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Utah Supreme Court

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IN THE SUPREME COURT OF THE

STATE OF UTAH

DOCKET NO. 20553

SAUNDRA BROWER and FRANK OSCAR BROWER, Plaintiffs-Appellants, vs. DR. DAVID W. BROWN, and I.H.C. HOSPITALS, INC., a corporation, and I.H.C. HOSPITALS, INC., a corporation dba VALLEY VIEW MEDICAL CENTER, Defendants-Respondents.	Case No. 20553

BRIEF OF RESPONDENT

I.H.C. HOSPITALS, INC. dba VALLEY VIEW MEDICAL CENTER

Appeal from the Judgment of the
Fifth Judicial District Court, Iron County,
Judge Allen B. Sorensen

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FILED
SEP 10 1985
Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE

STATE OF UTAH

SAUNDRA BROWER and FRANK OSCAR BROWER, Plaintiffs-Appellants, vs. DR. DAVID W. BROWN, and I.H.C. HOSPITALS, INC., a corporation, and I.H.C. HOSPITALS, INC., a corporation dba VALLEY VIEW MEDICAL CENTER, Defendants-Respondents.	)	Case No. 20553

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ISSUE PRESENTED

Whether Judge Sorensen committed reversible error in granting hospital's motion for summary judgment because the plaintiffs were aware of Mrs. Brower's leg injury and knew or should have known that it was possibly caused by hospital's negligence, more than two years before commencing this action.

DETERMINATIVE STATUTES, RULES AND REGULATIONS

The following determinative statutes, rules and regulations are set forth in relevant part in the addendum: Utah Health Care Malpractice Act, U.C.A. §§78-14-4 and 8 (1953 as amended) and Utah Rules of Civil Procedure 56.

STATEMENT OF THE CASE

A. Nature of the Case. This is a medical malpractice action in which plaintiffs-appellants Saundra Brower and Frank Oscar Brower ("Browers") seek damages for injuries allegedly caused by a puncture wound to Saundra Brower's right leg, which allegedly occurred while she was in the recovery room, following her hysterectomy in the Valley View Medical Center ("hospital") on October 22, 1980.

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B. Proceedings and Disposition Below. Browers' action against the hospital is confined to allegations of damages related to the puncture wound in her right leg. On February 21, 1985, Judge Allen B. Sorensen of the Fifth Judicial District Court, Iron County, granted hospital's motion for summary judgment and dismissed Browers' action with prejudice, on the grounds that this action was barred by the statute of limitations because Browers discovered this injury and the possibility of hospital's negligence on October 22, 1980, more than two years before filing this action. Browers' motion for partial summary judgment that her action was not barred by the statute of limitations was denied. (R. at 138).

C. Statement of Facts. On October 22, 1980, Saundra Brower underwent a surgical hysterectomy which was performed by co-defendant-respondent Dr. David W. Brown in a hospital operating room. Following this surgery, and as Mrs. Brower was being taken from the recovery room, she awoke from the anesthesia. At this time, she experienced pain in her right thigh, just above the knee, which was more severe than any pain she had ever had. She immediately began screaming "What did you do to my leg? What happened to my leg?" (Saundra Brower Dep. p. 47-48).

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Mrs. Brower's husband and sister, who were present at the time, observed a lot of blood coming from a puncture wound five or six inches above her right knee. Mrs. Brower recalls her sister commenting that the leg was bleeding and asking what had happened. (Saundra Brower Dep. p. 47 and Oscar Brower Dep. p. 18-20).

Mrs. Brower was placed in a hospital bed, the puncture wound was bandaged and heat was applied. (Saundra Brower Dep. p. 117).

After she fully awoke, Mrs. Brower discovered a large oval shaped bumpy bruise above her right knee, which was approximately two inches wide and four inches long. Mrs. Brower also noticed that there was a puncture mark in the center of the bruise, "like an injection hole". (Saundra Brower Dep. p. 49, 124).

