

2009

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

Utah Court of Appeals

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R. Scott Williams, Esq.; Peter J. Baxter, Esq.; Strong and Hanni; Attorneys for Appellee.

Eric P. Schoonveld, Esq.; Jason Watson, Esq.; Hall Prangle and Schoonveld, LLC; Attorneys for Appellee.

David E. Ross II; David E. Ross II, LC; Attorney for Appellant.

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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

REPLY BRIEF OF APPELLANT

Appeal from the Ruling of the Third Judicial District Court,  
The Honorable Judith Atherton

R. Scott Williams, Esq.  
Peter J. Baxter, Esq.  
STRONG & HANNI  
3 Triad Center, Suite 500  
Salt Lake City, UT 84180

Attorneys for Appellee  
Ronald Joseph, M.D.

Eric P. Schoonveld, Esq.  
Jason Watson, Esq.  
HALL, PRANGLE & SCHOONVELD, LLC  
136 East South Temple, Suite 2450  
Salt Lake City, UT 84111

Attorneys for Appellee  
St. Mark's Hospital

David E. Ross II  
David E. Ross II, LC  
Bellemarc Bldg Ste 209  
1912 Sidewinder Drive  
Park City, UT 84060

Attorney for Appellant  
Larry Roth

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UTAH APPELLATE COURTS  
MAR 24 2010

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## ARGUMENT

### **A. Setting aside default and denial of motion for default judgment.**

Northern Utah Healthcare Corporation dba St. Mark's Hospital ("St. Mark's") was served in May 2007 with a Notice of Intention to Commence an Action by Roth. [R336] St. Mark's through its attorneys stipulated that a proceeding before the Department of Occupational and Professional Licensing ("DOPL") would serve no purpose [R68] which provided for a certificate of compliance to be issued by DOPL so that Roth could file his lawsuit. [R336] **On March 31, 2008 St. Mark's attorneys received the Summons and Complaint** dated January 17, 2008. [R68] (Emphasis added) The Summons on its face stated that an answer was due within 30 days of service. [R28]. The only reason given for the failure to file an answer to the Summons and Complaint was a non-attorney in the attorneys office incorrectly calendared the due date at 45 days. [R68 and 76-77]. There is no dispute that St. Mark's did not file a timely answer. [See page 6 of St. Mark's Brief acknowledging the due date to answer as April 24, 2008 and they did not file until May 9, 2008].

St. Mark's opens its Argument at page 19 of its Appellee Brief arguing that a trial court is endowed considerable discretion in granting

or denying motions to set aside a default. Roth agrees. St. Mark's cites some cases, mainly federal cases that make relief from a default easier to obtain than relief from a default judgment and argues that it would be an abuse of the court in not granting relief in a case like the one before this Court based upon this less stringent requirement for granting relief.

However, this is contrary to the Utah Supreme Court decision cited in Roth's Brief at pg 22, concluding that Rule 60(b) criteria are applicable to demonstrate "good cause" under Rule 55(c), *See Gold Standard, Inc. v. American Barrick Resources Corp.*, 805 P.2d 164, 168 (Utah 1990) and does not square with a recent decision of this Court. In *Davis v. Goldsworthy*, 184 P.3d 626 (Utah Ct. App. 2008) in a case involving a default, like St. Mark's claim in this case, Goldsworthy's theory was essentially one of excusable neglect. This Court in *Davis v. Goldsworthy*, at 630 *id.* "To demonstrate that the default was due to excusable neglect, '[t]he movant must show that he has used due diligence and that he was prevented from appearing by circumstances over which he had no control.'" Citing *Black's Title, Inc.*, 1999 UT App. 330, ¶10, 991 P.2d 607 (quoting *Airkem Intermountain, Inc. v. Parker*, 513 P.2d 429, 431 (1973)). "Absent such a showing, [a defaulting party]'s assertion does not demonstrate his neglect was excusable." *Id.*

All that the Trial Court had to go on was that the answer was not filed by the deadline and that the only excuse was that a non-attorney staff member for HPS calendared the response date at 45 instead of the required 30 days. There was absolutely no requisite showing of due diligence after the attorneys received the summons and complaint and no showing or even suggestion of any kind that HPS was prevented from appearing by circumstances over which they had no control.

