefits to the medical profession certainly cannot be considered as relating to protection of the public health. On the contrary, the quality of health care may actually decline. To the extent that in tort actions of the malpractice type if the medical profession is less accountable than formerly, relaxation of medical standards may occur with the public the victim.

Courts, of course, may not invalidate legislation merely because it is preceived as unwise. Here there is a transgression of a basic constitutional principle forbidding unequal and special treatment for a class with no general beneficent reason apparent. (Emphasis added.)

(See also Simon v. St. Elizabeth Medical Center, 355 N.E. 2d 903 (Ohio 1976), where the above language was adopted and the compulsory arbitration requirement held violative of equal protection guarantees.)

Even where such arbitration/pre-submission requirements are upheld, it is clear that such are different from a pre-suit notice requirement which bears no relation to the purpose of expediting evaluation and settlement of claims. The notice requirement is at best a procedural burden to plaintiffs and an automatic extension of time to the providers-defendants.

Section 78-14-8, therefore, is unconstitutional as it is arbitrary and without rational basis in differentiating between plaintiffs in medical malpractice actions and plaintiffs in other types of professional malpractice and personal injury actions; also, it is not reasonably related to the purpose of the act as such is set forth by the legislature. Therefore, "[T]here is no fair reason for the law," (Gronlund, supra.), and this Court should strike it down. Like in Gronlund, supra., where the court found Sunday closing ordinances constitutional but found that the classification of what commodities could be sold on Sunday was arbitrary and unconstitutional, the Court may here find that a pre-suit notice requirement is constitutional but not where it applies to groups of plaintiffs not rationally nor reasonably distinguishable from another group of plaintiffs.

### POINT III

§78-14-8 VIOLATES ARTICLE VI, §26 OF THE CONSTITUTION OF UTAH.

Article VI, §26 of the Constitution of Utah states:

No private or special law shall be enacted where a general law can be applicable.

In the case of Utah Farm Bureau Insurance Company v. Utah Insurance Guaranty Association, 564 P.2d 75 (Utah 1977), this Court defined "special laws" and "general laws" as follows:

A general law applies to and operates uniformly upon all members of any class of persons, places, or things requiring legislation peculiar to themselves in the matters covered by the laws in question. On the other hand, special legislation relates either to particular persons, places or things or to persons, places or things which, though not particularized, are separated by any method of selection from the whole class to which the law might, but for such legislation, be applied.

In People v. Western Fruit Growers, [140 P.2d 13 (Cal. 1943)], the court stated a law is general when it applies equally to all persons embraced in a class founded upon some natural, intrinsic or constitutional distinction. It is special legislation if it . . . imposes peculiar disabilities, or burdensome conditions in the exercise of a common right; upon a class of persons arbitrarily selected, from the general body of those who stand in precisely the same relation to the subject of the law. (Emphasis added.)

The notice requirement of §78-14-8 is a procedural burden, a peculiar disability, imposed upon plaintiffs in medical malpractice actions. As discussed in Point II above, these plaintiffs constitute a class of plaintiffs arbitrarily selected from the general body of professional malpractice and personal injury plaintiffs. All such plaintiffs stand in "precisely the same relation to the subject of the law," the "subject of the law" being particularly professional malpractice actions. The notice statute is, therefore, violative of Article VI §26 of the Constitution of Utah.

#### POINT IV

THIS ACTION WAS TIMELY FILED PURSUANT TO THE TERMS OF §78-12-40, UTAH CODE ANNOTATED, 1953, AS AMENDED.

The straightforward application of §78-12-40, the Utah Saving Statute, results in Plaintiff-Appellant's action being timely filed whether or not the notice requirement is applicable hereto.

Section 78-12-40, Utah Code Annotated, 1953, as amended, provides:

If any action is commenced within due time and a judgment thereon for the plaintiff is reversed, or if the plaintiff fails in such action or upon a cause of action otherwise than upon the merits, and the time limited either by law or contract for commencing the same shall have expired, the plaintiff, or if he dies and the cause of action survives, his representatives, may commence a new action within one year after the reversal or failure.

This provides for a one-year grace period to re-commence an action if: (1) there has been an original action commenced within the period of the applicable statute of limitations; (2) the original action is dismissed or fails otherwise than on its merits; and (3) the original statute of limitations period has expired since the commencing of the original action.

Section 78-14-4, Utah Code Annotated, 1953, as amended, provides in relevant part:

No malpractice action against a health care provider may be brought unless it is commenced within two years after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered the injury, whichever first occurs, but not to exceed four years after the date of the alleged act, omission, neglect or occurrence . . . .

Plaintiff-Appellant entered the McKay-Dee Hospital on or about April 15, 1975. On or about April 18, 1975, and thereafter, Plaintiff sustained injuries and damage which were proximately caused by the negligent acts and omis-



sions of Defendants-Respondents. (R. 3-5, 16, 28, 29) Plaintiff, pursuant to the statute set forth above, had two years to commence an action. As he filed suit on April 18, 1977 (R.3, 16, 27), within the two-year limitation period, his Complaint was timely.

