

2009

Larry Roth v. Ronald Joseph, M.D. and Northen Utah Healthcare Corporation dba St. Mark's Hospital : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LARRY ROTH,
Appellant,

vs.

RONALD JOSEPH, M.D. and
NORTHERN UTAH HEALTHCARE
CORPORATION dba ST. MARK'S
HOSPITAL,
Appellees

Appellate Case No. 20090716-CA

Trial Court Case No. 080901034

BRIEF OF APPELLANT
ORAL ARGUMENT IS REQUESTED

Appeal from the Ruling of the Third Judicial District Court,
The Honorable Judith Atherton
Granting Motion for Summary Judgment

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LIST OF PARTIES

Plaintiff/Appellant: Larry Roth (referred to as “Roth”)

Defendant/Appellee: Ronald Joseph, M.D. Referred to as “Dr. Joseph”)

Defendant/Appellee: Northen Utah Healthcare Corporation dba St. Mark’s
Hospital
(Referred to as “St. Mark’s”)

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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

Issue #1: Did the trial court abuse its discretion in setting aside the default certificate against St. Mark's for its failure to file an answer in the prescribed time limit and in denying Roth's motion for default judgment based upon St. Mark's claim of simple clerical error?

Preservation of Issue: This issue was preserved upon the filing of Roth's Motion for Judgment by Default Against St. Mark's [R 47-49]¹, Roth's Memorandum in Support of Motion for Judgment by Default Against St. Mark's [R50-63] and Roth's Reply Memorandum [R 84-93] setting forth a factual and legal basis for the entry of the Default Certificate and the Default Judgment and challenging St. Mark's basis for striking Certificate of Default and denial of motion for judgment by default.

Issue # 2: Did the trial court err in finding that there was no genuine issue of material fact to dispute that on October 13, 2004, or at the very latest, January 5,

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

2005, Plaintiff discovered, or through the use of reasonable diligence should have discovered, his legal injury?

Preservation of Issue: Roth in his Affidavit [233-237] testifies that he did not discover his legal injury as such relates to the negligence of Dr. Joseph which caused his injury until and beginning on January 25, 2007 through August 2007. See ¶¶ 13, 14, 15, 16, 17 and 20 of Roth Affidavit [R 235-236]. Roth's allegations set forth in his Complaint [R. 1-14] set forth genuine issues of material fact. See allegations at ¶¶ 16, 21, 22, 23, 24, 25, 26, 29, 30, 31, 39, 40 and 41 [R 3-6]. Roth in his Memorandum in Opposition to Dr. Joseph's Motion for Summary Judgment sets forth genuine issues of material fact as to when he first discovered his legal injury. See ¶¶ 2, 3, 4, 5, 6, 7, 9, 10, 11 and 12 [R 220-222]. Roth disputed Dr. Joseph's claim in his "Statement of Facts" contained in his Memorandum in Support of Motion for Summary Judgment that the June 8, 2004 letter was included in the medical records that Roth obtained on January 5, 2005. [R219-220 at ¶¶ 15, 17 and 23 and Roth Affidavit [R 235 at ¶¶ 15 and 16].

Issue #3: Did the trial court err in finding that there was no genuine issue of material fact to support Roth's claim that he was prevented from discovering misconduct on the part of Dr. Joseph because Dr. Joseph had affirmatively acted to fraudulently conceal any alleged misconduct?

Preservation of Issue: ¶¶ 10, 11, 12, 24, 27 et. seq. of the Complaint [R1-14] reflect the doctor/patient relationship between Roth and Dr. Joseph. ¶¶ 19 through 37 of the Complaint [3-6] reveal alleged facts Dr. Joseph was required to disclose but affirmatively concealed from Roth. ¶¶ 13 through 25 of Roth Affidavit [R 235-237] set forth genuine issues of material fact as to material medical information Dr. Joseph was required to disclose to his patient, Roth, but did not. Roth in his Memorandum in Opposition to Dr. Joseph's Motion for Summary Judgment [R 215-257] disputes Dr. Joseph's Statement of Facts numbered 2, 7 and 12 as such relate to Dr. Joseph's allegation that he had in fact tattooed the polypectomy site (pages 3, 4 and 5 Roth's opposition memorandum [R 217-219]. Roth disputed Dr. Joseph's claim in his "Statement of Facts" contained in his Memorandum in Support of Motion for Summary Judgment that the June 8, 2004 letter was included in the medical records that Roth obtained on January 5, 2005. [R219-220 at ¶¶ 15, 17 and 23 and Roth Affidavit [R 235 at ¶¶ 15 and 16].