This Court should follow its own precedence as it declared under similar circumstances in Davis v. Goldsworthy, at 630, *id.* “reverse and remand to the trial court for the detailed findings required by Utah case law and for such orders as may then be appropriate.”

**B. Discovery of legal injury through due diligence.**

Dr. Joseph appears to argue that the burden is on Roth to overcome the trial court’s determination that he discovered his legal injury on October 13, 2004 or at least by January 5, 2005. However, this burden is and has been Dr. Joseph’s to establish. See Conder v. Hunt, 2000 UT App 105, ¶ 14, 1 P.3d 558, *cert. denied*, 9 P.3d 170 (Utah 2000). ¶ 14 “As with any affirmative defense, defendants have the burden of proving every element necessary to establish that the statute of limitations bars [plaintiff’s] claim.” Seale v. Gowans, 923 P.2d 1361, 1363 (Utah 1996). See Stewart v. K & S



Co., 591 P.2d 433, 435 (Utah 1979); Slayden v. Sixta, 250 Kan. 23, 825 P.2d 119, 122 (1992) (stating "the burden of pleading and proving" statute of limitation's applicability "rests on the defendant").

Dr. Joseph argues that since Roth obtained his medical records on January 5, 2005 the statute of limitations was triggered by at least this date if not the earlier date of October 13, 2004 when Roth admittedly learned of his physical injury. It appears from Dr. Joseph's argument that he is claiming that Roth learned of his legal injury on October 13, 2004 when he discovered that the polypectomy site was not removed during surgery.

However, all this establishes is that Roth learned of his physical injury, but in no way equates to his discovery of his legal injury. The statute of limitations that Dr. Joseph is seeking to invoke is *U.C.A.* §78B-3-404(1). It provides "...malpractice action... shall be commenced within two years after...patient discovers,...the injury..." "Injury" (legal injury) is defined as discovery of injury and the negligence that caused the injury. Foil v. Ballinger, 601 P.2d 144, 148-9 (Utah 1979). As for obtaining medical records on January 5, 2005, it is an incredulous claim that this established the day Roth knew of his legal injury. This would be like handing someone who does not know Arabic the Quran written in Arabic and then claiming that as of that date they were aware of the teachings of Muhammad.

The law in Utah is clear that in order to invoke the statute of limitations in this case, short of Dr. Joseph delineating some definitive event or date that clearly demonstrates Roth learned of his legal injury, it is for the jury to conclude when this occurred or should have occurred through due diligence. The Utah Supreme Court in a recent case, Daniels v. Gamma West Brachytherapy, 2009 UT 66, ¶31, 221 P.3d 256 (2009) declared,

Tying the statute of limitations' trigger to the discovery of the cause-in-fact of a patient's injury does not leave health care professionals endlessly susceptible to revived claims. Instead, the discovery rule is tempered by a requirement that a patient act with reasonable diligence in investigating a suspected injury. Thus, the statute of limitations begins when exercising such diligence a patient should have discovered his injury and its possible negligent cause. Whether and when a patient should have discovered an injury and its cause is a fact intensive question that requires a jury to determine, given the information available, whether the actions taken in response to an injury and the efforts extended to discover its cause were adequate.

The one record in these voluminous medical records that Dr. Joseph is “hanging his hat on” is an obscure office note of Dr. Voorhees in June 2004. By itself it does not really shed light on any determination that a negligent act occurred. At best it may lead one to further inquiry as to its meaning. That is exactly what Roth proceeded to do. He made inquiry through the depositions of Dr. Joseph and Dr. Voorhees in January 2007 as to the meaning of problems involving the tattoo ink.

In this case it is for the jury to determine when Roth through due diligence should have discovered his legal injury. As we learned from the Daniels v. Gamma West Brachytherapy, case at ¶31, in order for the jury to make this determination they also need to know “....which event it is evaluating for whether the plaintiff was aware or should have been aware of what was the negligent cause of his injury.” Roth on October 13, 2004 was led by Dr. Joseph to believe that the surgeon was responsible [R236 ¶19] causing Roth to concentrate on this causal event, the May 24, 2004 surgery, and not look at Dr. Joseph’s April 28, 2004 treatment.

