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Helen Labelle, Shelia Carlson, Linda Buckley and Marilyn Phillips, individually and as heirs of Norma Mary Harriman v. McKay-Dee Hospital Center, Intermountain Health Care, INC., Utah corporations, Dr. Ivan D. Wright, Dr. Harold Vonk and Dr. Ronald S. Rankin, individuals, and John Does 1-50, : Brief of Appellee

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

HELEN LABELLE, SHEILA CARLSON,
LINDA BUCKLEY and MARILYN
PHILLIPS, individually and as heirs of
Norma Mary Harriman,

Plaintiffs and Appellants,

v.

MCKAY-DEE HOSPITAL CENTER,
INTERMOUNTAIN HEALTH CARE,
INC., Utah corporations, DR. IVAN D.
WRIGHT, DR. HAROLD VONK and DR.
RONALD S. RANKIN, individuals, and
JOHN DOES 1-50,

Defendants and Appellees.

**BRIEF OF APPELLEES MCKAY-DEE
HOSPITAL CENTER AND
INTERMOUNTAIN HEALTH
CARE, INC.**

No. 20020204-SC

Appeal from Order of Dismissal,
Judge Timothy R. Hanson,
Third District Court, Salt Lake County,
Trial Court No. 010905108

Priority No. 15

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I.

STATEMENT OF JURISDICTION

This is an appeal from a summary judgment dismissal in a civil action. R. 246-47. Therefore, the Supreme Court has jurisdiction over this matter pursuant to Utah Code Ann. § 78-2-2(j) (Supp. 2002) (Supreme Court has jurisdiction over “orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction”).

II.

STATEMENT OF ISSUES PRESENTED AND STANDARD OF REVIEW

1. The primary issue presented for decision by this Court is:

Whether the trial court correctly ruled that the legislative mandates establishing compulsory conditions precedent to commencing litigation of malpractice actions against health care providers as set forth in Utah Code Ann. § 78-14-12 were not satisfied by Plaintiffs/Appellants, thereby preventing Plaintiffs/Appellants from commencing their action and depriving the district court of jurisdiction.

R. 246, 248 at p. 41.

The standard of review of this issue is correction of error, without deference to the trial court. This Court reviews “the trial court’s summary judgment ruling for correctness. [The Court] consider[s] only whether the trial court correctly applied the law and correctly concluded that no disputed issues of material fact existed.” *Kessler v. Mortenson*, 2000 UT 95, ¶ 5, 16 P.3d 1225 (citation omitted); *see also, e.g., Price Dev. Co., L.P. v. Orem City*, 2000 UT 26, ¶ 9, 995 P.2d 1237 (“In reviewing a summary judgment, we accord no deference to the trial court and review its ruling for correctness.”).

2. Another issue for decision by the Court is whether Plaintiffs/Appellants preserved for appeal claims that Utah Code Ann. § 78-14-12 is “unconstitutionally overbroad.” *See* Plaintiffs/Appellants’ Brief at pp. 2-3. Plaintiffs/Appellants may not raise issues for the first time on appeal, including constitutional issues, and Plaintiffs/Appellants have failed to marshal the record to support any such claims. Notwithstanding, the trial court did not violate Plaintiffs/Appellants’ constitutional rights in correctly following the plain language of Utah Code Ann. § 78-14-12(2)(b) (Supp. 2002). “[W]hether a statute is constitutional is a question of law, which we review for correctness, giving no deference to the trial court.” *Grand County v. Emery County*, 2002 UT 25, ¶ 6, 44 P.3d 734 (citations omitted). Further, a statute, including Utah Code Ann. § 78-14-12, “is presumed constitutional, and we resolve any reasonable doubts in favor of constitutionality.” *Id.* (citing *Utah Sch. Bds. Ass’n v. State Bd. of Educ.*, 2001 UT 2, ¶ 9, 17 P.3d 1125; *State v. Daniels*, 2002 UT 2, ¶ 30, 40 P.3d 611).

3. Plaintiffs/Appellants are not entitled to seek declaratory relief in challenging the constitutional validity of Utah Code Ann. § 78-14-12 because they have not served the attorney general with a copy of the proceeding as required by Utah Code Ann. § 78-33-11 (1996).

III.

DETERMINATIVE OR IMPORTANT CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND REGULATIONS

The following constitutional provisions, statutes and regulations are determinative or important to the resolution of this appeal. The more pertinent provisions are set forth below as follows:

1. Utah Constitution, Article VII, Section 5. [Jurisdiction of district court and other courts--Right of appeal.]

The district court shall have original jurisdiction in all matters except as limited by this constitution or by statute, and power to issue all extraordinary writs. The district court shall have appellate jurisdiction as provided by statute. The jurisdiction of all other courts, both original and appellate, shall be provided by statute. Except for matters filed originally with the Supreme Court, there shall be in all cases an appeal of right from the court of original jurisdiction to a court with appellate jurisdiction over the cause.

2. Utah Code Ann. § 78-14-2 (1996). 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 premiums can be reasonably and accurately calculated; and to provide other procedural changes to expedite early evaluation and settlement of claims.

3. Utah Code Ann. § 78-14-3 (Supp. 2002). Definitions.

....

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

....

(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.

....

(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.

....

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

4. Utah Code Ann. § 78-14-4 (1996). 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. . . .

5. Utah Code Ann. § 78-14-8 (1996). 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. . . .

6. Utah Code Ann. § 78-14-12 (Supp. 2002). Division to provide panel—Exemption—Procedures—Statute of limitations tolled—Composition of panel—Expenses—Division authorized to set license fees.

(1)(a) The division shall provide a hearing panel in alleged medical liability cases against health care providers as defined in Section 78-14-3, except dentists.