STANDARD OF REVIEW

Arbogast Family Trust v. River Crossings, 191 P.3d 39 (Utah Ct. Appl. 2008) "[A] trial court has broad discretion in deciding whether to set aside a default [judgment]." (quoting Lund v. Brown, 11 P.3d 277 (Utah 2000) However, "the court's discretion is not unlimited." *Id.*).

At the summary judgment stage, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

In order for nonmoving party to oppose successfully a motion for summary judgment and send the issue to the fact-finder, it is not necessary for the party to prove its legal theory; it is only necessary for nonmoving party to show facts controverting the facts stated in moving party's affidavit. Salt Lake City Corp. v. James Constructors, Inc. 761 P.2d 42 (Utah Ct App 1988).

This court reviews a trial court's legal conclusions and ultimate grant or denial of summary judgment for correctness, and views the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." Forsberg v. Bovis Lend Lease, Inc., 184 P.3d 610 (Utah Ct. App 2008) (internal quotation marks omitted).

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).

DETERMINATIVE LAW

Rule 55(c) *URCP* provides for the setting aside of a default certificate and Rule 60(b), *URCP*, provides the factors that are relevant to a determination of whether defendant has shown “good cause” under Rule 55(c) *URCP*. St. Mark’s in this case is claiming excusable neglect.

In order to demonstrate that Default was due to excusable neglect, “... movant must show that he has used due diligence and that he was prevented from appearing by circumstances over which he had no control.” Black’s Title, Inc. v. Utah State Ins. Dept., 991 P.2d 607 (Ut Appl 1999) quoting Airkem Intermountain, Inc. v. Parker, 513 P.2d 429, 431 (1973).

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.

U.C.A. §78B-3-404 further provides as follows:

(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."

STATEMENT OF THE CASE

This matter arose out of a botched surgery performed on Roth on May 24, 2004. [R1-10, ¶¶16, 20 & 21] The surgery was performed in order to remove a polypectomy site (this is a site where the GI doctor snipes a polyp in a patient's colon) that was suspect of being cancerous. [R 3 ¶15] Dr. Joseph was the doctor that performed the *polypectomy*. [R2 ¶12] *Dr. Joseph informed the general surgeon who performed the May 24, 2004 surgery that he [Dr. Joseph] placed tattoo markings above and below the polypectomy site in order to show its location in the colon.* [R 3 ¶18] 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. [R 3 ¶¶13, 19, R 360] During the surgery the general surgeon was unable to locate the tattoos and as Dr. Joseph was unavailable Dr. Joseph's partner Dr. Pedersen went over Dr. Joseph's medical chart with the general surgeon and then Dr. Pedersen joined the general surgeon in

the operating room (OR). [R 133 ¶7] in order to assist the general surgeon in locating the purported tattoo markings. Before Dr. Pedersen arrived in the OR the general surgeon had removed 25 cm of Roth's distal sigmoid colon. [R133 ¶8] Dr. Pedersen was unable to locate the tattoos or the polypectomy site. [R5 ¶31]

During discovery in Roth's action against the general surgeon, Roth concluded Dr. Joseph was negligent and Roth initiated his legal action against Dr. Joseph by serving him with the statutory requisite Notice of Intent to Commence an Action on May 9, 2007 [R 137, ¶24] and followed this with filing suit on January 17, 2008 [R 1-14] and serving Dr. Joseph on March 25, 2008. [R 31-34]. Dr. Joseph filed his Answer on April 17, 2008. [R 15-26] St. Mark's was served on March 25, 2008 [R 28-30]. A Certificate of Default against St. Mark's was entered on May 6, 2008, 42 days after St. Mark's was served and after they failed to file an answer. [R35]

STATEMENT OF FACTS RELEVANT TO ISSUES ON APPEAL

1. Northern was served with the Summons and Complaint in this matter on March 25, 2008. [R 28-30]

2. Northern is a Utah corporation doing business as St. Mark's Hospital in Salt Lake County, Utah, however, its headquarters is shown as in Nashville, Tennessee and out of caution Plaintiff provided thirty (30) days on the

face of the Summons for it to file an answer in this matter, setting April 24, 2008 as the due date.[R 50-51 & 60].