### **C. Discovery of Legal injury – Issue Preclusion**

Dr. Joseph argues issue preclusion based upon Judge Lindberg’s ruling in the Roth v. Pedersen, 2009 UT App. 313 (unpublished) (attached hereto in the Appendix). The trial court dismissed this case based upon its determination that Roth discovered his legal injury on October 13, 2004 and therefore his filing his statutory notice to commence an action and suit in 2008 was more than two years from this date and therefore the statute of limitations had run. This Court affirmed the dismissal; however, upon different grounds than applied by the Trial Court. This Court rejected the determination that Roth discovered his legal injury on October 13, 2004 and instead determined that by at least the time he initiated a malpractice action

against the surgeon he had discovered his legal injury, some nineteen months later. See Roth v. Pedersen, pg 3 of this Court's unpublished Memorandum Decision (Appendix). In order to use issue preclusion to establish that Roth discovered his legal injury on October 13, 2004, such prior position must have been successful, and in the prior case it was not. See 3D Constr. & Dev., L.L.C. v. Old Standard Life Ins. Co., 2005 UT App 307, ¶11, 117 P.3d 1082, 1085-86 "Under judicial estoppel, 'a person may not, to the prejudice of another person, deny any position taken in a prior judicial proceeding between the same persons or their privies involving the same subject matter, if such prior position was successfully maintained.' " Nebeker v. State Tax Comm'n, 2001 UT 74, ¶ 26, 34 P.3d 180 (quoting Tracy Loan & Trust Co. v. Openshaw Inv. Co., 102 Utah 509, 132 P.2d 388, 390 (1942)).

Furthermore, Dr. Joseph in his Brief at page 28 sets forth the criteria that must be met before issue preclusion is applied, citing Oman v. Davis School District, 2008 UT 70, ¶29, 194 P.3d 956.

(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.

Roth is the party in both suits for which Dr. Joseph seeks issue preclusion, so element (i) is met and the memorandum decision in the prior appeal "resulted in a final judgment on the merits." See State v. Baker, 176 P.3d 493, 496 (Utah App. 2008); thus, element (ii) is met. The litigation however, was never completely and fully litigated in that there was no hearings conducted, there was no evidence provided to the Court, and in this jury case no jury was impaneled. Thus element (iii) was not met and as for element (ii) the issue decided is not identical to the issue in the matter at hand. Dr. Pedersen was sued for alleged malpractice that occurred in a surgical procedure on May 24, 2004; whereas, Dr. Joseph is being sued for medical malpractice related to his treatment in a separate causal event in April 2004.

Notwithstanding the foregoing argument, the final decision on the merits in Roth v. Pedersen, pg. 3, *id.*, concluded that Roth discovered his legal injury by May 2006 and as such the statute of limitations in this case would have similarly run in May 2008, some four months after Roth filed suit against Dr. Joseph and St. Mark's.

#### **D. Concealment**

Where the June 8, 2004 letter from Dr. Voorhees to Dr. Joseph plays a significant role in this case is that it represents information that Dr. Joseph

had a duty to disclose to Roth after receipt of the letter from Dr. Voorhees. Dr. Joseph was absolutely required to inform Roth that he was experiencing problems with the SPOT ink used to tattoo Roth's polypectomy site and that it was likely Dr. Voorhees failed to remove this cancerous site in the May 24, 2004 surgery, which information was critical for Roth in determining how to proceed in protecting his body. 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.*

Roth testified in his affidavit herein, that the first he became aware of the June 8, 2004 letter from Dr. Voorhees to Dr. Joseph was during the deposition of Dr. Joseph in 2007. The fact this letter was not in Dr. Joseph's medical records certainly raises a question for the jury as to why Dr. Joseph concealed this letter from Roth. This certainly raises a material issue of fact.

Dr. Joseph argues that Roth's argument of fraudulent concealment is baseless and Roth was required to prove that Dr. Joseph affirmatively acted to conceal. The law is clear in Utah that a doctor has a duty to disclose to his patient material medical information. Nixdorf v. Hicken, at 354 *id.*

The Court in Charlesworth v. Reynolds, 113 P.3d 1031, 1037 (UT App. 2005) stated, “A fiduciary's breach of the 'duty to speak the truth' is sufficient to establish fraudulent concealment. Russell/Packard Dev., Inc. v. Carson, 78 P.3d 616, *aff'd as to result*, 108 P.3d 741, 752 (quoting Chapman v. Primary Children's Hosp., 784 P.2d 1181, 1186 (Utah 1989)).

