

2009

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

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

R. Scott Williams; Peter J. Baxter; Strong and Hanni; Attorneys for Defendant/Appellee. Eric P. Schoonveld; Jason Watson; Hall Prangle and Schoonveld, LLC; Attorneys for Defendant/Appellee. David E. Ross II; Attorney for Plaintiff/Appellant.

Recommended Citation

Brief of Appellee, *Roth v. Joseph*, No. 20090716 (Utah Court of Appeals, 2009).
https://digitalcommons.law.byu.edu/byu_ca3/1843

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

LARRY ROTH,

Plaintiff and Appellant,

vs.

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

Defendants and Appellees.

BRIEF OF THE APPELLEE RONALD
JOSEPH, M.D.

Case No. 20090716-CA

Appeal from the Third District Court, Salt Lake County, Judge Judith S. Atherton

David E. Ross, II
Bellemarc Building, Suite 209
1912 Sidewinder Drive
Park City, UT 84060
Attorney for Plaintiff/Appellant

Eric P. Schoonveld
Jason Watson
HALL PRANGLE & SCHOONVELD, LLC
136 East South Temple, Suite 2450
Salt Lake City, UT 84111
*Attorneys for Defendant/Appellee
Northern Utah HealthCare Corporation
dba St. Mark's Hospital*

R. Scott Williams, #3498
Peter J. Baxter, #10193
STRONG & HANNI
3 Triad Center, Suite 500
Salt Lake City, UT 84180
Telephone: (801) 532-7080
Facsimile: (801) 596-1508
swilliams@strongandhanni.com
pbaxter@strongandhanni.com
*Attorneys for Defendant/Appellee
Ronald Joseph, M.D.*

UTAH APPELLATE COURT

FEB 19 2010

IN THE UTAH COURT OF APPEALS

LARRY ROTH,

Plaintiff and Appellant,

vs.

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

Defendants and Appellees.

BRIEF OF THE APPELLEE RONALD
JOSEPH, M.D.

Case No. 20090716-CA

Appeal from the Third District Court, Salt Lake County, Judge Judith S. Atherton

David E. Ross, II
Bellemarc Building, Suite 209
1912 Sidewinder Drive
Park City, UT 84060
Attorney for Plaintiff/Appellant

Eric P. Schoonveld
Jason Watson
HALL PRANGLE & SCHOONVELD, LLC
136 East South Temple, Suite 2450
Salt Lake City, UT 84111
*Attorneys for Defendant/Appellee
Northern Utah HealthCare Corporation
dba St. Mark's Hospital*

R. Scott Williams, #3498
Peter J. Baxter, #10193
STRONG & HANNI
3 Triad Center, Suite 500
Salt Lake City, UT 84180
Telephone: (801) 532-7080
Facsimile: (801) 596-1508
swilliams@strongandhanni.com
pbaxter@strongandhanni.com
*Attorneys for Defendant/Appellee
Ronald Joseph, M.D.*

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF JURISDICTION	1
STATEMENT OF THE ISSUES	1
DETERMINATIVE LAW	2
STATEMENT OF THE CASE	4
STATEMENT OF FACTS	5
A. Medical Care of Larry Roth	5
B. Mr. Roth's Legal Action against Dr. Voorhees	10
C. Mr. Roth's Legal Action against Dr. Joseph	12
D. Mr. Roth's Legal Action against Dr. Pedersen	13
SUMMARY OF THE ARGUMENTS	14
ARGUMENT	16
A. This Court Should Affirm the Summary Judgment Order Entered by the Trial Court as There Is No Genuine Issue of Material Fact That Mr. Roth's Claims Against Dr. Joseph Are Barred by the Statute of Limitations	16
B. This Court Should Affirm the Summary Judgment Order Entered by the Trial Court as There Is No Genuine Issue of Material Fact That Dr. Joseph Did Not Affirmatively Acted to Fraudulently Conceal His Alleged Misconduct	23
1. <u>Mr. Roth's Fraudulent Concealment Claim Is Baseless</u>	24

	<u>Page</u>
2. <u>Mr. Roth’s Fraudulent Concealment Claim Is Irrelevant</u> <u>Because Mr. Roth Discovered His Legal Injury on</u> <u>October 13, 2004, or at the Very Latest January 5, 2005.</u>	25
C. This Court Should Affirm the Summary Judgment Order Entered by the Trial Court since under the Legal Doctrine of Issue Preclusion, the Statute of Limitations Began to Run on Mr. Roth’s Claim on October 13, 2004.	26
CONCLUSION	29

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases Cited</u>	
<i>Allred v. Allred</i> , 2008 UT 22, 182 P.3d 337	2
<i>Daniels v. Gamma West Brachytherapy</i> , 2009 UT 66, 221 P.3d 256.	17
<i>DeBry v. Noble</i> , 889 P.2d 428 (Utah 1995)	24
<i>Deschamps v. Pulley</i> , 784 P.2d 471 (Utah App. 1989)	19
<i>Foil v. Ballinger</i> , 601 P.2d 144 (Utah 1979)	17
<i>Jensen v. IHC Hospitals, Inc.</i> , 2003 UT 51, 82 P.3d 1076	18
<i>Oman v. Davis School District</i> , 2008 UT 70, 194 P.3d 956	27, 28, 29
<i>Roth v. Pedersen</i> , 2009 UT App 313	14, 18
<i>Smith v. Four Corners Mental Health Ctr., Inc.</i> , 2003 UT 23, 70 P.3d 904	2
<i>Smith v. Frandsen</i> , 2004 UT 55, 94 P.3d 919	2, 27

Statutes and Other Authorities Cited

Utah Code Ann. § 78A-3-102	1
Utah Code Ann. § 78B-3-404	3, 4, 16, 17, 21,23, 24, 26, 29
Utah R. Civ. P. 9	24
Utah R. Civ. P. 12	26
Utah R. Civ. P. 56	1, 2, 3, 18, 22, 23

STATEMENT OF JURISDICTION

The Utah Supreme Court has original jurisdiction of this appeal pursuant to Utah Code Ann. § 78A-3-102(3). The Supreme Court transferred the case to the Utah Court of Appeals pursuant to Utah Code Ann. § 78A-3-102(4). This appeal is properly before the Court of Appeals.

