

1999

Max R. Carter vs. Milford Valley Memorial Hospital, a government agency of Beaver County : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

990203

MAX R. CARTER,

Plaintiff / Appellant,

vs.

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

Defendant / Appellee

BRIEF OF APPELLANT

Case No. 980500056

990203-CA

Priority No. 15

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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FILED

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[illegible]

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.

ISSUE PRESENTED ON APPEAL

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? This issue was preserved by virtue of Plaintiff's opposition to Defendant's Motion for Summary Judgment. (R. 98-104).

STANDARD OF REVIEW

The standard of review for reviewing a summary judgment is one of correctness; namely, whether the lower court's conclusions of law were correct, without giving any deference

whatsoever to those conclusions. Craftsman Builder's Supply v. Butler Manufacturing, 364 Utah Adv. Rep. 22, 24 (Utah 1999); Taylor v. Ogden School District, 927 P.2d 159, 162 (Utah 1996).

DETERMINATIVE STATUTES AND RULES

1. Utah Code Ann. §78-14-3 (1998) is set forth verbatim in the Addendum herein.
2. Utah Code Ann. §78-14-4 (1998) is set forth verbatim in the Addendum herein.

STATEMENT OF THE CASE

This is a case for wrongful death as a consequence of the delayed medical care to the decedent arising from a malfunctioning ambulance. This appeal is from a summary judgment entered by the Fifth District Court of Beaver County, State of Utah on February 2, 1999. That court ruled that because Defendant is a health care provider, it was protected from Plaintiff's claim of negligence by its employees/agents in the automotive maintenance of an ambulance, by the two-year statute of limitations set forth in the Utah Health Care Malpractice Act, U.C.A. § 78-14-1 *et. seq.* (R. 109-114).

STATEMENT OF FACTS

On October 8, 1995, Anna Rae Carter, a resident of Minersville, Utah, became ill and distressed. Her husband, Max R. Carter, the Plaintiff/Appellant in this action, called for emergency assistance from an ambulance located in Minersville ("the Minersville Ambulance") which was operated by Defendant/Appellee, Milford Valley Memorial Hospital. Upon arrival of the Minersville Ambulance at her home, Mrs. Carter was placed inside and they departed for the Beaver Valley Hospital, located in Beaver, Utah, some 18 miles away. (R. 112).

Because the Minersville Ambulance began to experience mechanical difficulties, a second ambulance was called for by radio and dispatched from Beaver to meet the Minersville

Ambulance en route. Mrs. Carter was transferred to the Beaver Ambulance to continue the journey to the Beaver Valley Hospital. Mrs. Carter subsequently died on October 17, 1995. (R. 112).

Plaintiff filed the Complaint in this action on January 6, 1998, over two years after the incident in question.¹ In his Complaint, Plaintiff alleges that the Minersville Ambulance broke down and had to wait for the Beaver Ambulance, resulting in a delay of some twenty minutes. The Complaint further alleges negligent care and maintenance of the Minersville Ambulance, causing a delay in Mrs. Carter's arrival at the Beaver Valley Hospital, which was a direct and proximate cause of her wrongful death.² (R. 5)

SUMMARY OF ARGUMENT

An automotive mechanic does not provide care and service in any way similar to physicians, nurses, therapists, etc., and is not a health care provider under the Utah Health Care Malpractice Act. An action against a hospital engaging the services of an automotive mechanic steps beyond its protected role as a "malpractice action against a health care provider" contemplated by the statute, as all facets of hospital operation do not and should not be construed to be providing health care under the Act.

¹ When bringing this action, Plaintiff complied with the statute of limitations imposed by the Utah Governmental Immunity Act. See Utah Code Ann. §§ 63-30-13 to -15 (1998).

² Although Defendant submitted an Affidavit disputing such facts, they are not "material" to a determination of the Statute of Limitations issue as to whether the automobile mechanic is a health care provider. See Utah R. Civ. P. 56(r). *Cf. Heglar Ranch, Inc. v. Stillman*, 619 P.2d 1390, 1391 (Utah 1980) (summary judgment can be granted on undisputed material facts, even if are often non material facts disputed).

ARGUMENT

POINT ONE

AUTO MECHANICS DO NOT PROVIDE CARE OR SERVICE SIMILAR TO PHYSICIANS, NURSES, ETC., AND ARE NOT A HEALTH CARE PROVIDERS UNDER THE UTAH HEALTHCARE MALPRACTICE ACT

At issue is whether the definition of “health care provider” reaches to include an auto mechanic’s work on an ambulance. The applicable definition is specifically articulated in Section 78-14-3 of the Utah Code:

(11) "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.** [Emphasis added.]

Utah Code Ann. § 78-14-3(11)(1998).

Of course one does not find ambulance auto mechanic articulated among the specifically identified providers. If it is to be found, it must somehow be included as one of the “others rendering similar services . . .” clause. Instructing how to apply this clause, the Utah Supreme Court in Platts v. Parents Helping Parents, 947 P.2d 658, 663 (Utah 1997), pointed out that “[T]he statute does not address the similarity of titles, but rather the similarity of care and services.”

There is no room practically or technically to question how a physician, nurse, dentist, pharmacist or therapist, etc., provides for the health needs of persons. Yet, by any view, it seems unfathomable how one could include an automotive mechanic among their ranks.