A few hours later, when the anesthesiologist visited the room, Mrs. Brower asked what he had done to her leg. The anesthesiologist examined the leg and told her "I didn't do that", "That wasn't there when you left the operating room" and "Whatever happened happened to you in the recovery room." (Saundra Brower Dep. p. 50). Mrs. Brower later testified that, at this point, she "knew there was a problem" and that "something

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had happened that was improper". (Saundra Brower Dep. p. 120-121).

Mrs. Brower consulted with her sister and was told that when she was being brought from the recovery room "blood was spurting from her leg" and that the nurse told her "I don't know". (Saundra Brower Dep. p. 117).

Thereafter, Mrs. Brower "asked everybody" who came to care for her for information about the puncture wound. She complained to Nurse Condra Lawrence, who responded by checking the puncture area. Nurse Lawrence told them that she did not know why this had been done. (Saundra Brower Dep. p. 52 and Condra Lawrence Dep. p. 14, 19).

Later this same day, Dr. Brown became available and the Browers asked him what had happened. Dr. Brown examined the leg and told them "he did not know but he would find out". (Saundra Brower Dep. p. 51 and Oscar Brower Dep. p. 21).

Following this conversation, neither Mrs. Brower nor her husband had any further conversations with Dr. Brown regarding the puncture wound. Mrs. Brower later testified that Dr. Brown never again said anything about her leg. (Saundra Brower Dep. p. 53 and Oscar Brower Dep. p. 21).

On October 28, while still experiencing constant pain and a cramping feeling at the site of the puncture wound, Mrs.

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Brower was discharged from the hospital. (Saundra Brower Dep. p. 54).

On February 16, 1983, almost four months after the two-year statute of limitations had lapsed, Browers served the hospital with a notice of intent to commence this action. (R. at 1 para 8).

Browers' complaint against the hospital was filed on June 14, 1983, almost eight months after the limitation period had run. Allegations against the hospital are limited to negligence and injuries relating to Mrs. Brower's puncture wound. Browers' complaint does not allege that the hospital prevented them from discovering negligence or misconduct or any other facts which would extend the two-year statute of limitations. (R. at 1).

SUMMARY OF ARGUMENT

Browers' action is barred by the statute of limitations because they discovered the injury and the possibility of hospital's negligence on October 22, 1980, more than two years before filing this action.

Utah Code Annotated §78-14-4 cuts off all medical malpractice claims not brought within two years after a plaintiff discovers or should have discovered an injury. This Court has consistently ruled that an injury is deemed to have been

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discovered and the statute of limitations begins to run when a plaintiff discovers the fact of the injury and the possibility that it may have been caused by negligence. Certainty of causation and negligence is not required and the injury need not be catastrophic for the statute to begin to run. Regardless of whether a plaintiff has conferred with experts, the statute of limitations begins to run at the time one knows or should know of an injury and the possibility of negligence.

Judge Sorensen's judgment below was based upon the Browers' own uncontradicted testimony that, over two years before commencing this action, they knew that Mrs. Brower's leg had been injured in the recovery room and believed that something "improper" had happened.

ARGUMENT

I. BROWERS' ACTION IS BARRED BY THE STATUTE OF LIMITATIONS BECAUSE THEY DISCOVERED THEIR LEGAL INJURY ON OCTOBER 22, 1980, MORE THAN TWO YEARS BEFORE FILING THIS ACTION.

A. The Statute of Limitations Began to Run On October 22, 1980, When Browers Became Aware of Their Injury and the Possibility of Hospital's Negligence.

Browers' claim was not commenced within two years following their discovery that they had a possible cause of action against the hospital. Consequently, their claim is

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forever barred. Utah Code Annotated §§78-14-4 cuts off all medical malpractice claims not brought within two years after a plaintiff discovers or should have discovered a possible cause of action. This statutory limitation period states in pertinent part that:

> No malpractice action against a health care provider may be brought unless it is commenced within two years after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered the injury, whichever first occurs,. . .