3. This Court entered a Default against Northern on May 6, 2008.

[R 35]

4. May 9, 2008, Northern files an unauthorized pleading, entitled Defendant Northern Utah Healthcare Corporation dba St. Mark's Hospital's Answer to Plaintiff's Complaint and Joinder in Jury Demand. [36-46]

PLEASE NOTE: The following ¶¶ 5 through 37 are from the Complaint [R 1-6]

5. Roth is a resident of Draper, Salt Lake County, state of Utah.

6. Dr. Joseph performs professional services as a physician and does business in Salt Lake County, state of Utah.

7. St. Mark's maintains its hospital facility and offices in Salt Lake City, State of Utah.

8. A Certificate of Compliance from the Utah Department of Commerce was issued for the parties herein, indicating compliance with *UCA* §78-14-12.

9. At all times relevant herein Dr. Joseph was and is a licensed physician in the state of Utah.

10. That commencing on or about April 28, 2004 Dr. Joseph provided medical care and treatment to Roth.

11. Dr. Joseph performed a colonoscopy on Roth on April 28, 2004.

12. Dr. Joseph removed from Roth's colon a large polyp of about 2.5 cm in size along with several small polyps measured in terms of millimeters.

13. Dr. Joseph did prepare his medical report indicating the removal of these polyps from Roth's colon and did state that the large 2.5 cm polyp was located at 15 cm from the anal verge in part of this report and in the same report stated that the large polyp was located in the distal sigmoid colon.

14. That the April 28, 2004 pathology report for the polyps removed by Dr. Joseph as specimens indicated that the large polyp had cancerous cells probably touching the cauterized surgical margin where Dr. Joseph had removed the large polyp.

15. Roth was referred to a general surgeon by Dr. Joseph for the resection of the surgical site where Dr. Joseph removed the large polyp ("polypectomy site").

16. Roth discovered in the summer of 2007 that Dr. Joseph described the area of concern as "Adenocarcinoma in distal sigmoid" to Radiology when Roth had been referred over to radiology for out patient care to perform a CT scan on or about May 4, 2004

19. Dr. Joseph provided the general surgeon with a copy of his medical report describing the location in the colon where the polypectomy site was, indicating to a general surgeon that it was in the distal sigmoid colon.

20. Dr. Joseph used ink for tattooing under the brand name SPOT.

21. Roth first became aware through the deposition testimony of the general surgeon on January 26, 2007 that Dr. Joseph had experienced difficulty using SPOT, including it disappearing or fading shortly after administration as opposed to remaining as a permanent tattoo for marking purposes.

22. The general surgeon 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.

23. The general surgeon in a separate action testified on January 26, 2007 and August 2007 that he told Dr. Joseph in June 2004 that he did not see the tattoos and that he thinks he may have removed the polypectomy site, but was not sure and that he, Dr. Joseph need perform a follow up colonoscopy as soon as practical.

24. Dr. Joseph concealed this information from Roth and in fact led Roth to believe he did not have any knowledge that the site had not been removed until he performed a routine colonoscopy on Roth in October 2004 and at no time did Dr. Joseph inform Roth of having any problems with the SPOT tattoos.

25. Roth did not discover until it was pointed out by Dr. Stephen Porter, another Gastroenterologist in July 2007 that Dr. Joseph's anatomical description of the location of the polypectomy site was in a different location than Dr. Joseph's centimeter description and that it is well known by gastroenterologists that surgeon's used anatomical description for locating surgical sites as opposed to metric measurement.