Even assuming that a mechanic is employed full time by a hospital³, is the mechanic protected by the statute when he has worked on an ambulance and it breaks down in route? Or on the administrator's company car when it catches fire and burns him badly? Or on the hospital's garbage truck when its brakes fail and it runs a red light killing several in a minivan?

Perhaps its approach was flawed or the construction too narrow, but the Utah Court of Appeals took well the point that those attempting to apply — or those thinking that the statute just logically could not apply — need to know what procedural course they should take before pursuing an action. *See Platts v. Parents Helping Parents*, 897 P.2d 1228, 1231-32, (Utah Ct. App. 1995), *rev'd by Platts v. Parents Helping Parents*, 947 P.2d 658 (Utah 1997).

Early in its analysis, the Utah Supreme Court aptly points out:

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**. . . . “Statutory enactments are to render **all parts thereof relevant and meaningful**. . . .” 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**.” [Emphasis added.]

Platts 947 P.2d at 662. (citations omitted)(quoting Jensen v. Intermountain Health Care, Inc., 679 P.2d 903, 906 (Utah 1984); Millett v. Clark Clinic Corp., 609 P.2d 934, 936 (Utah 1980); Savage Industries., Inc. v. State Tax Commission, 811 P.2d 664, 670 (Utah 1991).

If “plain language” within an Act is regarded as best evidence of meaning; if the analysis

³ There is no dispute, of course, that when providing health care Defendant is a health care provider under Section 78-14-3(11).

is to come away with something relevant and meaningful; if unreasonably confused or inoperable readings are to be avoided— how is it possible that the statute in question is not ambiguous, where a trial court can construe an ambulance mechanic to be a health care provider and that common negligence in routine mechanical maintenance can be viewed as “medical malpractice.” when it is so patently contrary to the plain meaning of the terms and their common relevance? Because of the ambiguity and license for extremely broad construction, normally could not, an even very sophisticated potential plaintiff logically be better informed as to what action to pursue when advancing a claim.” Platts v. Parents Helping Parents, 897 P.2d 228, 1232,(Utah Ct. App. 1995), *rev’d by* Platts v. Parents Helping Parents, 947 P.2d 658 (Utah 1997).

The Supreme Court’s answer was that “whether [the one providing a service does] indeed qualify as a ‘health care provider’ depends, of course, upon whether the . . . service actually rendered [is] in fact similar to the care and services rendered by any of those specifically listed in the statute.” Id. at 663.

Applying this analysis, the question becomes whether an automotive mechanic working on an ambulance provides services arising out of the health needs of persons or groups of persons in any way plainly or meaningfully similar to those of a physician, registered nurse, dentist, optometrist, or clinical laboratory technologist or anyone employed by or acting for them in rendering such care or service. To say that it does simply must go well beyond any reasonable intent the legislature could have had in setting out the specifics of the statute.

The trial court’s conclusion that an auto mechanic is a health care provider simply because she is an employee of a hospital is plainly and practically wrong. No one using plain meanings could place the services of a mechanic on par with those of a physician or therapist in asserting negligence and applicable standards of care. Common sense would say that there is not even an issue of fact; a mechanic is not a health care provider and alleging malpractice regarding

a mechanic's care or service cannot be done in good faith. Nevertheless, the technical inquiry urged by the Utah Supreme Court in its version of Platts at a minimum raises an issue of material fact upon which the trial court wrongfully granted summary judgment.

POINT TWO

SINCE PLAINTIFF'S CLAIM DOES NOT ARISE FROM HEALTH CARE PROVIDED BY DEFENDANT, IT IS NOT A "MALPRACTICE IN ACTION AGAINST A HEALTH CARE PROVIDER"

Even assuming that this court determines that the Defendant "wears only one hat", there is still at least a question of fact as to whether this action is a "malpractice action against a health care provider" as that term is defined under Section 78-14-3(14) of the Utah Code.

"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 health care rendered or which should have been rendered by the health care provider. [Emphasis added]

Utah Code Ann. § 78-14-3(14)(1998).

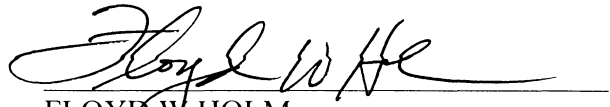
In the instant case, although there is no dispute that Defendant ordinarily acts as a "health care provider", it seems that the maintenance and repair of an ambulance by an auto mechanic is in no way related to or arising from "health care." Accordingly, even though Defendant is a "health care provider" when it is "wearing its auto mechanic hat" through its employees it is not entitled to the protections of the Malpractice Act.

CONCLUSION

The mechanical condition of an ambulance and the pertinent negligence of its automotive mechanic are not matters of medical malpractice. The Utah Medical Malpractice cannot be read so broadly as to protect such negligence of an ambulance mechanic or the hospital for which his services are rendered. These are matters of ordinary care and general liability and this Court should so conclude.

The summary judgment entered by the trial court should accordingly be reversed and remanded for further proceedings.

RESPECTFULLY SUBMITTED THIS 20th day of July, 1999.

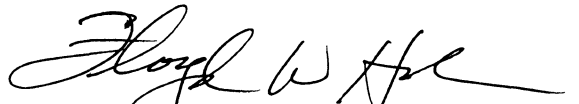

FLOYD W HOLM
Attorney for Appellant/Plaintiff

MAILING CERTIFICATE

I certify that I mailed a true and complete copy of the foregoing BRIEF OF APPELLANT, by first-class mail, with postage fully prepaid this 20th day of July, 1999, to:

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Secretary

where any of the parties resides or service is had, subject, however, to the power of the court to change the place of trial as provided by law. 1953

78-13-8. Change of venue — Conditions precedent.

