

1999

# Max R. Carter v. Milford Valley Memorial Hospital, a government agency of Beaver County : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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MAX R. CARTER,

Plaintiff/Appellant,

vs.

MILFORD VALLEY MEMORIAL  
HOSPITAL, a government agency of  
BEAVER COUNTY,

Defendant/Appellee.

**BRIEF OF APPELLEE**

Civil No. 990203-CA

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Appeal from a Summary Judgment, in the Fifth District Court of Beaver County, State of Utah, the Honorable J. Philip Eves presiding.

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Utah Court of Appeals

AUG 18 1999

Julia D'Alesandria  
Clerk of the Court

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**IN THE UTAH COURT OF APPEALS**

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MAX R. CARTER,		<b>BRIEF OF APPELLEE</b>
Plaintiff/Appellant,		
vs.		
MILFORD VALLEY MEMORIAL HOSPITAL, a government agency of BEAVER COUNTY,		Civil No. 990203-CA
Defendant/Appellee.		

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**JURISDICTION OF THE COURT**

The jurisdiction of the Court is established by Sections 78-2-2(4) and 78-2a-3(2)(j), Utah Code Annotated, 1953, as amended and Rule 3, Utah Rules of Appellate Procedure.

**ISSUE PRESENTED ON APPEAL**

Appellant has framed the issue as follows: “Were the employees/agents of Defendant who performed automotive mechanical maintenance, repairs and/or replacement of an ambulance, health care providers under the Utah Health Care Malpractice Act?” However, the issue, as noted below, does not concern the act of an automotive mechanic, but the actions of employees/agents of Defendant in transferring the decedent to another ambulance. Therefore the issue is: “Were the employees/agents of Defendant who determined to transfer the decedent to a new ambulance after experiencing potential malfunctions, health care



providers and/or employees of health care providers under the Utah Health Care Malpractice Act?”

### **STANDARD OF REVIEW**

The standard of review for reviewing a summary judgment is correctness. “Because ‘a challenge to summary judgment presents only a question of law,’ we review it for correctness.” Ryan v. Dan’s Food Stores, Inc., 972 P.2d 395, 400 (Utah 1998)(quoting West v. Thomson Newspapers, 872 P.2d 999, 1004 (Utah 1994)). That court continued: “In reviewing a grant of summary judgment, ‘[w]e determine only whether the trial court erred in applying the governing law and whether the trial court correctly held that there were no disputed issues of material of fact.’” Ryan, at 400 (quoting Ferree v. State, 784 P.2d 149, 151 (Utah 1989)).

### **DETERMINATIVE STATUTES AND RULES**

1. UTAH CODE ANN. § 78-14-2 (1999) is set forth verbatim in part herein and is found in the addendum to Appellant’s Brief.
2. UTAH CODE ANN. § 78-14-3 (1999) is set forth verbatim in part herein and is found in the addendum to Appellant’s Brief.
3. UTAH CODE ANN. § 78-14-4 (1999) is set forth in the addendum to Appellant’s Brief.
4. UTAH CODE ANN. § 78-14-8 (1999) is referred to herein and is found in the attached addendum.

5. UTAH CODE ANN. § 63-30-2 (1999) is set forth verbatim in part herein and is found in the attached addendum.

6. UTAH CODE ANN. § 63-30-3 (1999) is set forth verbatim in part herein and is found in the attached addendum.

7. UTAH CODE ANN. § 63-30-10 (1999) is set forth verbatim in part herein and is found in the attached addendum.

8. UTAH CODE ANN.-§ 78-11-7 (1999) is referred to herein and is found in the attached addendum.

9. UTAH CODE ANN. § 78-12-28(2) (1999) is referred to herein and is found in the attached addendum.

### **STATEMENT OF THE CASE**

In the present case, Plaintiff/Appellant brought an action against the Hospital Service District/Appellee for the alleged wrongful death of his spouse. This appeal is from the summary judgment entered by the Fifth District Court of Beaver County, State of Utah, on February 2, 1999. The District Court ruled that the Hospital Service District is a health care provider, and the actions complained of related to the transportation of the decedent by the ambulance service provided by the Defendant. As this ambulance service falls under the health care provisions of the Utah Health Care Malpractice Act, UTAH CODE ANN. § 78-14-1 *et. seq.* (1999), the two year statute of limitations barred the claims of the Appellant, because

he failed to comply with mandates of this Act by filing the appropriate notice within the required period of time and by not filing suit within the two year required period.

### **STATEMENT OF FACTS**

The facts were determined by the District Court to be undisputed as that court found that the Appellant had failed “to provide any such ‘concise statement of material facts as to which [it] contends a genuine issue exists.’ Nor does he ‘specifically refer’ to any portion of the record to demonstrate disputed issues of fact.” Memorandum Decision at 2, attached to addendum of Appellant’s Brief. The Court adopted the facts of the Appellee and summarized the facts as they are related below.

On October 8, 1995, the decedent became ill. Her husband, the Appellant, called for emergency assistance from the Appellee hospital. An ambulance was dispatched, and the decedent was placed aboard. The ambulance departed for the Beaver Valley Hospital. See Memorandum Decision at 2-3.

In his brief, the Appellant contends that the ambulance broke down en route. However, as noted above, no disputed fact was presented at the trial court level supporting this contention. The undisputed facts indicate that a gauge within the ambulance began to operate “erratically.” A second ambulance was dispatched which met the first en route. When both ambulances met, the decedent was transferred to the second ambulance, which took a minute or two. The decedent died nine days later on October 17, 1995. See Memorandum Decision at 2-3.

Over two years later, the Appellant filed the present claim, alleging that the Appellee's negligence in the care of its ambulance caused the decedent's delayed arrival at the Beaver Valley Hospital and therefore caused her wrongful death. See Memorandum Decision at 3.

### **SUMMARY OF ARGUMENT**

The facts of the case were not disputed by the Appellant, and the district court properly adopted the facts of the Appellee. Therefore, in accordance with Supreme Court precedent, the review of the District Court's decision is one of correctness. See Shurtz v. BMW of North America, 814 P.2d 1108, 1111 (Utah 1991). The undisputed facts indicate that action complained of by the Appellant occurred while health care was being rendered to the decedent by the ambulance service of the Appellee Hospital. Section 78-14-3(11) of the Utah Health Care Malpractice Act ("Act") defines health care providers and the statute clearly encompasses the ambulance service. Interpretation of this statute by the Supreme Court, and statutory construction principles defined by that court further demonstrate that the health care provided in the present case fell within statutes parameters.

An ambulance service, standing alone is also part of the health care service envisioned in the Act. This service provides services similar to other care providers. Further, the ambulance service is an integral part of the health care provided by the hospital.

Appellant contends that a mechanic is not a health care provider, and therefore this case was wrongly decided. However, the statutory language and the accompanying

legislative history indicate that employees of health care providers fall within the language of the Act. Therefore, the actions of an employee relating to health care carried out in the course of employment fall within the requirements of the Act, specifically that any action brought against a health care provider must be brought within the two year statute of limitations found in § 78-14-4.

The acts of a health care employee, though not a direct rendering of health care, give rise to claims under § 78-14-3(14). The Act encompasses all claims “based upon alleged personal injuries.” Again, legislative intent and established principles of statutory construction indicate that the actions taken in the maintenance of the ambulance do relate to health care. Further, the argument presented by the Appellant would create a gap in the Act, frustrating its purpose. Also, Appellant’s interpretation of the Act creates contradictions in effect of the Act, which is contrary to the rules of statutory construction. The Act was proposed to limit the time for claims against health care providers, not shield them from claims. Appellant’s argument attempts to create a new interpretation of the Act, because the claim was not properly brought in accordance with the Act’s statute of limitations.

Appellee presented two other grounds for summary judgment in the district court. Although that court did not reach these grounds, the district courts grant of summary judgment may also be affirmed on either of these two grounds. See Nova Casualty Co. v. Able Construction, Inc., 374 Utah Adv. Rep. 3 (1999).

The first of these grounds is that the Appellant's claims are barred by the Utah Governmental Immunity Act. The Appellee is a hospital organized as a political body created as a hospital service district. As such it is immune from certain claims including those arising out of the operation of an emergency vehicle and for failure to make a proper inspection of the ambulance. See UTAH CODE ANN. §§ 63-30-10(4) and (15) (1999).

The final argument is that Appellant's claim is barred by the two-year general statute of limitations for wrongful death actions as contained in § 78-12-28(2). The more specific statute of limitations should apply as provided by the Utah Health Care Malpractice Act. However, Appellant also failed to comply with § 78-12-28(2) by failing to file the present suit within two years of the death of the decedent.

## **ARGUMENT**

### **A. The Ambulance Service Is an Integral Part of the Defendant and Is a Health Care Provider as Provided by the Utah Health Care Malpractice Act.**

Appellant contends that the actions complained of were caused by the negligence of an "auto mechanic," who is not covered by the provisions of the Utah Health Care Malpractice Act as defined in § 78-14-3 of the Utah Code. However, the undisputed facts indicate that no action by a mechanic was involved in this case. Appellant alleged a mechanical failure of the ambulance, causing a twenty minute delay. However, as noted above, and by undisputed the facts on the record, this was not the case.