26. Dr. Stephen Porter in a deposition described this error in telling the surgeon the wrong location of the polypectomy site as "a train wreck waiting to happen."

27. Dr. Joseph after performing a routine follow up colonoscopy on Roth on October 13, 2004 expressed that he was surprised that the subject polypectomy site was still there and had not been resected.

28. Dr. Joseph concealed material medical information from his patient Roth that he, Dr. Joseph did in fact describe a different and incorrect area for Dr. Voorhees to resect.

29. Roth learned for the first time on January 26, 2007 that the general surgeon informed Dr. Joseph in June 2004 that he could not see the tattooing that Dr. Joseph claims he placed above and below the polypectomy site.

30. Dr. Joseph testified on January 25, 2007 that he placed ink tattoos above and below the polypectomy site.

31. The general surgeon testified on January 26, 2007 that he could not identify the tattoo's and that Dr. Joseph's partner Dr. Peder J. Pedersen using a lighted sigmoid scope searched Roth's rectum during the May 24 surgery and could not see any tattoos in the area that Dr. Joseph claims he placed tattoos.

32. Dr. Pedersen testified that he expended about 20 minutes scoping in a small confined space of the rectum looking for the tattooing that Dr. Joseph claims he placed above and below the polypectomy site.

33. 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 Roth about six months later and subsequent to the routine follow-up by the Dr. 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.

34. Dr. Joseph intentionally concealed from Roth that he had failed to tattoo the polypectomy site prior to Roth's surgery to remove the polypectomy site, and that this intentional concealment was done to hide Dr. Joseph's negligence.

35. Alternatively Dr. Joseph intentionally concealed from Roth that he used a tattoo product that he knew to be unreliable and known by him to prematurely disappear or fade.

36. That in furtherance of this fraudulent concealment to cover up the failure to tattoo or to use a reliable ink, Dr. Joseph re-tattooed Roth on October 13, 2004 when Roth was unconscious during the follow up routine colonoscopy.

37. Dr. Joseph failed to disclosed and affirmatively concealed from Roth that he became aware by June 2004 that the general surgeon likely did not remove the polypectomy site and in furtherance of concealing this known fact, Dr. Joseph informed Roth that he became aware for the first time of the failure in the resection of the polypectomy site when he was performing the routine follow up colonoscopy on Roth in October 2004.

38. Roth initiated a legal action against Dr. Voorhees, charging him with medical malpractice on May 24, 2007. [R 137]

39. Roth became aware for the first time during the deposition of Dr. Joseph on January 25, 2007 that Dr. Voorhees had sent a letter dated June 8, 2004 to Dr. Joseph as a follow up to their conversation that day and that the letter expressed Dr. Voorhees' concern over the type of ink dye being used by Dr. Joseph. [221 ¶4]

40. The June 8, 2004 letter from Dr. Voorhees to Dr. Joseph that is referred to in the preceding paragraph was not included in the medical records that Roth requested from Dr. Joseph in December 2004. [R 221 ¶5]

41. Dr. Joseph led Plaintiff to believe by expressing shock and surprise after the follow up colonoscopy on October 13, 2004 that the polypectomy site remained intact and that he [Dr. Joseph] had no idea that Dr. Voorhees did not resect the polypectomy. [R 221-222 ¶8]

42. In the Voorhees Action in August 2007 Dr. Voorhees testified that he believed that the polypectomy site was in the distal sigmoid colon. [R 222 ¶10]

SUMMARY OF THE ARGUMENTS

Roth upon this appeal is asking the Utah Court of Appeals to reverse the Trial Court's granting St. Mark's Motion to Set Aside the Default Certificate entered by the Clerk of the District Court against St. Mark's for its failure to file an Answer within the time prescribed by the Utah Rules of

