

2002

HELEN LABELLE, SHEILA CARLSON, LINDA BUCKLEY and MARILYN PHILLIPS, individuals 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, Brief of Appellee

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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, individuals and as
heirs of Norma Mary Harriman,

Plaintiffs/Appellants,

vs.

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/Appellees

Case No. 20020204-SC

Priority No. 15

**BRIEF OF APPELLEES IVAN D. WRIGHT, M.D.; HAROLD VONK, M.D.;
AND RONALD S. RANKIN, M.D.**

Appeal from Order of Dismissal entered by
The Honorable Timothy Hanson
Third Judicial District Court of Salt Lake County, State of Utah

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UTAH SUPREME COURT

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JURISDICTION

This Court has jurisdiction over this appeal pursuant to Utah Code Ann.

§ 78-2-2(3)(j).

STATEMENT OF THE ISSUES AND STANDARD OF APPELLATE REVIEW

1. The trial court correctly dismissed Appellants' complaint because it did not have jurisdiction to hear the matter.

Standard of review: A trial court's conclusions of law are reviewed for correctness. See S.S. v. State, 972 P.2d 439, 440-41 (Utah 1998); Orton v. Carter, 970 P.2d 1254, 1256 (Utah 1998).

2. Appellants may not raise constitutional issues for the first time on appeal.

3. The trial court correctly followed the plain language of Utah Code Ann. § 78-14-12(2)(b), and did not deny Appellants' their due process rights or their right of access to the courts.

Standard of review: The trial court's interpretation of statutes, rules and ordinances is a question of law reviewed for correctness. See, e.g., Rushton v. Salt Lake County, 1999 UT 36, ¶17, 977 P.2d 1201; Taylor ex rel. C.T. v. Johnson, 1999 UT 35, ¶6, 977 P.2d 479.

4. Appellants' constitutional challenges to the Utah Health Care Malpractice Act based upon the actions of the Utah Division of Occupational and Professional Licensing are not relevant on appeal.

STATEMENT OF THE CASE

This appeal arises from an Order of Dismissal issued by the trial court on February 4, 2002. 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. (now Appellees), all moved to dismiss Plaintiffs'/Appellants' claims for failure to comply with the compulsory conditions precedent of the Utah Health Care Malpractice Act—specifically, those provisions requiring medical malpractice claimants to file a Request for Prelitigation Review with the Division of Occupational and Professional Licensing and to serve that Request by mail to the named defendant health care providers.

The trial 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 Defendants/Appellees. Although the trial court found that a disputed fact existed concerning whether Plaintiffs/Appellants had filed the Request with the Division, the court found undisputed the fact that Plaintiffs/Appellants failed to mail the Request on all named health-care providers in the action. The court therefore concluded that it had no jurisdiction to hear the matter because Plaintiffs/Appellants had failed to comply with all

of the Act's directives. In the words of the trial court, "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." Plaintiffs/Appellants then brought this appeal based on the trial court's order.

STATEMENT OF THE FACTS

1. On June 12, 2001, Appellants filed a Complaint in the Third District Judicial Court, Salt Lake County, State of Utah, alleging, among other things, a medical malpractice claim against Appellees. See Complaint, LaBelle v. McKay-Dee Hosp. Ctr., et al., Civil No. 010905108, Third District Court, Salt Lake County, State of Utah (R.1-9.)

2. Appellants' allegations concern the medical treatment and care of Norma Mary Harriman in February 1999. Id. at ¶¶13-15.

3. Appellees Ivan D. Wright, M.D., Harold Vonk, M.D., and Ronald S. Rankin, M.D., are health care providers as defined by Utah Code Ann. § 78-14-3(11). See R.118.

4. In February 2001, Dr. Wright received a copy of Plaintiffs' "notice of intent by certified mail. See Affidavit of Robert G. Wright (R.125-127).

5. Immediately thereafter, counsel for Dr. Wright filed a Notice of Appearance of Counsel with the Division of Occupational and Professional Licensing ("the Division") on February 28, 2001, and served the Notice on Plaintiffs' counsel, as

well as counsel for all other parties named in the Notice of Intent. See Notice of Appearance (R.128-130).

6. On July 10, 2001, Defendant McKay-Dee Hospital and Intermountain Health Care, Inc., moved to dismiss the Complaint on the grounds that Appellants had failed to comply with the compulsory conditions precedent to commencing litigation imposed by the Utah Health Care Malpractice Act, U.C.A. § 78-14-12(1). See (R.13-21.)

7. By July 10, 2001, counsel for Dr. Wright had not received any indication from the Division that Appellants had filed a Request for Prelitigation Panel or that the Division had accepted such a Request. See (R.126, ¶6.)

8. Counsel for Dr. Wright checked several times with the Division to determine if a Request had been filed and if prelitigation proceedings had been set. See (Id., ¶5.)

9. Neither Dr. Wright nor his counsel has ever received service of any Request for Prelitigation Panel. See (R.127, ¶7.)

10. Dr. Wright moved to dismiss the Complaint on September 19, 2001. See (R.112-144.)

11. Dr. Vonk and Dr. Rankin moved to dismiss the Complaint on October 11, 2001. See (R.188-195.)

12. According to the testimony before the trial court, Appellants did not request prelitigation panel review with the Division within sixty days of serving the notice of intent as required by Utah Code Ann. § 78-14-12(2)(a). Appellants also did not submit the requisite filing fee to the Division. See Affidavit of Adele Bancroft (R.130-132.).¹

13. The Division therefore did not convene a prelitigation panel to review the merits of Appellants' claims against the named health care providers in this matter. See (R.132, ¶9.)

14. Defendants/Appellees submitted their motions to dismiss to the trial court, and the court heard oral argument on the motions on December 19, 2001. See (R.258.)

15. The trial court issued its ruling by minute entry, dismissing Plaintiffs'/Appellants' case for lack of jurisdiction. See (R.239-240.)

16. Specifically, the trial court considered Defendants'/Appellees' motions as Rule 56 motions and found that a disputed fact existed as to whether Plaintiffs/Appellants had filed a Request for Prelitigation Panel Review with the Division. See (Id.)

¹ The record on appeal does not include a record page number for the first page of Ms. Bancroft's affidavit, which is attached as an exhibit to Dr. Wright's Memorandum in support of his Motion to Dismiss. Appellees refer the court to R.130 as the last record cite just prior to the first page of Ms. Bancroft's affidavit. Defendants McKay-Dee Hospital Center and Intermountain Health Care, Inc., originally filed Ms. Bancroft's affidavit in support of their Reply to Plaintiffs' "Opposition to Motion to Dismiss."

17. Nevertheless, the trial court also found that Plaintiffs/Appellants acknowledged that they did not mail a Request for Prelitigation Panel Review to all the health care providers named in the action. See (Id.)

18. Accordingly, the trial court concluded that it had no jurisdiction to hear the merits of the case based upon Plaintiffs'/Appellants' failure to comply with the conditions precedent mandated by the Utah Health Care Malpractice Act, (or "the Act") Utah Code Ann. §§ 78-14-12(1)(c), 78-14-12(2)(b). See (Id.)

19. Defendants'/Appellees' counsel prepared an Order of Dismissal consistent with the trial court's ruling and submitted it to the court for review. The Order of Dismissal included the following finding of fact and conclusions of law:

[T]he 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."

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.

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.

See (R.246, ¶¶3, 4, 5.)

20. The court entered the Order of Dismissal on February 4, 2002. See (R.245-248.)

21. Plaintiffs/Appellants filed a notice of appeal of the trial court's Order of Dismissal on March 4, 2002. See (R.249-251.)