The ambulance transportation did experience a delay of one or two minutes when those on board the ambulance rendering health care to the decedent, determined to call for a second ambulance as a precautionary measure. Their ambulance, at no point, actually suffered a mechanical breakdown. See Memorandum in Support of Motion for Summary Judgment at 2, ¶ 7, attached hereto in the addendum. As noted in the Memorandum Decision, Appellant failed to produce any disputed facts and the Court admitted Appellee's facts for the Motion for Summary Judgment. See Memorandum Decision at 2. Therefore, the undisputed facts demonstrated that the decision to transfer the decedent was made by the driver of the ambulance in conjunction with his duties in rendering health care to promote the health care of the decedent. Again, as the facts are not in dispute the decision of the district court is reviewed only for correctness. See Utah Bankers Association v. America First Credit Union, 912 P.2d 988, 990-991 (Utah 1996); see also Shurtz v. BMW of North America, 814 P.2d 1108, 1111 (Utah 1991) (“[A] challenge to a summary judgment presents for review only conclusions of law because by definition, cases decided on summary judgment do not resolve factual issues.”)

This ambulance service is a “health care provider” as defined by the act. Section 78-14-3(11) of the Utah Code provides that a hospital is one such defined health care provider:

“Health care provider” includes any person, partnership, association, corporation, or other facility or institution who causes to be rendered or who renders health care or professional services as a hospital, physician, registered nurse, licensed practical nurse, nurse-midwife, dentist, dental hygienist,

optometrist, clinical laboratory technologist, pharmacist, physical therapist, podiatric physician, psychologist, chiropractic physician, naturopathic physician, osteopathic physician, osteopathic physician and surgeon, audiologist, speech-language pathologist, clinical social worker, certified social worker, social service worker, marriage and family counselor, practitioner of obstetrics, or others rendering similar care and services relating to or arising out of the health needs of persons or groups of persons and officers, employees, or agents of any of the above acting in the course and scope of their employment.

UTAH CODE ANN. § 78-14-3(11) (1999). It is undisputed the Appellee is a hospital. The District Court not only noted that the Appellee “is [] licensed as a ‘General Acute Hospital,’” but further stated in accordance with the above cited language that the Appellee “easily qualifies as a health care provider for the purposes of the Malpractice Act. The [Appellee] is a hospital which renders health care and related professional services.” Memorandum Decision at 3-4. The Court further noted that the “[t]ransportation of persons in need of health care to the hospital is obviously an integral part of the hospital function and is part of the health care provided by the [Appellee]. Indeed, the health care service which the [Appellee] provided through its ambulance is the very issue in this case.” *Id.* at 4-5.

The District Court correctly made this decision based on current law. Utah Code § 78-14-3(11) was recently interpreted by the Supreme Court in Platts v. Parents Helping Parents, 947 P.2d 658 (Utah 1997). In that case, the parent of a child who committed suicide while under the care of defendant brought an action against the defendant, Parents Helping Parents. The District Court granted summary judgment to the defendant holding that the



defendant was a health care provider. Because it was a health care provider, the statute of limitations found in § 78-14-4 was applicable to their case, and therefore the claim was time barred. The parents appealed this decision to the Court of Appeals.

The Court of Appeals, in their decision, stated the general rule of statutory interpretation. The court cited the purpose of the Act is such that courts should look to congressional intent. See Platts v. Parents Helping Parents, 897 P.2d 1228, 1231 (Utah Ct. App. 1995). That court concluded:

We construe § 78-14-3(11) narrowly to cover only those specifically identified as “health care providers” or those in the rare cases who are so similar to those listed as to have little doubt as to their intended “health care provider” status.

Id. at 1232. The Court of Appeals then held as a matter of law the defendant, a “day treatment facility,” was not a health care provider because their titles were not among those listed in § 78-14-3(11), nor were their titles sufficiently similar to them. See id.

The Supreme Court reversed this decision on certiorari, thereby rejecting a narrow interpretation of § 78-14-3(11) and holding that Parents Helping Parents was one of those encompassed under the “others rendering care and services similar.” See Platts, 947 P.2d 658 (Utah 1997). It should also be noted that the Supreme Court restated the rules of statutory interpretation:

In matters of statutory construction, “[t]he best evidence of the true intent and purpose of the legislature in enacting [an] Act is the plain language of the Act.” *Jensen v. Intermountain Health Care, Inc.*, 679 P.2d 903, 906 (Utah 1984). “[S]tatutory

enactments are to be construed as to render all parts thereof relevant and meaningful.” *Millett v. Clark Clinic Corp.*, 609 P.2d 934, 936 (Utah 1980). Likewise, we are compelled to give the statutory language meaning and to assume that “each term in the statute was used advisedly . . . unless such a reading is unreasonably confused or inoperable.” *Savage Indus., Inc. v. State Tax Comm’n.*, 811 P.2d 664, 670 (Utah 1991)(footnote omitted). We will avoid an interpretation which renders portions of, or words in, a statute superfluous or inoperative. *State v. Hunt*, 906 P.2d 311, 312 (Utah 1995).

Id. at 662.

The Supreme Court further stated that § 78-14-3(11) “is not ambiguous . . .” and “[t]he judiciary is obligated to interpret statutes as they are crafted . . .” Id. at 662. The court stated that Court of Appeals erred in excluding the defendant because their license was obtained under a section not listed in the statute. The court stated that this would exclude all those who may perform similar care or services. The court stated:

We conclude that the statute in question means what it says. All those identified in the statute are “health care providers.” All others rendering care and services similar to those explicitly identified are also “health care providers.”

Id. at 663. A much stronger argument applies in the case at bar where the ambulance services is directly addressing the patients health care needs.

For the reasons stated above, the District Court properly and correctly interpreted the statute. The Appellee is a hospital of which the ambulance service was an integral part. The District Court correctly noted that an ambulance service is directly related to the health care provided by the Appellee. Therefore, the Appellee is a health care provider because it is

specifically listed as a hospital and its integral parts, such as the ambulance service, provide “care and services to those explicitly identified.”

**B. The Ambulance Service, Apart from the Hospital Is Still a Health Care Provider as Provided by the Act.**

Even if the ambulance driver was not a listed health care provider, his services, as stated by the Platts decision were related to health care as he was “rendering care and services similar to those explicitly identified are also ‘health care providers.’” Id. at 663. As noted by the above citation to the Utah Code, “others rendering similar care and services relating to or arising out of the health needs of persons or groups of persons” are also health care providers. UTAH CODE ANN. § 78-14-3(11). As the District Court Judge noted, ambulance transportation is an integral part of the services rendered. Therefore, the conclusions of the District Court Judge that the ambulance service was a health care provider was correct, and this position is supported by the language in Platts.

**C. The Appellant’s Claim Is Still Barred by the Utah Health Care Malpractice Act Because an Ambulance Mechanic Would Still Be Covered by the Provisions of the Act.**

Although the facts do not indicate that a mechanical decision was made at any time during the proceedings, Appellant contends that the negligence claim was based upon an “auto mechanic’s” negligent care of the ambulance. While there was no such evidence before the trial court, Appellant bases his argument on allegations made in his complaint, which were not presented on summary judgment. At no point does the Appellant dispute the

District Court's analysis that the ambulance service is an integral part of the health care provided by the Appellee. Nor did Appellant contend in his facts that a particular mechanic was liable, but suggested only in his argument opposing summary judgment that someone other than the hospital may have been responsible. However, assuming that the ambulance driver or the mechanic were not rendering direct health care to the decedent, the providing of their services is still encompassed by the Act.

Section 78-14-3(11), states in part, that a health care provider is any one of those several titles listed, including the hospital as noted above. It also includes "officer, employees, or agents of the any of the above (including hospitals) acting in the course and scope of their employment" UTAH CODE ANN. § 78-14-3(11) (1999). As is correctly noted by the Appellant, an auto mechanic is not a listed health care provider. However, even if the question as to whether the mechanic was the negligent or cause of the negligence in the present case, the maintenance of the ambulance would still fall within the scope of their employment as that employment aided the hospital in its role as a health care provider. Therefore, the District Court properly concluded that the ambulance transportation was still covered by the principles of the Act. When the two year statute of limitations had run, Appellant's claim was barred as the ambulance mechanic was acting within the scope of his duties, which included rendering health care to another. Again, the Platts court determined that "the statute in question means what it says," explicitly identifying that all others rendering similar aid fell within the provisions of the Act. Platts, at 663. The same argument

applies in the present case. The citation from the Utah Code cited above immediately follows all those who render similar care. Therefore, the plain language of the Act encompasses all those working within the scope of their employment in the areas of health care. Claims against those who act within the scope of their employment on behalf of the health care providers, are barred by § 78-14-4's two year statute of limitations.

However, it should be noted that this final argument need not be reached by this Court. As noted above in subpart A, the District Court properly concluded that the ambulance transportation was an integral part of the hospital. The hospital itself is clearly an identified health care provider. Therefore, the hospital may not be subject to suit after the two years statute of limitations has expired. Further, as indicated in subpart B above, the District Court in this same conclusion stated that the transportation is an integral part of the hospital, and the driver and the ambulance providing transportation to the hospital were clearly part of the health care rendered. This conclusion is based properly on the status of the law as interpreted by Platts. Further, the lower court did not explicitly reach the decision that a mechanic was covered by the health care provision, as the Appellant raised no issues of fact supporting this contention. However, the above argument indicates that while acting in the scope of his employment, he also falls under the provisions of the Act.