Civil Procedure as well as with the time period that was set forth on the face of the Summons and to further reverse the Trial Court's Denial of Roth's Motion for Judgment by Default and to remand for an evidentiary hearing on the issue of damages. St. Mark's argument for setting aside the Certificate of Default and for striking Roth's Motion for Default Judgment was that Roth was required to serve counsel and Roth's counsel refused to vacate the default certificate when informed by St. Mark's that the "...fact that St. Mark's Answer was filed late due to a simple calendaring error,..." "Lastly, justice and equity requires that the Default certificate be set aside as there would be no prejudice to any party in the case." [64-65] Although, Roth requested oral argument [R 84] the Trial Court rendered its decision by Minute Entry and Amended Minute Entry based upon the filings and without oral argument. [R121-124]. The primary issue revolves around whether or not the alleged simple calendaring mistake rises to the level of excusable neglect required by the Utah Courts. In order to establish excusable neglect, a party must provide the court with specific details to demonstrate due diligence in spite of uncontrollable circumstances. See Blacks Title, Inc. v. Utah State Ins. Dept., 991 P.2d 607, 611 (UT Ct Appl 1999). There was no showing of any "uncontrollable circumstances" and there was no detail to demonstrate diligence. The only showing was that for some unknown

reason the paralegal assigned by the law firm to calendar deadlines set the deadline for 45 days for answering the summons and complaint that reflected on the face of the Summons that St. Mark's had 30 days to answer. Roth provided the Court with several Utah and sister state cases where similar acts did not rise to the level of "excusable neglect." [R 84-93]

As for there being no prejudice the Utah Supreme Court aptly addressed this issue in Airkem Intermountain, Inc. v. Parker, 513 P.2d 429, 431 (1973), to relieve the defaulting party "vitiates the effect of *res judicata* and creates a hardship for the successful litigant by causing him to prosecute more than once his action and subjecting him to the possible loss of collecting his judgment."

This appeal is asking the Utah Court of Appeals to reverse the Trial Court's order granting of Dr. Joseph's motion for summary judgment. [R409-412] The Trial Court relied on certain of Dr. Joseph's factual allegations to conclude that Roth discovered his legal injury by October 13, 2004 or at the latest on January 5, 2005. Dr. Joseph alleges that Roth knew of his legal injury on October 13, 2004 when he discovered that the polypectomy site was not removed during the May 24, 2004 surgery or at least by January 5, 2005 when Roth obtained the medical records from the general surgeon. There is nothing in the Record to indicate that Roth knew

of his legal injury (knew of the negligence that caused his injury) on either of these dates. It was mere speculation. Roth adamantly denies that he discovered his legal injury (Dr. Joseph's negligence that caused Roth's injury) before 2007, thus, establishing a genuine issue of material fact.

The determination of when one discovers or should have discovered his legal injury is a fact intensive matter for a jury to ascertain. We do know that in this case that at least by May 24, 2006 the two year statute of limitations would have been triggered by Roth initiating a malpractice action against the general surgeon. This date establishes Roth's belief by at least May 24, 2004 that his injury was caused by negligence and he knew it resulted during the May 24, 2004 surgery; thus, the statute of limitations for filing an action would have run at least by May 24, 2008.² Under the Utah Medical malpractice Act a prerequisite to filing suit against a healthcare provider is to issue a Notice of Intent to Commence an Action. Roth initiated his legal action against Dr. Joseph by issuing the prerequisite Notice of Intent to Commence a Lawsuit to Dr. Joseph on May 9, 2007 and filed his lawsuit on January 17, 2008, well within the two year statute of limitations under U.C.A. §78B-3-404(1).

² It is worthy to note that the statute of limitations (notwithstanding subsection (2)(b)) would have run on May 24, 2008 in any event as the maximum period is 4 years from the date of injury which occurred on May 24, 2004, date of the surgery.

Roth contends that U.C.A. §78B-3-404(1)(b) is applicable to the case at hand. [R46-57] That Dr. Joseph 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. [R] Dr. Joseph who supposedly marked the polypectomy site used a new ink dye that occasionally faded or disappeared. [R1-10, ¶30] Dr. Joseph failed to inform the general surgeon before the operation of Roth on May 24, 2004 of this fact. [R1-10, ¶31] Dr. Joseph further failed to inform Roth, his patient of this fact. [R1-10, ¶39] This is particularly important to note that after Dr. Voorhees had expressed his concern over the use of the fading ink and that he may not have resected the polypectomy site, Dr. Joseph's fiduciary duty to inform Roth was heightened at this point. In other words Dr. Joseph after this conversation knew or should have known that Dr. Voorhees likely did not remove the polypectomy site and was required to disclose this to his Patient, Roth. Dr. Joseph in response states that he could not have affirmatively concealed this information from Roth. However, although having a duty to disclose and not revealing this significant medical information is of course one method of concealing something from another.