If the county in which the action is commenced is not the proper county for the trial thereof, the action may nevertheless be tried therein, unless the defendant at the time he answers or otherwise appears files a motion, in writing, that the trial be had in the proper county. 1953

78-13-9. Grounds.

The court may, on motion, change the place of trial in the following cases:

- (1) when the county designated in the complaint is not the proper county;
- (2) when there is reason to believe that an impartial trial cannot be had in the county, city, or precinct designated in the complaint;
- (3) when the convenience of witnesses and the ends of justice would be promoted by the change;
- (4) when all the parties to an action, by stipulation or by consent in open court entered in the minutes, agree that the place of trial may be changed to another county. Thereupon the court must order the change as agreed upon. 1953

78-13-10. Court to which transfer is to be made.

If any action or proceeding is commenced or is pending in a court and the court orders the place of trial to be changed, it must be transferred for trial to a court the parties may agree upon by stipulation in writing or made in open court and entered in the minutes, or if they do not so agree, then to the nearest court where like objection or cause for making the order does not exist. 1953

78-13-11. Duty of clerk — Fees and costs — Effect on jurisdiction.

When an order is made transferring an action or proceeding for trial, the court must transmit the pleadings and papers therein to the court to which it is transferred. The costs and fees therefor and filing the papers anew must be paid by the party at whose instance the order was made; provided, that when such order is made for the reason that the cause was commenced in the wrong county, the costs of transfer and filing the papers anew shall be paid by the plaintiff in the action within ten days after the making of such order, or said cause shall be dismissed for want of jurisdiction. The court to which an action or proceeding is transferred shall have and exercise the same jurisdiction as if it had been originally commenced therein. 1953

CHAPTER 14

MALPRACTICE ACTIONS AGAINST HEALTH CARE PROVIDERS

Section	
78-14-1.	Short title of act.
78-14-2.	Legislative findings and declarations — Purpose of act.
78-14-3.	Definitions.
78-14-4.	Statute of limitations — Exceptions — Application.
78-14-4.5.	Amount of award reduced by amounts of collateral sources available to plaintiff — No reduction where subrogation right exists — Collateral sources defined — Procedure to preserve subrogation rights — Evidence admissible — Exceptions.
78-14-5.	Failure to obtain informed consent — Proof

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78-14-16.	Proceedings considered a binding arbitration hearing upon written agreement of parties — Compensation to members of panel.

78-14-1. Short title of act.

This act shall be known and may be cited as the "Utah Health Care Malpractice Act." 1976

78-14-2. Legislative findings and declarations — Purpose of act.

The legislature finds and declares 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. Because of these increases the insurance industry has substantially increased the cost of medical malpractice insurance. 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. Further, certain health care providers are discouraged from continuing to provide services because of the high cost and possible unavailability of malpractice insurance.

In view of these recent trends and with the intention of alleviating the adverse effects which these trends are producing in the public's health care system, it is necessary to protect the public interest by enacting measures designed to encourage private insurance companies to continue to provide health-related malpractice insurance while at the same time establishing a mechanism to ensure the availability of insurance in the event that it becomes unavailable from private companies.

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 specific period for which professional liability insurance pre-

miums can be reasonably and accurately calculated; and to provide other procedural changes to expedite early evaluation and settlement of claims.

1976

78-14-3. Definitions.

As used in this chapter:

(1) "Audiologist" means a person licensed to practice audiology under Title 58, Chapter 41, Speech-language Pathology and Audiology Licensing Act.

(2) "Certified social worker" means a person licensed to practice as a certified social worker under Section 58-60-305.

(3) "Chiropractic physician" means a person licensed to practice chiropractic under Title 58, Chapter 73, Chiropractic Physician Practice Act.

(4) "Clinical social worker" means a person licensed to practice as a clinical social worker under Section 58-60-305.

(5) "Commissioner" means the commissioner of insurance as provided in Section 31A-2-102.

(6) "Dental hygienist" means a person licensed to practice dental hygiene as defined in Section 58-69-102.

(7) "Dentist" means a person licensed to practice dentistry as defined in Section 58-69-102.

(8) "Division" means the Division of Occupational and Professional Licensing created in Section 58-1-103.

(9) "Future damages" includes damages for future medical treatment, care or custody, loss of future earnings, loss of bodily function, or future pain and suffering of the judgment creditor.

(10) "Health care" means any act or treatment performed or furnished, or which should have been performed or furnished, by any health care provider for, to, or on behalf of a patient during the patient's medical care, treatment, or confinement.

(11) "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.

(12) "Hospital" means a public or private institution licensed under Title 26, Chapter 21, Health Care Facility Licensing and Inspection Act.

(13) "Licensed practical nurse" means a person licensed to practice as a licensed practical nurse as provided in Section 58-31b-301.

(14) "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 health care rendered or which should have been rendered by the health care provider.

(15) "Marriage and family therapist" means a person licensed to practice as a marriage therapist or family therapist under Section 58-60-405.

(16) "Naturopathic physician" means a person licensed to practice naturopathy as defined in Section 58-71-102.