SUMMARY OF THE ARGUMENT

The trial court correctly dismissed Plaintiffs' Complaint because it did not have jurisdiction to hear the merits of their claims. Appellants failed to comply with the compulsory conditions precedent of the Utah Health Care Malpractice Act prior to commencing litigation. Specifically, Appellants did not mail a copy of their Request for Prelitigation Panel Review to all the named health-care providers in the action. The trial court also did not have "concurrent jurisdiction" with the Division of Occupational and Professional Licensing because the plain language of the Act expressly conditions the filing of an action in court upon a claimant's compliance with certain prerequisites. Appellants failed to comply with the Act and, therefore, were precluded from commencing litigation.

Appellants may not raise constitutional issues for the first time on appeal. Several 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. This Court should therefore disregard those arguments.

Even if this Court chooses to consider Appellants' constitutional challenges to the trial court's application of the Act, those challenges should be rejected. The trial court's application of the Act was in accordance with the Utah and United States Constitutions, and Appellants were not denied any due process rights or their right of access to the courts.

Finally, this Court should refuse to consider Appellants' constitutional challenges to the Act based upon the Division's actions because they are not relevant to this appeal. The trial court's Order of Dismissal was based upon the undisputed fact that 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, either in accepting Appellants' alleged filing of their Request or in promulgating administrative procedures for such filing, was not the basis for the trial court's dismissal. The Court should therefore disregard Appellants' arguments that their constitutional rights were violated by the Division's conduct.

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY DISMISSED APPELLANTS' COMPLAINT BECAUSE IT DID NOT HAVE JURISDICTION TO HEAR THE MATTER.

Appellants first argue that the trial court erroneously concluded that it did not have jurisdiction to hear their claims because Appellants failed to comply with the compulsory conditions precedent to commencing litigation set forth in the Utah Health Care Malpractice Act, Utah Code Ann. § 78-14-1, et seq. (“the Act”). Appellants correctly state the prerequisites for filing an action against a health care provider in Utah, but conveniently omit or misconstrue the effect of failing to comply with the provisions of the Act.

Appellants contend that they fulfilled the initial prelitigation requirement of filing and serving a Notice of Intent to Commence Action, as required by Utah Code Ann. § 78-14-8. Dr. Wright does not dispute that fact. Nevertheless, Appellants were then also required to file and serve by mail a Request for Prelitigation Panel Review within 60 days after serving their Notice pursuant to section 78-14-12(2), which states:

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

(Emphasis added.) See also Malone v. Parker, 826 P.2d 132 (Utah 1992) (recognizing claimant must not only file request with Division but must also serve copy of request upon all named health-care providers).

Indeed, Appellants' counsel conceded during oral argument before the trial court that he never mailed a copy of the Request to any of the named health care providers, as required by the statute.

THE COURT: Now, when did you mail the request for pre-litigation panel?

MR. ROUNDY: We didn't mail that, a copy of that, to them.

THE COURT: And doesn't the statute require that?

MR. ROUNDY: There is a reference in there to it being required. As I've thought back about why we might not have mailed that to them individually, at that time I think it was simply because, as in a case where I might have numerous defendants, and I serve one of them before I serve the other ones, I don't send copies of everything I file in the action to the other parties who haven't been served.

THE COURT: But —

MR. ROUNDY: In this case —

THE COURT: Well, but see, the rules of procedure really don't apply, do they? There are some standards that the legislature, right or wrong, has decided to give special treatment to health-care providers. . . . But in any event, you apparently agree that, for whatever reason, you did not mail a copy of the request for pre-litigation panel to the health-care providers.

MR. ROUNDY: That's correct.

Motion Hearing, December 19, 2001 (R.258, at 18-20).

Based upon this concession and the absence of any controverted fact in Appellants' memoranda, the trial court specifically found that no dispute existed that Appellants failed to comply with the plain language of Section 78-14-12(2)(b), which requires a claimant to serve a copy of the Request for Prelitigation Panel Review upon all named health-care providers in the action. As the Court stated in its Order of Dismissal:

[T]he 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."

Order of Dismissal, at 2, ¶3 (R.246) (emphasis added).

Appellants conveniently ignore the trial court's ruling on this point and instead argue that because the Division did not convene a prelitigation panel review hearing, they were thereby released from all prelitigation requirements pursuant to Utah Code Ann. § 78-14-12(3)(b)(ii). Appellants' argument may hold true for a claimant who has timely filed and served an accepted Request for Prelitigation Panel Review and then received no response from the Division. Indeed, the Division, once it accepts a Request, has jurisdiction to hear the matter for only 180 days. See Utah Code Ann. § 78-14-

12(3)(b)(i). If no hearing is held within 180 days after the Request has been accepted, “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. § 78-14-12(3)(b)(ii).

In this case, however, the trial court found as an undisputed fact that Appellants did not timely serve a Request for Prelitigation Panel Review to all named health-care providers and, therefore, did not comply with the compulsory conditions precedent of the Act. See Order of Dismissal, at ¶¶5-6 (R.246). As such, the trial court had no jurisdiction over the matter and properly dismissed Appellants’ Complaint. See Utah Code Ann. § 78-14-12(1)(c); see also Carter v. Milford Valley Mem’l Hosp., 2000 UT App 21, ¶13, 996 P.2d 1076 (“If these requirements are not fully met, the action will be dismissed.”) (citing Malone, 826 P.2d at 134).

Appellants argue that this ruling was in error and that their Complaint was properly filed because the trial court has “concurrent jurisdiction” with the Division. Appellants, however, ignore the plain language of the Act, which declares that prelitigation panel review proceedings are a “compulsory condition precedent to commencing litigation.” See Utah Code Ann. § 78-14-12(1)(c). Their argument also declines to recognize that once a proper Request for Prelitigation Panel Review is filed with the Division, the statute of limitations is tolled until the earlier of 60 days following either of two events: (1) the Division issues an opinion by prelitigation panel, or (2) the

Division's jurisdiction is terminated upon failing to complete a prelitigation review panel hearing within 180 days after the Request for Prelitigation Panel Review is filed. See id. § 78-14-12(3)(a) & (b). The plain language of these subdivisions is jurisdictional and bars a trial court from hearing the merits of the matter until the Division has issued its opinion or conceded its own jurisdiction.

Other courts have reached the same conclusion under similar statutes. See Johnson v. Methodist Hosp. of Gary, Ind., 547 F. Supp. 780, 781 (N.D. Ind. 1982) (affirming trial court's decision to dismiss medical malpractice complaint which was filed before claimant submitted claims to Commissioner of Insurance as required prerequisite to suit under Indiana statute); Schwartz v. Lilly, 452 A.2d 1302, 1304-05 (Md. Ct. App. 1982) (trial court was in error to deny defendant's motion raising preliminary objection on ground of jurisdiction where plaintiffs had not first filed claims with Health Claims Arbitration Office under statute requiring all malpractice claims to be submitted first to nonbinding arbitration); Perez v. Brubaker, 660 P.2d 619, 621 (N.M. Ct. App. 1983) (holding district court had no jurisdiction to hear claims where claimant did not first submit claims to state Medical Review Commission and obtain a decision from that commission). ²

² Other state and federal courts considering delegation of judicial powers and separation of powers attacks against their own medical review panel statutes have concluded that the proceedings are jurisdictional and are not an improper delegation of judicial power. See, e.g., Keyes v. Humana Hosp. Alaska, Inc., 750 P.2d 343, 356 (Alaska 1988). "Most have relied on the maxim that 'the essence of judicial power is the final

Indeed, the above statutory scheme recognizes the exclusive nature of the prelitigation proceedings, allowing a suspension of the statute of limitations so that the Division may conduct a review of the matter before the litigant heads to court. See Utah Code Ann. § 78-14-12(3)(a). Once the Division has either completed its review or fails to complete its review upon proper request, the statute of limitations resumes and the litigant may commence litigation. See id. A petitioner who complies with the Act and who timely files and serves the Request for 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. See id.; Utah Admin. Code R156-78A-14.