Respondents will argue that as suit was filed after the effective date (April 1, 1976) of the Health Care Malpractice Act, that he (Plaintiff) was subject to the notice requirement contained in §78-14-8 of said act and could not "commence" an action until he complied with the notice provision. This has been thoroughly discussed in the preceding portion of this brief. Suffice it to say here that it is Plaintiff-Appellant's position that the notice requirement is not applicable. However, even if it is held to be applicable, Plaintiff's action was timely "commenced."

The only Utah authority setting forth how an action may be commenced is Rule 3(a) of the Utah Rules of Civil Procedure. In relevant part it provides:

A civil action is commenced (1) by filing a complaint with the court, or (2) by the service of a summons.

As Plaintiff filed a Complaint, he did commence an action. If the notice requirement was applicable, which Plaintiff submits it was not, it does not effect the fact that the action had been commenced. The action, however, may have been subject to an order of dismissal or an order staying prosecution.

In any event, on April 18, 1977, Plaintiff's action was commenced within due time. However, on January 15, 1978, Plaintiff voluntarily dismissed this action pursuant to Rule 41(a)(1) of the Utah Rules of Civil Procedure. (R. 3, 16, 27)

This rule provides in pertinent part that an action may be voluntarily dismissed by a Plaintiff without order of the court "by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment . . . Unless otherwise stated in the notice . . . the dismissal is without prejudice . . . ." Because nothing had been served upon the Defendants, and none of them had filed an answer or motion for summary judgment, Plaintiff's Notice of Dismissal acted to dismiss his action without prejudice. (R. 3, 16, 26, 27)

There is, therefore, no question but that Plaintiff's original action was timely commenced. In addition, Utah case law has expressly held that a voluntary dismissal by a plaintiff without prejudice is a failure of action "otherwise than upon the merits." Luke v. Bennion, 36 Utah 61, 106 P. 712 (1908); Jones v. Jenkins, 22 F.2d 642 (1927). Therefore, there is also no question that Plaintiff's original action was dismissed without prejudice for reasons other than on its merits. Thirdly, for purposes of this portion of the argument, it will be assumed that the original statute of limitations period had expired. Therefore, pursuant to §78-12-40 as set forth above,

Plaintiff had one year from the date of dismissal, i.e., until January 14, 1979, to re-commence his action. As this was done on January 17, 1978, when he re-filed, he was again timely. (R. 2, 3, 16, 27)

However, this second action, in March, 1978, was erroneously dismissed "otherwise than upon the merits" when the lower court, following its interpretation of this Court's decision in Vealey, dismissed the action without prejudice to allow Plaintiff to give notice of intent to commence action pursuant to §78-14-8. (R. 2, 3, 16, 27) Plaintiff did give notice pursuant to said statute and re-commenced his action on September 28, 1978. (R. 1, 4, 6, 28) It is upon this third action that the present appeal is based.

Defendants' Motions for Summary Judgment on this third action were granted, the lower court having found that the claim was barred by the Statute of Limitations. (R. 83, 86, 87) As set forth in the preceding discussion, this finding was clearly in error as the action was timely by application of 78-12-40. This is true even if the Court holds that the notice requirement is applicable herein, as Plaintiff did fully comply therewith prior to commencing this action. (R. 4, 16, 28)

It should be noted that there is authority for holding as the Oregon court did in White v. Pacific Tel. & Tel. Co., 123 P.2d 193 (Ore. 1942), that the Oregon statute paralleling U.C.A. §78-12-40 "applied only to the same cause of action

. . . for if the cause of action is a different cause of action than that sued on in the former action, . . . the bringing of said action would be expressly barred by statute."

In addition, 51 Am. Jur. 2d, Limitation of Actions, p. 820, §318 states:

As a general rule, a statute permitting commencement of a new action within a specified time after failure of a prior action other than on the merits is not applicable where the parties in the new action are not the same as the ones in the prior action. Thus, where an enabling act permits a subsequent action after the limitation period where the first suit has failed, the second suit must be substantially the same cause of action and must be prosecuted by the same plaintiff or his legal representatives against all the defendants who were necessary parties to the first suit or their legal representatives. (Emphasis added.)

In this case, the only real difference in the original and subsequent complaints filed by the Plaintiff is that Dr. John Bender is named as a Defendant in the first Complaint and is not named in either of the subsequent Complaints. Otherwise, the Complaints deal with the same cause of action, the same Plaintiff or his legal representative, and the subsequent actions are against all "defendants who were necessary parties to the first suit."

In any event, no allegation has been made and no defense raised by any of the Defendant-Respondents herein where it is alleged that Dr. John Bender was a necessary party to the first suit. Furthermore, whether Dr. Bender was a necessary party is a question of fact which, if properly

raised by the Defendants, must be decided by a trial court--finder of fact.

Therefore, the Utah Saving Statute, U.C.A. §78-12-40, is applicable here to establish that Plaintiff's action upon which this appeal is based was timely filed.