(b)(i) The division shall establish procedures for prelitigation consideration of medical liability claims for damages arising out of the provision of or alleged failure to provide health care.

(ii) The division may establish rules necessary to administer the process and procedures related to prelitigation hearings and the conduct of prelitigation hearings in accordance with Sections 78-14-12 through 78-14-16.

(c) The proceedings are informal, nonbinding, and are not subject to Title 63, Chapter 46b, Administrative Procedures Act, but are compulsory as a condition precedent to commencing litigation.

(d) Proceedings conducted under authority of this section are confidential, privileged, and immune from civil process.

(2)(a) The party initiating a medical liability action shall file a request for prelitigation panel review with the division within 60 days after the service of a statutory notice of intent to commence action under Section 78-14-8.

(b) The request shall include a copy of the notice of intent to commence action. The request shall be mailed to all health care providers named in the notice and request.

(3)(a) The filing of a request for prelitigation panel review under this section tolls the applicable statute of limitations until the earlier of 60 days following the division's issuance of an opinion by the prelitigation panel, or 60 days following the termination of jurisdiction by the division as provided in this subsection. The division shall send any opinion issued by the panel to all parties by regular mail.

(b)(i) The division shall complete a prelitigation hearing under this section within 180 days after the filing of the request for prelitigation panel review, or within any longer period as agreed upon in writing by all parties to the review.

(ii) If the prelitigation hearing has not been completed within the time limits established in Subsection (3)(b)(i), the division has no further jurisdiction over the matter subject to review and the claimant is considered to have complied with all conditions precedent required under this section prior to the commencement of litigation.

(c)(i) The claimant and any respondent may agree by written stipulation that no useful purpose would be served by convening a prelitigation panel under this section.

(ii) When the stipulation is filed with the division, the division shall within ten days after receipt enter an order divesting itself of jurisdiction over the claim, as it concerns the stipulating respondent, and stating that the claimant has complied with all conditions precedent to the commencement of litigation regarding the claim. . . .

7. Utah Code Ann. § 78-33-11 (1996). Parties.

When declaratory relief is sought all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal or county ordinance or franchise such municipality or county shall be made a party, and shall be entitled to be heard, and if a statute or state franchise or permit is alleged to be invalid the attorney general shall be served with a copy of the proceeding and be entitled to be heard.

IV.

STATEMENT OF THE CASE

This appeal was brought to challenge the Order of Dismissal issued by the district court. The defendants in the underlying action, McKay-Dee Hospital Center; Intermountain Health Care, Inc.; Ivan D. Wright, M.D.; Harold Vonk, M.D.; and Ronald S. Rankin, M.D. (hereinafter “Health Care Appellees”) all moved to dismiss Plaintiffs/Appellants’ (hereinafter “Heir Appellants”) claims for failure to comply with the compulsory conditions precedent to commencing a malpractice claim mandated by the Utah Health Care Malpractice Act (the “Act”) as set forth in Utah Code Ann. § 78-14-1 (Supp. 2002) et seq.

Following briefing by the parties and oral argument, the trial court on February 4, 2001 entered its order granting the Health Care Appellees’ motions. R. 245-48.¹ The trial

¹A copy of the trial court’s order, which includes findings of fact and conclusions of law, is included in the Addendum hereto.

court, considering the motions to dismiss as motions for summary judgment under Rule 56 of the Utah Rules of Civil Procedure, ruled in favor of Health Care Appellees. R. 245-48.

The trial court found that although the Heir Appellants had filed the Notice of Intent to Commence Litigation with the Division of Occupational and Professional Licensing (“Division”), it was undisputed that the Heir Appellants had failed to mail the Request for Prelitigation Review to all the named health care providers in the action. The court therefore found “Because plaintiffs did not satisfy the conditions precedent to commencing litigation, the Court concludes that plaintiffs could not commence their action. Further, because the plaintiffs’ action could not be and was not commenced, this Court lacks jurisdiction and is compelled to dismiss plaintiffs’ complaint.” R. 247. Heir Appellants subsequently brought this appeal challenging the Order of Dismissal issued by the district court. R. 249-51.

V.

STATEMENT OF FACTS

The following facts are relevant to the issues presented to this Court for review.

The material and determinative facts regarding the Heir Appellants’ claims are as follows:

1. Heir Appellants’ underlying malpractice claims (relating to the death of Norma Mary Harriman on March 3, 1999) are subject to the provisions of the Utah Health Care Malpractice Act, Utah Code Ann. § 78-14-1 (Supp. 2002) et seq. R. 1-9.
2. Each of the Health Care Appellees is a "Health care provider" as defined by the Utah Health Care Malpractice Act. Utah Code Ann. § 78-14-3(11) (1996).

3. Under the Utah Health Care Malpractice Act, a “‘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.” Utah Code Ann. § 78-14-3(14) (Supp. 2002).

4. The Utah Health Care Malpractice Act also sets forth various conditions which are “compulsory as a condition precedent to commencing litigation.” Utah Code Ann. § 78-14-12(1)(c) (Supp. 2002).

5. Heir Appellants were aware of the requirements of the Utah Health Care Malpractice Act when on February 14, 2001 they mailed Health Care Appellees a “notice of intent to commence action” as required by Utah Code Ann. § 78-14-8. R. 258, at p. 13.

6. Despite the admission of counsel for Heir Appellants that no filing fee was paid to the Division, R. 258 at p. 12, the court found that “a question of fact exists regarding whether a request for prelitigation panel review was ‘filed’ with the Division of Occupational and Professional Licensing.” R. 246.

7. However, it is undisputed that “neither the plaintiffs nor their counsel complied with the requirement of Utah Code Ann. § 78-14-12(2)(b) that the request for prelitigation hearing ‘shall be mailed to all health care providers named in the notice and request.’” R. 246.