In this case, however, Appellants did not file and serve upon all parties a Request for Prelitigation Panel Review within 60 days after filing their Notice of Intent. The two-year statute of limitations—extended by 120 days—was therefore not tolled and

authority to render and enforce a judgment,’ and thus found no separation of powers problems because the actions of the panel are at most advisory and its decision has no more weight than an expert opinion.” Id. (citing DiAntonio v. Northampton-Accomack Mem’l Hosp., 628 F.2d 287, 292 (4th Cir. (Va.), 1980); Eastin v. Broomfield, 570 P.2d 744, 750 (Ariz. 1977); Lacy v. Green, 428 A.2d 1171, 1178 (Del. Super. 1981); Prendergast v. Nelson, 256 N.W.2d 657, 666-67 (Neb. 1977)). This reasoning applies with equal force to Utah’s statute because the prelitigation panel review is “informal and nonbinding.” Utah Code Ann. § 78-14-12(1)(c). In fact, Utah’s statute is arguably less invasive into the role of the judiciary than those of other states. For example, the statute upheld in Keyes went so far as to uphold as constitutional the statute’s provision allowing the panel’s published opinion to be introduced as “expert” evidence at trial. See Keyes, 750 P.2d at 346-47. The Utah Health Care Malpractice Act, however, forbids the disclosure of the review panel’s decision and protects the confidentiality of the proceedings. See Utah Code Ann. § 78-14-12(1)(d) (“Proceedings conduct under authority of this section are confidential, privileged, and immune from civil process.”).

expired on June 14, 2001. Although Appellants filed their Complaint within the 120-day extension on June 12, 2001, the filing was defective because the Complaint contained no certification that Appellants had fully complied with the Utah Health Care Malpractice Act, that a prelitigation panel review hearing had been held, or that the Division's jurisdiction had expired. The trial court therefore had no jurisdiction pursuant to Utah Code Ann. § 78-14-12.

Appellants' reliance on the this Court's decision in Avila v. Winn, 794 P.2d 20 (Utah 1990), to justify their premature filing in the Third District court is simply misplaced. Although the Avila Court determined that the complaint which was filed before a prelitigation panel review was held should not be dismissed in that instance, the facts and holding in that case are inapposite. In Avila, the plaintiff filed a Notice of Intent within 90 days of the expiration of the two-year statute of limitations. See id. at 20-21. The statute of limitations was therefore extended by 120 days pursuant to U.C.A. § 78-14-8. See id. at 21. The plaintiff then filed a request for prelitigation panel review within the 60-day time period required by statute. See id. The Division also held a prelitigation panel hearing, but the plaintiff's attorney did not present evidence or argument on his client's behalf. See id. at 22. The Division thereafter did not issue an opinion. See id.

Eleven months later, the defendants filed a motion to dismiss on the basis that the plaintiff had failed to comply with the two-year statute of limitation. The trial court recognized that, despite the compulsory conditions precedent of the Act, the

plaintiff had filed the complaint before the prelitigation panel review hearing was held. See id. at 21. The trial court also noted that the prelitigation panel review was incomplete and, on that basis, refused to dismiss the complaint and tolled the proceedings until after a complete panel review could be accomplished. See id.

After a second prelitigation panel hearing, the review panel issued an opinion, but the plaintiff did not re-file his complaint in district court. The defendants again filed a motion to dismiss, arguing that the plaintiff had failed to file a complaint within 60 days after the prelitigation panel issued its opinion. See id. (citing U.C.A. § 78-14-12(3)). The trial court thereafter dismissed the plaintiff's action.

In reversing the trial court's dismissal, this Court found that the defendants had not sought and obtained a final ruling on their initial motion to dismiss and thus the defendants were estopped from arguing that the plaintiff's complaint was filed untimely. Based upon the defendants' failure to act and the plaintiff's reasonable reliance on the fact that he had already filed a complaint, the Supreme Court concluded that, in equity, the plaintiff's complaint should not have been dismissed. See id. at 23. More important, this Court added that, "[i]n so holding, we 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. (emphasis added).

Thus, Avila does not stand for the proposition Appellants advance, and this Court should not rely on Avila to condone the filing of a complaint in these

circumstances. As this Court made clear, Avila was an equitable exception necessitated by unique facts—facts that are not present in this case. Unlike the petitioner in Avila, Appellants in this case did not file and serve a Request for Prelitigation Panel Review within the 60 days provided by the Act, and no prelitigation panel review hearing was ever held. Because Plaintiffs did not comply with the conditions precedent mandated by the Utah Health Care Malpractice Act prior to commencing litigation, the trial court was without jurisdiction to hear the matter. This Court should therefore affirm the trial court’s decision to dismiss Plaintiffs’ Complaint.

POINT II

APPELLANTS MAY NOT RAISE CONSTITUTIONAL ISSUES FOR THE FIRST TIME ON APPEAL.

Appellants launch a volley of constitutional challenges to the trial court’s ruling and the Division’s conduct, contending that the trial court and the Division violated their rights under the open courts clause, the equal protection clause, and the due process clause of the Utah Constitution. Appellants also argue that the trial court and the Division violated Article XVI, section 5, of the Utah Constitution, which provides certain guarantees for wrongful death actions. Violations of federal rights are also referenced.

“It is a fundamental principle of appellate review that matters not raised at the trial level cannot be raised for the first time on appeal.” State ex rel. M.S., 781 P.2d 1289, 1291 (Utah Ct. App. 1989) (citing State v. John, 770 P.2d 994, 995 (Utah 1989)). This general rule “applies equally to constitutional challenges not presented below, but

raised subsequently on appeal.” Id. (citations omitted); cf. Rudolph v. Galetka, 2002 UT 7, ¶5, 43 P.2d 467 (“Any issues that were not addressed on direct appeal but could have been raised may not be raised for the first time in a post-conviction relief proceeding absent unusual circumstances. This rule applies to all claims, including constitutional questions.”) (citing Julian v. State, 966 P.2d 249, 258 (Utah 1998)).

In this case, Appellants purport to challenge the Utah Health Care Malpractice Act on several constitutional grounds. Many of those grounds, however, are raised for the first time on appeal. In fact, Appellants utterly fail to identify in their opening brief where in the record they specifically preserved their constitutional arguments before the trial court. This omission directly contravenes Rule 24 of the Utah Rules of Appellate Procedure, which requires an appellant to include in the brief “[a] statement of the issues presented for review, including for each issue: the standard of appellate review with supporting authority; and . . . citation to the record showing that the issue was preserved in the trial court; or . . . a statement of grounds for seeking review of an issue not preserved in the trial court.” Utah R. App. P. 24(a)(5) (emphasis added).

Should the Court choose to forgive Appellants’ failure to comply with Rule 24, it should still not consider the merits of Appellants’ constitutional arguments other than those regarding due process or right of access to the courts because they are raised in this Court for the first time. Appellees acknowledge that Appellants did address some constitutional challenges in their opposition to the motions before the trial court. Other

constitutional challenges made below, however, are not those raised in this appeal. For example, Appellants did not raise the issue of whether the Act violated equal protection in any of their opposition memoranda to Appellees' motions to dismiss. See R.22-25; 78-86; 154-166; 196-199; 200-207; 208-210. They should not be heard now on that issue when the trial court was never given any meaningful opportunity to consider the issue and rule upon it.