#### POINT V

IF THERE WAS AN UNELAPSED PORTION OF THE LIMITATIONS PERIOD AS OF APRIL 1, 1976 FOR MEDICAL MALPRACTICE ACTIONS ARISING PRIOR TO THAT DATE, THE LAW REGARDING THE PERIOD OF LIMITATIONS THAT EXISTED PRIOR TO SAID DATE WOULD BE CONTROLLING BUT NOT TO EXTEND THE PERIOD BEYOND MARCH 30, 1980.

Even if the notice requirement of §78-14-8 is construed to be applied retroactively, Plaintiff's Complaint of September 28, 1978 would still have been timely.

The Health Care Malpractice Act provides in §78-14-4(2):

The provisions of this section shall apply to all persons regardless of minority or other legal disability (under §78-12-36 or any other provision of the law) 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 the 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. (Emphasis added; also, the portions in parenthesis were added by the 1979 amendment.)

The above clearly and unequivocally provides that the provisions of §78-14-4 regarding the Statute of Limitations are to apply regardless of legal disability, and that the time limitations are to be applied retroactively. It does not state, however, that the provisions in that section are to be applied retroactively to effect those with legal disabilities predating the act's effective date. The applicability of this section to those with legal disabilities and the retroactivity of the time limits set forth in the section are not necessarily related. A careful analysis of the wording of the section shows that just the opposite is true.

The clause (underlined above) following the first semicolon of the above quoted provision is an express limitation on the preceding clause. That this provision is to apply regardless of legal disability and is to be applied retroactively is set forth but is then limited by "provided, however . . ." that for actions not barred by the Statute of Limitations on or before April 1, 1976, an "action which under former law could have been commenced after the effective date of this act," the period of limitation under former law would be controlling. This only, however, to the extent there exists an unelapsed portion of time as measured by the Statute of Limitations applicable prior to April 1, 1976. This is further limited by the concluding clause to the effect that the unelapsed portion of the limitations period

under the former law would be controlling but not to extend beyond four years from the effective date of the act.

Under former law, there was no provision abnegating the applicability of Utah Code Annotated, 1953, §78-12-36, as amended, to malpractice actions. Said section provides in pertinent part:

If a person entitled to bring an action, other than for the recovery of real property, is at the time the cause of action accrued, either: . . . (2) Mentally incompetent and without a legal guardian; or . . . the time of such disability is not a part of the time limited for the commencement of the action.

Since Plaintiff-Appellant was mentally incompetent at the time his cause of action accrued, which was before the effective date of the Health Care Act, and has continued under this disability ever since said time (R. 9-13, 93, 94); and since under former law a disability effectively tolled the running of the Statute of Limitations even in malpractice actions, no part of the time that passed from the date his cause of action accrued until the effective date of the act is a "part of the time limited for the commencement of the action."

That is, as of April 1, 1976, no time had run against Plaintiff-Appellant on the applicable Statute of Limitations as the statute had been effectively tolled by his disability. Plaintiff-Appellant, by the terms of the last clause of §78-14-4(2), had until March 30, 1980, four years from the effective date of the act, to commence his action. This



being true, this cause of action which was commenced on September 28, 1978, was timely filed. (R. 2) This is true even if the Court rejects all of Plaintiff-Appellant's arguments against the retroactive application of the notice provision, as he fully and timely complied therewith before commencing this action. (R. 4, 16, 28)

### CONCLUSION

The 1979 Amendments to the Utah Health Care Malpractice Act are determinative of the issue of the retroactivity of the notice requirement of §78-14-8. As shown by these amendments and by careful analysis of the original statute, it is clear that the legislature's intent was and is that this section not be applied retroactively. Vealey, supra. should be overruled or clarified to conform herewith.

Even if this were not true, §78-14-8 violates the equal protection clause of the United States Constitution and Article I §24 and Article VI §26 of the Constitution of Utah. It is, therefore, void and unenforceable.

Finally, pursuant to the application of §78-12-40, the Utah Saving Statute, Plaintiff's action of September 28, 1978 was timely. However, even if the Court were to reject application of the saving statute, Plaintiff's September 28, 1978 action was timely pursuant to the terms of §78-14-4(2) and the fact that Plaintiff has suffered a legal disability from the time his cause of action arose, which was before the



effective date of the act. In addition, were the Court to reject all of Plaintiff-Appellant's arguments with respect to the retroactivity or unconstitutionality of §78-14-8, such notice requirement was complied with by Plaintiff prior to filing his action on September 28, 1978.

This action, therefore, should be remanded for trial on its merits.

DATED this 18<sup>th</sup> day of May, 1979.

RESPECTFULLY SUBMITTED



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MAILING CERTIFICATE

Mailed a copy of the foregoing BRIEF OF PLAINTIFF-  
APPELLANT ZEBLEN V. WHITE, et al., to Dan S. Bushnell and  
Larry R. White, Kirton, McConkie, Boyer & Boyle, 330 South  
Third East, Salt Lake City, Utah 84111, and to R. M. Child,  
Bayle, Child & Ritchie, 1105 Continental Bank Building, Salt  
Lake City, Utah 84101, this 18<sup>th</sup> day of May, 1979, postage  
prepaid.

  
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