**D. The Action of which the Appellant Complains Clearly Relates to the Health Care Provided.**

In Point Two of the Appellant's argument, the Appellant states "that the maintenance and repair of an ambulance by an auto mechanic is in no way related to or arising from 'health care.'" Appellant's Brief at 7. Appellant relies on § 78-14-3(14) of the Utah Code which defines a malpractice action.

"Malpractice action against a health care provider" means *any action* against a health care provider whether in *contract, tort, breach of warranty, wrongful death, or otherwise*, based upon alleged personal injuries relating to or arising out of the health care rendered or which should have been rendered by the health care provider.

Utah Code Ann. § 78-14-3(14) (1999) (emphasis added).

However, Appellant's contention fails for three reasons. First, as stated by the District Court, the health care provided by the Appellee hospital is an "integral part" of their health care services and therefore "relates to" health care. Second, Appellant's interpretation of this section, contradicts the intent of the legislature and contradicts the accepted language of § 78-14-3(11) cited above. Third, Appellant's interpretation will lead to absurd results creating a gap in the Act, thereby frustrating legislative intent and making the language within the Act superfluous.

The District Court specifically noted, as stated above, that the "[t]ransportation of persons in need of health care to the hospital is obviously an integral part of the hospital function as part of the health care provided by the [Appellee]." Memorandum Decision at

4-5. Again, the statutory language states that an action “relating to . . . health care rendered or which should have been rendered by the health care provider.” UTAH CODE ANN. § 78-14-3(14) (1999). Appellee rendered transport services to the hospital, the sole purpose of this transport was to expedite the “health care” of the person being transported. Therefore, if a failure occurs in the transport, then by logical conclusion, a failure occurs in the health care being rendered.

Additionally, the last portion of this statute relates to health care which “which should have been rendered.” Assuming the facts to be true as stated above, then the Appellee Hospital should have rendered health care with its ambulance services, which were stopped in this case for a minute or two to make the transfer.

For these reasons, the ambulance transportation itself, as well as the service of the particular ambulance in this case, falls within the language § 78-14-3(14). Again, the Platts court stated that “the statute . . . means what it says.” Platts, 947 at 663. The ambulance care related and arose from the health care being provided to the decedent, even if a mechanic failed to properly monitor a gauge located on the ambulance. The interpretation of the above statute by the Appellant also contradicts the intent of the legislature and the accepted language of § 78-14-3(11), which is cited above. The Utah Legislature stated that:

In enacting this Act, it is the purpose of the legislature to provide a reasonable time in which actions may be commenced against health care providers while limiting that time to a specified period for which professional liability insurance premiums can be reasonably and accurately calculated; and to

provide other procedural changes to expedite early evaluation and settlement of claims.

UTAH CODE ANN. § 78-14-2 (1999).

In the present case the Appellee Hospital is clearly a health care provider, and as noted above, the employees and other services which relate to the provision of health care fall within the statutory scheme. If in every situation where the hospital or other health care provider had to justify how every act fell within the contemplation of the provision of health care the purposes of the statute would be frustrated. In the present case the Appellant brought the action over two years later and now is attempting to justify the lateness of his claim by basing it on an argument that the care provided by an ambulance does not fall within the health care provided. However, as noted above, both subsections (11) and (14) encompass any claim relating to or arising from the health care including the ambulance services in this case.

Further, Appellant's interpretation of § 78-14-3(14) would specifically contradict the language cited above from subsection (11), which stated any "officers, employees, or agents of any of the above acting in the course and scope of their employment." The ambulance system's sole existence is to provide transport to those needing health care, and assuming *arguendo* that the auto mechanic would be responsible for the maintenance of care of this ambulance, subsection (11) clearly encompasses that mechanic. This is supported by the argument above. However, according to the interpretation of subsection (14) by the



Appellant, the employees of a hospital or other health care provider would be removed if the specific action they took did not directly relate to the specific injury. As noted in the present case, the facts are that the Appellant called for the ambulance which was dispatched as part of the health care service. Therefore again, any failure of the ambulance was a failure in the health care service provided. Therefore, under the language of the statute the claim is barred by the statute of limitations. “The best evidence of the true intent and purpose of the legislature in enacting the act is the plain language of the act.” Boulder Mountain Lodge, Inc. v. Town of Boulder, 373 Utah Adv. Rep. 5, 7 (1999) (quoting State v. Hunt, 906 P.2d 311, 313 (Utah 1995)). That court went on to state: “accordingly, we ‘look first to the plain language of the statute and assume that each of the terms was used advisably. The language is therefore read literally unless such a reading proves to be unreasonably confused or inoperable.’” Boulder Mountain Lodge, at 7 (quoting Surety Life Ins. Co. v. Smith, 892 P.2d 1, 3 (Utah 1995)). In Boulder Mountain Lodge the court stated with regard to a liquor license statute that: “the statutory language requiring the written consent of local authority . . . is exceedingly plain on its face.” Therefore, based on the plain language of this statute stating “any” claim arising from health care is covered, and this is one such claim

The Platts court further stated “we will avoid an interpretation which renders portions of, or words in, a statute superfluous or inoperative.” Platts, at 662 (quoting State v. Hunt, 906 P.2d 311, 312 (Utah 1995)). Accepting the interpretation by the Appellant in this case would render the language in subsection (11) superfluous. That section, as noted repeatedly

above, indicates that employees working in the scope of their employment for one of the identified health care providers fall within the purview of the Act. Therefore, subsection (14), if granted the interpretation by the Appellant, would have those persons removed if the specific act of employment was not within the listed health care fields. The result is a hospital employee is covered within the definition of (11), but removed by (14) under the Appellant's interpretation if his job title is not on the list of other healthcare professional or standing alone is not so similarly-related. The health care provided by the ambulance in this case was related. However, assuming that the auto mechanic was negligent in his care of the ambulance, his actions would be covered under subsection (11), but according to the Appellant not covered under subsection (14). If his actions are not covered under subsection (14), the language of the act is superfluous in that no employee ever acting within the scope of their employment would be covered unless he also met the first part of part of the definition. However, if he is an employee acting within the scope of his employment, subsection (14) is still viable in that his employment related to the health care being provided. Therefore, the interpretation adopted by the District Court and that supported by the Appellee in this case renders both subsections operable and is within the cited intent of the legislature. "[S]tatutory enactments are to be construed as to render all parts thereof relevant and meaningful." Platts, at 662 (quoting Millet v. Clark Clinic Corp., 609 P.2d 934, 936 (Utah 1980)).

The Appellant's interpretation would also lead to absurd results and thereby frustrates legislative intent. As noted above, the legislative intent is to place a time limit on all actions brought against health care providers. As noted by the interpretation by the Platts court, as well as the arguments above, this definition is broad enough to cover all actions relating to or arising from health care, again, the above cited language from the act states that *any* action may fall within the definition, including torts, contracts, etc. The purpose of the Act was to lower costs for insurance and other costs provided by health care providers. The actions complained of in this case and similar cases result in costs to the health care providers. These are the costs that the health care provider was meant to avoid after the period of statute of limitations had run, according to the purpose of the statute as cited above.

Further, though not implicated in this present case, the interpretation by the Appellant would open a gap in the law. His interpretation would require the courts to analyze every specific act taken by any employee of any health care provider which does not directly relate to the health care of that particular person. It is true that a mechanic does not perform a "health care service." However, his service is related and arises from the need for health care.

A few examples demonstrate the gap that would be created by the argument made by the Appellant. First, an elevator failure in a hospital may result in a patient having to be moved between floors by stairs. This would result in delay of the health care being provided to them. That situation is very similar to the present case. It would be absurd for a claimant

to wait over two years to bring an action simply because an elevator operator or elevator mechanic failed to properly inspect or otherwise maintain the elevators. Clearly the hospital in that situation bears the responsibility of all provisions of its health care, including that of the maintenance of the elevator. Therefore, the two year statute of limitations should apply.

Another example is that of a cafeteria employee. A patient staying at a hospital may require a certain diet. A cafeteria worker is clearly not a “health care provider.” However, failure on her part to properly monitor the ingredients in a food item may interrupt or interfere with recovery, or even cause physical injuries to the patient. In such a situation, a claimant may state that the cafeteria worker was not providing health care. However, clearly the dietary needs of the patients arise from and relate to the health care provided to that patient by the hospital. Similarly in the present case, as noted above and by the District Court, the health care provided was an “integral part” of the health care provided by the Appellee hospital. Again, all of Appellant’s contentions and arguments could have been addressed by simply complying with the mandates of the Act by filing the appropriate notice within the required period of time.

**E. The Trial Court’s Decision Should Also Be Affirmed in Accordance With The Governmental Immunity Act And Because Appellant Failed to Make His Claim Within the Statute of Limitations for a Wrongful Death Action**

Appellee made its motion for summary judgment on three grounds. As noted above, the lower court did not “reach the separate issues governmental immunity, or the applicability of the statute of limitations for wrongful death actions.” Memorandum

Decision at 5. However, these two other grounds also serve as a proper basis for this court to affirm the judgment of the lower court in accordance with the holding of Nova Casualty Co. v. Able Construction, Inc., 374 Utah Adv. Rep. 3 (1999).