STATEMENT OF THE ISSUES

Mr. Roth raises two issues on appeal that pertain to Dr. Joseph.¹ The first is whether the trial court erred in finding that there was no genuine issue of material fact that on October 13, 2004, or at the very latest, January 5, 2005, Mr. Roth discovered, or through the use of reasonable diligence should have discovered, his legal injury. The second is whether the trial court erred in finding there was no genuine issue of material fact that Mr. Roth was not prevented from discovering Dr. Joseph's alleged misconduct through Dr. Joseph's affirmative act to fraudulently conceal his alleged misconduct. Mr. Roth preserved these two issues before the trial court. However, Dr. Joseph disputes the allegations raised and conclusions reached by Mr. Roth pertaining to these two issues.

In considering the issues raised in this appeal, the Court should employ the following standard: Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of

¹ Mr. Roth presents a total of three issues on appeal. The first issue applies to St. Mark's Hospital and will be addressed in its separate appellee brief. The remaining two issues apply to Dr. Joseph and will be addressed herein.

law.”² Utah R. Civ. P. 56(c). “The Court must view all facts and inferences in the light most favorable to the nonmoving party, but *it may not assume facts for which no evidence [has been] offered.*” *Allred v. Allred*, 2008 UT 22, ¶ 15, 182 P.3d 337 (citations omitted) (emphasis added). The Court reviews the lower Court’s legal conclusions for correctness. *See Smith v. Four Corners Mental Health Ctr., Inc.*, 2003 UT 23, ¶ 13, 70 P.3d 904. However, “it may affirm the result reached by the trial court if it is sustainable on any legal ground or theory apparent on the record, even though that ground or theory was not identified by the lower court as the basis of its ruling.” *Smith v. Frandsen*, 2004 UT 55, ¶ 6, 94 P.3d 919 (citations omitted).

DETERMINATIVE LAW

The following determinative law is applicable:

Rule 56 (b) and (c) of the Utah Rules of Civil Procedure:

(b) *For defending party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move for summary judgment as to all or any part thereof.

(c) *Motion and proceedings thereon.* The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings,

² Mr. Roth claims “it is only necessary for [the] nonmoving party to show facts controverting the facts stated in [the] moving party’s affidavit.” (Brief of Appellant, p. 4.) Mr. Roth’s interpretation of the summary judgment standard is too sweeping. Opposing a summary judgment motion requires more than controverting the moving party’s factual allegations. Summary judgment requires the opposing party to controvert *material* facts. *See* Utah R. Civ. P. 56(c).

depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Utah Code Ann. § 78B-3-404:

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

(2) Notwithstanding Subsection (1):

(a) in an action where the allegation against the health care provider is that a foreign object has been wrongfully left within a patient's body, the claim shall be barred unless commenced within one year after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered, the existence of the foreign object wrongfully left in the patient's body, whichever first occurs; or

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

(3) The limitations in this section shall apply to all persons, regardless of minority or other legal disability under Section 78B-2-108 or any other provision of the law.

STATEMENT OF THE CASE

This is a medical malpractice action from the Third District Court that was filed by Larry Roth against Dr. Ronald Joseph, a gastroenterologist. Mr. Roth claims that during a colonoscopy on April 28, 2004, Dr. Joseph failed to tattoo a polypectomy site³ properly, and/or with reliable ink. (R. at 7.) This alleged failure caused the surgery to remove the cancerous polypectomy site to be unsuccessful, thereby necessitating a second surgery which caused Mr. Roth damages. (R. at 163-173.) However, the statute of limitations began running on Mr. Roth's cause of action against Dr. Joseph more than two years before Mr. Roth initiated his lawsuit against Dr. Joseph. Accordingly, on January 20, 2009, Dr. Joseph filed a Motion for Summary Judgment asking the Court to dismiss Mr. Roth's claims against him with prejudice because they were barred by the statute of limitations, Utah Code Ann. § 78B-3-404. (R. at 127-129.)

Although fact discovery on Mr. Roth's claims against Dr. Joseph had not begun, fact discovery had been conducted in a separate arbitration proceeding brought by Mr. Roth against Dr. Hugh Voorhees, the general surgeon who performed the unsuccessful surgery to remove the cancerous polypectomy site. Since the facts giving rise to Mr. Roth's claim against Dr. Voorhees are the same that give rise to Mr. Roth's claims against

³ A "polypectomy site" is an area of the colon where a polyp has been removed.

Dr. Joseph, they were set forth and relied upon in Dr. Joseph's Motion for Summary Judgment.

After Dr. Joseph's Motion was fully briefed by the parties, the Honorable Judith S. Atherton heard oral argument on June 19, 2009. (R. at 328-329.) After hearing arguments from the parties, the Court granted Dr. Joseph's Motion for Summary Judgment. (R. at 408.) The Order granting Dr. Joseph's Motion and dismissing Mr. Roth's claims against him with prejudice was entered by the Court on July 14, 2009.⁴ (R. at 409-412.)

On August 26, 2009, Mr. Roth filed a Notice of Appeal. (R. at 425-427.) The appeal was subsequently transferred to this Court for consideration. (R. at 435.)

As the following will show, the trial court properly dismissed Mr. Roth's claims because there was no genuine issue of material fact that the statute of limitations began running on Mr. Roth's cause of action against Dr. Joseph more than two years before Mr. Roth initiated a lawsuit against Dr. Joseph. Accordingly, this Court should affirm the decision of the Third Judicial Court.

⁴ An Order granting St. Mark's Hospital's Motion for Summary Judgment was entered by the Court on July 28, 2009. (R. at 423-424.)