Appellants' counsel briefly addressed other constitutional arguments based upon due process and access to the courts during the hearing on Appellees' motions for summary judgment. Those arguments, however, were cursory at best, and the trial court was not provided with any meaningful analysis or case law supporting Appellants' position on those issues, either in Appellants' memoranda or at oral argument. See Motion Hearing, December 19, 2001 (R.258, at 27, 29). Appellants also have not shown that the trial court committed plain error or that any exceptional circumstances warrant consideration of their arguments. See State v. Irwin, 924 P.2d 5 (Utah Ct. App. 1996), cert. denied, 931 P.2d 146 (Utah 1997). Simply put, Appellants failed to adequately preserve their constitutional arguments which they now raise on appeal, and the Court should refuse to consider them.

POINT III

THE TRIAL COURT'S INTERPRETATION OF UTAH CODE ANN. § 78-14-12(2)(b) WAS IN ACCORDANCE WITH THE UNITED STATES AND UTAH CONSTITUTIONS.

Even if this Court concludes that Appellants adequately preserved their constitutional challenges to the trial court's interpretation of the Utah Health Care Malpractice Act, no grounds support those arguments. The trial court correctly concluded that, based on undisputed facts, Appellants failed to comply with the compulsory conditions precedent to commencing litigation when they did not serve a copy of the Request for Prelitigation Panel Review upon all named health-care providers in the action. This violated the plain mandate of Section 78-14-12(2), as explained above. See Point I, infra.

Insofar as Appellants' constitutional challenges address this particular ruling,³ and assuming that Appellants adequately preserved those challenges, this Court may easily conclude that the Act's requirement to serve all named health-care providers with the Request for Prelitigation Panel Review does not violate Appellants' procedural

³ In support of their argument that the trial court erroneously interpreted the Act, Appellants cite several of the trial court's statements made during oral argument. These statements, however, were not part of the trial court's ruling from the bench, see R.258, at 38-44, and even if they were, this Court has held that oral statements made from the bench are not the judgment of the case and therefore are not appealable. See State v. Gerrard, 584 P.2d 885 (Utah 1978). This Court should therefore reject any implication that those statements comprise a part of the trial court's judgment in this case.

or substantive due process rights, deny them access to the courts, or deny them equal protection under the law.⁴

1. The Act does not violate Appellants' due process rights.

Appellants do not explain how the prelitigation review proceedings violate “due process,” either under the Utah Constitution or the United States Constitution. If Appellants’ argument is that the proceedings violate their substantive due process rights, “it is well-established that legislative acts adjusting economic burdens and benefits carry a presumption of constitutionality and that the person challenging the enactment must

⁴ Appellants off-handedly contend, without any analysis or citation to case law, that the prelitigation panel review proceedings violate their right to equal protection under the law. Appellants, however, have failed to comply with Rule 24 of the Utah Rules of Appellate Procedure, which, in part, requires Appellants’ brief to include an argument section containing “the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on.” Utah R. App. P. 24(a)(9). Appellants offer nothing other than two references to “equal protection” in their brief. No mention is made of what classification or fundamental right is involved, and the brief is also bereft of any analysis regarding the appropriate level of scrutiny to be applied.

Moreover, Appellants’ arguments fail to adequately cite to the “parts of the record relied on.” For example, Point II of Appellants’ argument includes a grand total of two references to the oral argument transcript (without record cites), and Point III is equally devoid of references. This Court has repeatedly declared that it “is not ‘a depository in which the appealing party may dump the burden of argument and research.’” State v. Gamblin, 2000 UT 44, ¶6, 1 P.3d 1108 (citing State v. Jaeger, 1999 UT 1, ¶31, 973 P.2d 404 (citations omitted); Mackay v. Hardy, 973 P.2d 941, 948 n.9 (Utah 1998)). Like the appellant in Gamblin, Appellants’ brief in argument as required by Rule 24(a)(9) of the Utah Rules of Appellate Procedure.” Gamblin, 2000 UT 44 at ¶6. Indeed, “[b]riefs that do not comply with rule 24 ‘may be disregarded or stricken, on motion or sua sponte by the court.’” Id. (citations omitted). As such, this Court should refuse to consider Appellants’ inadequately briefed arguments.

establish that the legislature has acted in an ‘arbitrary and irrational’ manner.” Houk v. Furman, 613 F. Supp. 1022, 1033-34 (D. Me. 1985) (citing Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15, 96 S. Ct. 2882, 2892, 49 L.Ed.2d 752 (1976); Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 487-88, 75 S. Ct. 461, 464, 99 L.Ed. 563 (1955)). Moreover, this Court has reiterated that “[w]hen construing the language of a statutory provision, ‘[w]e presume that the legislature used each word advisedly. . . .’” Associated Gen. Contractors v. Board of Oil, Gas and Mining, 2001 UT 112, ¶30, 38 P.3d 291 (quoting Nelson v. Salt Lake County, 905 P.2d 872, 875 (Utah 1995)). This court “will not ‘infer substantive terms into the text that are not already there. Rather, the interpretation must be based on the language used, and [this Court] has no power to rewrite the statute to conform to an intention not expressed.’” Id. (quoting Berrett v. Purser & Edwards, 876 P.2d 367, 370 (Utah 1994)).

Appellants have not offered any argument or analysis to demonstrate exactly how the Act is an “arbitrary and irrational” exercise of the legislature’s authority, as is their burden to do so. See Houk, 613 F. Supp. at 1033-34. Without such explanation, this Court should reject Appellants’ due process challenge. Even so, Appellees assert that the Act is anything but arbitrary and irrational. It is a carefully crafted measure to ensure the continued availability of health care in the face of mounting health care and

malpractice insurance costs. See Utah Code. Ann. § 78-14-2.⁵ Other courts have reached the same conclusion regarding their own legislation. See Linder v. C.W. Smith, 629 P.2d 1187, 1190 (Mt. 1981) (“In all instances, the articulated basis for the panel acts has been the malpractice crisis existing in many states, with this legislation intended as a means to limit malpractice filings to those which are clearly meritorious.”). Even today, the rising costs of medical malpractice insurance threaten to seriously curb the availability of medical services to the public and support the continued viability of the Utah Health Care Malpractice Act. See, e.g., Michael Freedman, The Tort Mess, Forbes, May 13, 2002, at 91-98; Laura Bradford, Out of Medicine, Time (Inside Business Section), September 2002.⁶

⁵ The Utah legislature enacted Utah Code Ann. § 78-14-1 et seq. in response to a growing medical malpractice insurance crisis during the early and mid-1970s. See Utah Code Ann. § 78-14-2. Several other states enacted similar legislation to alleviate the effects of the crisis. See Keyes v. Humana Hosp. Alaska, Inc., 750 P.2d 343, 353 n.14 (Alaska 1988) (citing Redish, Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications, 55 Tex. L. Rev. 759, 793 (1977); Comment, An Analysis of State Legislative Responses to the Medical Malpractice Crisis, 1975 Duke L. J. 1417; Abraham, Medical Malpractice Reform: A Preliminary Analysis, 36 Md. L. Rev. 489, 513-14 (1977); Comment, Recent Medical Malpractice Legislation — A First Checkup, 50 Tulane L. Rev. 655, 679-80 (1976)).