In Nova, the appellee similarly argued that the trial court had properly affirmed its motion for summary judgment, but that the trial court could have affirmed this decision on other grounds which the trial court rejected. The appellant, Able Construction, argued that Nova had to raise these issues through a cross-appeal. The Supreme disagreed stating: “If they [Nova] wish to uphold the trial court’s ruling on grounds that were raised but rejected below, a cross appeal is not necessary.” Id. at 3. The Supreme Court continued: “Nova does not request any change in relief. It was granted summary judgment, and it asks only that the decision of the trial court be affirmed. Therefore, it is free to raise arguments, not accepted below, in support of the ruling.” Id. at 4.

In the present case, the Appellee raised two other arguments in support of its motion for summary judgment. The trial court did not consider these as it found the first to be dispositive. Similar to Nova, the Appellee is not seeking to enlarge its rights, but demonstrate that the trial court’s decision should be affirmed. Therefore, Appellee raises the two other arguments not reached by the trial court, which are supported below.

**1. Appellant’s Claims are Barred by the Utah Governmental Immunity Act**

Section 63-30-3(1) states in part that “all governmental entities are immune from suit for any injury which results from the exercise of a . . . governmentally owned hospital . . .

or other governmental health care facility . . . .” UTAH CODE ANN. § 63-30-3(1). The term “government entity” is defined in § 63-30-2(3) as “the state and its political subdivisions as defined in this chapter.” Section 63-30-2(7) defines a “political subdivision” as “any county, city, town . . . or other governmental subdivision or public corporation.” The Appellee Hospital is a public division of Beaver County, State of Utah. See Memorandum Decision at 3; Memorandum in Support of Summary Judgment at 1-2. Since Appellee meets the definition of a governmental entity, and since it is governmentally owned, the Utah Governmental Immunity Acts applies to this case.

Appellant’s specific claims are barred by §§ 63-30-10(15) and 63-30-10(4). Section 63-30-10 states that no waiver of immunity exists where “the injury arises out of, in connection with or results from . . . (15) the operation of an emergency vehicle” while the emergency vehicle is being driven within the parameters of § 41-6-14 (traffic laws exceptions for emergency vehicles). Therefore, under § 63-30-10(15) the state has not waived sovereign immunity in cases where a claim for relief is based on injuries resulting from the use of emergency vehicles unless it can be shown that they were guilty of some traffic violation as outlined in § 41-6-14. In his Complaint, Appellant alleged that “[t]he death of the decedent was a direct and proximate result of the delay in transporting her to the Beaver Valley Hospital.” Complaint at 2, attached hereto in the addendum. This, Appellant claims, was the result of unnecessary negligent delay caused by Appellee’s “[f]ailure to keep the ambulance in proper maintenance [sic] and repair so that it could complete the trip to

Beaver Valley Hospital.” Complaint at 3. Appellant does not claim that Appellee violated any traffic laws outlined in § 41-6-14. The Utah Supreme Court upheld that validity of this section as is noted in Day v. Utah Dept. of Safety, 882 P.2d 1150, 1152 fn.1 (Utah App. 1994).

In his Memorandum in opposing summary judgment, Appellant argued that governmental immunity has been waived under § 63-30-10(15) because the Appellant did not claim that the decedent’s injuries arose from the “operation of an emergency vehicle,” but instead arose because of “improper care and maintenance of the ambulance.” Plaintiff’s Memorandum in Opposition to Summary Judgment at 4. However, an analysis of § 63-30-10 reveals that governmental immunity has not been waived.

Section 63-30-10 states that “immunity from suit of all governmental entities is waived for injury proximately caused by negligent acts or omissions of an employee committed within the scope of employment *except . . . in connection with . . .* (15) the operation of an emergency vehicle. . . .” UTAH CODE ANN. § 63-30-10 (emphasis added). The death of the decedent does not have to arise from or result from the operation of an emergency vehicle in order to maintain governmental immunity, but it is sufficient that the injuries are somehow *connected* to the operation of an emergency vehicle. It is clear that the Appellant attributes the alleged injuries directly to the operation of the ambulance. Therefore, governmental immunity has not been waived, and the Appellant’s claims should be barred under § 63-30-3. Once again, “[t]he best evidence of the true intent and purpose

of the legislature in enacting [an] Act is the plain language of the Act.” Jensen v. Intermountain Health Care, Inc., 679 P.2d 903, 906 (Utah 1984).

Appellant’s claims are also barred by the Utah Governmental Immunity Act under § 63-30-10(4). As noted above, § 63-30-10 states that governmental immunity is generally waived. However, an exception is made in § 63-30-10(4) where the claim results from an employee’s “failure to make an inspection or . . . making an inadequate or negligent inspection.” In the present case the Appellant argues (though as noted above did not argue at the trial level) that the delay was caused by the negligence of an “auto mechanic” who failed to properly maintain the ambulance. If such is the case, the failure to properly inspect the ambulance falls within the parameters of this statute. The Utah Supreme Court has held that the policy behind the exceptions to the waiver of immunity that are found in § 63-30-10 are based upon public interest: “Far more persons would suffer if government did not perform these functions than would be benefitted by permitting recovery in cases where the government is shown to have performed inadequately.” Erickson v. Salt Lake City Corp., 858 P.2d 995, 998 (Utah 1993) (quoting 4 California Law Revision Commission, *Reports, Recommendations and Studies* 817-18 (1963)). That court held that § 63-30-10(4) “was intended to immunize only the conclusions and results of an inspection where the inspector may have overlooked something or made faulty judgment in deciding whether to approve or reject the subject of the inspection.” Erickson, at 998. Appellant’s claim that decedent’s



death was caused by the faulty inspection by an auto mechanic is therefore barred by § 63-30-10(4).

**2. Appellant's Claims Under the General Statute of Limitations for Wrongful Death Actions Are Barred By Utah Code Ann. § 78-12-28(2) and § 78-11-7.**

Although the statute allowing for a wrongful death action is found in § 78-11-7, any such suit “caused by the wrongful act or neglect of another” falls under the two year statute of limitations found in § 78-12-28(2). See UTAH CODE ANN. § 78-12-28(2) (1999). In a recent Supreme Court case, factually similar to the present case, the Court held that the two year statute of limitations as set forth in the Utah Health Care Malpractice Act was applicable to an action against a health care provider rather than the general two year statute of limitations: “Clearly, the legislature intended that the Utah Health Care Malpractice Act apply to actions for wrongful death based upon injuries arising out of medical malpractice.” Jensen v. IHC Hospitals, Inc., 944 P.2d 327, 332 (Utah 1997). Even if the Utah Health Care Malpractice Act did not apply the action is still barred by this statute of limitations as the action is a wrongful death action as the Appellant did not timely file this action during the two year time period.

However, as Appellant argued in his Memorandum opposing summary judgment the two year statute of limitations for wrongful death actions is superceded by the statute of limitations in Utah Health Care Malpractice Act (§ 78-14-4). Plaintiff's argument is correct, but misplaced. Plaintiff argues on the one hand that the general statute of limitations for

wrongful death actions did not apply as § 78-14-4's general statute of limitations does apply. Then Appellant argues, as noted above, that the Utah Health Care Malpractice Act does not apply as the claim was not for medical malpractice. See Plaintiff's Memorandum in Opposition to Summary Judgment at 2-3. Therefore, if the Court finds that the Utah Health Care Malpractice Act does not apply, then the governing statute of limitations for wrongful death actions must be § 78-12-28(2), with which the Appellant did not comply as he filed suit over two years after the death of the decedent. However, as stated above, if the Court holds that the Utah Health Care Malpractice Act does apply, then the statute of limitations of that Act apply and the Appellant's claims are barred as he failed to comply with requirements of § 78-14-4 or the intent to sue provisions of § 78-14-8. Therefore, as the Appellant failed to comply with the requirements of either statute, the decision of the district court granting summary judgment should be affirmed.

## **CONCLUSION**

For the foregoing reasons, the summary judgment of the District Court should be affirmed. The District Court found that there were no disputed material facts as to the issues involving the Utah Health Care Malpractice Act. The Appellant has raised no contention that there were disputed material facts which need be addressed on appeal. As noted above, the Appellee is a health care provider which is clearly listed among the health care provisions of the Utah Health Care Malpractice Act as outlined in the Utah Code. Further, the actions complained of by the Appellant occurred during the time that health care services were being

provided. Further the Appellant's claims are barred by the Governmental Immunity Act and the two year statute of limitations for a wrongful death action. For the foregoing reasons, the decision of the District Court granting the summary judgment should be affirmed, and this appeal dismissed.

RESPECTFULLY SUBMITTED this 18<sup>th</sup> day of August, 1999.

JEFFS & JEFFS, P.C.