Dr. Joseph states that where fraudulent concealment is alleged the circumstances forming the basis of the allegation must be stated with particularity. Roth has stated acts of fraudulent concealment with particularity. Roth pointed to Dr. Joseph's knowledge of the problems the surgeon experienced in the botched surgery, that it related to his failure to properly tattoo the polypectomy site, his failure to disclose his miscommunication to the surgeon as to the location of the polypectomy site and his failure to disclose to Roth that the surgeon asked Dr. Joseph to promptly perform a colonoscopy in order to determine if the polypectomy site had been removed as he was concerned that it might not have been. [R1-8]. Dr. Joseph much like the defendant Dr. Veasy in Chapman v. Primary Children's Hospital, 784 P.2d 1181 (Utah 1989), misdirected Roth away from looking at him for malpractice [R236 ¶19] and although aware of critical medical information that he was required and had a duty to disclose to Roth, he remained silent (concealment). “In this case, however,

the Chapmans' complaint, though drafted in an admittedly 'scattershot' fashion, contains the averments that defendants withheld information regarding the cause of Jennifer's injuries and 'misinformed [the Chapmans] by, among other things, advising them that the brain damage sustained by Jennifer Chapman was an unavoidable event which was not caused by any misconduct on the part of any of the defendants.' This is a sufficiently clear and specific description of the facts underlying the Chapmans' claim of fraudulent concealment to support our conclusion that the requirement of rule 9(b) has been met. See Peteler v. Robison, 81 Utah 535, 553, 17 P.2d 244, 250 (1932)." Roth respectfully submits that he has as well made sufficiently clear and specific description of the facts underlying his claim of fraudulent concealment to support a conclusion that the requirement of Rule 9(b) has been met.

### **CONCLUSION**

The Trial Court did not make the requisite findings to support St. Mark's request for relief for excusable neglect, specifically no findings were made and interestingly nothing was provided by St. Mark's showing due diligence and that it was prevented from appearing by circumstances over which it had no control. This Court should reverse the Trial Court's setting



aside the Default Certificate and remand for the detailed findings required by Utah case law and for such orders as may then be appropriate.


The Order granting Summary Judgment must be reversed as genuine issues of material fact exist as to when Roth discovered or through due diligence should have discovered his legal injury. Specifically there is actually no date provided in the Record that establishes Roth's discovery of both the causal event and the negligence which caused his physical injury. As to when he should have through due diligence discovered the causal event and the negligence is a fact intensive matter for the jury to determine. The Order granting Summary Judgment must be reversed as a genuine issue of material fact exists as to whether Roth was prevented from discovering his legal injury because of the alleged fraudulent concealment of Dr. Joseph.

Issue preclusion is inapplicable in this case and does not support the summary judgment entered herein.

For these reasons, this Court should reverse and remand on the granting of Rule 60(b) relief to St. Mark's and allow the Trial Court to make such findings under Utah law as to whether or not St. Mark's can demonstrate that their failure to timely file an answer to the Complaint was due to excusable neglect. This Court should reverse the Summary Judgment entered in favor of the defendants and allow a jury to decide when Roth discovered the causal event and negligence that caused his injury and/or

determine whether there was fraudulent concealment in order for the Trial Court to then be able to determine whether the statute of limitations ran or had not run in this case.

**DATED** this 24<sup>th</sup> day of March 2010.



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David E. Ross II  
*Attorney for Appellant*

## **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that he mailed a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT and Disc to the following by U.S. Mail, first class, postage prepaid, this 24<sup>th</sup> day of March 2010:

R. Scott Williams, Esq.  
Peter J. Baxter, Esq.  
STRONG & HANNI  
3 Triad Center, Suite 500  
Salt Lake City, UT 84180

Eric P. Schoonveld, Esq.  
Jason Watson, Esq.  
HALL, PRANGLE & SCHOONVELD, LLC  
136 East South Temple, Suite 2450  
Salt Lake City, UT 84111

A handwritten signature in black ink, appearing to read "Eric P. Schoonveld", is written over a horizontal line.