ARGUMENT

A. EVIDENCE SUPPORTING TRIAL COURT'S MINUTE

ENTRY SETTING ASIDE DEFAULT CERTIFICATE AND
DENYING MOTION FOR DEFAULT JUDGMENT

The Affidavit of Joslin C. Wright sets forth the sole reason the answer to the complaint was filed late. [R 76-77]

B. EVIDENCE GRANTING DEFENDANTS MOTIONS FOR
SUMMARY JUDGMENT:

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

The Trial Court granted the motion for summary judgment based upon, a finding that “There was no genuine issue of material fact to dispute that Plaintiff did not initiate a lawsuit against Dr. Joseph or provide notice of intent to commence an action against Dr. Joseph pursuant to the Utah Health Care Malpractice Act, Utah Code Ann. §78B-3-401, *et. seq.*, until May 9, 2007, more than two years after Plaintiff discovered, or through the use of reasonable diligence should have discovered, his legal injury.” [R 408-411 ¶4] The Court further found that “There is no genuine issue of material fact to dispute that on October 13, 2004, or at the very latest, January 5, 2005, Plaintiff discovered, or through the use of reasonable diligence should have discovered, his legal injury...”

Dr. Ronald Joseph on October 13, 2004, during his follow up colonoscopy on Roth saw tattooing above and below the polypectomy site

that was located in the rectum at about 15 cm. Dr. Joseph on October 13, 2004 informed Roth of this finding, indicating that it was still there [R 134], which demonstrates Roth knew he suffered an injury, the failure to remove the polypectomy site during the May 24, 2004 surgery. Dr. Joseph's October 13, 2004 display of shock and his exclamation to Roth that the general surgeon "failed" to remove the polypectomy site suggested to Roth that the general surgeon may have been negligent. [R 221-222 ¶8].

Following up on this suggestion Roth obtained the medical records of the general surgeon on January 5, 2005 [R 135-136 ¶15] that through discovery ultimately led to Roth filing an arbitration action against the general surgeon for malpractice on May 24, 2006. [R 136 ¶19]. Included in these medical records was Dr. Joseph's April 28, 2004 medical record which contained information describing two distinctly different locations of the subject polypectomy site [R 360] and a notation in the general surgeon's June 8, 2004 office note referenced their [referring to Dr. Joseph] using a new ink that has unequivocal results that they are looking into. [R 288]

The Trial Court further relied upon the finding by the Trial Court in Roth v. Pedersen³, Third Judicial District Court, Case No. 080917484, with similar facts and that case too revolved around the botched May 24, 2004

³ This case was appealed and a decision rendered by the Utah Court of Appeals, Appellate No. 20090139-CA, 2009 UT Appl 313.

surgery performed upon Roth. The Pedersen Trial Court concluded that Roth discovered his legal injury on or about October 13, 2004. [R 138 ¶27]

The Trial Court further stated that there were no genuine issues of material fact to support a claim that Roth was prevented from discovering his legal injury by Dr. Joseph's action or failure to act. [R 410 ¶1] and there is no genuine issue of material fact to support a claim that Roth was prevented from discovering misconduct on the part of Dr. Joseph because he acted affirmatively to fraudulently conceal any alleged misconduct. [R 410 ¶2].

Evidence that would support a finding that there was no genuine issue of material fact of the fraudulent concealment issue is that the medical records contained much of the information that ultimately led to discovering the alleged misconduct. Secondly the Trial Court concluded that there was no evidence of affirmative acts on the part of Dr. Joseph to prevent Roth from discovering any misconduct. [June 19, 2009 Hearing Trans. Pg 31, lines 10 – 15].