STATEMENT OF FACTS

A. Medical Care of Larry Roth

1. On April 28, 2004, Dr. Joseph performed a colonoscopy on Mr. Roth. During the procedure, Dr. Joseph removed a 2.5 cm polyp along with several other smaller polyps. (*See R. 150.*)

2. Dr. Joseph noted that the 2.5 cm polyp he removed was 15 cm from the anal verge. (*See R. 150.*) Dr. Joseph also noted in his April 28, 2004 Colonoscopy Report that he tattooed above and below the polypectomy site with ink. (*See R. 150.*) The ink Dr. Joseph used was SPOT ink. (*R. at 165.*)

3. One of the purposes of tattooing a polypectomy site with ink is to help the surgeon identify the section of colon containing the polypectomy site if it is later determined that the site needs to be removed. Mr. Roth testified that he understood this purpose of tattooing:

Q. Mr. Roth, do you understand how these markings are placed in the bowel in the first place by someone like Dr. Joseph, who is going to try and identify an area that he wants a surgeon or someone else to look at? Do you have a basic understanding of how that's done?

A. I know how it works, because Dr. Joseph had told me what he was – what he had done, that he had marked this area. That was with – you know, at the very beginning. He says, “I have put a dye mark on each side of that so that they’ll be able to” –

(*R. at 157-158.*)

4. The Pathology Report from the April 28, 2004 colonoscopy noted that the 2.5 cm polyp that was removed was “moderately-differentiated adenocarcimona” and that the “tumor invades into submucosa and probably touches cauterized surgical margin.” (R. at 160-161.)

5. Based on the results from the Pathology Report, Mr. Roth was referred to Dr. Hugh Voorhees, a general surgeon, for resection of the part of Mr. Roth’s colon that contained the polypectomy site because there was a potential for lingering cancer cells in that area of the colon. (*See* R. 165.)

6. On May 24, 2004, Dr. Voorhees performed surgery on Mr. Roth to remove the section of Mr. Roth’s colon containing the polypectomy site. (*See* R. 165.)

7. During the surgery, Dr. Voorhees was unable to clearly identify the polypectomy site that Dr. Joseph tattooed with ink.⁵ As a result, Dr. Voorhees contacted Dr. Joseph who was unavailable. Dr. Voorhees then contacted Dr. Joseph’s partner, Dr. Peder J. Pedersen, who came to the operating room to help Dr. Voorhees find the tattooed polypectomy site. (*See* R. 175-176.)

8. While Dr. Voorhees was waiting for Dr. Pedersen, he removed 25 cm of Mr. Roth’s colon that Dr. Voorhees identified as the “most likely area” containing the polypectomy site. (*See* R. 175.) After Dr. Pedersen arrived, Dr. Voorhees and Dr.

⁵ In his Operative Note, Dr. Voorhees noted: “The colon is freed up to the area where the 15 to 20 cm would be. Unfortunately, I cannot identify the India ink injected. I can see one area at about the 15 cm mark where I can see a spot of dye in the mesentery . . . I could only see one dye spot.” (R. at 175.)

Pedersen were unable to identify the tattooed polypectomy site, despite Dr. Pedersen performing a sigmoidoscopy. (*See* R. 178-179.)

9. After the surgery, Dr. Voorhees informed Mr. Roth that even though he could not identify the tattooed polypectomy site, he believed he removed the correct portion of Mr. Roth's colon.

Q. Okay. What's the first thing that you remember after the surgery? After you've come out of the anesthesia and wake up, take it from there.

A. . . . Dr. Voorhees . . . explained to me that there was a problem because he couldn't find the dye marks and that he felt comfortable that they got everything anyway.

Q. Do you remember anything more that he may have said about difficulty finding the dye marks?

A. No. All I remember, in my mind, was that he couldn't find the dye marks, but he thinks he got it. That's what I remember.

(R. at 153-154.)

10. On October 13, 2004, Dr. Joseph performed a follow-up colonoscopy on Mr. Roth. Dr. Joseph inspected the area of the May 24, 2004 surgery and found that the section of colon Dr. Voorhees removed was above the previous polypectomy site. Dr. Joseph saw "some faint ink in the mucosa, but it was barely visible." (R. at 181.)

11. Mr. Roth described his discussion with Dr. Joseph following the October 13, 2004 colonoscopy:

Q. Do you remember discussing with Dr. Joseph what he had found after he had completed the October 13th procedure?

A. Absolutely.

Q. What did he tell you?

A. Still there.

Q. Well, tell me as much as you can remember about that conversation.

A. Just the fact that he says that we have gone in there, and he says, "I can see the scar tissue" – I don't remember everything he says, but basically, it wasn't removed. And I don't know what my reaction was with that. I mean, I was – I was not happy, naturally . . . [A]s we were talking back and forth is when he recommended that I go see Dr. Burt.

(R. at 155-156.)

12. Mr. Roth was referred by Dr. Joseph to the University of Utah where on November 8, 2004, he underwent another colonoscopy. Two tattoos identifying the polypectomy site from Dr. Joseph's first colonoscopy on April 28, 2004 were identified during the procedure. (*See* R. 183-186.)

13. On January 24, 2005, Dr. Bradford Sklow, a colorectal surgeon, performed an anterior resection of the rectosigmoid colon to remove the polypectomy site identified

during Dr. Joseph's first colonoscopy in April 28, 2004. Dr. Sklow also performed a diverting loop ileostomy.⁶ (*See* R. 188-192.)

14. Pathology studies performed on the resected colon showed no malignancy. (*See* R. 194-195.)

B. Mr. Roth's Legal Action against Dr. Voorhees.

15. On January 5, 2005, prior to the surgery discussed in paragraph 13 above, Mr. Roth obtained for himself a copy of his complete medical file from Dr. Voorhees. (*See* R. 197-198.)⁷

16. Dr. Voorhees' medical chart contains numerous references to Dr. Joseph's involvement in Mr. Roth's care, including copies of medical records Dr. Joseph generated pertaining to his care of Mr. Roth. Dr. Voorhees' medical chart also includes Dr. Pedersen's records pertaining to his involvement in the case.

17. In addition, Dr. Voorhees' medical chart contains a letter from Dr. Voorhees to Dr. Joseph discussing what happened during the May 24, 2004 surgery. The letter states in part:

At the time of surgery, the tattooing was not found, and colonoscopy at the time of surgery was used distally and no tattooing and no lesion was identified. . . . Our discussion about the tattooing situation was very informative for me and

⁶ On April 11, 2005, Dr. Sklow reversed Mr. Roth's ileostomy.