## **APPENDIX**

Roth v. Pedersen, 2009 UT App. 313.

Entered October 29, 2009, as an unpublished Memorandum Decision

OCT 29 2009

IN THE UTAH COURT OF APPEALS

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Larry Roth,	)	MEMORANDUM DECISION
	)	(Not For Official Publication)
Plaintiff and Appellant,	)	
	)	Case No. 20090139-CA
v.	)	
	)	F I L E D
Peder J. Pedersen, M.D.,	)	(October 29, 2009)
	)	
Defendant and Appellee.	)	2009 UT App 313

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Third District, Salt Lake Department, 080917484  
The Honorable Denise P. Lindberg

Attorneys: David E. Ross II, Park City, for Appellant  
Dennis C. Ferguson, Salt Lake City, for Appellee

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Before Judges Greenwood, Orme, and McHugh.

McHUGH, Judge:

Larry Roth appeals the trial court's grant of Dr. Peder J. Pedersen's motion for judgment on the pleadings, which dismissed with prejudice Roth's medical malpractice claim against Pedersen. We affirm.

Whether a motion for judgment on the pleadings is properly granted is a question of law, which we review for correctness. See MBNA Am. Bank, N.A. v. Williams, 2006 UT App 432, ¶ 2, 147 P.3d 536. "When reviewing a grant of [such] a motion . . . , this court accepts the factual allegations in the complaint as true; we then consider such allegations and all reasonable inferences drawn therefrom in a light most favorable to the plaintiffs." Intermountain Sports, Inc. v. Department of Transp., 2004 UT App 405, ¶ 7, 103 P.3d 716 (internal quotation marks omitted). Further, "[t]he applicability of a statute of limitations and the applicability of the discovery rule are [also] questions of law, which we review for correctness." Russell Packard Dev., Inc. v. Carson, 2005 UT 14, ¶ 18, 108 P.3d 741 (internal quotation marks omitted).

Roth argues that the trial court improperly considered materials outside the pleadings to conclude that the two-year statute of limitations for filing a medical malpractice claim

against Pedersen had expired. Specifically, he claims the trial court considered Pedersen's memorandum supporting his motion for judgment to extrapolate the date upon which Roth first became aware of his legal injury. In reviewing a motion for judgment on the pleadings, a trial court may only consider the pleadings. See Utah R. Civ. P. 12(c); see also id. R. 7(a) (listing the following pleadings: complaint, answer, reply to a counterclaim, answer to a cross-claim, third party complaint, and third party answer). "'If a court does not exclude material outside the pleadings and fails to convert a rule 12[(c)] motion to one for summary judgment, it is reversible error unless the dismissal can be justified without considering the outside documents.'" Tuttle v. Olds, 2007 UT App 10, ¶ 6, 155 P.3d 893 (quoting Oakwood Vill., LLC v. Albertsons, Inc., 2004 UT 101, ¶ 12, 104 P.3d 1226).<sup>1</sup> Although we agree that the trial court relied upon material outside of the pleadings in "finding" that Roth became aware of the legal injury on October 13, 2004, we nevertheless uphold the order granting the motion because "the dismissal can be justified without considering the outside document[]," see id.

The Utah Health Care Malpractice Act (the Act) requires an action to 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." Utah Code Ann. § 78B-3-404(1) (2008).<sup>2</sup> The Utah Supreme Court has "repeatedly interpreted the phrase 'discovered the injury' as meaning discovering the 'injury and the negligence which resulted in the injury,' also referred to as 'legal injury.'" Daniels v. Gamma W. Brachytherapy, LLC, 2009 UT 66, ¶ 25, 640 Utah Adv. Rep. 8 (quoting Foil v. Ballinger, 601 P.2d 144, 148 (Utah 1979)); see also Brower v. Brown, 744 P.2d 1337, 1338-39 (Utah 1987) ("[T]he plaintiff must know of the injury and of the negligence which caused the injury."); Foil, 601 P.2d at 148 ("[T]he two-year

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1. Tuttle v. Olds, 2007 UT App 10, 155 P.3d 893, addresses the same question in the context of a motion to dismiss under rule 12(b)(6). See id. ¶ 7. However, because "[t]he Utah Rules of Civil Procedure contain identical provisions for converting motions under rules 12(b)(6) and 12(c) into motions for summary judgment," id. ¶ 7 n.1, the same standard of review applies for a 12(c) motion as for one under 12(b)(6).