⁶ Recent figures reflecting a 43% increase in medical malpractice jury verdicts nationwide are accompanied by a sharp incline in malpractice premiums. The renewed crisis hits close to home. According to Bradford, Nevada “is one of the states with the sharpest rise in malpractice costs,” which has forced some major insurance carriers to withdraw malpractice coverage for physicians in that state and has forced physicians to limit the number of patients they treat or leave their practices altogether. Bradford, Out of Medicine, Time, September 2002, at A13-14. In fact, a recent survey revealed that 42% of obstetricians are planning to move their practices out of southern Nevada in the face of skyrocketing insurance premiums for that area. Freedman, The Tort Mess, Forbes, May

The federal due process clause also does not provide Appellants refuge in this case. As the Alaska Supreme Court noted in Keyes v. Humana Hosp. Alaska Inc., “the federal due process guarantee does not ‘prevent a state from prescribing a reasonable and appropriate condition precedent to the bringing of a suit of a specified kind or class so long as the basis of distinction is real and the condition imposed has reasonable relation to a legitimate object.’” 750 P.2d 343, 352 n.13 (Alaska 1988) (quoting Jones v. Union Guano Co., 264 U.S. 171, 181, 44 S. Ct. 280, 282, 68 L.Ed. 623, 628 (1924) (upholding state statute providing that no suit for damages to crops resulting from fertilizer use may be brought except after chemical analysis showing deficiency of ingredients); and citing Prendergast, 256 N.W.2d at 668 (legislature may pass law which seeks to distinguish between different types of tort actions so long as distinctions are reasonable and ground upon real differences inherent those actions)). The Utah legislature was certainly within its authority to counter what it deemed a substantial threat to public health and welfare and acted reasonably in doing so.

Finally, Appellants attempt to distinguish the notice provisions and prerequisites of the Utah Governmental Immunity Act, U.C.A. § 63-30-11, arguing that

13, 2002, at 92.

Other recent developments are troubling. In December of last year, St. Paul Companies, the nation’s second-largest medical malpractice insurer, announced that it would no longer provide coverage for physicians after it lost \$985 million in malpractice coverage in 2001. See Id. As a result, “42,000 doctors and 750 hospitals, covering at least 25% of the market in 12 states, will be left to seek new coverage, paying as much as 300% more in premiums.” Id.

the Immunity Act “creates a right of action when certain requirements are met” and that the Utah Health Care Malpractice Act “serves as a limitation on actions.” Appellant’s Brief, at 16-17. Appellants, however, are mistaken in their assertion that the Immunity Act “creates a right of action,” when, in fact, the Immunity Act creates immunity from suit for any injury and then waives that immunity for specific obligations or injuries. See Utah Code Ann. § 63-30-3; §§ 63-30-5 to 63-30-10.5.

As part of the government’s waiver of immunity for certain injuries, the Immunity Act requires individuals with claims against a governmental agency or employee to “file a written notice of claim with the entity before maintaining an action” within one year after the claim arises. Id. § 63-30-11(2), § 63-30-12. Failure to file a written notice within one year will bar any subsequent action to recover damages. See, e.g., Thomas E. Jeremy Estate v. Salt Lake City, 87 Utah 370, 49 P.2d 405 (1934). Such a “limitation” on a litigant’s right to initiate an action against the government has been held as a constitutional exercise of the legislature’s authority. See Sears v. Southworth, 563 P.2d 192 (Utah 1977) (holding notice of claim requirement does not deny equal protection); cf. Parks v. Utah Transit Auth., 2002 UT 35, ¶¶15-18, ____ P.3d ____ (holding Governmental Immunity Act’s limitation on recoverable damages did not violate provision of State Constitution prohibiting statutory limitations on amount recoverable in wrongful death action or provisions related to due process, uniform operation of laws, and the right to jury trial); Lyon v. Burton, 2000 UT 55, ¶¶ 32-43, 5 P.3d 616 (statutory cap

on damages awards against government agencies did not violate open courts provision of Utah Constitution by limiting recovery in action in which governmental entity was substituted for government employee) (Howe, J. concurring, with one justice concurring and one justice concurring in the result).

Appellants certainly cannot argue that a “limitation” on medical malpractice actions under the Utah Health Care Malpractice Act is unconstitutional as a violation of due process. This Court has already upheld the statute of limitations found in the Act as a constitutional exercise of the legislature’s power to limit the time in which malpractice claimants may initiate a lawsuit. See Allen v. Intermountain Health Care, Inc., 635 P.2d 30, 32 (Utah 1981). Likewise, the notice and prelitigation panel review provisions of the Utah Health Care Malpractice Act impose “limitations” on a claimant’s ability to proceed with litigation—nevertheless, they do not restrict or preclude a claimant’s ability to proceed once those notice and prelitigation requirements are met. This Court acknowledged as much when it upheld the Act’s shortened statute of limitations “along with requiring notice of intention to sue” as a constitutional legislative acts to “insure the continued availability of adequate health care services.” Id. (emphasis added).

The Act does not “eliminate lawsuits against providers of medical care,” as Appellants propose; rather, it is a constitutional enactment that serves to further the legislature’s legitimate purpose of reigning in the spiraling costs of medical malpractice insurance, ensuring the continued availability of medical care, and encouraging the early

settlement of malpractice claims. See Utah Code Ann. § 78-14-2. Appellants were not cut off from their right of access to the courts or due process as long as they complied with the mandates of the Act. The trial court was correct to disregard Appellants' due process challenge (if, indeed, there was one), and this Court should do the same.

2. The trial court's ruling did not deny Appellants access to the courts.

Appellants next contend that the prelitigation panel review procedures mandated by the Act violates their right to access to the courts under Article I, section 11 of the Utah Constitution. A challenge to a legislative enactment based upon the open courts clause of the Utah Constitution usually presumes that the legislature has acted to extinguish or abolish an existing right without providing a "substitute equivalent remedy." For example, in Berry v. Beech Aircraft Corp, 717 P.2d 670, 675 (Utah 1985), the principal case upon which Appellants rely, this Court concluded that the statute of repose under the then-existing Utah Products Liability Act operated to arbitrarily extinguish a common-law or state tort law remedy without providing an adequate substitute remedy. See id. at 783.

That is simply not what the legislature has done in this case. The Utah Health Care Malpractice Act does not extinguish the common law right of a claimant to seek redress in court for injuries arising from alleged medical negligence. Rather, the Act serves to provide an informal forum and proceedings, which directly advance the legislature's stated purpose

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.

U.C.A. 78-14-2.

Based upon this legislative purpose, this Court has declared before that “the Act was premised upon the need to protect and insure the continued availability of health care services to the public, and not (as asserted by plaintiff) to shield insurance companies from legitimate claims.” Allen v. Intermountain Health Care, Inc., 635 P.2d 30, 32 (Utah 1981). Although the prelitigation procedures are informal, the Act declares that they “are compulsory as a condition precedent to commencing litigation.” Utah Code Ann. § 78-14-12(1)(c). It is the claimant’s failure to comply with the Act’s procedures, not the Act itself, that will prove fatal to initiating a medical negligence lawsuit. See, e.g., Avila v. Winn, 794 P.2d 20, 22 (Utah 1990); Allen, 635 P.2d at 30-31; see also Carter v. Milford Valley Mem’l Hosp., 2000 UT App 21, ¶13, 996 P.2d 1076 (“If these requirements are not fully met, the action will be dismissed.”) (citing Malone v. Parker, 826 P.2d 132, 134 (Utah 1992)).

Because the Act does not operate to extinguish or annul a state tort or common-law right, the analysis under Berry does not apply to this case. Indeed, the Berry “two-part test applies only when a right has been ‘abrogated’” or extinguished. Burgandy v. State Dept. of Human Servs., 1999 UT App 208, ¶16, 983 P.2d 586. Instead, this

Court's analysis in Jensen v. State Tax Comm'n, 835 P.2d 965 (Utah 1992), is more applicable to Appellants' arguments that essentially imply that their right to access to the court has been "chilled."