(17) "Nurse-midwife" means a person licensed to engage in practice as a nurse midwife under Section 58-44a-301.

(18) "Optometrist" means a person licensed to practice optometry under Title 58, Chapter 16a, Utah Optometry Practice Act.

(19) "Osteopathic physician" means a person licensed to practice osteopathy under Title 58, Chapter 68, Utah Osteopathic Medical Practice Act.

(20) "Patient" means a person who is under the care of a health care provider, under a contract, express or implied.

(21) "Pharmacist" means a person licensed to practice pharmacy as provided in Section 58-17a-301.

(22) "Physical therapist" means a person licensed to practice physical therapy under Title 58, Chapter 24a, Physical Therapist Practice Act.

(23) "Physician" means a person licensed to practice medicine and surgery under Title 58, Chapter 67, Utah Medical Practice Act.

(24) "Podiatric physician" means a person licensed to practice podiatry under Title 58, Chapter 5a, Podiatric Physician Licensing Act.

(25) "Practitioner of obstetrics" means a person licensed to practice as a physician in this state under Title 58, Chapter 67, Utah Medical Practice Act, or under Title 58, Chapter 68, Utah Osteopathic Medical Practice Act.

(26) "Psychologist" means a person licensed under Title 58, Chapter 61, Psychologist Licensing Act, to practice psychology as defined in Section 58-61-102.

(27) "Registered nurse" means a person licensed to practice professional nursing as provided in Section 58-31b-301.

(28) "Representative" means the spouse, parent, guardian, trustee, attorney-in-fact, or other legal agent of the patient.

(29) "Social service worker" means a person licensed to practice as a social service worker under Section 58-60-305.

(30) "Speech-language pathologist" means a person licensed to practice speech-language pathology under Title 58, Chapter 41, Speech-language Pathology and Audiology Licensing Act.

(31) "Tort" means any legal wrong, breach of duty, or negligent or unlawful act or omission proximately causing injury or damage to another.

1978

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,

(f) final orders and decrees of the district court review of informal adjudicative proceedings of agencies under Subsection (e);

(g) a final judgment or decree of any court of record holding a statute of the United States or this state unconstitutional on its face under the Constitution of the United States or the Utah Constitution;

(h) interlocutory appeals from any court of record involving a charge of a first degree or capital felony;

(i) appeals from the district court involving a conviction of a first degree or capital felony;

(j) orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction; and

(k) appeals from the district court of orders, judgments, or decrees ruling on legislative subpoenas.

(4) The Supreme Court may transfer to the Court of Appeals any of the matters over which the Supreme Court has original appellate jurisdiction, except:

(a) capital felony convictions or an appeal of an interlocutory order of a court of record involving a charge of a capital felony;

(b) election and voting contests;

(c) reapportionment of election districts;

(d) retention or removal of public officers;

(e) matters involving legislative subpoenas; and

(f) those matters described in Subsections (3)(a) through (d).

(5) The Supreme Court has sole discretion in granting or denying a petition for writ of certiorari for the review of a Court of Appeals adjudication, but the Supreme Court shall review those cases certified to it by the Court of Appeals under Subsection (3)(b).

(6) The Supreme Court shall comply with the requirements of Title 63, Chapter 46b, in its review of agency adjudicative proceedings. 1996

78-2-3. Repealed. 1986

78-2-4. Supreme Court — Rulemaking, judges pro tempore, and practice of law.

(1) The Supreme Court shall adopt rules of procedure and evidence for use in the courts of the state and shall by rule manage the appellate process. The Legislature may amend the rules of procedure and evidence adopted by the Supreme Court upon a vote of two-thirds of all members of both houses of the Legislature.

(2) Except as otherwise provided by the Utah Constitution, the Supreme Court by rule may authorize retired justices and judges and judges pro tempore to perform any judicial duties. Judges pro tempore shall be citizens of the United States, Utah residents, and admitted to practice law in Utah.

(3) The Supreme Court shall by rule govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to the practice of law. 1986

78-2-5. Repealed. 1988

78-2-6. Appellate court administrator.

The appellate court administrator shall appoint clerks and support staff as necessary for the operation of the Supreme Court and the Court of Appeals. The duties of the clerks and support staff shall be established by the appellate court administrator, and powers established by rule of the Supreme Court. 1986

78-2-7. Repealed. 1986

78-2-7.5. Service of sheriff to court.

The court may at any time require the attendance and services of any sheriff in the state. 1988

78-2-8 to 78-2-14. Repealed. 1986, 1988

CHAPTER 2a

COURT OF APPEALS

Section

78-2a-1.

Creation — Seal.

78-2a-2.

Number of judges — Terms — Functions — Filing fees.

78-2a-3.

Court of Appeals jurisdiction.

78-2a-4.

Review of actions by Supreme Court.

78-2a-5.

Location of Court of Appeals.

78-2a-1. Creation — Seal.

There is created a court known as the Court of Appeals. The Court of Appeals is a court of record and shall have a seal.

78-2a-2. Number of judges — Terms — Functions — Filing fees.

(1) The Court of Appeals consists of seven judges. The term of appointment to office as a judge of the Court of Appeals shall be six years, beginning on the first Monday in January, next following the date of election. A judge whose term expires may serve for a second term if reelected. The Judicial Council, upon request of the Judicial Council, until a successor is appointed and qualified. The presiding judge of the Court of Appeals shall receive as additional compensation \$1,000 per annum for the period served.