  
M. Dayle Jeffs

#### MAILING CERTIFICATE

I hereby certify that the original Brief of Appellee and seven (7) copies were mailed to the Utah Court of Appeals, State of Utah, 450 South State Street, P.O. Box 140230, Salt Lake City, Utah, 84721-0230, and a copy mailed to the below named party by placing the same in the United States mail, postage prepaid, this 18<sup>th</sup> day of August, 1999, addressed as follows:

FLOYD W. HOLM  
141 North Main, Suite 220  
Cedar City, Utah 84721

  
M. Dayle Jeffs

## **ADDENDUM**

## **63-30-2. Definitions.**

As used in this chapter:

(1) "Claim" means any claim or cause of action for money or damages against a governmental entity or against an employee.

(2) (a) "Employee" includes a governmental entity's officers, employees, servants, trustees, commissioners, members of a governing body, members of a board, members of a commission, or members of an advisory body, officers and employees in accordance with Section 67-5b-104, student teachers certificated in accordance with Section 53A-6-104, educational aides, students engaged in providing services to members of the public in the course of an approved medical, nursing, or other professional health care clinical training program, volunteers, and tutors, but does not include an independent contractor.

(b) "Employee" includes all of the positions identified in Subsection (2)(a), whether or not the individual holding that position receives compensation.

(3) "Governmental entity" means the state and its political subdivisions as defined in this chapter.

(4) (a) "Governmental function" means any act, failure to act, operation, function, or undertaking of a governmental entity whether or not the act, failure to act, operation, function, or undertaking is characterized as governmental, proprietary, a core governmental function, unique to government, undertaken in a dual capacity, essential to or not essential to a government or governmental function, or could be performed by private enterprise or private persons.

(b) A "governmental function" may be performed by any department, agency, employee, agent, or officer of a governmental entity.

(5) "Injury" means death, injury to a person, damage to or loss of property, or any other injury that a person may suffer to his person, or estate, that would be actionable if inflicted by a private person or his agent.

(6) "Personal injury" means an injury of any kind other than property damage.

(7) "Political subdivision" means any county, city, town, school district, public transit district, redevelopment agency, special improvement or taxing district, or other governmental subdivision or public corporation.

(8) "Property damage" means injury to, or loss of, any right, title, estate, or interest in real or personal property.

(9) "State" means the state of Utah, and includes any office, department, agency, authority, commission, board, institution, hospital, college, university, or other instrumentality of the state.

### **63-30-3. Immunity of governmental entities from suit.**

(1) Except as may be otherwise provided in this chapter, all governmental entities are immune from suit for any injury which results from the exercise of a governmental function, governmentally-owned hospital, nursing home, or other governmental health care facility, and from an approved medical, nursing, or other professional health care clinical training program conducted in either public or private facilities.

(2) (a) For the purposes of this chapter only, the following state medical programs and services performed at a state-owned university hospital are unique or essential to the core of governmental activity in this state and are considered to be governmental functions:

(i) care of a patient referred by another hospital or physician because of the high risk nature of the patient's medical condition;

(ii) high risk care or procedures available in Utah only at a state-owned university hospital or provided in Utah only by physicians employed at a state-owned university acting in the scope of their employment;

(iii) care of patients who cannot receive appropriate medical care or treatment at another medical facility in Utah; and

(iv) any other service or procedure performed at a state-owned university hospital or by physicians employed at a state-owned university acting in the scope of their employment that a court finds is unique or essential to the core of governmental activity in this state.

(b) If any claim under this subsection exceeds the limits established in Section 63-30-34, the claimant may submit the excess claim to the Board of Examiners and the Legislature under Title 63, Chapter 6.

(3) The management of floodwaters and other natural disasters and the construction, repair, and operation of flood and storm systems by governmental entities are considered to be governmental functions, and governmental entities and their officers and employees are immune from suit for any injury or damage resulting from those activities.

(4) Officers and employees of a Children's Justice Center are immune from suit for any injury which results from their joint intergovernmental functions at a center created in Title 62A, Chapter 4a.

### **63-30-10. Waiver of immunity for injury caused by negligent act or omission of employee — Exceptions.**

Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of employment except if the injury arises out of, in connection with, or results from:

- (1) the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused;
- (2) assault, battery, false imprisonment, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, or violation of civil rights;
- (3) the issuance, denial, suspension, or revocation of or by the failure or refusal to issue, deny, suspend, or revoke any permit, license, certificate, approval, order, or similar authorization;
- (4) a failure to make an inspection or by making an inadequate or negligent inspection;
- (5) the institution or prosecution of any judicial or administrative proceeding, even if malicious or without probable cause;
- (6) a misrepresentation by an employee whether or not it is negligent or intentional;
- (7) riots, unlawful assemblies, public demonstrations, mob violence, and civil disturbances;
- (8) the collection of and assessment of taxes;
- (9) the activities of the Utah National Guard;
- (10) the incarceration of any person in any state prison, county or city jail, or other place of legal confinement;
- (11) any natural condition on publicly owned or controlled lands, any condition existing in connection with an abandoned mine or mining operation, or any activity authorized by the School and Institutional Trust Lands Administration or the Division of Forestry, Fire and State Lands;
- (12) research or implementation of cloud management or seeding for the clearing of fog;
- (13) the management of flood waters, earthquakes, or natural disasters;
- (14) the construction, repair, or operation of flood or storm systems;
- (15) the operation of an emergency vehicle, while being driven in accordance with the requirements of Section 41-6-14;
- (16) a latent dangerous or latent defective condition of any highway, road, street, alley, crosswalk, sidewalk, culvert, tunnel, bridge, viaduct, or other structure located on them;
- (17) a latent dangerous or latent defective condition of any public building, structure, dam, reservoir, or other public improvement;
- (18) the activities of:
  - (a) providing emergency medical assistance;
  - (b) fighting fire;
  - (c) regulating, mitigating, or handling hazardous materials or hazardous wastes;
  - (d) emergency evacuations; or
  - (e) intervening during dam emergencies; or
- (19) the exercise or performance or the failure to exercise or perform any function pursuant to Title 73, Chapter 5a or Title 73, Chapter 10 which immunity is in addition to all other immunities granted by law.

**78-11-7. Death of adult — Suit by heir or personal representative [Effective until July 1, 1997].**

Except as provided in Title 35, Chapter 1, when the death of a person not a minor is caused by the wrongful act or neglect of another, his heirs, or his personal representatives for the benefit of his heirs, may maintain an action for damages against the person causing the death, or, if such person is employed by another person who is responsible for his conduct, then also against such other person. If such adult person has a guardian at the time of his death, only one action can be maintained for the injury to or death of such person, and such action may be brought by either the personal representatives of such adult deceased person, for the benefit of his heirs, or by such guardian for the benefit of the heirs as provided in Section 78-11-6. In every action under this and Section 78-11-6 such damages may be given as under all the circumstances of the case may be just.

**Death of adult — Suit by heir or personal representative [Effective July 1, 1997].**

Except as provided in Title 35A, Chapter 3, Workers' Compensation Act, when the death of a person not a minor is caused by the wrongful act or neglect of another, his heirs, or his personal representatives for the benefit of his heirs, may maintain an action for damages against the person causing the death, or, if such person is employed by another person who is responsible for his conduct, then also against such other person. If such adult person has a guardian at the time of his death, only one action can be maintained for the injury to or death of such person, and such action may be brought by either the personal representatives of such adult deceased person, for the benefit of his heirs, or by such guardian for the benefit of the heirs as provided in Section 78-11-6. In every action under this and Section 78-11-6 such damages may be given as under all the circumstances of the case may be just.



## **78-12-28. Within two years.**

An action may be brought within two years:

(1) against a marshal, sheriff, constable, or other officer for liability incurred by the doing of an act in his official capacity, and by virtue of his office, or by the omission of an official duty, including the nonpayment of money collected upon an execution;

(2) for recovery of damages for a death caused by the wrongful act or neglect of another; or

(3) in causes of action against the state and its employees, for injury to the personal rights of another if not otherwise provided by state or federal law.

**History:** L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-28; L. 1971, ch. 212, § 1; 1976, ch. 23, § 13; 1987, ch. 19, § 3; 1996, ch. 79, § 112; 1997, ch. 153, § 1.

**Amendment Notes.** — The 1997 amend-

ment, effective May 5, 1997, deleted “but this section does not apply to an action for an escape” at the end of Subsection (1); in Subsection (3) added “in causes of action against the state and its employees” and substituted “if not

#### **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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IN THE FIFTH JUDICIAL DISTRICT COURT OF BEAVER COUNTY

STATE OF UTAH

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MAX R. CARTER,

Plaintiff,

vs.

BEAVER COUNTY and MILFORD  
VALLEY MEMORIAL HOSPITAL, a  
governmental agency of BEAVER COUNTY,

Defendants.

**MEMORANDUM IN SUPPORT OF  
MOTION FOR SUMMARY  
JUDGMENT**

*Civil No. 98-CV-56  
Judge J. Philip Eves*

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COMES NOW the Defendant, Milford Valley Memorial Hospital, by and through counsel, and moves the court to dismiss the plaintiff's Complaint.

**FACTS**

1. Defendant Milford Valley Memorial Hospital is the operating name of the hospital owned by the Beaver County Special Hospital Service District No. 3 and is a political subdivision of Beaver County doing business as a health care provider within Beaver County, Utah.