⁷ A complete copy of Mr. Roth's medical file from Dr. Voorhees had been forwarded to the University of Utah on October 26, 2004. (*See* R. 200.)

I think in the future, either differing inks or earlier surgery may seem to solve the problem we found ourselves in.

(R. at 202.)

18. Mr. Roth claims that he did not receive a copy of the June 8, 2004 letter when he received a copy of his medical records from Dr. Voorhees (for this reason Mr. Roth argues that there is a genuine issue of material fact as to when he discovered his legal injury). However, included in the medical chart Mr. Roth received from Dr. Voorhees on January 5, 2005 is the following June 8, 2004 office note summarizing a visit Mr. Roth had with Dr. Voorhees:

[Mr. Roth] underwent sigmoid colectomy with low anterior resection on 5/24/04. . . . Dr. Ron Joseph had injected dye upstream and downstream but at the time of surgery, no dye was identified. A colonoscopy was requested during surgery and again, no dye was identified. I removed the area in question with a low anterior resection and the pathology shows no evidence of tumor This is disconcerting because the area of previous biopsy is still not positively identified. Apparently, the new dye that they are using rather than the India ink has equivocal results. They are looking into that and ways of changing the tattooing that is being done.

(R. at 288.)

19. On September 19, 2005, Mr. Roth requested from Dr. Voorhees' office a copy of the arbitration agreement he and Dr. Voorhees signed. (*See* R. 204.)

20. On May 24, 2006, Mr. Roth initiated legal action against Dr. Voorhees by filing a Notice of Claim under Arbitration Agreement. Dr. Joseph was not named as a

defendant; however, based on information and belief, his involvement in Mr. Roth's care was referenced throughout the Notice.

21. On January 25, 2007, Dr. Joseph was deposed as a fact witness in the arbitration dispute involving Mr. Roth and Dr. Voorhees.

22. In August 2007, an arbitration hearing was held to consider Mr. Roth's claims against Dr. Voorhees. The arbitration panel returned a no cause verdict in favor of Dr. Voorhees.

C. Mr. Roth's Legal Action against Dr. Joseph.

23. On December 28, 2004, prior to the surgery discussed in paragraph 13 above, Mr. Roth called Dr. Joseph's office requesting his complete medical file from Dr. Joseph. Mr. Roth informed the office that he would pick up the records on January 5, 2005. (*See* R. 206.)⁸

24. Dr. Joseph's medical chart also contains copies of medical records Dr. Voorhees and Dr. Pedersen generated pertaining to their care of Mr. Roth. Dr. Joseph's medical chart also includes the June 8, 2004 letter Dr. Voorhees sent Dr. Joseph that is referenced in paragraph 17 above.

25. On or about May 9, 2007, following Dr. Joseph's deposition, Mr. Roth filed a Notice of Intent to Commence Malpractice Action against Dr. Joseph with the Division of Occupational and Professional Licensing ("the Division"). The parties agreed to waive

⁸ A complete copy of Mr. Roth's medical file from Dr. Joseph had been forwarded to the University of Utah on October 22, 2004. (*See* R. 208.)

the prelitigation hearing and as a result, on August 28, 2007, the Division issued a Certificate of Compliance.

26. On or about January 17, 2008, Mr. Roth filed a Complaint and Jury Demand against Dr. Joseph alleging damages for medical malpractice. Mr. Roth alleged that as a result of Dr. Joseph failing to tattoo the polypectomy site properly, and/or with reliable ink, the May 24, 2004 surgery was unsuccessful, necessitating a second surgery which caused him damages. (*See* R. 169-170.)

27. On January 20, 2009, Dr. Joseph filed a Motion for Summary Judgment asking the Court to dismiss Mr. Roth's claims against him with prejudice because they were barred by the statute of limitations, Utah Code Ann. § 78B-3-404. (R. at 127-129.)

28. On June 19, 2009, after Dr. Joseph's Motion was fully briefed by the parties, the Honorable Judith S. Atherton heard oral argument and granted Dr. Joseph's Motion for Summary Judgment. (R. at 328-329, 408.)

29. The Order granting Dr. Joseph's Motion and dismissing Mr. Roth's claims against him with prejudice was entered by the Court on July 14, 2009. (R. at 409-412.)

D. Mr. Roth's Legal Action against Dr. Pedersen.

30. On or about August 21, 2008 (prior to Dr. Joseph filing his Motion for Summary Judgment), Mr. Roth filed a separate legal action in the Third District Court against Dr. Pedersen alleging damages based on Dr. Pedersen's involvement in Mr. Roth's care.

31. On December 23, 2008, based on a Motion for Judgment on the Pleadings which was filed by Dr. Pedersen, Judge Denise P. Lindberg dismissed Mr. Roth's case against Dr. Pedersen because the statute of limitations had run on Mr. Roth's claim. Judge Lindberg ruled that "the two year statute of limitations governing [Mr. Roth's] legal action . . . commenced running on or about October 13, 2004, when [Mr. Roth's] was placed on notice that he had received a legal injury." (*See* R. 210-214.)

32. Mr. Roth's appeal of Judge Lindberg's decision was heard by this Court. On October 29, 2009, this Court filed a Memorandum Decision affirming Judge Lindberg's dismissal with prejudice of Mr. Roth's claim against Dr. Pedersen. *See Roth v. Pedersen*, 2009 UT App 313 (unpublished memorandum decision).

SUMMARY OF THE ARGUMENTS

The statute of limitations begins to run when a person knows or should have known through the use of reasonable diligence that they have suffered a legal injury. Mr. Roth claims that on April 28, 2004, Dr. Joseph failed to tattoo the polypectomy site properly, and/or with reliable ink. (R. at 169.) Mr. Roth understood that the reason tattoos were made by Dr. Joseph during the colonoscopy was so a surgeon could find the proper area of the colon to resect if he required a subsequent surgery. (R. at 157-158.) Given this understanding, Mr. Roth became aware of Dr. Joseph's alleged negligence on May 24, 2004 when Dr. Voorhees informed Mr. Roth that during surgery to remove a section of Mr. Roth's colon, he could not identify the polypectomy site Dr. Joseph tattooed. (R. at 153-154.)