(2) The Court of Appeals shall sit and render judgments in panels of three judges. Assignment to panels shall be by random rotation of all judges of the Court of Appeals. The Court of Appeals by rule shall provide for the selection of a chair for each panel. The Court of Appeals may not sit in a panel of more than three judges.

(3) The judges of the Court of Appeals shall elect a presiding judge from among the members of the court by a majority vote of all judges. The term of office of the presiding judge shall be two years and until a successor is elected. A presiding judge of the Court of Appeals may serve in that office no more than two successive terms. The Court of Appeals may by rule provide for an acting presiding judge to serve in the absence or inability of the presiding judge.

(4) The presiding judge may be removed from the office of presiding judge by majority vote of all judges of the Court of Appeals. In addition to the duties of a judge of the Court of Appeals, the presiding judge shall:

(a) administer the rotation and scheduling of panels;

(b) act as liaison with the Supreme Court;

(c) call and preside over the meetings of the Court of Appeals; and

(d) carry out duties prescribed by the Supreme Court and the Judicial Council.

(5) Filing fees for the Court of Appeals are the same as the filing fees for the Supreme Court.

78-2a-3. Court of Appeals jurisdiction.

(1) The Court of Appeals has jurisdiction to issue writs of habeas corpus, writs of certiorari, writs of prohibition, writs of mandamus, and writs of quo warrant.

(a) to carry into effect its judgments, orders, and decrees; or

(b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) the final orders and decrees resulting from the adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, School and Institutional Trust Lands Board of Trustees, Division of Forests

CHAPTER 2a
COURT OF APPEALS

Section	
78-2a-1.	Creation — Seal.
78-2a-2.	Number of judges — Terms — Functions — Filing fees.
78-2a-3.	Court of Appeals jurisdiction.
78-2a-4.	Review of actions by Supreme Court.
78-2a-5.	Location of Court of Appeals.

78-2a-1. Creation — Seal.

There is created a court known as the Court of Appeals. The Court of Appeals is a court of record and shall have a seal.

1986

78-2a-2. Number of judges — Terms — Functions — Filing fees.

(1) The Court of Appeals consists of seven judges. The term of appointment to office as a judge of the Court of Appeals is until the first general election held more than three years after the effective date of the appointment. Thereafter, the term of office of a judge of the Court of Appeals is six years and commences on the first Monday in January, next following the date of election. A judge whose term expires may serve, upon request of the Judicial Council, until a successor is appointed and qualified. The presiding judge of the Court of Appeals shall receive as additional compensation \$1,000 per annum or fraction thereof for the period served.

(2) The Court of Appeals shall sit and render judgment in panels of three judges. Assignment to panels shall be by random rotation of all judges of the Court of Appeals. The Court of Appeals by rule shall provide for the selection of a chair for each panel. The Court of Appeals may not sit en banc.

(3) The judges of the Court of Appeals shall elect a presiding judge from among the members of the court by majority vote of all judges. The term of office of the presiding judge is two years and until a successor is elected. A presiding judge of the Court of Appeals may serve in that office no more than two successive terms. The Court of Appeals may by rule provide for an acting presiding judge to serve in the absence or incapacity of the presiding judge.

(4) The presiding judge may be removed from the office of presiding judge by majority vote of all judges of the Court of Appeals. In addition to the duties of a judge of the Court of Appeals, the presiding judge shall:

- (a) administer the rotation and scheduling of panels;
- (b) act as liaison with the Supreme Court;
- (c) call and preside over the meetings of the Court of Appeals; and
- (d) carry out duties prescribed by the Supreme Court and the Judicial Council.

(5) Filing fees for the Court of Appeals are the same as for the Supreme Court.

1988

78-2a-3. Court of Appeals jurisdiction.

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

- (a) to carry into effect its judgments, orders, and decrees; or
- (b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

- (a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, School and Institutional Trust Lands Board of Trustees, Division of Forestry, Fire

and State Lands actions reviewed by the executive director of the Department of Natural Resources, Board of Oil, Gas, and Mining, and the state engineer;

(b) appeals from the district court review of:

- (i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and
- (ii) a challenge to agency action under Section 63-46a-12.1;

(c) appeals from the juvenile courts;

(d) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;

(e) appeals from a court of record in criminal cases, except those involving a conviction of a first degree or capital felony;

(f) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;

(g) appeals from the orders on petitions for extraordinary writs challenging the decisions of the Board of Pardons and Parole except in cases involving a first degree or capital felony;

(h) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, visitation, adoption, and paternity;

(i) appeals from the Utah Military Court; and

(j) cases transferred to the Court of Appeals from the Supreme Court.

(3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction.

(4) The Court of Appeals shall comply with the requirements of Title 63, Chapter 46b, Administrative Procedures Act, in its review of agency adjudicative proceedings.

1996

78-2a-4. Review of actions by Supreme Court.

Review of the judgments, orders, and decrees of the Court of Appeals shall be by petition for writ of certiorari to the Supreme Court.

1986

78-2a-5. Location of Court of Appeals.

The Court of Appeals has its principal location in Salt Lake City. The Court of Appeals may perform any of its functions in any location within the state.