8. Affidavit testimony was introduced that the Division had no record of a Request for Prelitigation having been filed, and that “Because a Request was not filed with the Division and the required filing fee was not submitted to the Division, no action was

taken or required to be taken by the Division in this matter, and no prelitigation review was approved.” R. 49.

9. Despite having failed to satisfy the conditions precedent to commencing litigation specified in Section 78-14-12, Heir Appellants filed an action in the Third District Court on June 13, 2001, alleging negligence and wrongful death against the Health Care Appellees. R. 1-7.

10. Health Care Appellants moved to dismiss Heir Appellants’ complaint because Heir Appellants failed to satisfy all conditions under the Utah Health Care Malpractice Act which are “compulsory as a condition precedent to commencing litigation.” Utah Code Ann. § 78-14-12(1)(c) (Supp. 2002). R. 13-15; 112-14; 171-73; 188-95.

11. Heir Appellants opposed the motions to dismiss, filing various memoranda in opposition. R. 22-25; 78-86; 154-66; 196-99; 208-10.

12. On December 19, 2001, oral argument was heard on the motions to dismiss, and the court ruled in favor of the Health Care Appellees. R. 258 at pp.38-44.

13. On February 4, 2002, the Honorable Timothy Hansen entered an Order of Dismissal. The trial court made the following findings:

3. However, the Court finds that it is undisputed that neither the plaintiffs nor their counsel complied with the requirement of Utah Code Ann. § 78-14-12(2)(b) that the request for prelitigation hearing “shall be mailed to all health care providers named in the notice and request.” In light of the plaintiffs’ failure to mail the request for prelitigation to any of the health care providers, the Court finds that plaintiffs failed to comply with the statutory requirements which “are compulsory as a condition precedent to commencing litigation.”

4. The Court therefore concludes that the Court has no jurisdiction based on the legislative mandates set forth in the Utah Health Care Malpractice Act, Utah Code Ann. § 78-14-1 et seq.

5. Because plaintiffs did not satisfy the conditions precedent to commencing litigation, the Court concludes that plaintiffs could not commence their action. Further, because the plaintiffs' action could not be and was not commenced, this Court lacks jurisdiction and is compelled to dismiss plaintiffs' complaint.

Therefore, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the plaintiffs did not satisfy the statutory conditions precedent to commencing litigation and therefore the defendants' Motions to Dismiss are GRANTED and the above-entitled action against the defendants SHALL BE AND IS HEREBY DISMISSED.

R. 245-48, attached to Addendum.

14. Heir Appellants filed a notice of appeal of the trial court's Order of Dismissal on March 4, 2002. R. 249-51.

15. Although Heir Appellants now seek to challenge the constitutional validity of Utah Code Ann. § 78-14-12, they have failed to serve the attorney general with a copy of the proceeding as required by Utah Code Ann. § 78-33-11(1996) in order to obtain the declaratory relief sought. *See* Heir Appellants Brief at pp. 2-3.

VI.

SUMMARY OF ARGUMENT

The trial court correctly ruled that the legislative mandates establishing compulsory conditions precedent to commencing litigation of malpractice actions against health care providers as set forth in Utah Code Ann. § 78-14-12 (Supp. 2002) were not satisfied by

Heir Appellants, thereby preventing them from commencing their action and depriving the district court of jurisdiction. In 1985, the Utah State Legislature amended the Utah Health Care Malpractice Act, Utah Code Ann. § 78-14-1 (Supp. 2002) et seq., to create the prelitigation panel process and specified that this procedure is a compulsory condition precedent to commencing litigation of a medical malpractice claim. *See* Utah Legislative Report 1985, S.B 153. Prior to 1985, the Utah Health Care Malpractice Act had no provision for and did not require the prelitigation review process now codified in Section 78-14-12. In enacting Section 78-14-12, the legislature clearly specified that compliance with the prelitigation requirements is “compulsory as a condition precedent to commencing litigation.” Utah Code Ann. § 78-14-12(1)(c) (Supp. 2002). The plain language of the legislature clearly expresses the intent that these requirements must be completed prior to commencement of a medical malpractice action.

It is undisputed that Heir Appellants did not mail a copy of their Request for Prelitigation Panel Review to all the named health-care providers in this action. This undisputed fact is determinative of the issues. Thus, the district court properly found that “Because plaintiffs did not satisfy the conditions precedent to commencing litigation, the Court concludes that plaintiffs could not commence their action. Further, because the plaintiffs’ action could not be and was not commenced, this Court lacks jurisdiction and is compelled to dismiss plaintiffs’ complaint.” R. 246.

In addition, Heir Appellants are precluded from raising issues for the first time on appeal, including constitutional issues, and Heir Appellants have failed to cite that portion of the record to support any such claims. The constitutional issues brought in this appeal

were either not raised before the trial court or were so inadequately briefed and argued that the trial court had no meaningful opportunity to rule upon them. Therefore, any such issues have not been preserved for appeal. Notwithstanding, the trial court did not violate any constitutional rights by correctly following the plain language of Utah Code Ann. § 78-14-12(2)(b) (Supp. 2002).

Further, this Court should refuse to consider any constitutional challenges to the Act based upon the Division's alleged actions because they are irrelevant to the court's order. The trial court's Order of Dismissal was based upon the undisputed fact that Heir Appellants failed to mail a copy of their Request for Prelitigation Panel Review to all named health-care providers in the action. The Division's conduct was simply not considered in the trial court's dismissal. Moreover, Heir Appellants are not entitled to seek declaratory relief in challenging the constitutional validity of Utah Code Ann. § 78-14-12 (Supp. 2002) because they have not served the attorney general with a copy of the proceeding as required by Utah Code Ann. § 78-33-11 (1996).