On October 13, 2004, Mr. Roth discovered that Dr. Joseph's alleged negligence resulted in an injury. On October 13, 2004, Dr. Joseph performed a follow-up colonoscopy, inspected the area of the May 24, 2004 surgery and found that the piece of colon Dr. Voorhees removed was above the polypectomy site. (R. at 181.) Mr. Roth understood that the polypectomy site that should have been removed during the May 24, 2004 surgery was not. (R. at 155-156.) Thus, on October 13, 2004, Mr. Roth discovered, or through the use of reasonable diligence should have discovered that Dr. Joseph allegedly failed to tattoo the polypectomy site properly, and/or with reliable ink, causing the May 24, 2004 surgery to be unsuccessful.

The fact that Mr. Roth discovered his legal injury on October 13, 2004 is evidenced by Mr. Roth's actions thereafter. On December 28, 2004, Mr. Roth called Dr. Joseph's office requesting his complete medical file from Dr. Joseph. (R. at 206.) On January 5, 2005, Mr. Roth obtained his complete medical file from Dr. Joseph and Dr. Voorhees. (R. at 197-196, 206.) These medical charts detail the care Mr. Roth received that is at issue in this case and therefore, at the latest, Mr. Roth discovered his legal injury on January 5, 2005.

Since the statute of limitations began running on Mr. Roth's cause of action against Dr. Joseph on October 13, 2004 and no later than January 5, 2005, the two year statute of limitations expired on October 13, 2006 and no later than January 5, 2007. Since Mr. Roth did not file his lawsuit against Dr. Joseph until May 9, 2007, Mr. Roth's claims against Dr. Joseph are barred.

Mr. Roth argues that his claims against Dr. Joseph are not barred by the statute of limitations because pursuant to Utah Code Ann. § 78B-3-404(2)(b), Dr. Joseph fraudulently concealed his alleged misconduct. Mr. Roth's fraudulent concealment claim is baseless as Mr. Roth has cited to no facts to support this assertion. Also, Mr. Roth's fraudulent concealment claim fails to recognize that Mr. Roth actually discovered his legal injury on October 13, 2004, or at the latest on January 5, 2005.

Finally, Mr. Roth's claims are barred under the doctrine of issue preclusion. Since Judge Denise Lindberg ruled in Mr. Roth's separate legal case against Dr. Pedersen that the statute of limitations began running on Mr. Roth's claim on October 13, 2004, the Court should also recognize that the statute of limitations began running on Mr. Roth's claim in his case against Dr. Joseph on October 13, 2004.

For all of these reasons that are more fully set forth below, the trial court properly dismissed all of Mr. Roth's claims against Dr. Joseph with prejudice.

ARGUMENT

A. This Court Should Affirm the Summary Judgment Order Entered by the Trial Court as There Is No Genuine Issue of Material Fact That Mr. Roth's Claims Against Dr. Joseph Are Barred by the Statute of Limitations.

Mr. Roth's claims against Dr. Joseph are barred by the statute of limitations. The Utah Medical Malpractice Act states:

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

exceed four years after the date of the alleged act, omission, neglect or occurrence.

Utah Code Ann. § 78B-3-404(1) (emphasis added).

The statute of limitations begins to run when a person knows or should have known that they have suffered an injury. *Foil v. Ballinger*, 601 P.2d 144, 148 (Utah 1979). The Utah Supreme Court has defined the word “injury” in Utah Code Ann. § 78B-3-404(1), as “legal injury” and that “the term discovery of injury . . . means discovery of injury and the negligence which resulted in the injury.” *Id.* Or, as recently clarified by the Supreme Court, discovery of injury means discovery of the causal event. *Daniels v. Gamma West Brachytherapy*, 2009 UT 66, ¶ 29, 221 P.3d 256.

At oral argument to consider Dr. Joseph’s Motion for Summary Judgment, Mr. Roth’s counsel conceded the following:

[In Mr. Roth’s separate legal case against Dr. Pedersen] the Court did find – and we have appealed it, but it was a final judgment that the date of the discovery of the injury was October 13th, 2004. Actually – and I know opposing Counsel has raised some arguments on that. I don’t think we’ve ever challenged that. He knew on that date – I think that’s just a factual matter that on that date he was informed by Dr. Joseph that Dr. Voorhees had – did not resect the polypectomy site. At that point in time he knew that the cancerous tumor was still there. So at that point in time he knew that – you know, he suffered the injury.

(Supp. R. 17.)

In spite of this concession, Mr. Roth alleges that he did not know Dr. Joseph was negligent until discovery began in his separate arbitration case against Dr. Voorhees,

beginning with the deposition of Dr. Joseph on January 25, 2007. Mr. Roth argues that his allegation that he was unaware of Dr. Joseph's involvement until discovery began in his lawsuit against Dr. Voorhees creates a genuine issue of material fact as to when he discovered his injury. However, apart from his *allegation*, Mr. Roth has not pointed to any *fact* to refute the basis of the trial court's Summary Judgment Order that he discovered his injury on October 13, 2004, or at the latest on January 5, 2005. Under Rule 56(c) of the Utah Rules of Civil Procedure, summary judgment is appropriate when "there is no genuine issue as to any material fact" and absent any genuine issue of fact, Mr. Roth's allegations are insufficient to overcome summary judgment.⁹

Mr. Roth's allegation that he did not know Dr. Joseph was negligent until after discovery began in his case against Dr. Voorhees is also without merit because "[a] plaintiff need not have certain knowledge of negligence in order to have discovered it. All that is necessary is that the plaintiff be aware of facts that would lead an ordinary person, using reasonable diligence, to conclude that a claim for negligence may exist." *Jensen v. IHC Hospitals, Inc.*, 2003 UT 51, ¶ 61, 82 P.3d 1076 (citations omitted). The

⁹ Mr. Roth also relies on *Roth v. Pedersen*, 2009 UT App 313 (unpublished memorandum decision), his appeal of the dismissal of his case against Dr. Pedersen, claiming that the statute of limitations did not begin to run on his claims against Dr. Joseph until May 24, 2006. In *Roth*, this Court did not hold that Mr. Roth discovered his injury *on* May 24, 2006; rather, that *by* May 24, 2006, Mr. Roth had discovered his injury. *Roth*, 2009 UT App 313, ¶¶ 6-7. The Court did not make a determination when Mr. Roth first discovered his injury and therefore, Mr. Roth's reliance on *Roth* is misplaced.

law is clear that a plaintiff need not have absolute or certain knowledge that his injury was caused by negligence, but only reason to know of the possibility of negligence:

[A] legal determination of negligence is not necessary to start the statute of limitations. Rather, the crucial question is whether the plaintiff was aware of the facts that would lead a reasonable person to conclude that he may have a cause of action against the health care provider. Those facts include the existence of an injury, its cause and the possibility of negligence.