1996

CHAPTER 3**DISTRICT COURTS**

Section	
78-3-1 to 78-3-2.	Repealed.
78-3-3.	Term of judges — Vacancy.
78-3-4.	Jurisdiction — Appeals.
78-3-5.	Repealed.
78-3-6.	Terms — Minimum of once quarterly.
78-3-7 to 78-3-11.	Repealed.
78-3-11.5.	State District Court Administrative System.
78-3-12.	Repealed.
78-3-12.5.	Costs of system.
78-3-13.	Repealed.
78-3-13.4.	Transfer of court operating responsibilities — Facilities — Staff — Budget.
78-3-13.5, 78-3-14.	Repealed.
78-3-14.2.	District court case management.
78-3-14.5.	Allocation of district court fees and forfeiture.

before the expiration of any extension of time granted under Section 63-30-11, regardless of whether or not the function giving rise to the claim is characterized as governmental.

1998

63-30-13. Claim against political subdivision or its employee — Time for filing notice.

A claim against a political subdivision, or against its employee for an act or omission occurring during the performance of the employee's duties, within the scope of employment, or under color of authority, is barred unless notice of claim is filed with the governing body of the political subdivision according to the requirements of Section 63-30-11 within one year after the claim arises, or before the expiration of any extension of time granted under Section 63-30-11, regardless of whether or not the function giving rise to the claim is characterized as governmental.

1998

63-30-14. Claim for injury — Approval or denial by governmental entity or insurance carrier within ninety days.

Within ninety days of the filing of a claim the governmental entity or its insurance carrier shall act thereon and notify the claimant in writing of its approval or denial. A claim shall be deemed to have been denied if at the end of the ninety-day period the governmental entity or its insurance carrier has failed to approve or deny the claim.

1965

63-30-15. Denial of claim for injury — Authority and time for filing action against governmental entity.

(1) If the claim is denied, a claimant may institute an action in the district court against the governmental entity or an employee of the entity.

(2) The claimant shall begin the action within one year after denial of the claim or within one year after the denial period specified in this chapter has expired, regardless of whether or not the function giving rise to the claim is characterized as governmental.

1987

63-30-16. Jurisdiction of district courts over actions — Application of Rules of Civil Procedure.

The district courts shall have exclusive original jurisdiction over any action brought under this chapter, and such actions shall be governed by the Utah Rules of Civil Procedure in so far as they are consistent with this chapter.

1983

63-30-17. Venue of actions.

Actions against the state may be brought in the county in which the claim arose or in Salt Lake County. Actions against a county may be brought in the county in which the claim arose, or in the defendant county, or, upon leave granted by a district court judge of the defendant county, in any county, contiguous to the defendant county. Leave may be granted ex parte. Actions against all other political subdivisions including cities and towns, shall be brought in the county in which the political subdivision is located or in the county in which the claim arose.

1983

63-30-18. Compromise and settlement of actions.

(1) A political subdivision, after conferring with its legal officer or other legal counsel if it does not have a legal officer, may compromise and settle any action as to the damages or other relief sought.

(2) The risk manager in the Department of Administrative Services may:

(a) compromise and settle any claim of \$25,000 or less in damages filed against the state for which the Risk Management Fund may be liable;

(b) with the concurrence of the attorney general or his representative and the executive director of the Depart-

ment of Administrative Services, compromise and settle any claim of \$25,000 to \$100,000 in damages for which the Risk Management Fund may be liable; and

(3) The risk manager shall comply with procedures and requirements of Title 63, Chapter 38b, in compromising and settling any claim of \$100,000 or more.

63-30-19. Undertaking required of plaintiff in action.

At the time of filing the action the plaintiff shall file an undertaking in a sum fixed by the court, but in no case less than the sum of \$300, conditioned upon payment by the plaintiff of taxable costs incurred by the governmental entity in the action if the plaintiff fails to prosecute the action or fails to recover judgment.

63-30-20. Judgment against governmental entity bars action against employee.

Judgment against a governmental entity in an action brought under this act shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee whose act or omission gave rise to the claim.

63-30-21. Repealed.

63-30-22. Exemplary or punitive damages prohibited — Governmental entity exempt from execution, attachment, or garnishment.

(1) (a) No judgment may be rendered against the governmental entity for exemplary or punitive damages.

(b) The state shall pay any judgment or portion of any judgment entered against a state employee in the employee's personal capacity even if the judgment is for damages that includes exemplary or punitive damages if the state would be required to pay the judgment under Section 63-30-36 or 63-30-37.

(2) Execution, attachment, or garnishment may not issue against a governmental entity.

63-30-23. Payment of claim or judgment against state — Presentment for payment.

Any claim approved by the state as defined by Subsection 63-30-2(1) or any final judgment obtained against the state shall be presented to the state risk manager, or to the office, agency, institution or other instrumentality involved for payment, if payment by said instrumentality is otherwise permitted by law. If such payment is not authorized by law then such judgment or claim shall be presented to the board of examiners and the board shall proceed as provided in Section 63-6-4.

63-30-24. Payment of claim or judgment against political subdivision — Procedure by governing body.

Any claim approved by a political subdivision or any final judgment obtained against a political subdivision shall be submitted to the governing body thereof to be paid forthwith from the general funds of said political subdivision unless such funds are appropriated to some other use or restricted by law or contract for other purposes.

63-30-25. Payment of claim or judgment against political subdivision — Installment payments.

If the subdivision is unable to pay the claim or award during the current fiscal year it may pay the claim or award in more than ten ensuing annual installments of equal size or such other installments as are agreeable to the claimant.