VII.

ARGUMENT

POINT I.

THE TRIAL COURT'S ORDER IS BASED ON UNDISPUTED FACTS AND THE PLAIN LANGUAGE OF THE UTAH HEALTH CARE MALPRACTICE ACT.

The only issue raised by Heir Appellants which relates to arguments properly raised before the trial court is the issue of the effect of Heir Appellants' undisputed failure to comply "with the requirement of Utah Code Ann. § 78-14-12(2)(b) that the request for

prelitigation hearing ‘shall be mailed to all health care providers named in the notice and request.’” R. 246. The trial court’s order is consistent with the plain language of the Utah Health Care Malpractice Act (the “Act”), Utah Code Ann. § 78-14-1 (Supp. 2002) et seq., as well as appellate court opinions upholding the Act.

A. The Trial Court Lacked Subject Matter Jurisdiction Because Heir Appellants Failed to Comply with the Compulsory Conditions Precedent of the Utah Health Care Malpractice Act.

Utah appellate courts have consistently held that “[i]f these requirements [of the Utah Health Care Malpractice Act] are not fully met, the action will be dismissed.” *Carter v. Milford Valley Memorial Hosp.*, 2000 UT App 21, ¶ 13, 996 P.2d 1076 (citing *Malone v. Parker*, 826 P.2d 132, 134 (Utah 1992); *Avila v. Winn*, 794 P.2d 20, 22 (Utah 1990); *Allen v. Intermountain Health Care, Inc.*, 635 P.2d 30, 30-31 (Utah 1981)). The trial court properly found that because the requirements of the Act were not satisfied, the Heir Appellants’ action must be dismissed:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the plaintiffs did not satisfy the statutory conditions precedent to commencing litigation and therefore the defendants’ Motions to Dismiss are GRANTED and the above-entitled action against the defendants SHALL BE AND IS HEREBY DISMISSED.

R. 246-47.

The Utah Health Care Malpractice Act clearly states that no malpractice litigation against a health care provider may be commenced until the plaintiff satisfies conditions which “are compulsory as a condition precedent to commencing litigation.” Utah Code Ann. § 78-14-12(1)(c) (Supp. 2002). It is clear that the prelitigation panel review process

set forth in Section 78-14-12 are operative in the commencement of a medical malpractice action and determine when and how an action can be commenced. Heir Appellants were obviously aware of the Act's requirements when on February 14, 2001 they mailed Health Care Appellees a "notice of intent to commence action" as required by Utah Code Ann. § 78-14-8 (1996). R. 258, at p. 13. However, Heir Appellants failed to comply with the other requirements of the Act.

The issues before this Court are readily resolved in favor of Health Care Appellees through the proper statutory interpretation of the applicable statutes. As the Utah Supreme Court has held:

When faced with a question of statutory construction, we look first to the plain language of the statute. In so doing, [w]e presume that the legislature used each word advisedly and give effect to each term according to its ordinary and accepted meaning. We will not infer substantive terms into the text that are not already there. Rather, the interpretation must be based on the language used, and [we have] no power to rewrite the statute to conform to an intention not expressed.

Arredondo v. Avis Rent A Car System, Inc., 2001 UT 29, ¶ 12, 24 P.3d 928 (quotation marks and citations omitted, alterations in original). Thus, each word is given effect. In addition, the statutory scheme is interpreted as a comprehensive whole.

The primary role of statutory interpretation is to give effect to the intent of the legislature in light of the purpose the statute was meant to achieve. The best indicator of that intent is the plain language of the statute. Also, [a] general rule of statutory construction is that a statute should be construed as a comprehensive whole.

Beaver County v. Utah State Tax Comm’n, 916 P.2d 344, 358 (Utah 1996) quotation marks and citations omitted, alterations in original). Principles of statutory construction and interpretation are well established.

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.” “[S]tatutory enactments are to be construed as 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.” We will avoid an interpretation which renders portions of, or words in, a statute superfluous or inoperative.

Platts v. Parents Helping Parents, 947 P.2d 658, 662 (Utah 1997) (citing *State v. Hunt*, 906 P.2d 311, 312 (Utah 1995); *Savage Indus., Inc. v. State Tax Comm’n*, 811 P.2d 664, 670 (Utah 1991); *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)) .

An examination of the plain language of the relevant statutes and of the statutory scheme construed as a whole demonstrates that the Heir Appellants failed to comply with statutory conditions precedent. Therefore, by the plain language of the Act, before a medical malpractice action can be commenced, certain prerequisites must be satisfied.

The statutory scheme in question is not ambiguous. The Act clearly states that no malpractice litigation against a health care provider may be commenced until the plaintiff satisfies conditions which “are compulsory as a condition precedent to commencing litigation.” Utah Code Ann. § 78-14-12(1)(c) (Supp. 2002). The inclusion of this language

in the statute indicates the legislature's intention to define how and when a medical malpractice action can be commenced.

Also, each word should be given effect. Condition precedent is defined as follows:

"A condition precedent is one . . . which is to be performed before some right dependent thereon accrues, or some act dependent thereon is performed." *Black's Law Dictionary*, (6th Ed. 1991). The use of "condition precedent" should be given its plain meaning.

In addition, the statute plainly requires the "filing of a request for prelitigation panel review **under this section.**" Utah Code Ann. § 78-14-12(3) (Supp. 2002). The Act specifies requirements for requesting prelitigation panel review:

(2)(a) The party initiating a medical liability action shall file a request for prelitigation panel review with the division within 60 days after the service of a statutory notice of intent to commence action under Section 78-14-8.