In Jensen, "a statute required the taxpayers to deposit the full amount of assessed taxes, penalties, and interest (more than \$340,000) with the Tax Commission before seeking appellate review." Burgandy, 1999 Utah App 208, at ¶17, (citing Jensen, 835 P.2d at 969). The Utah Court of Appeals concluded that the statute did not actually extinguish an existing common law right and that the Berry analysis did not apply. Nevertheless, the court still found persuasive the appellant's argument that the statute had "chilled" his right to access to the courts. Id. In holding that the statute was an unconstitutional bar to judicial review, the Jensen Court reasoned that "to the extent that [a statute] precludes reasonable access to judicial review, it violates the open courts provision and is unconstitutional as applied." Id. (quoting Jensen, 835 P.2d at 969) (emphasis added).

Unlike the statute in Jensen, however, the Utah Health Care Malpractice Act still allows reasonable access to judicial review. True, medical malpractice claimants must comply with various prerequisites to filing a claim, such as serving notice of their intent to commence an action against a health care provider and submitting their claims to prelitigation panel review with the Division. The Act, however, appropriately balances the need to protect the public interest in available health care with the rights of

individuals to seek redress for claims in court. The procedures are “informal and nonbinding,” and, once the Division is allowed to review the matter, claimants are free to pursue their claims through litigation.

Based upon this Court’s reasoning in Jensen and its progeny, limitations (if any) on Appellants’ right to access to the courts in this case may be upheld so long as Appellants have reasonable access to the courts or a rational basis exists for the Act.⁷ As explained above, the Utah legislature enacted the Utah Health Care Malpractice Act in response to a growing crisis in increased medical malpractice insurance. Most jurisdictions have cited this reason as the basis for upholding their panel review statutes, see, e.g., Linder v. C.W. Smith, 629 P.2d 1187, 1190 (Mt. 1981), and have either expressly or impliedly concluded that a rational basis exists for any alleged delays and/or expenses. See, e.g., Keyes, 750 P.2d at 358-59 (citing Seoane v. Ortho Pharm., 660 F.2d 146, 151 (5th Cir. (La.), 1981); Woods, 591 F.2d at 1174 n.16; Everett v. Goldman, 359 So.2d 1256, 1269 (La. 1978); Paro, 369 N.E.2d at 990; Linder, 629 P.2d at 1191; Comiskey v. Arlen, 390 N.Y.S.2d 122, 129 (1976)).

⁷ Several other jurisdictions have considered whether similar prelitigation panel review procedures deny a claimant his or her right to access to the courts under their own constitutions. A majority of those courts have upheld those procedures against this challenge. See Irish v. Gimbel, 691 A.2d 664, 673 (Me. 1997) (citing Houk v. Furman, 613 F. Supp. 1022, 1034 (D. Me. 1985)); see also Linder, 629 P.2d at 1190 (citing Paro v. Longwood Hosp., 369 N.E.2d 985, 989-990 (Mass. 1977); State ex rel. Strykowski v. Wilkie, 261 N.W.2d 434, 444 (Wis. 1978); Prendergast v. Nelson, N.W.2d 657, 663-64 (Neb. 1977); Woods v. Holy Cross Hosp., 591 F.2d 1164, 1173 n.16 (5th Cir. (Fla.), 1979)).

As stated above, Appellants have not adequately preserved their constitutional argument for appeal, and they are therefore precluded from raising them for the first time on appeal. See Point II, infra. Nevertheless, even if these issues are adequately preserved, Appellants still have not presented this Court with any basis to rule that the Act prevents reasonable access to judicial review. The Act merely creates compulsory conditions precedent to commencing an action against a health care provider in Utah. Further, Appellants have failed to demonstrate that the Act is without any rational basis. To the contrary, the increasing costs of medical malpractice insurance, the threat of diminished health care access for the public, and the encouragement of early evaluation of claims are all rational bases for the Utah legislature's action in this matter. Appellants were not deprived of their right to access to the courts.

POINT IV

THIS COURT SHOULD REFUSE TO CONSIDER APPELLANTS' CONSTITUTIONAL CHALLENGES TO THE UTAH HEALTH CARE MALPRACTICE ACT BASED UPON THE DIVISION'S ACTIONS BECAUSE THEY ARE NOT RELEVANT ON APPEAL.

Appellants make a final attempt to excuse their noncompliance with the Utah Health Care Malpractice Act by claiming that the Division acted unconstitutionally by failing to (1) notify Appellants of their duty to file a Request for Prelitigation Panel Review with the Division; (2) notify Appellants of an alleged "lost" filing; or (3) promulgate adequate administrative rules for claimants who overlook prelitigation requirements or for "lost" filings.

These constitutional arguments all rely on Appellants' contention that their Request for Prelitigation Panel Review was filed with the Division—a fact that the trial court found was disputed. See Order of Dismissal, at 2, ¶2 (R.246). The trial court, however, granted summary judgment in favor of Appellees on the undisputed fact that Appellants never served any of the named health care providers with a copy of their Request, pursuant to the mandate of Section 78-14-12(2)(b). See id., ¶5.

None of the constitutional challenges Appellants advance in their appeal to this Court addresses the trial court's ruling on this issue or this particular section of the Act. Appellants' arguments may have been appropriate had the trial court based its decision upon some deficiency with Appellants' filing of the Request or upon an action of the Division. Summary judgment, however, was based upon the undisputed fact that Appellants did not follow the plain language of Section 78-14-12(2)(b) by serving a copy of the Request upon all named health-care providers in the action. Service of the Request was wholly the responsibility of the Appellants, and the Division had nothing to do with this requirement. As such, the trial court correctly concluded that it did not have jurisdiction to hear the matter and properly dismissed the Complaint.

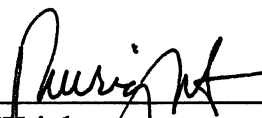
CONCLUSION

Based on the foregoing, Appellees Ivan D. Wright, M.D., Harold Vonk, M.D., and Ronald S. Rankin, M.D., respectfully request that this Court affirm the

decision of the trial court granting summary judgment in favor of Appellees and against Appellants Helen LaBelle, Sheila Carlson, Linda Buckley, and Marilyn Phillips.

DATED this 18th day of September, 2002.


RICHARDS, BRANDT, MILLER & NELSON



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Attorneys for Defendant/Appellee Ivan D.
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DATED this 18th day of September, 2002.

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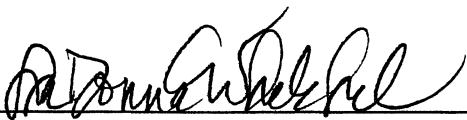
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two true and correct copies of the foregoing instrument were mailed, first-class, postage prepaid, on this 18th day of September, 2002, to the following:

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ADDENDUM

mother during pregnancy, labor, and child birth, 3 A.L.R.5th 123.

Liability of hospital, physician, or other medical personnel for death or injury to mother or child caused by inadequate attendance or monitoring of patient during and after pregnancy, labor, and delivery, 3 A.L.R.5th 146.

Liability of doctor or other health practitioner to third party contracting contagious disease from doctor's patient, 3 A.L.R.5th 370.

Refusal of medical treatment on religious grounds as affecting right to recover for personal injury or death, 3 A.L.R.5th 721.

Liability of hospital, physician, or other medical personnel for death or injury to mother or child caused by improper choice between, or timing of, vaginal or cesarean delivery, 4 A.L.R.5th 148.

Liability of hospital, physician, or other medical personnel for death or injury to mother or child caused by improper procedures during vaginal delivery, 4 A.L.R.5th 210.