63-30-26. Reserve funds for payment of claims or purchase of insurance created by political subdivisions.

Any political subdivision may create and maintain a reserve fund or may jointly with one or more other political subdivisions

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**IN THE FIFTH JUDICIAL DISTRICT COURT
IN AND FOR BEAVER COUNTY, STATE OF UTAH**

MAX R. CARTER,

Plaintiff,

v.

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

Defendants.

MEMORANDUM DECISION

Civil No. 980500056
Judge J. Philip Eves

This case came before the court on a Motion for Summary Judgment filed by Defendant Milford Valley Memorial Hospital on May 26, 1998. A Reply Memorandum in Support of Motion for Summary Judgment was also filed by Defendant on September 2, 1998. On November 23, 1998 Plaintiff filed his Memorandum of Points and Authorities in Opposition to Summary Judgment and Request for Oral Argument. Oral argument on the Motion occurred on December 16, 1998.

Having reviewed the Parties' Memoranda and Affidavits, having heard oral argument, and having reviewed relevant Utah law, the court now rules as follows:

FACTS

C.J.A. Rule 4-501(2)(B) provides that:

The points and authorities in opposition to a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each disputed fact shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the opposing party relies, and, if applicable, shall state the numbered sentence or sentences of the movant's facts that are disputed. All material facts set forth in the movant's statement and properly supported by an accurate reference to the record shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party's statement.

In his Memorandum of Points and Authorities and Opposition to Summary Judgment and Request for Oral Argument, Plaintiff fails 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. However, Defendant Milford Valley Memorial Hospital supports its motion with affidavits and exhibits containing statements of fact which are in substantial compliance with C.J.A. Rule 4-501(2)(B). Consequently, Milford Valley's facts are deemed to be admitted for the purpose of this motion. However, pursuant to Utah R. Civ. P. 56(b) and the case law surrounding it, the Court shall view these purported facts in the light most favorable to the non-moving party, asking whether a genuine issue of material fact exists that must be resolved by a finder of fact. See Draper City v. Estate of Bernando, 888 P.2d 1097, 1099 (Utah 1995); Ron Shepherd Ins. Inc. v. Shields, 882 P.2d 650, 654 (Utah 1994); Utah Dept. Of Environmental Quality v. Wind River Petroleum, 881 P.2d 869, 872 (Utah 1994); Holbrook v. Adams, 542 P.2d 191, 193 (Utah 1975). In relevant part, the undisputed facts of this case can be summarized as follows:

On October 8, 1995, Anna Rae Carter, a resident of Minersville, Utah, became ill and distressed. Her husband, Max R. Carter, the plaintiff in this action, called for emergency assistance from Milford Valley Memorial Hospital. An ambulance was dispatched. Upon its

arrival in Minersville, Mrs. Carter was placed inside and the ambulance departed for the Beaver Valley Hospital. However, due to the “erratic” operation of a gauge within the ambulance, a second ambulance was sent from Beaver Valley to meet the Milford Ambulance *en route*. When the two ambulances met, Mrs. Carter was transferred to the Beaver ambulance, which took a minute or two. Ms. Carter then continued her journey to the Beaver Valley Hospital. See Memorandum in Support of Motion for Summary Judgment, at pp. 2-3. Neither ambulance actually ever became immobile or ceased to function.

Mrs. Carter subsequently died on October 17, 1998. Id.

Approximately 2 1/3 years later, Plaintiff filed a complaint in this action, alleging that Defendant’s negligent care and maintenance of the ambulance caused the delay of Mrs. Carter’s arrival at the Beaver Valley Hospital, which in turn caused her wrongful death. Id. pp. 1-2.

Defendant Milford Valley Memorial Hospital Ambulance Service is owned and operated by Defendant Milford Valley Memorial Hospital. Milford Valley Memorial Hospital was duly created as a separate body politic under the Utah Special Service District Act, Utah Code Ann. §§ 17A-2-1301, *et. seq.*. Milford Valley Hospital is also licensed as a “General Acute Hospital” pursuant to § 26-21-2. Id.

ANALYSIS

Defendant asserts that Plaintiff’s claim is barred by the two year statute of limitations contained in the Utah Health Care Malpractice Act, as well as the general two year statute of limitations for wrongful death. Defendant also argues that Plaintiff’s claim is barred by the Utah Governmental Immunity Act.

In response, Plaintiff asserts that the Utah Health Care Malpractice Act is inapplicable to the present case since the suit is not for medical malpractice, but is for negligent in the

maintenance of the ambulance originally sent to transport Ms. Carter. The plaintiff agrees, however, "that if the Medical Malpractice Act is applicable, his claim should be barred." See Memorandum of Points and Authorities and Opposition to Summary Judgment and Request for Oral Argument, at pp. 2-4. Plaintiff also argues that the general statute of limitations for wrongful death does not apply to his case, nor does the Governmental Immunity Act bar his present case because his "claims do not arise out of the operation of an emergency vehicle," and "do not arise from a negligent inspection or failure thereof." Id. at pp. 4-7.

The statute of limitations contained in the Utah Health Care Malpractice Act, found in Utah Code Ann. § 78-14-4(1), provides in relevant 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, which ever first occurs, but not to exceed four years after the date of the alleged act, omission, neglect or occurrence

The statute defines a health care provider as "any person, partnership, association, corporation, or other facility . . . who renders health care or professional services as a hospital" See § 78-14-3(11). The statute also defines a malpractice action against a health care provider as "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 health care rendered or which should have been rendered by the health care provider." See § 78-14-3(14).