(b) The request shall include a copy of the notice of intent to commence action. **The request shall be mailed to all health care providers named in the notice and request.**

Utah Code Ann. § 78-14-12(2) (Supp. 2002) (emphasis added). As a matter of law, compliance with the terms of the Act requires more than mere delivery of a notice of intent and request for prelitigation review to the Division. The requirements under Section 78-14-12 include that "[t]he request **shall** be mailed to all health care providers named in the notice and request." *Id.* (emphasis added).

It is also well established that "[t]he form of the verb used in a statute, i.e., something 'may,' 'shall' or 'must' be done, is the single most important textual consideration determining whether a statute is mandatory or directory."

“According to its ordinary construction, the term ‘may’ means permissive, and it should receive that interpretation unless such a construction would be obviously repugnant to the intention of the Legislature or would lead to some other inconvenience or absurdity.” The term “shall,” on the other hand, “is usually presumed mandatory and has been interpreted as such previously in this and other jurisdictions.”

State in Interest of M.C., 940 P.2d 1229, 1236 (Utah Ct. App. 1997) (citations omitted).

“The meaning of the word shall is ordinarily that of command.” *Herr v. Salt Lake County*, 525 P.2d 728, 729 (Utah 1974). As a result the trial court had no discretion to disregard this statutory requirement. “This mandatory language leaves no discretion to the court.” *Lyon v. Burton*, 2000 UT 19, ¶ 76, 5 P.3d 616.

B. The Heir Appellants' Failure to Comply with Statutory Conditions Precedent Prevented the Commencement of their Medical Malpractice Action.

It is undisputed that “neither the plaintiffs nor their counsel complied with the requirement of Utah Code Ann. § 78-14-12(2)(b) that the request for prelitigation hearing ‘shall be mailed to all health care providers named in the notice and request.’” R. 246, 258 at pp. 40-41. This requirement is **not** merely a procedural nicety, but would have alerted the Health Care Appellees to the attempted initiation of prelitigation proceedings and would have warned them of the possibility that following the prescribed 180-day period the prelitigation requirement might be deemed satisfied. As it was, the Heir Appellants’ failure to mail a copy of the purported request for prelitigation panel review to any of the Health Care Appellees deprived the Health Care Appellees of the opportunity to protect their entitlement to timely prelitigation review under the Act.

Because the Heir Appellants did not comply with the Act’s prelitigation requirements as to Health Care Appellees, they could not commence their action and their complaint was dismissed for lack of jurisdiction by the trial court. The trial court’s findings and order are clear:

3. However, the Court finds that it is undisputed that neither the plaintiffs nor their counsel complied with the requirement of Utah Code Ann. § 78-14-12(2)(b) that the request for prelitigation hearing “shall be mailed to all health care providers named in the notice and request.” In light of the plaintiffs’ failure to mail the request for prelitigation to any of the health care providers, the Court finds that plaintiffs failed to comply with the statutory requirements which “are compulsory as a condition precedent to commencing litigation.”

4. The Court therefore concludes that the Court has no jurisdiction based on the legislative mandates set forth in the Utah Health Care Malpractice Act, Utah Code Ann. § 78-14-1 et seq.

5. Because plaintiffs did not satisfy the conditions precedent to commencing litigation, the Court concludes that plaintiffs could not commence their action. Further, because the plaintiffs' action could not be and was not commenced, this Court lacks jurisdiction and is compelled to dismiss plaintiffs' complaint.

R. 246-47.

Because Heir Appellants never satisfied the conditions precedent they could not commence their medical malpractice litigation. The Kansas Supreme Court, interpreting similar statutory language, found clear legislative intent preventing the commencement of litigation absent the completion of conditions precedent. In *Gessner v. Phillips County Commissioners*, 11 P.3d 1131 (Kan. 2000), the plaintiffs filed suit against the county for injuries sustained in an automobile accident involving an ambulance which belonged to the county. Similar to the case at hand, in *Gessner* the initial “actions were dismissed by the trial court for lack of jurisdiction” because of the failure to comply with statutory conditions precedents “prior to filing the suits.” *Id.* at 1132.

Examining the relevant statutory provisions including the specific language “before commencing such action” and “no action shall be commenced until,” the court held that such language “expresses a clear legislative intent **to disallow the commencement of any actions prior to** the filing of the requisite notice.” *Id.* at 1133-34 (emphasis added). The court further referred to the statutory notice prerequisite as “a jurisdictional prerequisite to

commencing a lawsuit” and as a “condition precedent to the filing of an action.” *Id.* at 1134. Consequently, the court held:

It is clear that the legislature intended that failure to provide the appropriate notice **must be construed to preclude claimants from commencing a legal action. The failure to file a claim against a municipality, pursuant to [the statutory condition precedent], is not cured by the application of the savings statute**

We can reach no other conclusion but that the plaintiffs’ actions were not commenced until well beyond the applicable 2 year period of limitations and the trial court correctly entered orders of dismissal of all three cases.

Id. (emphasis added). As was the case in *Gessner*, the Heir Appellants’ failure to timely comply with conditions precedent prevented the commencing of litigation.

Excusing Heir Appellants’ disregard of the statutory provisions would defeat the very essence of the object sought to be accomplished by the legislature: that certain conditions are compulsory as a condition precedent to commencing litigation. *See* Utah Code Ann. § 78-14-12(1)(c) (Supp. 2002). Heir Appellants should not be allowed to knowingly disregard the requirements and time frame established by the Act through the application of the savings statute.

C. The Statute of Limitations Was Not Tolled and Ran Prior to Heir Appellants’ Filing of this Complaint.

The statutory scheme set forth in the Act focuses on what is the proper statute of limitations period. It is uncontested that the applicable statute of limitations governing Heir Appellants’ medical malpractice claims is set forth in Utah Code Ann. § 78-14-4 (1996). The legislature crafted the Act to include provisions ensuring that the statute of

limitations is tolled during the prelitigation process, which is compulsory as a condition precedent to commencing litigation. The clear intent is that prior to commencing litigation of a medical malpractice claim, the prelitigation process must be properly initiated within the original statute of limitations. In the medical malpractice context, a plaintiff cannot toll or extend the statute of limitations by simply filing a complaint in district court when the conditions precedent to commencing litigation have not been met.

