

2008

Gina M. Arnold and Charlie S. Arnold v. Gary B. White, M.D., Uintah Basin Medical Center and David Grigsby, M.D. : Reply Brief

Utah Supreme Court

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Recommended Citation

Reply Brief, *Arnold v. White*, No. 20080255.00 (Utah Supreme Court, 2008).
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IN THE SUPREME COURT OF THE STATE OF UTAH

GINA M. ARNOLD and CHARLIE S.
ARNOLD,

Plaintiffs and Appellees,

vs.

GARY B. WHITE, M.D., UTAH
BASIN MEDICAL CENTER and DAVID
GRIGSBY, M.D.,

Defendants and Appellants.

REPLY BRIEF OF APPELLANTS

Case No. 20080255-SC

APPEAL FROM A JUDGMENT OF THE COURT OF APPEALS OF UTAH

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FILED
UTAH APPELLATE COURTS
OCT 02 2008

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ARGUMENT

I. **The More Well Reasoned Interpretation of the Plain Language of Section 78-14-4(2) is that the Medical Malpractice Two-Year Statute of Limitations Applies to All Persons, Regardless of Any Other Provision of Law, Including Section 78-12-35.**

The Plaintiffs erroneously claim that Defendant Dr. Grigsby takes no position regarding the proper interpretation of Section 78-14-4(2) in his Brief before this Court. (Plaintiffs/Appellees' Supreme Court of Utah (SC) Brief, p. 15.) The Plaintiffs include in a footnote the interpretation of Section 78-14-4(2) that was "urged by Dr. Grigsby in the proceeding below and in his Petition for Writ of Certiorari." (Plaintiffs/Appellees' SC Brief, p. 13.) However, in point of fact, Defendant Dr. Grigsby's statutory interpretation of Section 78-14-4(2) "urged by Dr. Grigsby in the proceeding below and in his Petition for Writ of Certiorari." and quoted by the Plaintiffs in footnote 4 is the same interpretation that Defendant Dr. Grigsby continues to advocate in his Brief before this Court. In footnote 4 of their Brief before this Court, the Plaintiffs quote Defendant Dr. Grigsby's statutory interpretation of Section 78-14-4(2) "urged by Dr. Grigsby in the proceeding below and in his Petition for Writ of Certiorari.":

To illustrate, in order to make his statutory interpretation to the Court of Appeals, Dr. Grigsby had to rely on ellipses and bold emphasis to deemphasize intervening words in the statute. . . . "The provisions of this section **shall** apply to all persons, **regardless of** minority or other legal disability under Section 78-12-36 or **any other provision of the law.**"

(Plaintiffs/Appellees' SC Brief, fn. 4, quoting Defendant Dr. Grigsby's/Appellee's Court of Appeals of Utah (CA) Brief.) However, in his Brief of the Appellant before this Court, Defendant Dr. Grigsby clearly indicated what he continues to assert is the proper

interpretation of the plain language of Section 78-14-4(2):

the interpretation of Utah Code Ann. § 78-14-4(2) that clearly harmonizes its provisions in accordance with the legislative intent and purpose is where the two-year limitation period “shall apply to *all persons, regardless* of minority or other legal disability under Section 78-12-36 or *any other provision of the law*,” including Utah Code Ann. § 78-12-35.

(Defendant Dr. Grigsby’s/Appellants’ SC Brief, pp. 21-22.) Contrary to the Plaintiffs’ assertions, Defendant Dr. Grigsby’s discussion in his Brief before this Court that harmonizes the plain language of Section 78-14-4(2) with the legislative intent of the Utah Health Care Malpractice Act manifests a clear position regarding the proper interpretation of Section 78-14-4(2). Defendant Dr. Grigsby’s position as to the proper interpretation of Section 78-14-4(2) has been consistent and specifically argued before this Court as well as the Utah Court of Appeals and the trial court. Defendant Dr. Grigsby continues to maintain that the more well-reasoned interpretation of the plain language of Section 78-14-4 indicates that the Utah Health Care Malpractice Act’s statute of limitations applies to all persons, regardless of any other provision of law, which contemplates Utah Code Ann. § 78-12-35 and includes minority or legal disability under Utah Code Ann. § 78-12-36.¹