2. For the convenience of the reader, we reference the 2008 codification of section 78B-3-404 because the renumbered statute contains language identical to the version in effect when Roth's cause of action arose. See Utah Code Ann. § 78B-3-404 amendment notes (2008) (noting that statute had been renumbered and reorganized but no substantive changes were made).

provision does not commence to run until the injured person knew or should have known that he had sustained an injury and that the injury was caused by negligent action." ).

In his complaint, Roth avers that he underwent resection surgery in May 2004 to remove a cancerous section of his colon. The affected area had been marked by tattoos to assist with the resection. Roth further alleges that six months after the resection surgery, the doctor who had first identified the cancerous polyps, and the doctors who performed a second colonoscopy saw the original tattoo markings, indicating that the wrong area of Roth's colon had been removed during the May 2004 resection surgery. Roth also asserts that he had a second surgery to remove the correct site. The answer states that the date of that surgery was January 24, 2005.

It is clear from the pleadings that Roth was aware that a legal injury had occurred at least by the time he initiated legal action against the general surgeon in May 2006. Thus, Roth knew both that he had suffered a legal injury and that it had happened during the resection surgery. That awareness triggered the statute of limitations regardless of whether Roth knew the precise identity of the wrongdoer. See McDougal v. Weed, 945 P.2d 175, 177 (Utah Ct. App. 1997) (interpreting the Act to start the statute of limitations once a plaintiff or patient discovers that an injury has occurred and that injury was likely the result of negligence, not upon the establishment of the identity of the person responsible); see also Daniels, 2009 UT 66, ¶ 28 ("Under McDougal v. Weed, 945 P.2d 175 (Utah Ct. App. 1997)], a plaintiff need not know the identity of the responsible tortfeasor, but must know which medical event allegedly caused his injury." ).

Nevertheless, Roth neglected to file his complaint against Pedersen until August 2008, some three months after the statute of limitations had expired.<sup>3</sup> Accordingly, we conclude that the grant of the motion for judgment and subsequent dismissal were appropriate because Roth failed, as required by the Act, to commence litigation within two years of discovery of his legal injury, which occurred, at the very latest, in May 2006. See

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3. Roth did serve a notice of intent to commence legal action on Pedersen on January 12, 2008. However, where the notice is served more than ninety days prior to the expiration of the statute of limitations, the action must actually be commenced within the two-year statute of limitations. See Utah Code Ann. § 78B-3-412(4) (extending the statute of limitations only where notice is filed within the statute of limitations but less than ninety days prior to its expiration).

generally Utah Code Ann. § 78B-3-404(1) (prescribing the statute of limitations for malpractice actions).

Roth alternately contends that the trial court erred in concluding that the statute of limitations had expired pursuant to subsection (1) of Utah Code section 78B-3-404(1), see id. § 78B-3-404(1), because he alleged fraudulent concealment, which is governed by subsection (2)(b) of that section, see id. § 78B-3-404(2)(b). Subsection (2)(b) provides,

[W]here 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.

Id. Pedersen counters that Roth's fraudulent concealment claim must fail because Roth did not state his claim with particularity as required by rule 9(b) of the Utah Rules of Civil Procedure, see Utah R. Civ. P. 9(b) (stating that in allegations of fraud, the "circumstances constituting fraud . . . shall be stated with particularity"); see also Chapman v. Primary Children's Hosp., 784 P.2d 1181, 1185-86 (Utah 1989) (requiring a plaintiff pleading fraudulent concealment under the Act to comply with rule 9(b)'s particularity requirements). Pedersen correctly concedes that "[a] fraud allegation made on information and belief is adequate under rule 9(b), 'as long as it includes the facts upon which the belief is based.'" Kuhre v. Goodfellow, 2003 UT App 85, ¶ 24, 69 P.3d 286 (quoting Arena Land & Inv. Co. v. Petty, 906 F. Supp 1470, 1476 (D. Utah 1994)). However, "mere conclusory allegations in a pleading, unsupported by a recitation of relevant surrounding facts, are insufficient to preclude dismissal or summary judgment." Chapman, 784 P.2d at 1186.