The only way to toll the statute of limitations is to file a notice of intent pursuant to Section 78-14-8 **and** to properly initiate the prelitigation panel review pursuant to Section 78-14-12. Because Heir Appellants did not comply with the statutory prerequisites, “the running of the statute of limitations was not tolled.” *Malone v. Parker*, 826 P.2d 132, 136 (Utah 1992); *see also Kittredge v. Shaddy*, 2001 UT 7, 20 P.3d 285 (holding statute of limitations not tolled in medical malpractice action for failure to timely file request for prelitigation panel review).

Heir Appellants’ complaint was dismissed because it was filed prematurely. Section 78-14-12(1)(c) clearly states that the prelitigation panel review proceedings are “compulsory as a condition precedent to commencing litigation.” To satisfy the compulsory conditions precedent, generally a prelitigation panel review takes place and the Division issues an opinion by the prelitigation panel. *See* Utah Code Ann. § 78-14-12(3)(a) (Supp. 2002). It is undisputed that no such review occurred in this matter. However, two alternatives means are provided to satisfy “all conditions precedent **required** under [Utah Code Ann. § 78-14-12] prior to the commencement of litigation.” Utah Code Ann. § 78-14-12(3)(b)(ii) (Supp. 2002) (emphasis added.) In this case, neither alternative was

satisfied at the time Heir Appellants filed their complaint. Again, this statutory plain language reinforces the legislative intent that a petitioner must have complied with all conditions precedent to the commencement of litigation regarding the claim.

One alternative to completing a prelitigation panel review is that “the claimant and any respondent may agree by written stipulation” to waive the prelitigation requirements. Utah Code Ann. § 78-14-12(3)(c)(i) (Supp. 2002). If such a “stipulation is filed with the division, the division shall within ten days after receipt enter an order divesting itself of jurisdiction over the claim, as it concerns the stipulating respondent, and stating that the claimant has complied with all conditions precedent to the commencement of litigation regarding the claim.” Utah Code Ann. § 78-14-12(3)(c)(ii) (Supp. 2002). No such stipulation or order exists in this case.

The second alternative to prelitigation review, which Heir Appellants attempt to invoke, is set forth in Section 78-14-12(3)(b). That section of the Act provides:

(b)(i) The division shall complete a prelitigation hearing under this section **within 180 days** after the filing of the request for prelitigation panel review, or within any longer period as agreed upon in writing by all parties to the review.

(ii) If the prelitigation hearing has not been completed **within the time limits** established in Subsection (3)(b)(i), the division has no further jurisdiction over the matter subject to review and the claimant is considered to have complied with all conditions precedent required under this section prior to the commencement of litigation.

Utah Code Ann. § 78-14-12(3)(b) (emphasis added). Once again, the legislature used the plain language that all conditions precedent required under this section must be complied with prior to the commencement of litigation.

Heir Appellants erroneously argue that they were entitled under the second alternative found in Section 78-14-12(3)(b)(ii) to file their complaint. As can be seen in the statutory language, before this alternative can be applied, the prelitigation process must have been properly commenced and the division accepted jurisdiction. Only if the Division's jurisdiction has been properly invoked and if the prelitigation review process has not been completed within the 180-day period, then **after** that time "the division has no further jurisdiction over the matter subject to review and the claimant is considered to have complied with all conditions precedent required under this section prior to the commencement of litigation." *Id.* However, Heir Appellants failed to properly invoke the Divisions' jurisdiction because they failed to comply with the requirements of Section 78-14-12. Even accepting, for the sake of argument only, Heir Appellants' representation that on February 14, 2001, they filed a request for prelitigation review, their complaint was prematurely filed on June 13, 2001--well **before** the completion of the 180-day period. When Heir Appellants filed their complaint, Heir Appellants could **not** as a matter of law be "considered to have complied with all conditions precedent required under this section prior to the commencement of litigation." Consequently, the Heir Appellants' claim was properly dismissed. As a matter of law, their complaint was premature because it was filed June 13, 2001, well before the expiration of the 180-day period during which jurisdiction rests **exclusively** with the Division.

The Heir Appellants argument that the district court has "concurrent jurisdiction" with the Division simply lacks any support. As previously set forth, a concept of concurrent jurisdiction conflicts with the plain meaning of the Act. The statutory scheme

recognizes the exclusive jurisdiction of the Division during properly initiated prelitigation proceedings and provides for the tolling of the statute of limitations before the completion of the conditions precedent to commencing litigation. A petitioner who complies with the Act and who timely files for and properly initiates the prelitigation panel review will thus not be precluded from filing a complaint in district court once the panel issues its opinion and a Certificate of Compliance. Heir Appellants ignore the plain language of the statute and simply refer to Section 78-3-4 in claiming there is “concurrent jurisdiction.” Heir Appellants’ Brief at p. 8. However, Utah Code Ann. § 78-3-4(1) (Supp. 2002) provides: “The district court has original jurisdiction in all matters civil and criminal, not excepted in the Utah Constitution and not prohibited by law.” Utah Constitution, Article VII, Section 5 provides, in pertinent part, that “The district court shall have original jurisdiction in all matters except as limited by this constitution or by statute.” The Act specifically limits the jurisdiction of the district court by setting forth conditions precedent to the commencement of a malpractice action against a health care provider.