Liability of hospital, physician, or other medical personnel for death or injury to mother or child caused by improper treatment during labor, 6 A.L.R.5th 490.

Liability of hospital, physician, or other medical personnel for death or injury to mother caused by improper postdelivery diagnosis, care, and representations, 6 A.L.R.5th 534.

Liability of hospital, physician, or other medical personnel for death or injury to mother or child caused by improper diagnosis and treatment of mother relating to and during pregnancy, 7 A.L.R.5th 1.

Validity, construction, and application of state statutory provisions limiting amount of recovery in medical malpractice claims, 26 A.L.R.5th 245.

Ophthalmological malpractice, 30 A.L.R.5th 571.

Medical malpractice in connection with breast augmentation, reduction, or reconstruction, 28 A.L.R.5th 497.

Medical malpractice: negligent catheterization, 31 A.L.R.5th 1.

Medical malpractice liability or sports medicine care providers for injury to, or death of, athlete, 33 A.L.R.5th 619.

Malpractice in treatment of skin disease, disorder, blemish, or scar, 19 A.L.R.5th 563.

When does medical practitioner's treatment of patient constitute "willful and malicious injury," so as to make practitioner's debt arising from such treatment nondischargeable under § 523(a)(6) of Bankruptcy Act (11 USCS § 523(a)(6)), 77 A.L.R. Fed. 918.

Free exercise of religion clause of First Amendment as defense to tort liability, 93 A.L.R. Fed. 754.

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 premiums can be reasonably and accurately calculated; and

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

History: L. 1976, ch. 23, § 2.

Meaning of "this act." — The phrase "this act" in the last paragraph means Laws 1976, Chapter 23, which enacted this chapter.

COLLATERAL REFERENCES

Journal of Contemporary Law. — Medical Malpractice Legislation: Rx for Utah, 11 J. Contemp. L. 287 (1984).

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.

History: C. 1953, 78-14-7.1, enacted by L. 1986, ch. 205, § 1.

COLLATERAL REFERENCES

Utah Law Review. — Recent Developments in Utah Law — Legislative Enactments — Torts, 1987 Utah L. Rev 292.

A.L.R. — Future disease or condition, or anxiety relating thereto, as element of recovery, 50 A L R 4th 13

Recoverability of compensatory damages for

mental anguish or emotional distress for tortiously causing another's birth, 74 A L.R 4th 798

Medical malpractice measure and elements of damages in actions based on loss of chance, 81 A L R 4th 485

78-14-7.5. Limitation on attorney's contingency fee in malpractice action.

(1) In any malpractice action against a health care provider as defined in Section 78-14-3, an attorney shall not collect a contingent fee for representing a client seeking damages in connection with or arising out of personal injury or wrongful death caused by the negligence of another which exceeds 33⅓% of the amount recovered.

(2) This limitation applies regardless of whether the recovery is by settlement, arbitration, judgment, or whether appeal is involved.

History: C. 1953, 78-14-7.5, enacted by L. 1985, ch. 67, § 1.

78-14-8. Notice of intent to commence action.

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

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

History: L. 1976, ch. 23, § 8; 1979, ch. 128, § 2.

Cross-References. — Service of summons and complaint, U.R.C.P. 4.

NOTES TO DECISIONS

ANALYSIS

Constitutionality.

Action not timely filed.

Effect of improper notice.

Extension of time.

Imputed knowledge.

Notice.

Retroactive effect of 1979 amendment.

Tolling statute of limitations.

Cited.

Constitutionality.

The 1979 amendment of this section did not violate constitutional requirement that acts embrace no more than one subject; since title of a bill need not describe each and every change contained in the bill and the title of an act amending a previous act is sufficient if it simply specifies the section to be amended. *McGuire v. University of Utah Medical Ctr.*, 603 P.2d 786 (Utah 1979).

The 1979 amendment of this section is not unconstitutional as being a special law; the amendment clearly operates uniformly upon a class of persons consisting of all those having a cause of action arising prior to the effective date of the Health Care Malpractice Act (April 1, 1976) whether they have been filed or not. *McGuire v. University of Utah Medical Ctr.*, 603 P.2d 786 (Utah 1979).

This section does not constitute unconstitutional special legislation. *Yates v. Vernal Family Health Ctr.*, 617 P.2d 352 (Utah 1980).

This section does not violate Utah Const., Art. I, Sec. 24 or Utah Const., Art. VI, Sec. 26. *Allen v. Intermountain Health Care, Inc.*, 635 P.2d 30 (Utah 1981).

Action not timely filed.

Where plaintiff experienced complications from breast surgery necessitating a second operation on November 2, 1976, and then filed a notice of intent under this section on August 17, 1978, but did not file the action until January 18, 1979, the action was properly dismissed since the action had to be filed within 120 days of the filing of the notice of intent (December 15, 1978). *Millett v. Clark Clinic Corp.*, 609 P.2d 934 (Utah 1980).

Effect of improper notice.

The notice provisions of this section were not complied with where plaintiff's husband, rather than plaintiff herself, filed the notice; however, such failure to comply was not an adjudication on the merits, but merely a procedural defect that did not relate to the merits of

the basic action, and plaintiff was entitled to serve a proper notice and file another complaint pursuant to the requirements of § 78-12-40. *Yates v. Vernal Family Health Ctr.*, 617 P.2d 352 (Utah 1980).

Extension of time.

When a plaintiff serves a notice of intent to commence action within 90 days of the expiration of the statute of limitations, thereby becoming entitled to an additional 120-day extension, a court may not bar the plaintiff's action for failure to file a request for prelitigation review within 60 days of that notice. *Gramlich v. Munsey*, 838 P.2d 1131 (Utah 1992).

Imputed knowledge.

Where plaintiff's former attorney had hired a physician to evaluate her claim of malpractice and the attorney had filed a notice of intent to commence action, any knowledge reflected by the attorney's filing of the notice was imputed to plaintiff in determining her knowledge for purposes of the running of the statute of limitations. *Deschamps v. Pulley*, 784 P.2d 401 (Utah Ct. App. 1989).

Notice.

Filing of the complaint did not satisfy the notice requirement as this section required notice be given ninety days before filing. *Vealey v. Clegg*, 579 P.2d 919 (Utah 1978).

Retroactive effect of 1979 amendment.

The 1979 amendment of this section was retroactive; however, the notice of intent to sue provision is not applicable to causes of action arising before enactment of the Malpractice Act (April 1, 1976) and does not determine when an action is "commenced." *Foil v. Ballinger*, 601 P.2d 144 (Utah 1979); *McGuire v. University of Utah Medical Ctr.*, 603 P.2d 786 (Utah 1979).

Tolling statute of limitations.

The 90-day period following the giving of notice under this section is not a statutory prohibition under § 78-12-41 so as to toll the statute of limitations during the 90-day period since the specific provision of this section controls the general provision of § 78-12-41. *Millett v. Clark Clinic Corp.*, 609 P.2d 934 (Utah 1980).

A notice of intent, served less than 90 days before the expiration of the two-year statute of limitations but not less than 90 days before the expiration of the four-year statutory period, extends both periods of time for 120 days. *Forbes v. St. Mark's Hosp.*, 754 P.2d 933 (Utah 1988).

Cited in Duerden v. Utah Valley Hosp., 663 768 P.2d 449 (Utah 1989); Malone v. Parker, F. Supp. 781 (D. Utah 1987); Phillips v. Smith, 826 P.2d 132 (Utah 1992).

COLLATERAL REFERENCES

Am. Jur. 2d. — 61 Am. Jur. 2d Physicians, Surgeons, and Other Healers § 315. **Key Numbers.** — Physicians and Surgeons ⇨ 18(2).
C.J.S. — 70 C.J.S. Physicians and Surgeons § 109.