2. The Milford Valley Memorial Hospital Ambulance Service is owned and operated by Defendant Milford Valley Memorial Hospital. (See Affidavit of John Gledhill attached hereto as Exhibit "A".)

3. Defendant Milford Valley Memorial Hospital (known as "Beaver County Special Hospital Service District No. 3") was duly created as a separate body politic under the Utah Special Service District Act, U.C.A. §§ 17A-2-1301, et. seq. (See Exhibit "B").

4. Defendant Milford Valley Memorial Hospital is licensed as a "General Acute Hospital" pursuant to § 26-21-2 (See Exhibit "C").

5. Defendant Milford Valley Memorial Hospital performs duties related to general hospital care and professional services in Beaver County, State of Utah.

6. The incident in question took place in Beaver County, Utah.

7. On October 8, 1995, the decedent, Mrs. Carter, became ill and distressed to the point that Plaintiff called for emergency assistance from the Milford Valley Memorial Hospital. An ambulance was dispatched promptly. Upon arrival, the ambulance personnel placed Mrs. Carter in the ambulance and began their journey to the Beaver Valley Hospital, located in Beaver, Utah. En route, the driver noticed one of the gauges operating in an erratic fashion. Being concerned he called the Hospital and requested that they send a second ambulance in case he suffered a breakdown. The ambulance did not break down. When the ambulances met, as a safety precaution, they transferred Mrs. Carter to the Beaver

Hospital Ambulance and then continued with Mrs. Carter to the Hospital. Downtime for the change of ambulance was no more than one minute. Mrs. Carter died on October 17, 1995.

8. Plaintiff waited until January 6, 1998, to file the Complaint for this action, nearly two and one third years after the incident in question occurred.

9. Plaintiff alleges negligence on the part of Defendant which allegedly led to the death of Mrs. Carter.

### **ARGUMENT**

Under Rule 56(c) of the Utah Rules of Civil Procedure, the court may grant any parties' Motion for Summary Judgment so long as the moving party shows "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." Furthermore, the court must view all evidence, admissions, and inferences in a light most favorable to the non-moving party. See Bullock v. Desert Dodge Truck Center, Inc., 354 P.2d 559 (Utah 1960).

#### **A. Utah Health Care Malpractice Act Applies.**

Section 78-14-2 has recognized that "the number of suits and claims for damages and the amount of judgments and settlements arising from health care has increased greatly in recent years." As a result, the costs of health care have risen dramatically: "The effect of increased insurance premiums and increased claims is increased health care cost, both through the health care providers passing the cost of premiums to the patient and through the provider's practicing defensive medicine because he views a patient as a potential adversary

in a lawsuit.” § 78-14-2 states that the purpose of the Utah Health Care Malpractice Act is to “provide a reasonable time in which actions may be commenced against health care providers while limiting that time to a specific period for which professional liability insurance premiums can be reasonably and accurately calculated.” Through this section, the Utah Legislature has announced its desire to specifically protect health care providers from having to concern themselves with long periods of time in which their potential liability is unknown, thus hopefully bringing down the costs of being a health care provider. Title 78 Chapter 14 sets forth the required steps that must be taken in order for a party to present a legitimate claim against a health care provider. If, then, a potential Defendant meets the definition of a health care provider as provided for in § 78-14-3, a party seeking suit against that health care provider must meet all of these requirements or their claim will be barred. § 78-14-3(14) defines a “malpractice action against a health care provider” as “[a]ny action against a health care provider, whether in contract, tort, breach of warranty, *wrongful death*, or otherwise . . . .” (emphasis added). In addition, § 78-14-3(11) defines “health care provider” as “any person, partnership, association, corporation, or other facility or institution who causes to be rendered or who renders health care or professional services as a hospital . . . or others rendering similar care and services relating to or arising out of the health needs of persons or groups of persons and officers, employees or agents of any of the above acting in the course or scope of their employment” (Emphasis added). There are two parts to this definition. Under the first part, § 78-14-4(12) defines “hospital” as “a public or private

institution licensed under Title 26, Chapter 21, Health Care Facility Licensure and Inspection Act.” As stated in the facts portion of this Motion, Defendant is licensed as a “General Acute Hospital” pursuant to § 26-21-13. Thus, since Defendant is licensed as a “General Acute Hospital,” they are a “hospital” pursuant to § 78-14-4(12). Since they are a hospital, and since they render “health care or professional services” (See Facts Portion of this Motion Para. 5) they meet the definition of a health care provider. The service being provided was ambulance service arising out of the health care needs of the patient. Thus, the ambulance service is a health care provider under § 78-14-3(1). Finally, since they are a health care provider, and since this claim is for wrongful death, the Utah Health Care Malpractice Act applies to this case. Under the second part, since the Milford Valley Memorial Hospital Ambulance Service, as agents for the Defendants, performed the service that allegedly was negligent, and since they were, at the time of the incident, “acting in the course or scope of their employment,” pursuant to § 78-14-4(11) the Utah Health Care Malpractice Act applies. In either case, because § 78-14-4(11) uses the conjunction “or” rather than “and” to separate the two parts of the definition, this Act applies to this suit if either of the two parts part apply.

*1. Plaintiff's Claims Under the Utah Health Care Malpractice Act Barred by Utah Code Ann. § 78-14-4(1).*

Pursuant to § 78-14-4(1) the statute of limitations for any malpractice action against a health care provider is two years. As before stated, defendant meets the requirements of a

“health care provider.” Thus, since Plaintiff brought suit against Milford Valley Memorial Hospital, a health care provider under § 78-14-3(11), and since the alleged wrongdoing occurred through the use of the Milford Valley Memorial Hospital Ambulance (being a service of the Defendant), the statute of limitations as set forth in § 78-14-4(1) applies. The next question then is whether the Plaintiff brought his action within the requisite two-year period. The Medical Malpractice Act statute of limitations begins to run “from the time the ‘plaintiff or patient’ discovers or ‘should have discovered’ the injury.” Lee v. Gaufin, 867 P.2d 574 (Utah 1993). In addition, The Utah Supreme Court has held that “the point at which a person reasonably should know that he or she has suffered a legal injury is a question of fact.” Andreini v. Hultgren, 869 P.2d 919 (1993). In the case at bar, Plaintiff alleges that the incident that is the heart of this action occurred on October 8, 1995 (Complaint at 2). No other facts have been alleged by the Plaintiff that would indicate that he was unaware of the claimed legal injury at that time. As such, the statute of limitations on this matter began to run on October 8, 1995. Defendants did not file this suit until January 6, 1998, nearly two and one third years after the statute of limitations began to run. Since Plaintiff waited too long to file this action, under § 78-14-4(1) their claim is barred. They had until October 9, 1997 to file this claim. The action was not timely filed.



2. *Plaintiff's Claims Under the Utah Health Care Malpractice Act Barred by Utah Code Ann. § 78-14-8.*

Section 78-14-8 requires that “[n]o 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 90 days’ prior notice of intent to commence an action.” Provided, however, if the notice of intent to commence an action is given in the last 90 days, the statute of limitations is extended 120 days. In other words, if the party files their notice of intent to sue within the 90-day period immediately preceding the expiration of the two-year statute of limitations period, they will be granted a 120-day grace period in which they can file suit.

Again, as before stated, Defendant meets the definition of “health care provider” as found in § 78-14-3(11). As a result, Plaintiff was required to give notice of intent to sue to Defendant, under the Malpractice Act, at least 90 days prior to the initiation of this law suit and before the end of the two-year statute of limitations period. In October of 1996, plaintiff filed a Notice of Claim under the Governmental Immunity Act. Even though this Notice of Claim is not the same procedurally as the notice of intent to sue, if the Court deems it as a notice of intent to commence an action for purposes of the Utah Health Care Malpractice Act, Plaintiff is still unable to avail himself of § 78-14-8’s 120-day extension. As before stated, the Notice of Claim was filed in October of 1996, one year prior to the last day of the two-year statute of limitations. Since the 120-day extension applies only where the Notice

was filed within the last 90 days of such date, Plaintiff is unable to take advantage of this grace period.

Since Plaintiff, to date, has neglected to file a notice of intent to sue under the Utah Health Care Malpractice Act, they have not complied with § 78-14-8 and, thus, their claim under § 78-14-8 should be barred. See Platts v. Parents Helping Parents, 1997 WL 613002. In the alternative, even if this court finds that the October 1996 Notice of Claim acts as a notice of intent under the Malpractice Act § 78-14-8, plaintiff is bound by said requirement and statute of limitations. Plaintiff still cannot use the 120-day extension granted to those who file the notice of intent because he did not file the notice of intent during the 90 days leading up to the end of the two-year statute of limitations period. As such, on the last day of the two-year period (October 9, 1997) Plaintiff's claim was barred under § 78-14-8.