Further, contrary to Heir Appellants’ insinuation, *Avila v. Winn*, 794 P.2d 20 (Utah 1990), does not stand for the proposition that the Utah Supreme Court condones or approves of the filing of a medical malpractice action prior to the satisfaction of the compulsory conditions precedent of the prelitigation process review. In contrast, the Utah Supreme Court stated: “[W]e do not condone the act of filing a complaint before the time specified in the Malpractice Act. The instant case is an exception necessitated by procedural errors and omissions.” *Id.* at 23. The circumstances present in that case are clearly not present in the case at hand.

POINT II.

HEIR APPELLANTS HAVE WAIVED ANY CONSTITUTIONAL CHALLENGES TO THE UTAH HEALTH CARE MALPRACTICE ACT BECAUSE THEY WERE NOT ADEQUATELY RAISED BEFORE THE TRIAL COURT

Heir Appellants are precluded from raising issues for the first time on appeal, including constitutional issues, and Heir Appellants have failed to cite to the record to support any such claims. “Under ordinary circumstances, appellate courts will not consider an issue, including a constitutional argument, raised for the first time on appeal unless the trial court committed plain error.” *State ex rel. E.R.*, 2001 UT App 66, ¶ 9, n.3, 21 P.3d 680 (citing *State v. Helmick*, 2000 UT 70, ¶ 8, 9 P.3d 164). The alleged constitutional issues presented by Heir Appellants as issues “II” and “III” on pages 1-3 of their Brief were not properly raised before the trial court. “[C]laims not raised before the trial court may not be raised on appeal. . . . [This] preservation rule applies to every claim, including constitutional questions.” *State v. Holgate*, 2000 UT 74, ¶ 11, 10 P.3d 346. It has long been established that “[i]ssues not raised at trial cannot be raised on appeal. This general rule applies equally to constitutional issues, with the limited exception of where a person’s liberty is at stake.” *Pratt v. City Council of City of Riverton*, 639 P.2d 172, 174 (Utah 1981).

Because Heir Appellants did not raise constitutional issues before the district court, they are precluded from raising them now. The failure to raise constitutional challenges is demonstrated by a review of the record. “For a question to be considered on appeal, the record must clearly show that it was timely presented to the trial court in a manner sufficient to obtain a ruling thereon.” *Franklin Fin. v. New Empire Dev. Co.*, 659 P.2d

1040, 1045 (Utah 1983). Heir Appellants' have failed to cite pertinent portions of the record to satisfy this burden. Heir Appellants simply mention the term "due process" and fail to cite any authority or make any substantive argument or meaningful discussion which would have enabled the trial court to address any such constitutional claim. R. 204, 258 at pp. 27, 29.

To preserve a substantive issue for appeal, a party must timely bring the issue to the attention of the trial court, thus providing the court an opportunity to rule on the issue's merits [T]he mere mention of an issue in the pleadings, when no supporting evidence or relevant legal authority is introduced at trial in support of the claim, is insufficient to raise an issue at trial and thus insufficient to preserve the issue for appeal.

LeBaron & Associates, Inc. v. Rebel Enterprises, Inc., 823 P.2d 479, 483 (Utah Ct. App. 1991) (citing *James v. Preston*, 746 P.2d 799, 801-02 (Utah Ct. App. 1987); *Turtle Management, Inc. v. Haggis Management, Inc.*, 645 P.2d 667, 672 (Utah 1982)). Heir Appellants simply failed to provide any record citation wherein they preserved constitutional issues for appeal.

Similarly, the argument in Heir Appellants' Brief is inadequate to raise constitutional issues for appeal. "[A] reviewing court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository in which the appealing party may dump the burden of argument and research." *State v. Bishop*, 753 P.2d 439, 450 (Utah 1988) (citation omitted).

Although Heir Appellants' Brief cites four cases in its discussion regarding the constitutionality of Utah Code Ann. § 78-14-12 (Supp. 2002), Heir Appellants do "not

analyze these cases to demonstrate that [their] contentions compel reversal of the trial court's ruling.” *State v. Gamblin*, 2000 UT 44, ¶ 7, 1 P.3d 1108.

This court has repeatedly held that appealing parties must “‘clearly define[]’” the issues presented on appeal “‘with pertinent authority cited.’” Likewise, Utah Rule of Appellate Procedure 24 unequivocally requires, that “[Appellant’s brief] shall contain the contentions and reasons of the appellant with respect to the issues presented, including . . . citations to the authorities, statutes, and parts of the record relied on.” Consequently, “[i]t is well established that a reviewing court will not address arguments that are not adequately briefed.”

Water & Energy Systems Technology, Inc. v. Keil, 2002 UT 32, ¶ 20, 48 P.3d 888

(citations omitted). Because, Heir Appellants’ Brief in this case “fails to adequately set forth an argument as required by Rule 24(a)(9) of the Utah Rules of Appellate Procedure” it “may be disregarded or stricken, on motion or sua sponte by the court.” *State v. Gamblin*, 2000 UT 44, ¶¶ 7-8, 1 P.3d 1108.

POINT III.

HEIR APPELLANTS HAVE NOT ESTABLISHED THAT THE ACT IS UNCONSTITUTIONAL

In addition to failing to preserve the issue for appeal, Heir Appellants have failed to establish that the Act is unconstitutional. Statutes are presumed constitutional.

“Furthermore, to the extent we are making a determination of a statute’s constitutionality, the ‘statute is presumed constitutional, and we resolve any reasonable doubts in favor of constitutionality.’” *Grand County v. Emery County*, 2002 UT 25, ¶ 6, 44 P.3d 734 (citing *Utah Sch. Bds. Ass’n v. State Bd. of Educ.*, 2001 UT 2, ¶ 9, 17 P.3d 1125; *State v. Daniels*, 2002 UT 2, ¶ 30, 40 P.3d 611).