Deschamps v. Pulley, 784 P.2d 471, 474 (Utah App. 1989) (citations omitted).

Mr. Roth claims that on April 28, 2004, after removing a 2.5 cm polyp during a colonoscopy, Dr. Joseph failed to tattoo the polypectomy site properly, and/or with reliable ink. (*See* R. 169-170.) Mr. Roth understood that the reason Dr. Joseph made tattoos during the colonoscopy was so that a surgeon could find the proper area of the colon to resect during a subsequent surgery. (*See* R. 157-158.) Given this understanding, Mr. Roth became aware of Dr. Joseph's alleged negligence on May 24, 2004 when Dr. Voorhees informed Mr. Roth that he could not identify the tattooed polypectomy site during his surgery to remove that cancerous section of Mr. Roth's colon. (*See* R. 153-154.) Thus, on May 24, 2004, Mr. Roth discovered, or should have discovered through the use of reasonable diligence, that Dr. Joseph failed to tattoo the polypectomy site properly and/or with reliable ink.

On October 13, 2004, Mr. Roth discovered that Dr. Joseph's alleged failure to tattoo the polypectomy site properly resulted in an injury. On October 13, 2004, Dr. Joseph performed a follow-up colonoscopy, inspected the area of the May 24, 2004

surgery and found that the piece of colon Dr. Voorhees removed was above the polypectomy site. (*See* R. 181.) Mr. Roth understood that the cancerous polypectomy site Dr. Joseph tattooed was not removed during the May 24, 2004 surgery. (*See* R. 155-156.) Thus, on October 13, 2004, Mr. Roth discovered, or through the use of reasonable diligence should have discovered, a legal injury—that Dr. Joseph allegedly failed to tattoo the polypectomy site properly, and/or with reliable ink, causing the May 24, 2004 surgery to remove that cancerous section of the colon to be unsuccessful.

On December 28, 2004, Mr. Roth called Dr. Joseph's office requesting his complete medical file from Dr. Joseph. (*See* R. 206.) On January 5, 2005, Mr. Roth obtained his complete medical file from Dr. Joseph and Dr. Voorhees. (*See* R. 197-198, 206.) These medical charts detailed the care Mr. Roth received that is at issue in this case. Furthermore, both charts contained a letter Dr. Voorhees sent Dr. Joseph on June 8, 2004 discussing what happened during the surgery:

At the time of surgery, the tattooing was not found, and colonoscopy at the time of surgery was used distally and no tattooing and no lesion was identified. . . . Our discussion about the tattooing situation was very informative for me and I think in the future, either differing inks or earlier surgery may seem to solve the problem we found ourselves in.

(R. at 202.)

Mr. Roth claims that he did not receive a copy of the June 8, 2004 letter when he received a copy of his medical records from Dr. Voorhees and that he was first made aware of the information in the letter after discovery began in his lawsuit against Dr.

Voorhees. For this reason, Mr. Roth argues that there is a genuine issue of material fact as to when he discovered his legal injury. However, this claim lacks merit because assuming *arguendo* that Mr. Roth did not receive the June 8, 2004 letter, the information in the letter was included in Dr. Voorhees' June 8, 2004 office note. The June 8, 2004 office note was included in the medical chart Mr. Roth received from Dr. Voorhees on January 5, 2005. The June 8, 2004 office note provides as follows:

[Mr. Roth] underwent sigmoid colectomy with low anterior resection on 5/24/04. . . . Dr. Ron Joseph had injected dye upstream and downstream but at the time of surgery, no dye was identified. A colonoscopy was requested during surgery and again, no dye was identified. I removed the area in question with a low anterior resection and the pathology shows no evidence of tumor This is disconcerting because the area of previous biopsy is still not positively identified. Apparently, the new dye that they are using rather than the India ink has equivocal results. They are looking into that and ways of changing the tattooing that is being done.

(R. at 288.)¹⁰

Thus, on no later than January 5, 2005, Mr. Roth discovered, or through the use of reasonable diligence should have discovered, his legal injury.

Considering all these facts, under Utah Code Ann. § 78B-3-404(1), the statute of limitations began running on Mr. Roth's cause of action against Dr. Joseph on October 13, 2004, and no later than January 5, 2005. Accordingly, the two year statute of limitations expired on October 13, 2006, and no later than January 5, 2007. Mr. Roth did

¹⁰ Mr. Roth has not claimed that he did not receive this June 8, 2004 office note in the records he obtained on January 5, 2005.

not file his Notice of Intent to Commence Malpractice Action against Dr. Joseph until May 9, 2007, after the statute of limitations ran on Mr. Roth's claims against Dr. Joseph regardless of whether it began running on October 13, 2004 or January 5, 2005. Thus, since the statute of limitations ran on Mr. Roth's cause of action against Dr. Joseph, the trial court properly entered an Order dismissing all of Mr. Roth's claims against Dr. Joseph with prejudice. This Court should affirm that Order.

Mr. Roth has repeatedly alleged that he was unaware of Dr. Joseph's identity and/or role in this case until Dr. Joseph's deposition.¹¹ The facts set forth above refute this allegation. There is more than ample evidence that Mr. Roth was aware of Dr. Joseph's identity and role in this case from the beginning. Mr. Roth has not pointed to any fact to refute these facts set forth above.