**B. Utah Governmental Immunity Act Applies.**

Utah Code Ann. § 63-30-3(1) states that “all governmental entities are immune from suit for any injury which results from the exercise of a . . . governmentally owned hospital . . . or other governmental health care facility . . . .” The term “governmental entity” is defined in § 63-30-2(3) as “the state and its political subdivisions as defined in this chapter.” § 63-30-2(7) then defines a “political subdivision” as “any county, city, town . . . or other governmental subdivision or public corporation.” In addition, as stated in the Facts portion of this Motion, Beaver County Special Hospital Service District No. 3, doing business as Milford Valley Memorial Hospital, is a political subdivision of Beaver County, State of

Utah. Since Defendant meets the definition of a governmental entity, and since they are governmentally owned, the Utah Governmental Immunity Act, found in Title 63, Chapter 30 of the Utah Code applies to this case.

*1. Plaintiff's Claims under the Utah Governmental Immunity are barred by Utah Code Ann. § 63-30-10(15).*

Subparagraph (15) of § 63-30-10 states that no waiver of immunity exists where “the injury arises out of, in connection with, or results from . . . the operation of an emergency vehicle” while the emergency vehicle is being driven within the parameters of § 41-6-14 (traffic law exceptions for emergency vehicles). In other words, under § 63-30-10(15) the state has not waived sovereign immunity in cases where a claim for relief is based on injuries resulting from the use of an emergency vehicle unless it can be shown that they were guilty of some traffic violation as outlined in § 41-6-14. Plaintiff has made no such assertion. In his Complaint, Plaintiff alleges that “[t]he death of the decedent was a direct and proximate result of the delay in transporting her to the Beaver Valley Hospital.” (Plaintiff’s Complaint at 2). This, Plaintiff claims, was the result of unnecessary and negligent delay caused by Defendant’s “[f]ailure to keep the ambulance in proper and maintenance [sic] and repair so that it could complete the trip to Beaver Valley Hospital.” (Complaint at 3). Nowhere in his allegations does Plaintiff claim that Defendant violated any of the traffic laws as outlined in § 41-6-14. As a result, Plaintiff’s allegations are irrelevant as the state has not waived governmental immunity under Subparagraph (15) of § 63-30-10 of the Utah Code. The Utah

Supreme Court has upheld the validity of this Paragraph in Day v. Utah Dept. of Safety, 882 P.2d 1150, fn 1 (Utah Ct. App. 1994).

2. *Plaintiff's Claims under the Utah Governmental Immunity are barred by Utah Code Ann. § 63-30-10(4).*

Utah Code Ann. § 63-30-10 allows for a waiver of governmental immunity where an injury proximately caused by a negligent act or omission of an employee [has been] committed within the scope of employment . . . .” The rest of the Section states that this general rule is subject to certain exceptions including an exception for “a failure to make an inspection or . . . making an inadequate or negligent inspection.” Plaintiff, in his Complaint, alleges that “[t]he death of the decedent was a direct and proximate result of the delay in transporting her to the Beaver Valley Hospital.” (Plaintiff’s Complaint at 2). This, Plaintiff claims, was the result of unnecessary and negligent delay caused by Defendant’s “[f]ailure to keep the ambulance in proper and maintenance [sic] and repair so that it could complete the trip to Beaver Valley Hospital.” (Complaint at 3). In other words, Plaintiff alleges that the injuries were caused due to faulty inspections performed by the Defendant. Plaintiff essentially alleges that but for a faulty inspection, the injury would not have occurred. However, Plaintiff’s allegations are irrelevant due to the fact that Defendant has not waived their governmental immunity under § 63-30-10(4) of the Utah Code. Furthermore, the Utah Supreme Court has held that the policy behind the exceptions to waiver of immunity that are found in § 63-30-10 are based upon the public interest: “Far

more persons would suffer if government did not perform these functions than would be benefitted by permitting recovery in cases where the government is shown to have performed inadequately. [quoting from 4 California Law Revision Commission, Reports, Recommendations and Studies 817-18 (1963)].” Erickson v. Salt Lake City Corp., 858 P.2d 995, 998 (Utah 1993). As such, they held that § 63-30-10(4) “was intended to immunize only the conclusions and results of an inspection where the inspector may have overlooked something or made a faulty judgment in deciding whether to approve or reject the subject of the inspection.” Id. Plaintiff’s claim that decedent’s death was caused by faulty inspections is barred by § 63-30-10(4) for the reason that the state has not waived sovereign immunity for such claim.

**C. Plaintiff’s Claims Under the General Statute of Limitations for Wrongful Death are Barred by Utah Code Ann. §78-12-28(2) and § 78-11-7.**

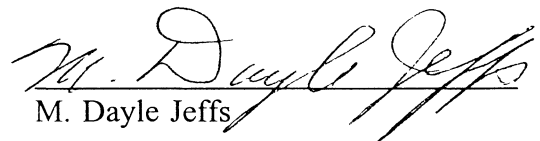
Although the statute allowing for a wrongful death suit is found in § 78-11-7, any such suits “caused by the wrongful act or neglect of another” fall under the general two year statute of limitations found in U.C.A. § 78-12-28(2). However, in a recent Utah Supreme Court case, a case factually similar to the case at bar, it was held that the two year statute of limitations as set forth in Title 78 Chapter 14 (the Utah Health Care Malpractice Act) was applicable to an action for malpractice against a health care provider rather than the general two year statute of limitations that is found in Chapter 12: “Clearly, the legislature intended that the Utah Health Care Malpractice Act apply to actions for wrongful death based upon

personal injuries arising out of medical malpractice.” Jensen v. IHC Hospitals, Inc., 1997 WL 155086 at 4. Even so, under the general § 78-12-28(2) statute of limitations Plaintiff’s suit still fails as it was not timely filed. As before stated, Plaintiff has neglected to initiate this action prior to the termination of the two year period. As such, he cannot assert his claim under the general wrongful death statute.

### CONCLUSION

For the reasons stated above Plaintiff’s claims are barred. Any one of Defendant’s affirmative defenses is sufficient grounds for this court to grant summary judgment. Since all of Defendant’s defenses are based upon and supported by existing law as set forth in the Utah Health Care Malpractice Act and the Governmental Immunity Act, as well as U.C.A. § 78-12-28(2)’s two-year wrongful death statute of limitations, this court should grant this Motion for Summary Judgment and dismiss Plaintiff’s claims in their entirety.

RESPECTFULLY submitted this 21<sup>st</sup> day of May, 1998.

  
M. Dayle Jeffs

IN THE FIFTH JUDICIAL DISTRICT COURT OF IRON COUNTY  
STATE OF UTAH

*Civil No. 980500005*  
*Judge J. Philip Eves*

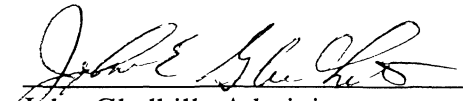
EXHIBIT

3. The ambulance service of Milford Valley Memorial Hospital is operated by Milford Valley Memorial Hospital and the vehicles are owned by the Beaver County Special Hospital Service District No. 3.

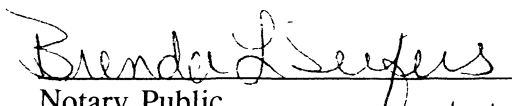
4. Milford Valley Memorial Hospital is the operating business name of the hospital which is owned by the Beaver County Special Hospital Service District No. 3.

5. The ambulances and the ambulance service is neither owned or operated by Beaver County

DATED and signed this 28<sup>th</sup> day of February, 1998.

  
John Gledhill, Administrator

SUBSCRIBED and sworn to before me this 27 day of February, 1998.

  
Notary Public  
Residing at Milford Utah



RESOLUTION TO ESTABLISH BEAVER COUNTY

SPECIAL HOSPITAL SERVICE DISTRICT NO. 3.

BE IT RESOLVED by the Board of County Commissioners of Beaver County, State of Utah, that:

SECTION 1. The Board of County Commissioners of Beaver County, Utah, hereby find and declare that the public health, convenience and necessity require that a special hospital service district be established to include the territory hereinafter described and to provide the service hereinafter specified pursuant to the provisions of Chapter 23 of Title 11, Utah Code Annotated, 1953, as amended, known and cited as the Utah Special Service District Act. Proceedings for the creation of such special service district are hereby commenced pursuant to Section 11-23-5(1), Utah Code Annotated, 1953, as amended.

SECTION 2. The name of such special service district shall be Beaver County Special Hospital Service District No. 3.

SECTION 3. The service to be provided by such special service district shall be hospital service.

SECTION 4. The territory to be included in said special service district shall consist of the following, to-wit:

All that portion of said Beaver County lying West of the following line: Commencing at a point where the range line dividing Range 8 West and Range 9 West, Salt Lake Base and Meridian, intersects the Beaver-Millard county line, and running thence South along said range line to the Southeast corner of Section 36, Township 29 South, Range 9 West, Salt Lake Base and Meridian; thence West 4 miles to the Northwest corner of Section 4, Township 30 South, Range 9 West; thence South to the Beaver-Iron County line.

SECTION 5. As the whole of the municipalities of Milford City and Minersville Town is contained within the territory intended to be included in said special service district, the governing body of each of said municipalities is hereby requested to adopt a resolution or ordinance consenting to the inclusion of said municipality in said special service district pursuant to Section 11-23-4(2)(b).