In addition, the Utah Health Care Malpractice Act has been previously upheld as constitutional. In *Allen v Intermountain Health Care, Inc.*, 635 P.2d 30 (Utah 1981), the court held the statute, which allows a two-year statute of limitations period for malpractice actions, is not unconstitutional. The court found that the legislative determination to have the shortened two-year statute of limitation in order to “insure the continued availability of adequate health care services” was not arbitrary or unreasonable. *Id.* at 32. Although the statutory conditions precedent impose conditions on a claimant’s ability to commence litigation against health care providers, like any other reasonable legislative condition they do not restrict or preclude a claimant’s ability to proceed if those conditions are satisfied. Thus, Heir Appellants’ representations that the only purpose of the Act is to “expedite early evaluation and settlement of claims,” Heir Appellants’ Brief at p. 17, disregards the plain language of the Act and prior rulings of the Utah Supreme Court. The stated purpose of the act is as follows:

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 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 (1996) (emphasis added).

Contrary to Heir Appellants' characterization, the Act does not simply "eliminate lawsuits against providers of medical care." Heir Appellants' Brief at p. 18. The Act serves to further the legislature's legitimate purpose of protecting the public interest. Heir Appellants have not been deprived of any constitutional rights.

POINT IV.

BECAUSE HEIR APPELLANTS HAVE NOT COMPLIED WITH UTAH CODE ANN. § 78-33-11 (1996) THEY ARE NOT ENTITLED TO DECLARATORY RELIEF

Heir Appellants are not entitled to seek declaratory relief in challenging the constitutional validity of Utah Code Ann. § 78-14-12 (Supp. 2002) because they have not served the attorney general with a copy of the proceeding as required by Utah Code Ann. § 78-33-11 (1996). When a statute is alleged to be invalid, as Heir Appellants contend, the attorney general must be given a copy of the proceeding and be entitled to be heard:

When declaratory relief is sought all persons shall be made parties who have or claim any interest which would be affected

by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal or county ordinance or franchise such municipality or county shall be made a party, and shall be entitled to be heard, and **if a statute or state franchise or permit is alleged to be invalid the attorney general shall be served with a copy of the proceeding and be entitled to be heard.**

Utah Code Ann. § 78-33-11 (1996) (emphasis added). Because Heir Appellants are challenging the validity of state statutes, before obtaining declaratory relief they should have notified the attorney general.

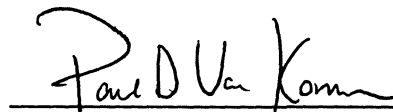
IX.

CONCLUSION

For the reasons set forth above, McKay-Dee Hospital respectfully requests that the Court affirm the judgment of the trial court.

RESPECTFULLY SUBMITTED this 18TH day of September 2002.

BURBIDGE, CARNAHAN & WHITE

A handwritten signature in black ink, appearing to read "Paul D. Van Komen", is written over a horizontal line.

JoAnn E. Carnahan

Paul D. Van Komen

Attorneys for Appellees McKay-Dee Hospital Center
and Intermountain Health Care, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 18TH day of September 2002, I caused to be served by the method indicated below two true and correct copies of the attached and foregoing **BRIEF OF APPELLEES MCKAY-DEE HOSPITAL CENTER AND INTERMOUNTAIN HEALTH CARE, INC.** to the following:

— VIA FACSIMILE
— VIA HAND DELIVERY
☒ VIA U.S. MAIL
— VIA FEDERAL EXPRESS

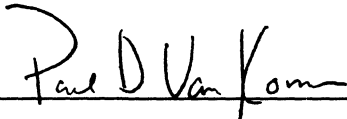
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W:\IHC\7465\0001\Appellate Brief

Addendum

having heard oral argument from counsel and having reviewed and considered the memoranda and affidavits submitted by the parties, finds as follows:

1. Because matters outside the pleading were presented and considered by the Court, the motions to dismiss were treated as motions for summary judgment under Rule 12(b) and disposed of as provided in Rule 56.

2. The Court finds that a question of fact exists regarding whether a request for prelitigation panel review was “filed” with the Division of Occupational and Professional Licensing.

3. However, the Court finds that it is undisputed that neither the plaintiffs nor their counsel complied with the requirement of Utah Code Ann. § 78-14-12(2)(b) that the request for prelitigation hearing “shall be mailed to all health care providers named in the notice and request.” In light of the plaintiffs’ failure to mail the request for prelitigation to any of the health care providers, the Court finds that plaintiffs failed to comply with the statutory requirements which “are compulsory as a condition precedent to commencing litigation.”

4. The Court therefore concludes that the Court has no jurisdiction based on the legislative mandates set forth in the Utah Health Care Malpractice Act, Utah Code Ann. § 78-14-1 et seq.

5. Because plaintiffs did not satisfy the conditions precedent to commencing litigation, the Court concludes that plaintiffs could not commence their action. Further, because the plaintiffs’ action could not be and was not commenced, this Court lacks jurisdiction and is compelled to dismiss plaintiffs’ complaint.

Therefore, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the plaintiffs

did not satisfy the statutory conditions precedent to commencing litigation and therefore the defendants' Motions to Dismiss are GRANTED and the above-entitled action against the defendants SHALL BE AND IS HEREBY DISMISSED.

DATED this 4 day of February, 2002.

BY THE COURT



Timothy Hanson
District Court Judge



CERTIFICATE OF SERVICE

I hereby certify that on the 4 day of January, 2002, I caused to be served by the method indicated below a true and correct copy of the attached and foregoing **proposed ORDER OF**

DISMISSAL to the following:

☒ VIA FACSIMILE
☒ VIA HAND DELIVERY
☒ VIA U.S. MAIL
☐ VIA FEDERAL EXPRESS

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