Finally, Mr. Roth argues that when he discovered his injury is a question of fact and therefore, should be a consideration for a jury, not the judge. While the determination of when a plaintiff discovers, or through the use of reasonable diligence,

¹¹ Mr. Roth has done this via affidavit and reliance on the allegations in his Complaint wherein he claims he was unaware of Dr. Joseph's alleged involvement until Dr. Joseph's deposition in his case against Dr. Voorhees. (*See* R. 233-237.) However, Mr. Roth provided no facts to support this claim in his Complaint or Affidavit or facts to refute the conclusions reached in Dr. Joseph's pleadings. Accordingly, pursuant to Rule 56(e) of the Utah Rules of Civil Procedure, Mr. Roth's Complaint and Affidavit are insufficient to create a genuine issue of material fact such to overcome the trial court's Summary Judgment Order. *See* Utah R. Civ. P. 56(e) ("When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.").

should have discovered an injury is a question of fact, it does not mean it is only a determination for a jury. Under Rule 56(c) of the Utah Rules of Civil Procedure, summary judgment is appropriate when “there is no genuine issue as to any material fact.” As set forth above, there is no genuine issue of fact to dispute that under Utah Code Ann. § 78B-3-404(1), the statute of limitations began running on Mr. Roth’s cause of action against Dr. Joseph on October 13, 2004 and no later than January 5, 2005. The two year statute of limitations expired by the time Mr. Roth began his lawsuit against Dr. Joseph. Therefore, the trial court properly ruled that Mr. Roth’s claim against Dr. Joseph is barred. Accordingly, this Court should affirm the trial court’s Order dismissing all of Mr. Roth’s claims against Dr. Joseph with prejudice.

B. This Court Should Affirm the Summary Judgment Order Entered by the Trial Court as There Is No Genuine Issue of Material Fact That Dr. Joseph Did Not Affirmatively Acted to Fraudulently Conceal His Alleged Misconduct.

Mr. Roth argues that his claims against Dr. Joseph are not barred by the statute of limitations because pursuant to Utah Code Ann. § 78B-3-404(2)(b), Dr. Joseph fraudulently concealed his alleged misconduct. As the following will show, Mr. Roth’s fraudulent concealment claim: (1) is baseless; and (2) fails to recognize that Mr. Roth actually discovered his legal injury on October 13, 2004, or at the latest on January 5, 2005.

1. Mr. Roth's Fraudulent Concealment Claim Is Baseless.

Without sufficient factual support, Mr. Roth attempts to rely on a fraudulent concealment claim to give new life to his time-barred action. The statute, however, requires more than Mr. Roth has provided:

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

Utah Code Ann. § 78B-3-404(2)(b) (emphasis added). Where fraudulent concealment is alleged, the circumstances forming the basis for the allegation must be stated with particularity. *See* Utah R. Civ. P. 9(b); *DeBry v. Noble*, 889 P.2d 428, 443 (Utah 1995).

In order to prove he was prevented from discovering Dr. Joseph's alleged misconduct, Mr. Roth must establish two elements: (1) that Dr. Joseph acted affirmatively, in (2) fraudulently concealing his misconduct. Mr. Roth has cited to no evidence that establishes these two elements with particularity. All Mr. Roth claims is that he did not receive the June 8, 2004 letter manifesting Dr. Joseph was aware of problems with the SPOT ink he used to tattoo Mr. Roth's polypectomy site before he performed the colonoscopy.

Assuming *arguendo* that Mr. Roth was never provided a copy of the June 8, 2004 letter from Dr. Voorhees to Dr. Joseph, the information from that letter was reiterated by Dr. Voorhees in an office visit note in Mr. Roth's medical chart. The note states:

[Mr. Roth] underwent sigmoid colectomy with low anterior resection on 5/24/04. . . . Dr. Ron Joseph had injected dye upstream and downstream but at the time of surgery, no dye was identified. A colonoscopy was requested during surgery and again, no dye was identified. I removed the area in question with a low anterior resection and the pathology shows no evidence of tumor This is disconcerting because the area of previous biopsy is still not positively identified. Apparently, the new dye that they are using rather than the India ink has equivocal results. They are looking into that and ways of changing the tattooing that is being done.

(R. at 288.) Mr. Roth obtained a copy of this record on January 5, 2005. Thus, assuming Mr. Roth never received a copy of the June 8, 2004 letter, his claim that this information was concealed from him is baseless because the information in the June 8, 2004 letter was also reiterated in Mr. Roth's medical chart, a copy of which he received.

All Mr. Roth has done is speculated that Dr. Joseph fraudulently concealed information. Mr. Roth has cited to no facts to support this claim. Mr. Roth's fraudulent concealment claim is a desperate attempt to avoid the fact that he discovered his injury on October 13, 2004, or at the very latest, January 5, 2005. This allegation falls well short of pleading with particularity. Accordingly, Mr. Roth's fraudulent concealment claim is baseless.

2. Mr. Roth's Fraudulent Concealment Claim Is Irrelevant Because Mr. Roth Discovered His Legal Injury on October 13, 2004, or at the Very Latest January 5, 2005.

There is no evidence that Dr. Joseph fraudulently concealed his alleged misconduct. Even assuming Dr. Joseph attempted to fraudulently conceal his alleged misconduct, such action is irrelevant because Mr. Roth has not and cannot refute the fact

that he had obtained sufficient information for the statute of limitations to begin running on October 13, 2004, or the very latest, January 5, 2005.

The statute of limitations begins to run when a person knows or should have known that they have suffered an injury and the negligence and cause which resulted in the injury. As set forth in Part A above, under Utah Code Ann. § 78B-3-404(1), the statute of limitations began running on Mr. Roth's cause of action against Dr. Joseph on October 13, 2004, and no later than January 5, 2005. Accordingly, the two year statute of limitations expired before Mr. Roth initiated his lawsuit against Dr. Joseph. Given the facts set forth in Part A above, it is irrelevant whether Dr. Joseph attempted to fraudulently conceal his alleged misconduct. Mr. Roth had sufficient information by October 13, 2004, and no later than January 5, 2005 for the statute of limitations to begin running regardless of Dr. Joseph's actions.

C. This Court Should Affirm the Summary Judgment Order Entered by the Trial Court since under the Legal Doctrine of Issue Preclusion, the Statute of Limitations Began to Run on Mr. Roth's Claim on October 13, 2004.