U.C.A. §78-14-4 (Supp. 1981.)

Thus, a plaintiff's cause of action accrues, and the statute of limitations begins to run, when the plaintiff "discovers the injury" and the action is barred two years from that date. The leading pronouncement of the Utah Supreme Court on what constitutes discovery of the injury is Foil v. Ballinger, 601 P.2d 144 (Utah 1979).

In Foil the court ruled that "the statute begins to run when an injured person knows or should know that he has suffered a legal injury" Id. at 147. Discovery of a "legal injury" means that the plaintiff must have discovered both the fact of the injury and the possibility that the injury may have been caused by the negligence of the health care provider. Reiser v. Lohner, 641 P.2d 93 (Utah 1982).

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Precise certainty of causation and negligence is not required for a cause of action to accrue. Rather, the discovery of causation and negligence may be either actual or presumptive. It is sufficient if the plaintiff is on inquiry notice of a possible cause of action or should know of the defendant's possible negligence. See Massey v. Litton, 669 P.2d 248, 251 (Nev. 1983) (adopting the Foil rule that the limitation period begins to run when the plaintiff is on "inquiry notice" of a possible cause of action) and Anderson v. Shook, 333 N.W.2d 708, 712 (N.D. 1983) (holding that a medical malpractice statute begins to run when the plaintiff knows or should know of a defendant's "possible negligence").

In Foil, the court found that, because the plaintiff had a history of back injuries, prior to the defendant's negligent treatment, the plaintiff did not know and could not have known that defendant's negligent treatment caused additional injury. Unlike the plaintiff in Foil, Browers were aware of both the injury and the possibility that it had been caused by hospital's negligence.

The Browers' own testimony establishes that on October 22, 1980, the date of surgery, they were aware that Mrs. Brower's right thigh had been injured because something "improper" had happened.

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B. On October 22, 1980, More Than Two Years Before Filing This Action, Browers Knew of Their Injury and Knew or Should Have Known that it was Possibly Caused by Hospital's Negligence.

Saundra Brower and her husband both testified that on October 22, 1980, they discovered that Mrs. Brower's thigh had been injured. During her deposition, Mrs. Brower said that, as she was being taken from the recovery room, she awoke from the anesthesia and experienced pain in her right thigh which was more severe than any pain which she could remember. Mrs. Brower's husband and sister were both present at the time and observed that there was a lot of blood coming from a puncture wound five or six inches above the right knee. Mrs. Brower further testified that when she fully awoke she discovered a large oval shaped bumpy bruise approximately two inches wide and four inches long. She also noted that there was a puncture mark in the center of the bruise "like an injection hole". (Saundra Brower Dep. p. 47-49, 117, 124).

Mrs. Brower admitted that because her operation had nothing to do with her leg, she and her husband were suspicious. As a result, Mrs. Brower confronted the anesthesiologist and asked what he had done to her leg. He denied having done anything and indicated that the injury wasn't there when she had left the operating room and that whatever

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happened must have taken place in the recovery room. Mrs. Brower testified, that, at this point, she and her husband knew that there was a problem and that something had happened that was improper. (Saundra Brower Dep. p. 50, 120-121).

Mrs. Brower testified that, thereafter, she asked everyone who came to care for her for information concerning the puncture wound. Nurse Condra Lawrence examined the wound and told the Browers she did not know why this had been done. Dr. Brown told the Browers that he did not know what had happened but would find out. He never said anything further about the injury. The Browers both testified that, thereafter, they tried many times to find out what happened. (Oscar Brower Dep. p. 21 and Saundra Brower Dep. p. 51-53).

By their own testimony, Browers knew or at least should have known, on October 22, 1980, that Saundra Brower's puncture wound was possibly caused by hospital's negligence. The Browers and their counsel have conceded the obviousness of this conclusion by alleging that res ipsa loquitur is applicable and that the puncture wound "would not have occurred without the negligence of someone." (R. at 1. para. 26).