SECTION 6. The governing body of the existing Beaver County Service Area No. Two, (which is a service area organized and existing under the former law governing county service areas), has elected that the said Beaver County Service Area No. Two become a special

EXHIBIT B

service district pursuant to the provisions of Section 11-23-28, Utah Code Annotated, 1953, the service being provided by the said Beaver County Service Area No. Two, to-wit, hospital service, being the same as the service to be provided by the anticipated special service district, and the territory described in Section 4 hereof, as the territory intended to be included within the proposed Beaver County Special Hospital Service District No. 3, including all of the area now constituting the said Beaver County Service Area No. Two.

SECTION 7. When the Board of County Commissioners shall have set a time and place for a public hearing on the question of whether or not said special service district shall be created as required by Section 11-23-9, Utah Code Annotated, 1953, as amended, then the Beaver County Clerk is directed to issue and publish notice thereof and of the intention of said Board of County Commissioners to create such district in the manner provided by Sections 11-23-7 and 11-23-8.

ADOPTED this 1st day of July, 1982.

Chad W. Johnson  
Chad W. Johnson  
Chairman

Richard Jefferson  
Richard Jefferson  
Commissioner

Howard J. Pryor  
Howard J. Pryor  
Commissioner

ATTEST

Helen W. Christiansen  
County Clerk  
Helen W. Christiansen

Interv #1 AT #2

UTAH DEPARTMENT OF HEALTH



LICENSE FOR GENERAL ACUTE HOSPITAL

EXHIBIT C

Name of Facility: Milford Valley Memorial Hospital

Address: 451 North Main, Milford, Ut 84751

Administrator: John Gledhill

Licensee: Beaver County Service District

Approved Bed Capacity: -34- Swing 24

Date Issued: July 1, 1996 Date of Expiration: June 30, 1997

License No: 1996HOSP0192 Variance Granted: no

*Dora Wynne Green*  
BUREAU DIRECTOR  
POST IN CONSPICUOUS PLACE

*Richard Frost*  
DIRECTOR  
LICENSE NOT TRANSFERABLE

DEPARTMENT OF COMMERCE

LICENSE

Milford Valley Memorial  
451 North Main  
Milford UT 84751

Hospital Pharm.  
Dispense Controlled Substances (2.5)

22-126443-1705  
22-126443-9939

EFFECTIVE

03/26/1997

EXPIRATION

05/31/1999

SIGNATURE OF HOLDER

Trim edges, fold in center and  
laminates for credit-card sized license.

PLEASE NOTE

Milford Valley Memorial  
451 NORTH MAIN  
MILFORD UT 84751

STATE OF UTAH  
DEPARTMENT OF COMMERCE

DIVISION OF OCCUPATIONAL & PROFESSIONAL LICENSING

LICENSE

ISSUED TO

EFFECTIVE DATE

03/26/1997

EXPIRATION DATE

05/31/1999

**Milford Valley Memorial**  
**451 North Main**  
**Milford UT 84751**

EXPIRATION

Hospital Pharmacy  
Dispense Controlled Substances (2.5)

22-126443-1705  
22-126443-9939

SIGNATURE OF HOLDER

EXHIBIT C

EXHIBIT C

No 2293

NOT TRANSFERABLE  
CITY OF MILFORD  
BEAVER COUNTY, UTAH  
**BUSINESS LICENSE**

GRANTED TO MILFORD VALLEY MEMORIAL HOSPITAL ( MILFORD VALLEY MEMORIAL CLINIC)  
To Carry On the Business of HOSPITAL & MEDICAL OFFICE  
At 451 NORTH MAIN STREET MILFORD, UTAH  
For a Period of 12 Months, Commencing JULY 1, 1996  
and Ending JUNE 30, 1997

THIS LICENSE granted subject to the provisions of the Ordinances of the City of Milford, Utah,  
and subsequent amendments relating to business license.

FEE \$ 50.00 (FIFTY AND 00/100 ----- Dollars)

Given under my hand and the Seal of the City of  
Milford, this 8th day of JULY, 1996

CORPORATE SEAL

Allean E. Hill  
Recorder

STATE OF UTAH  
DEPARTMENT OF COMMERCE

**LICENSE**

**Mtn View Family Pharmacy**

Branch Pharmacy

88-121035-1706

EFFECTIVE

**03/26/1997**

EXPIRATION

**05/31/1999**

SIGNATURE OF HOLDER

Trim edges, fold in center and  
laminare for credit card sized license

PLEASE NOTE

**Mtn View Family Pharmacy  
C/O MILFORD MEDICAL, INC  
405 SOUTH MAIN ST.  
MILFORD UT 84751**

STATE OF UTAH  
DEPARTMENT OF COMMERCE  
DIVISION OF OCCUPATIONAL & PROFESSIONAL LICENSING

**LICENSE**

ISSUED TO

EFFECTIVE DATE

**03/26/1997**

EXPIRATION DATE

**05/31/1999**

**Mtn View Family Pharmacy**

CLASSIFICATION

**Branch Pharmacy**

88-121035-1706

SIGNATURE OF HOLDER

EXHIBIT C

FLOYD W HOLM (1522)  
965 South Main, Suite 6  
P.O. Box 765  
Cedar City, UT 84720  
Telephone: (801) 586-6532  
Fax: (801) 586-3879

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FIFTH JUDICIAL COURT, IN AND FOR  
IRON COUNTY, STATE OF UTAH

---

MAX R. CARTER,	)	
	)	COMPLAINT
Plaintiff,	)	
	)	
v.	)	
	)	
BEAVER COUNTY and MILFORD	)	
VALLEY MEMORIAL HOSPITAL, a	)	
governmental agency of BEAVER	)	
COUNTY,	)	
	)	Case No.
Defendants.	)	

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Plaintiff, for cause of cause of action against Defendants, alleges as follows:

1. Defendant Beaver County is a political subdivision organized and existing under the laws of the State of Utah.
2. Defendant Milford Valley Memorial Hospital is an agency or subdivision of Beaver County doing business as a medical provider within Beaver County, Utah.
3. The acts and incident complained of herein took place in Beaver County, Utah.

4. Venue is proper in Iron County, Utah, pursuant to §63-30-17, Utah Code Annotated, 1953, as amended, in that Iron County is contiguous to Beaver County, one of the Defendants herein. Plaintiff has applied for and/or will receive leave of the Court for venue in Iron County.

5. At all times pertinent herein, in doing or omitting the things herein alleged, the officers, employees or agents of Defendants were acting within the course and scope of their employment or agency and with the permission or consent of Defendants.

6. Plaintiff is the widower and sole heir of Anna Rae Carter (the "decedent"), who died on October 17, 1995.

7. On or about October 8, 1995, the decedent became ill and distressed to the extent that Plaintiff called for emergency assistance from the Beaver County Ambulance, which is owned and operated by Defendants. The ambulance personnel obtained the decedent and began transporting her to Beaver Valley Hospital in Beaver, Utah. En route to the hospital, the ambulance broke down and another ambulance had to be called from Beaver to complete the trip, resulting in a delay of approximately twenty (20) minutes. Shortly before arriving at the hospital, the decedent lost consciousness and went into arrest. Although the decedent was revived after some forty (40) minutes, she never regained brain activity and died on October 17, 1995.

8. The death of the decedent was a direct and proximate result of the delay in transporting her to the Beaver Valley Hospital.



9. The Defendant, by and through its employees and agents, were negligent in the following particulars:

(a) Failure to keep the initial ambulance in proper and maintenance and repair so that it could complete the trip to Beaver Valley Hospital;

(b) Failure to timely replace the initial ambulance with a better functioning ambulance prior to the incidents of October 8, 1995; and

(c) Such other acts of negligence as may be shown at the time of trial.

10. The negligent acts of Defendants, by and through their officers, employees or agents, are the sole and proximate cause of the decedent's death and Plaintiff's injuries.

11. By reason of the negligent conduct of Defendants, and each of them, Plaintiff has suffered a loss of love, companionship, society, consortium, support and association of the decedent.

12. As a direct and proximate result of the negligence of Defendants, Plaintiff has been damaged generally in an amount to be shown at trial.

13. As a result of the acts of Defendants, Plaintiff has incurred additional expenses for the last illness of the decedent as well as funeral, burial and related expenses, all of which are special damages, in an amount to be proven at the time of trial.

14. Pursuant to §78-27-44, Utah Code Annotated, 1953, as amended, Plaintiff is entitled to interest on all special damages incurred by him at the rate of eight per cent (8%) per annum from October 8, 1995, to the date of judgment herein.


15. On October 7, 1996, Plaintiff caused to be executed a Notice of Claim, based upon the allegations herein, to Defendants. Said Notice of Claim was served upon the above entity or about October 8, 1996.

16. The Notice of Claim was not acted upon by Defendants within ninety (90) days of service upon it and, therefore, was deemed denied as of January 8, 1997.

WHEREFORE, Plaintiff prays for judgment against Defendants, and each of them, jointly and severally, as follows:

1. For special damages, including medical expenses of the last illness of the decedent and burial expenses, together with interest thereon, as may be determined by the Court at the time of trial;
2. For general damages as may be determined at the Court at the time of trial;
3. For cost of this action; and
4. For such other and further relief as the Court deems just and proper.

DATED this 6<sup>th</sup> day of January, 1998.

  
FLOYD W. HOLM  
Attorney for Plaintiff

Address of Plaintiff:

P.O. Box 86  
Minersville, UT 84752