In the present case, the defendant easily qualifies as a health care provider for purposes of the Malpractice Act. The defendant is a hospital which renders health care and related professional services. And, on October 8, 1995, the defendant provided such health care and related professional service to Mrs. Carter through its ambulance operations. Transportation 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 defendant. Indeed, the health care service which the defendant provided through its ambulance is the very issue in this case.

In addition, the action also qualifies as a malpractice suit for purposes of the Act, in that the plaintiff complains of the standard of service provided by defendant in the delayed arrival of Mrs. Carter at the hospital. Defendant's claim meets the definition of a malpractice action as defined by § 78-14-4(1) because it claims that competent service, "should have been rendered" by the hospital's ambulance service, but was not because of the delay they caused in treatment. Indeed, Plaintiff's claim is grounded in the assertion that "the death of [Mrs. Carter] was a direct and proximate result of the delay in transporting her to the Beaver Valley Hospital," and that if there had been no delay his wife's life could have been saved. See Complaint, at pp. 2-3. Hence, as the claim is based on a deficiency in the health care service provided by Milford Valley Memorial Hospital, the case can readily be classified as a malpractice action for purposes of § 78-14-4(1), and is subject to the two year statute of limitations required by the act.


Consequently, because the action was not filed until January 6, 1998, over two years from October 8, 1995, the date at which the facts indicate the plaintiff should have discovered the act or negligent occurrence, the Court finds that the plaintiff's claim is barred.

Since dismissal in this case is proper on the basis of the statute of limitations contained in § 78-14-4(1), the Court does not reach the separate issues of governmental immunity, or the applicability of the statute of limitations for wrongful death actions.

CONCLUSION

On the basis of the foregoing, Defendant's Motion for Summary Judgment is granted. Counsel for Defendant is to prepare, within 15 days of the date hereof, an order consistent with the terms of this decision and submit it to opposing counsel for approval as to form prior to submission to the Court for signature.

Dated this 7th day of January, 1999.



J. PHILIP EVES
DISTRICT COURT JUDGE

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FIFTH DISTRICT COURT

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BEAVER COUNTY

BY _____

IN THE FIFTH JUDICIAL DISTRICT COURT OF BEAVER COUNTY

STATE OF UTAH

MAX R. CARTER,

Plaintiff,

vs.

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

Defendants.

ORDER OF DISMISSAL

COPY

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

This matter having come before the court on defendant's Motion for Summary Judgment, and the court having been advised in the premises by memoranda in support of and opposition to the above motion, and a Memorandum Decision having been entered on January 7, 1999, the court hereby makes the following:

FINDINGS

1. On October 8, 1995, Ana Rae Carter, a resident of Minersville, Utah, became ill and distressed. Her husband, Max R. Carter, the plaintiff in this action, called for emergency assistance from Milford Valley Memorial Hospital. An ambulance was dispatched. Mrs. Carter was taken to the Beaver Valley Hospital.

2. Approximately two and one-third years later, plaintiff filed a complaint in this action, alleging that the defendant's negligent care and maintenance of the ambulance caused a delay in Mrs. Carter's arrival at the Beaver Valley Hospital, which in turn caused her wrongful death.

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3. Milford Valley Memorial Hospital's ambulance service is owned and operated by the defendant, Milford Valley Memorial Hospital.

4. Milford Valley Memorial Hospital is duly created as a separate body politic under the Utah Special Service District Act, § 17A-2-1301, *et. seq.*, Utah Code Ann.

5. Section 78-14-3(11), Utah Code Ann., defines a health care provider as "any person, partnership, association, corporation, or other facility . . . who renders health care or professional services as a hospital"

6. Section 78-14-3(14), Utah Code Ann., defines a malpractice action against a health care provider as:

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.

7. In the present case, the defendant easily qualifies as a health care provider for purposes of the Malpractice Act. The defendant is a hospital which renders health care and related professional services. On October 8, 1995, the defendant provided such health care and related professional service to Mrs. Carter through its ambulance operations. Transportation of persons in need of health care for the hospital is obviously an integral part of the hospital function and is part of the health care provided by the defendant. Indeed, the health care service which the defendant provided and upon which the claim of the plaintiff is based is an asserted deficiency in such service.

8. Hence, as the claim is based on a deficiency in the health care service provided by Milford Valley Memorial Hospital, the case can be readily classified as a malpractice action

for purposes of § 78-14-4(1), Utah Code Ann., and is subject to the two year statute of limitations required by the act.

9. The action was not filed until January 6, 1998, over two years from October 8, 1995, and the court finds that the plaintiff's claim is barred.

10. Since the dismissal in this case is proper on the basis of the statute of limitations contained in § 78-14-4(1), Utah Code Ann., the court does not reach the separate issues of governmental immunity or the applicability of the statute of limitations for wrongful death actions.

Based upon the foregoing Findings, the court now makes and enters the following:

ORDER

Defendant's Motion for Summary Judgment is granted and the case is dismissed with prejudice.

DATED and signed this 2nd February 1998 day of ~~January~~, 1998.

BY THE COURT:

J. Philip Eves
Judge J. Philip Eves

APPROVED AS TO FORM:

Floyd W. Holm
Attorney for Plaintiff