Although Judge Sorensen's order of dismissal is based upon the Browers' own uncontradicted testimony, Browers' brief suggests several reasons why the order was not appropriate.

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Browers' brief claims, for the first time, that the hospital suppressed evidence of misconduct, thereby tolling the running of the limitation period. Their complaint contains no such allegation and the record below fails to support this eleventh hour speculation. The mere fact that the complaint omits such an allegation is sufficient to bar Browers from relying on the "fraudulent concealment" extension to the statute of limitations. See U.C.A. §78-14-4(b) (1953 as amended).

Browers next claim that Dr. Brown's failure to discuss the leg injury or to give some explanation for its cause, misled them into thinking that it was an unavoidable consequence of the hysterectomy. This argument is contrary to the Browers' own testimony. Mrs. Brower testified that, because the leg injury did not appear to be related to the hysterectomy, she thought that perhaps some additional surgery had been performed, and "knew there was a problem" and believed that "something had happened that was improper." (Saundra Brower Dep. p. 120-121).

Browers next argue they had no reason to know that Mrs. Brower's thigh injury may have resulted from someone's negligence until she consulted Dr. Bever and Dr. Pandya on July, 1981. Mrs. Brower's account of her conversations with these doctors, however, contains only a passing reference to the thigh injury.

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gynecological/surgical procedures and follow up care. The record below contains no indication that any new facts about the thigh injury came to light as a result of Mrs. Brower's consultations with these doctors. Browers had as much knowledge about this injury on October 22, 1980, the day of Saundra Brower's surgery, as they did in July, 1981.

In a related argument, Browers contend that the statute of limitations should not begin to run until a plaintiff has been told by a medical expert that he or she has a cause of action. Browers suggest that the statute should not run against a lay person, who has not consulted an expert, unless the injury is catastrophic. Browers fail to explain what is meant by "catastrophic" or why this Court should adopt such a rule. Browers' brief, however, implies that unless the negligence associated with an injury is obvious, the statute of limitations should not run until a plaintiff has conferred with medical experts. As discussed above, the standard established by the legislature and by this Court in Foil is contrary. The statute of limitations begins to run when a plaintiff knows or should know of an injury and the possibility of a negligent cause.

The central reasoning behind the Foil decision was to encourage a potential claimant to diligently move forward and

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the injury and the possibility of negligence. Such diligence is not encouraged if the claimant can casually wait for expert confirmation of his claims or negligence before the statute begins to run. As noted in Dawson v. Eli Lilly and Co., 543 F. Supp. 1330, 1334, (D.D.C. 1982) (emphasis in the original):

> If the statute of limitations did not begin to run merely because a plaintiff who knew of a possible cause relationship and did not rely on any representations to the contrary did not have certain knowledge of causation, no claim or causation which could be disputed would ever accrue.

See also Duncan v. Augter, 661 P.2d 83, 86 (Or. App. 1983) (holding that the statute of limitations begins to run in medical malpractice actions when the plaintiff knows "facts from which a reasonable fact finder could conclude that the plaintiff's injury was caused by an act of the defendant that was somehow negligent." emphasis added)

In Hove v. McMaster, 621 P.2d 694 (Utah 1980), the Utah Supreme Court applied the Foil rule in a manner consistent with Dawson and Duncan. The claimant in Hove received anesthetic injections while having her teeth filled. During the injection she felt "an unusual" or "different" shock in her face and in the ensuing months she had a tingling sensation in the area of the injection. One year later she consulted a neurologist who told

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her that the injection was a possible cause of her pain. Three years after the treatment she was examined by another neurologist who told her that her pain was definitely caused by the injection. The action was filed a few months later.

This Court affirmed dismissal of the action based on a finding that discovery occurred more than two years before the action was filed. This Court explained that before the plaintiff consulted the first neurologist, she was "expected to have recognized the possibility that the recurring discomforts were the result of the injection..." Id. at 696 (emphasis added). Hove confirms that the rule in Foil only requires the claimant to have general knowledge of the negligence and possible causation aspects of the injury for the medical malpractice statute of limitations to begin running and that there is no requirement that the injury be catastrophic or that the plaintiff have expert advice.