C. **TRIAL COURT ERRED IN VACATING THE DEFAULT
CERTIFICATE WITHOUT ST. MARK'S
DEMONSTRATING EXCUSABLE NEGLIGENCE**

The Affidavit of Joslin C. Wright sets forth the sole reason the answer

to the complaint was filed late. At ¶3 of her affidavit she states “On or about March 31, 2008, I received by email the Summons and Complaint which was served upon defendant St. Mark’s at CT Corporation, and subsequently sent to St. Mark’s corporate headquarters in Nashville, Tennessee. At ¶4 the paralegal states “I incorrectly calculated a 45-day deadline instead of a 30-day deadline to answer Plaintiff’s complaint and docketed and calculated the due date as May 9, 2008.” [R 76-77 ¶2]

Rule 55(c) *URCP* states, “(c) Setting aside default. For good cause shown the court may set aside an entry of default”

Since Rule 55(c) of the Utah Rules of Civil Procedure and Rule 55(c) of the Federal Rules of Civil Procedure are substantively identical, “we freely refer to authorities which have interpreted the federal rule.” Gold Standard, Inc. v. American Barrick Resources Corp., 805 P.2d 164, 168 (Utah 1990). Rule 55(c) of the Utah Rules of Civil Procedure, like its federal counterpart, governs the setting aside of a default prior to the entry of judgment, and states that “[f]or good cause shown the court may set aside an entry of default....” *Id.* While Rule 55(c) distinguishes between the setting aside of a default and the setting aside of a default judgment under Rule 60(b), “[t]he factors described in Rule 60(b) are relevant to [a] determination of whether defendant has shown ‘good cause.’” Spica v. Garczynski, 78

F.R.D. 134, 135 (E.D.Pa.1978) (interpreting Rules 55(c) and 60(b) of the Federal Rules of Civil Procedure).

Rule 60(b) allows a court "upon such terms as are just" and "in the furtherance of justice" to relieve a party from a judgment for "mistake, inadvertence, surprise, or excusable neglect; . . . or . . . any other reason justifying relief...."

The Utah Court of Appeals in Stevens v. LaVerkin City, 2008 UT App 129, pg 10, defined excusable neglect as "the exercise of 'due diligence' by a reasonably prudent person under similar circumstances." Mini Spas, Inc. v. Industrial Comm'n, 733 P.2d 130, 132 (Utah 1987). In order to demonstrate that Default was due to excusable neglect, "...movant must show that he has used due diligence and that he was prevented from appearing by circumstances over which he had no control." Black's Title, Inc. v. Utah State Ins. Dept., 991 P.2d 607 (Ut Appl 1999) quoting Airkem Intermountain, Inc. v. Parker, 513 P.2d 429, 431 (1973). In order to establish excusable neglect, a party must provide the court with specific details to demonstrate due diligence in spite of uncontrollable circumstances. Blacks Title, Inc. v. Utah State Ins. Dept., at 611, id. Furthermore, Utah courts have found no abuse of discretion in a trial court's denial of a motion to set aside a default judgment where the only excuse offered by a party for

its untimely response was that the motion requiring the response was inadvertently misplaced within counsel's office. See Mini Spas, Inc., 733 P.2d at 132 ("This delay in filing a written protest was not due to circumstances beyond the [party]'s control....[because] the only excuse for untimely response was that the notice was 'inadvertently stuck together in the [party]'s drawer'").

In Stevens v. LaVerkin City, *id.* the Plaintiff Stevens only excuse it offered for not timely responding to a motion for summary judgment centered on its attorneys office expansion, relocation of workstations and the attorney who was assigned to the case had hired a new assistant and did not see the motion for summary judgment until after the due date. The Court in Stevens v. LaVerkin City found that the circumstances were part of the day-to-day challenges at a law firm and were not beyond counsel's control. Certainly it can be said counsel for St. Mark's had equally as much control as the attorneys in Stevens v. LaVerkin City.

D. TRIAL COURT ERRED IN APPLYING U.C.A. §78B-3-404(1)

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.