78-14-9. Professional liability insurance coverage for providers — Insurance commissioner may require joint underwriting authority.

If the commissioner finds after a hearing that in any part of this state any professional liability insurance coverage for health care providers is not readily available in the voluntary market, and that the public interest requires, he may by regulation promulgate and implement plans to provide insurance coverage through all insurers issuing professional liability policies and individual and group accident and sickness policies providing medical, surgical or hospital expense coverage on either a prepaid or an expense incurred basis, including personal injury protection and medical expense coverage issued incidental to liability insurance policies.

History: L. 1976, ch. 23, § 9.

Cross-References. — Governmental enti-

ties may purchase liability insurance, § 63-30-28 et seq.

COLLATERAL REFERENCES

Am. Jur. 2d. — 43 Am. Jur. 2d Insurance § 17 et seq. practice under state law, 49 A.L.R.4th 1240.
C.J.S. — 44 C.J.S. Insurance § 64. State regulation of insurer's right to classify insureds for premium or other underwriting purposes by occupation, 57 A.L.R.4th 625.
A.L.R. — Health provider's agreement as to patient's copayment liability after award by professional service insurer as unfair trade **Key Numbers.** — Insurance ⇨ 11.1.

78-14-9.5. Periodic payment of future damages in malpractice actions.

(1) As used in this section:

(a) "Future damages" means a judgment creditor's damages for future medical treatment, care or custody, loss of future earnings, loss of bodily function, or future pain and suffering.

(b) "Periodic payments" means the payment of money or delivery of other property to the judgment creditor at such intervals as ordered by the court.

(2) In any malpractice action against a health care provider, as defined in Section 78-14-3, the court shall, at the request of any party, order that future damages which equal or exceed \$100,000, less amounts payable for attorney's fees and other costs which are due at the time of judgment, shall be paid by periodic payments rather than by a lump sum payment.

(3) In rendering a judgment which orders the payment of future damages by periodic payments, the court shall order periodic payments to provide a fair correlation between the sustaining of losses and the payment of damages. Lost

78-14-9.5. Periodic payment of future damages in malpractice actions.

COLLATERAL REFERENCES

Brigham Young Law Review. — Note, The Fraught Rejection of the Current Tort System. Utah Medical No-Fault Proposal: A Problem- 1996 B.Y.U. L. Rev. 1.

78-14-12. 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.
- (4) The division shall provide for and appoint an appropriate panel or panels to hear complaints of medical liability and damages, made by or on behalf of any patient who is an alleged victim of medical liability. The panels are composed of:
 - (a) one member who is a resident lawyer currently licensed and in good standing to practice law in this state and who shall serve as chairman of the panel, who is appointed by the division from among qualified individuals who have registered with the division indicating a willingness to serve as panel members, and a willingness to comply with the rules of professional conduct governing lawyers in the state of Utah, and who has completed division training regarding conduct of panel hearings;
 - (b) (i) one member who is a licensed health care provider listed under Section 78-14-3, who is practicing and knowledgeable in the same specialty as the proposed defendant, and who is appointed by the division in accordance with Subsection (5); or
 - (ii) in claims against only hospitals or their employees, one member who is an individual currently serving in a hospital administration position directly related to hospital operations or conduct that includes responsibility for the area of practice that is the subject of the liability claim, and who is appointed by the division; and
 - (c) a lay panelist who is not a lawyer, doctor, hospital employee, or other health care provider, and who is a responsible citizen of the state, selected and appointed by the division from among individuals who have completed division training with respect to panel hearings.
- (5) (a) Each person listed as a health care provider in Section 78-14-3 and practicing under a license issued by the state, is obligated as a condition of holding that license to participate as a member of a medical liability prelitigation panel at reasonable times, places, and intervals, upon issuance, with advance notice given in a reasonable time frame, by the division of an Order to Participate as a Medical Liability Prelitigation Panel Member.
 - (b) A licensee may be excused from appearance and participation as a panel member upon the division finding participation by the licensee will create an unreasonable burden or hardship upon the licensee.
 - (c) A licensee whom the division finds failed to appear and participate as a panel member when so ordered, without adequate explanation or justification and without being excused for cause by the division, may be assessed an administrative fine not to exceed \$5,000.
 - (d) A licensee whom the division finds intentionally or repeatedly failed to appear and participate as a panel member when so ordered, without adequate explanation or justification and without being excused for cause by the division, may be assessed an administrative fine not to exceed \$5,000, and is guilty of unprofessional conduct.
 - (e) All fines collected under Subsections (5)(c) and (d) shall be deposited in the Physicians Education Fund created in Section 58-67a-1.
- (6) Each person selected as a panel member shall certify, under oath, that he has no bias or conflict of interest with respect to any matter under consideration.

(7) Members of the prelitigation hearing panels shall receive per diem compensation and travel expenses for attending panel hearings as established by rules of the division.

(8) (a) In addition to the actual cost of administering the licensure of health care providers, the division may set license fees of health care providers within the limits established by law equal to their proportionate costs of administering prelitigation panels.

(b) The claimant bears none of the costs of administering the prelitigation panel except under Section 78-14-16.

History: C. 1953, 78-14-12, enacted by L. 1985, ch. 238, § 1; 1986, ch. 170, § 2; 1987, ch. 92, § 159; 1989, ch. 26, § 1; 1989, ch. 225, § 95; 1994, ch. 171, § 2; 1996, ch. 248, § 56; 1997, ch. 137, § 1; 2002, ch. 256, § 69.

Amendment Notes. — The 1997 amend-

ment, effective May 5, 1997, substituted "service" for "filing" in Subsection (2)(a) and rewrote Subsection (3).

The 2002 amendment, effective July 1, 2002, substituted "Fund" for "Account" in Subsection (5)(e).

NOTES TO DECISIONS

ANALYSIS

Confidentiality.

Prerequisite to filing complaint.

—Prelitigation panel review.

Cited.

Confidentiality.

Because the notice of intent serves as the basis for a prelitigation panel review, and is often utilized as part of the prelitigation review, it is part of the proceeding, and thus must be kept confidential. *Doe v. Maret*, 1999 UT 74, 984 P.2d 980.

Prerequisite to filing complaint.

—**Prelitigation panel review.**

Under § 78-14-8, plaintiff's time for filing a

malpractice action was extended an additional 120 days from the date of the service of his first notice of intent; however, he was not entitled to any further extension because he failed to comply with the requirement in this section that the party initiating an action shall file a request for prelitigation panel review with the Division within sixty days after the filing of the notice of intent. *Kittredge v. Shaddy*, 2001 UT 7, 20 P.3d 285.

Cited in *Carter v. Milford Valley Mem'l Hosp.*, 2000 UT App 21, 996 P.2d 1076.

COLLATERAL REFERENCES

Utah Law Review. — Recent Developments in Utah Law — Judicial Decisions — Contract Law, 1995 Utah L. Rev. 1.

Utah's Medical Malpractice Prelitigation Panel: Exploring State Constitutional Arguments Against a Nonbinding Inadmissible Pro-

cedure, 2000 Utah L. Rev. 359.

Brigham Young Law Review. — Note, The Utah Medical No-Fault Proposal: A Problem-Fraught Rejection of the Current Tort System, 1996 B.Y.U. L. Rev. 1.

78-14-13. Proceedings — Authority of panel — Rights of parties to proceedings.

COLLATERAL REFERENCES

A.L.R. — Discovery, in medical malpractice action, of names and medical records of other patients to whom defendant has given treat-

ment similar to that allegedly injuring plaintiff, 66 A.L.R. 5th 591