Finally, Browers argue the propriety of not allowing a separate trial on the issue of the statute of limitations under U.C.A. §78-12-47. Initially, this is an improper argument in that it is raised for the first time on appeal and had absolutely nothing to do with Judge Sorensen's decision. Secondly, in Reiser v. Lohner, supra, this Court clearly held that the statute

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of limitations issue is subject to summary judgment when no genuine issues of material fact are raised. Id. at 100.

By their own uncontradicted admissions, Browers were aware, on October 22, 1980, that Mrs. Brower had been injured while in the recovery room, that this injury was not related to her hysterectomy, and that "something had happened that was improper". (Saundra Brower Dep. p. 121). As the District Court Judge who initially ruled on defendant's motion for summary judgment in Reiser v. Lohner, supra, Judge Sorensen is very familiar with this area of the law and his ruling that this action was not commenced within two years, as required by Utah Code Ann. §78-14-4, was based upon substantial evidence and should be affirmed. Hove v. McMaster, supra at 696.

CONCLUSION

The Utah Health Care Malpractice Act was enacted for the purpose of limiting malpractice claims of individuals who through delay, neglect or mere inattention fail to bring their claims witin two years following the discovery of the existence of a potential claim. Browers, in this case, had over two years in which to commence an action against the hospital but failed to do so. Judge Sorensen's order dismissing this action with prejudice should be upheld.

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Respectfully submitted this 10th day of September, 1985, Salt Lake City, Utah.

KIRTON, McCONKIE & BUSHNELL

By _____
Charles W. Dahlquist, II

By _____
Norman J. Younker
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ADDENDUM

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IN THE FIFTH JUDICIAL DISTRICT COURT OF IRON COUNTY

STATE OF UTAH

SAUNDRA BROWER and FRANK OSCAR BROWER, Plaintiffs, -vs- DR. DAVID W. BROWN and I.H.C. HOSPITALS, INC., a corporation, and I.H.C. HOSPITALS, INC., a corporation doing business as VALLEY VIEW MEDICAL CENTER, Defendants.	O R D E R Civil No. 10201

The Motion for Summary Judgment of Defendant I.H.C. HOSPITALS, INC., a corporation, and I.H.C. HOSPITALS, INC., a corporation doing business as VALLEY VIEW MEDICAL CENTER (hereinafter referred to as "Hospital"), having come on for argument before the Honorable Allen B. Sorensen, the hospital being represented by Charles W. Dahlquist, II, Defendant Dr. David W. Brown being represented by Jody K. Burnett, and Plaintiffs being represented by Russell A.

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Cannon, the Court having heard full argument on the matter and being fully advised in the premises,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Defendant Hospital's Motion for Summary Judgment is hereby granted; Plaintiff's Motion for Partial Summary Judgment having been fully considered by and argued before the Court is hereby denied; and Plaintiffs' action against Defendant Hospital is hereby dismissed with prejudice, each party to bear their own costs.

DATED this 21 day of June, 1985.

BY THE COURT:

Allen B. Sorensen

ALLEN B. SORENSEN, District Judge Ret.

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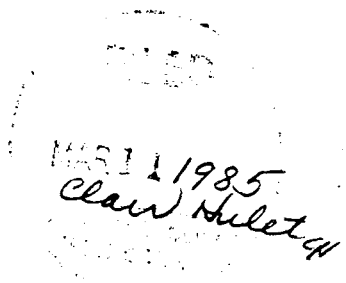

IN THE FIFTH JUDICIAL DISTRICT COURT OF IRON COUNTY

STATE OF UTAH

SAUNDRA BROWER and FRANK OSCAR BROWER, Plaintiffs, vs. DR DAVID W. BROWN, et al., Defendants.	JUDGMENT DENYING PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT CASE NO. 10202