This Court in the related case of Roth v. Pedersen, 2009 UT App 313, based upon essentially the same facts as in this case and more importantly for the lack of facts as to when Roth actually discovered that his injury was the result of negligence (this is a fact intensive matter for a jury and not the courts⁴) and therefore concluded that by at least the time he initiated his action against the general surgeon on May 24, 2006, he realized his legal injury; thus, triggering the two year statute of limitation. Since Roth filed his action against Dr. Joseph and St. Mark's on January 17, 2008, such is within the two years from the expiration of the statute of limitation of May 24, 2008 and therefore timely as a matter of law.

E. TRIAL COURT ERRED IN APPLYING U.C.A. §78B-3-404(2)(b)

⁴ “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). 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).

Doctors stand in a fiduciary relationship with their patients. See Daniels v. Gamma W. Brachytherapy, LLC, 2009 UT 66, ¶48, 640 Utah Adv. Rep. 8, citing Sorensen v. Barbuto, 2008 UT 8, ¶ 15, 177 P.3d 614.

A doctor does have a common law fiduciary duty “to disclose to his patient any material information concerning the patient’s physical condition.”

Nixdorf v. Hicken, 612 P.2d 348, 354 (Utah 1980). See Daniels, 2009 UT 66, ¶51. The question of what is “material information” is for the jury.

Nixdorf v. Hicken at 354, id.

McDougal v. Weed, 945 P.2d 175, 179 (Utah App. 1997) citing Jensen v. IHC Hospitals, Inc., 944 P.2d 327, 333 (Utah 1997) provided: “Fraudulent concealment requires that one with a legal duty or obligation to communicate certain facts *remain silent or otherwise* act to conceal material facts known to him.” (Emphasis added). This Court in D’Elia v. Rice Development, Inc., 147 P.3d 515, 526 (Utah App. 2006) also citing Jensen v. IHC Hospitals, Inc., 944 P.2d 327, 339 (Utah 1997) states, “To demonstrate constructive fraud in Utah, a party need only demonstrate ‘two elements: (1) a confidential relationship between the parties; and, (ii) a failure to disclose material facts.’” Thus, the issue is whether the medical information is material, again an issue for the jury.

CONCLUSION

There is no question that St. Mark's did not file a timely answer and the Clerk of the Court was correct in entering a Default Certificate. In order to overcome the Default Certificate under Utah law St. Mark's had to

establish excusable neglect. In order to establish excusable neglect, a party must provide the court with specific details to demonstrate due diligence in spite of uncontrollable circumstances. St. Mark's did not provide details to demonstrate diligence and made absolutely no showing of any uncontrollable circumstances.

Summary judgment is not appropriate where there exists a genuine issue of material fact. In this case there are definite genuine issues of material fact; e.g., as to when Roth saw the June 9, 2004 letter from Dr. Voorhees to Dr. Joseph. Dr. Joseph claims that Roth received this letter on January 5, 2006. Roth testifies in his affidavit that he did not see this letter until January 2007 during the deposition of Dr. Joseph.

Notwithstanding genuine issues of material fact exist as to when Roth discovered Dr. Joseph's malpractice, Roth at least by the time he initiated a malpractice action in May 2006 against the general surgeon had determined that his injury was the result of negligence; thus, triggering the commencement of the two year statute of limitations which expired May 2008. Therefore the malpractice action initiated by Roth against Dr. Joseph

on January 17, 2008 was within the two year statute of limitations and timely.

Alternatively summary judgment was inappropriate in this case as the issue of whether certain medical information was material to the extent that Dr. Joseph was required to disclose such to Roth and whether this medical information is material is a question for the jury.

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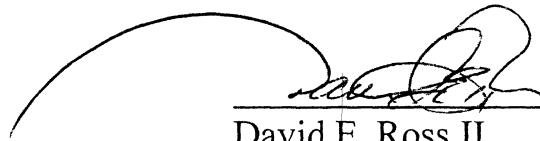
CERTIFICATE OF SERVICE

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 18th day of December 2009:

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Pursuant to UT R. App. P. 24(a)(11) Appellant states that no addendum is necessary.



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