In the separate lawsuit brought by Mr. Roth against Dr. Pedersen in the Third District, the Court ruled that the statute of limitations began to run on Mr. Roth's malpractice claims on October 13, 2004. (*See* R. 212.) Under the legal doctrine of issue preclusion, Mr. Roth is bound by that same ruling in this case.¹² While the trial court did

¹² Mr. Roth argued to the trial court that Dr. Joseph did not raise "res judicata" as an affirmative defense in his answer and therefore, under Rule 12(h) of the Utah Rules of Civil Procedure, he has waived the right to raise it now. Dr. Joseph has never raised the issue of

not base its granting of Dr. Joseph's Motion for Summary Judgment on the doctrine of issue preclusion, this Court may affirm the trial court's Order "if it is sustainable on any legal ground or theory apparent on the record, even though that ground or theory was not identified by the lower court as the basis of its ruling." *Smith*, 2004 UT 55, ¶ 6 (citations omitted). Dr. Joseph offers issue preclusion as another reason why the trial court's decision should be upheld.

Issue preclusion is different than claim preclusion, in that issue preclusion "prevents parties . . . from relitigating facts and issues in the second suit that were fully litigated in the first suit." *Oman v. Davis School District*, 2008 UT 70, ¶ 28, 194 P.3d 956. Furthermore, "where two causes of action embody the same dispositive issue, a prior determination of that issue in the context of one cause of action can have a preclusive effect in later litigation regarding the other cause of action. . . . [I]ssue preclusion prevents the relitigation of issues that have been once litigated and determined in another action even though the claims for relief in the two actions may be different." *Oman*, 2008 UT 70, ¶ 31.

In order for issue preclusion to apply, the following four elements must be met:

res judicata. Dr. Joseph has raised the separate legal doctrine of issue preclusion. Furthermore, on April 14, 2008, when Dr. Joseph filed his answer, the doctrine of issue preclusion was not available because Mr. Roth had not yet brought a lawsuit against Dr. Pedersen. On December 23, 2008, Mr. Roth had brought a lawsuit against Dr. Pedersen and Judge Lindberg issued her ruling that the statute of limitations began running on Mr. Roth's claim on October 13, 2004. Within a month of Judge Lindberg's ruling, Dr. Joseph filed his Motion for Summary Judgment invoking the issue preclusion doctrine. Therefore, any claim Dr. Joseph waived this defense is without merit.

(i) the party against whom issue preclusion is asserted must have been a party to or in privity with a party to the prior adjudication; (ii) the issue decided in the prior adjudication must be identical to the one presented in the instant action; (iii) the issue in the first action must have been completely, fully, and fairly litigated; and (iv) the first suit must have resulted in a final judgment on the merits.

Oman, 2008 UT 70, ¶ 29.

Based on the four elements set forth in *Oman*, issue preclusion applies in this case. Mr. Roth brought a separate medical malpractice case in the Third District Court against Dr. Pedersen for his involvement in Mr. Roth's care (*Oman* Element #1). After the case was filed, Dr. Pedersen filed a Motion to Dismiss claiming that the statute of limitations barred Mr. Roth's claim against him because the statute of limitations began to run on October 13, 2004. While Dr. Pedersen filed a motion to dismiss and Dr. Joseph filed a motion for summary judgment, they each addressed precisely the same issue—that Mr. Roth's claim against him is barred because the statute of limitations began to run on October 13, 2004 (*Oman* Element #2). The issue of when the statute of limitations began to run on Mr. Roth's claim for malpractice was completely, fully and fairly litigated in the case involving Dr. Pedersen. The issue was fully briefed by the parties and thereafter, the Court ruled that the statute of limitations began to run on Mr. Roth's malpractice claims on October 13, 2004 (*Oman* Element #3). (*See* R. 212.) Based on the Court's ruling that the statute of limitations began running on Mr. Roth's claim on October 13, 2004, Mr. Roth's claim was dismissed with prejudice and on the merits (*Oman* Element #4). (*See* R. 212.)

Since each of the four elements in *Oman* are met as discussed above, issue preclusion applies in this case. Accordingly, because Judge Lindberg ruled in Mr. Roth's case against Dr. Pedersen that the statute of limitations began running on Mr. Roth's claim on October 13, 2004, the Court should recognize that the statute of limitations began running on Mr. Roth's claim against Dr. Joseph on October 13, 2004. By doing so, Mr. Roth's claim against Dr. Joseph is barred since he filed a lawsuit on May 9, 2007, approximately seven months after the two year statute of limitations had passed. Such a ruling would maintain consistency in the rulings from the trial courts. It would also promote judicial economy as it would prevent plaintiffs from bringing separate case against each potential tortfeasor. Therefore, this Court should affirm the trial court's Order dismissing all of Mr. Roth's claims against Dr. Joseph with prejudice.

CONCLUSION

The statute of limitations has run on Mr. Roth's cause of action against Dr. Joseph pursuant to Utah Code Ann. § 78B-3-404. Therefore, this Court should uphold the trial court's Order granting Dr. Joseph's Motion for Summary Judgment.

DATED this 19th day of February, 2010.

STRONG & HANNI

By: 

R. Scott Williams

Peter J. Baxter

Attorney for Defendant/Appellee

Ronald D. Joseph, M.D.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing BRIEF OF THE APPELLEE RONALD JOSEPH, M.D. was mailed, first class, postage prepaid, and sent via electronic mail, on this the 19th day of February, 2010, to the following:

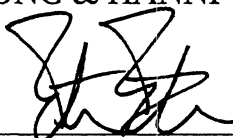
David E. Ross, II
Bellemarc Building, Suite 209
1912 Sidewinder Drive
Park City, UT 84060
deross2@msn.com

Eric P. Schoonveld
Jason Watson
HALL PRANGLE & SCHOONVELD, LLC
136 East South Temple, Suite 2450
Salt Lake City, UT 84111
eric@hpslaw.com
jwatson@hpslaw.com

DATED this 19th day of February, 2010.

STRONG & HANNI

By: _____



Peter J. Baxter

Attorney for Defendant/Appellee
Ronald D. Joseph, M.D.

1544.0569