The motions for partial summary judgment of plaintiffs as against each of the Defendants respectively, having come on regularly for hearing December 19, 1984, before the above entitled court, Russell A. Cannon appearing for Plaintiffs, Charles Dahlquist appearing for Defendant I.H.C. Hospitals, Inc. dba Valley View Medical Center, and Jody K. Burnett appearing for Defendant Dr. David W. Brown; and the court having reviewed the pleadings and memoranda on file herein, and having heard the

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arguments of counsel, and the court being fully advised in the premises, good cause appearing therefore, and this court finding and determining there is no just cause for delay of the appeal, it is hereby

ORDERED, ADJUDGED AND DECREED that the Plaintiffs' Motion for Partial Summary Judgment as against Defendant Dr. David W. Brown, is denied; that Plaintiffs' Motion for Partial Summary Judgment against Defendant I.H.C. Hospitals, Inc., a corporation, dba Valley View Medical Center, is hereby denied. There is no just cause for delay of this appeal as to both of said Orders and Judgments denying Plaintiffs' respective Motions for Partial Summary Judgment, and it is hereby ordered that the same and each of them be entered as final judgments. Each party shall bear its own costs.

Dated this 21 day of Feb., 1985

BY THE COURT

Allen B. Sorensen

ALLEN B. SORENSEN
District Judge, Retired

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Utah Health Care Malpractice Act, U.C.A. §78-14-4 and 8

78-14-4. Statute of limitations — Exceptions — Application. (1) No malpractice action against a health care provider may be brought unless it is commenced within two years after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered the injury, whichever first occurs, but not to exceed four years after the date of the alleged act, omission, neglect or occurrence, except that:

(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; and

(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.

(2) The provisions of this section shall apply to all persons, regardless of minority or other legal disability under section 78-12-36 or any other provision of the law, and shall apply retroactively to all persons, partnerships, associations and corporations and to all health care providers and to all malpractice actions against health care providers based upon alleged personal injuries which occurred prior to the effective date of this act; provided, however, that any action which under former law could have been commenced after the effective date of this act may be commenced only within the unelapsed portion of time allowed under former law; but any action which under former law could have been commenced more than four years after the effective date of this act may be commenced only within four years after the effective date of this act.

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

This section shall, for purposes of determining its retroactivity, not be construed as relating to the limitation on the time for commencing any action, and shall apply only to causes of action arising on or after April 1, 1976. This section shall not apply to third party actions, counterclaims or crossclaims against a health care provider.

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Rule 56. Summary Judgment.

(a) *For Claimant.* A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(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 with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) *Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, 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.

(d) *Case Not Fully Adjudicated on Motion.* If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) *Form of Affidavits; Further Testimony; Defense Required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. 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 his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) *When Affidavits Are Unavailable.* Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *Affidavits Made in Bad Faith.* Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

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MAILING CERTIFICATE

This is to certify that I caused to be mailed four true and correct copies of the forgoing, Brief of Respondent I.H.C. Hospital's Inc. dba Valley View Medical Center, postage prepaid, this 10th day of September, 1985, to:

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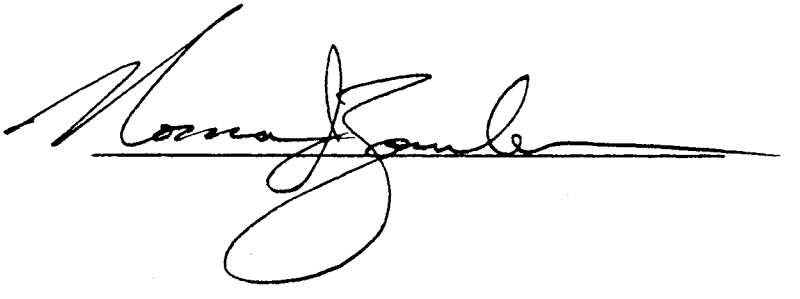

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