Pedersen asserts that Roth's fraudulent concealment claim consists of a single unsupported conclusory allegation. In this allegation, Roth claims that he obtained information in August 2007, from which

it appears that Dr. Pedersen concealed the fact that he failed to properly consult with [the general surgeon] in May 2004 as to the reasons the tattooing may not have been identified, the reasons the polypectomy site



could not be seen[,] and [to inform him that]  
the area requiring surgery remained  
[unremoved].

Roth argues that he incorporated by reference other factual statements made earlier in the complaint to support his allegation of fraudulent concealment. These factual averments suggest that Pedersen both knew about the problems with ink fading, the discrepancy between the doctors regarding the tattoos' locations, and the reasons why the polypectomy site may not be visible, and neglected to convey that knowledge to the general surgeon. Roth claims that this failure to speak was a breach of the fiduciary duty owed by Pedersen as Roth's physician. See Jensen v. IHC Hosps., Inc., 944 P.2d 327, 333 (Utah 1997) ("Fraudulent concealment requires that one with a legal duty or obligation to communicate certain facts remain silent or otherwise act to conceal material facts."); Nixdorf v. Hicken, 612 P.2d 348, 354 (Utah 1980) (noting that doctors have a fiduciary duty to their patients to disclose "any material information concerning the patient's physical condition"); see also Daniels v. Gamma W. Brachytherapy, LLC, 2009 UT 66, ¶¶ 50-51, 640 Utah Adv. Rep. 8 (reaffirming physician's fiduciary obligation to keep patient apprised of his physical condition post-treatment).

Even assuming that a fiduciary duty to reveal this information existed because of Pedersen's medical partnership with Roth's original doctor and his provision of medical care to Roth, Roth fails to allege that Pedersen "affirmatively acted to fraudulently conceal the alleged misconduct" from Roth, see Utah Code Ann. § 78B-3-404(2)(b) (2008). Indeed, Roth neither avers that he ever consulted with Pedersen about the May 2004 resection surgery nor alleges that Pedersen ever provided Roth with information that misrepresented or concealed his involvement in the surgery. He also does not claim that due to Pedersen's failure to disclose, the general surgeon misrepresented the problems that arose during surgery or the outcome.<sup>4</sup> Furthermore, nowhere in the complaint does Roth allege that he was precluded from further discussing the surgery with or deposing the general surgeon from whose August 2007 testimony he learned of Pedersen's lack of disclosure.<sup>5</sup> Without such factual allegations, Roth's

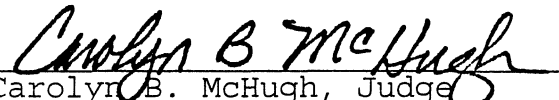
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4. In fact, the answer states that the general surgeon informed Roth that neither he nor Pedersen could see the tattoos but that the general surgeon believed he had removed the correct portion of Roth's colon.

5. The general surgeon testified that in June 2004, he discussed  
(continued...)

fraudulent concealment claim is nothing more than a mere conclusory allegation that is insufficient to preclude dismissal. See Chapman, 784 P.2d at 1186 (permitting dismissal where conclusory allegations were not supported by facts). Accordingly, we affirm the trial court's dismissal of this claim for failure to plead fraud with sufficient particularity.

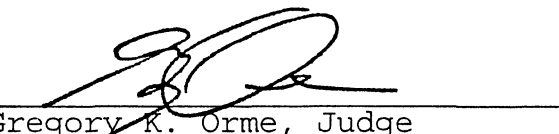
Because the two-year statute of limitations for filing a medical malpractice claim expired at the latest in May 2008, the trial court properly dismissed Roth's August 2008 complaint on a motion for judgment on the pleadings. Additionally, Roth failed to plead fraudulent concealment with particularity as required by rule 9(b) of the Utah Rules of Civil Procedure. Accordingly, we affirm the dismissal with prejudice.

  
Carolyn B. McHugh, Judge

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WE CONCUR:

  
Pamela T. Greenwood,  
Presiding Judge

  
Gregory K. Orme, Judge

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5. (...continued)  
with Roth's original doctor the lack of disclosure from  
Pedersen's office regarding the ink fading problems.