The Plaintiffs further allege that Defendant Dr. Grigsby’s “contention that

¹Defendant Dr. Grigsby is aware that the Utah Supreme Court determined in *Lee v. Gaufin*, 867 P.2d 572 (Utah 1983), that Utah Code Ann. § 78-14-4(2) is unconstitutional as applied to minors. However, that decision does not apply to the present case as it is clear that the Utah Supreme Court confined the unconstitutionality of Utah Code Ann. § 78-14-4(2) only to those circumstances when a minor has been injured. As Ms. Arnold was not a minor at the time of her alleged injuries, this issue is not before this Court. Therefore, when Dr. Grigsby discusses the plain language of Utah Code Ann. § 78-14-4(2), it is with the recognition that this Court has already ruled as to the issue of minor’s claims.

malpractice claims are never subject to tolling under any provision of Utah would require an awkward and strained reading of the statute's language, and would disregard the structure and punctuation of the provision." (Plaintiffs/Appellees' SC Brief, p. 13.) In support of their allegation, the Plaintiffs cite the "last antecedent doctrine":

"Under the last antecedent doctrine, relative and qualifying words, phrases, and clauses are to be applied to the immediately preceding words or phrases."

(Appellee's Brief, p. 14.) However, the Utah Supreme Court has pointed out the limitations of the "last antecedent" rule:

Of more plausibility is the County's invocation of the rule of construction known as the "last antecedent" rule, whereby qualifying words and phrases are generally regarded as applying to the immediately preceding words, rather than to more remote ones. We have no doubt of the correctness of that rule of construction as a generality, if applied in appropriate circumstances. But helpful as rules of construction often are, they are useful guides, but poor masters; and they should not be regarded as having any such rigidity as to have the force of law, or distort an otherwise natural meaning or intent. Their only legitimate function is to assist in ascertaining the true intent and purpose of the statute. . . . **An even more fundamental rule of statutory interpretation helpful here is that the statute should be looked at in its entirety and in accordance with the purpose which was sought to be accomplished.**

Salt Lake City v. Salt Lake County, 568 P.2d 738, 741 (Utah 1977). (Emphasis added.) The Plaintiffs ignore the "even more fundamental rule of statutory interpretation . . . that the statute should be looked at in its entirety and in accordance with the purpose which was sought to be accomplished." *Id.* Looking at the Utah Health Care Malpractice Act "in its entirety and in accordance with the purpose which was sought to be accomplished" would require the Plaintiffs to specifically address the purpose of the Act as expressly described in Section 78-14-2, which clearly indicates that the "stated purpose of the UHCMA is to

alleviate health care costs via the establishment of a **fixed window of 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.’”** *Dowling v. Bullen*, 2004 UT 50, ¶ 11, 94 P.3d 915. (Emphasis added.) The Plaintiffs fail to provide any substantive discussion of Section 78-14-4(2) in accordance with the purpose of the Act as expressly described in Section 78-14-2.²

Similarly, instead of following the “more fundamental rule of statutory interpretation,” the Plaintiffs cite another “maxim of statutory construction that ‘expressio unius est exclusio alterius’ – that the expression of one thing is evidence of the exclusion of the other.” (Plaintiffs/Appellees’ SC Brief, p. 18.) The Utah Supreme Court has also pointed out the limitations of this rule of statutory construction:

Reliance is placed upon the maxim “expressio unius est exclusio alterius.” **It is appreciated that that maxim is sometimes helpful in determining the meaning of an otherwise questionable statute.** But its only usefulness is for that purpose: as a rule of construction. It has no force of law; **and it has no proper application when its effect would be to obstruct rather than to carry out the purpose of the statute.** It has been aptly said that it is “a valuable servant, but a dangerous master.” Whether it is helpful in understanding the intended effect of a statute depends upon an analysis of the legislative enactment to which it is sought to be applied.

Rio Grande Motor Way v. Public Serv. Comm’n, 445 P.2d 990, 991 (Utah 1968). (Emphasis added.) It is interesting to note that the Utah Supreme Court expressly indicated that this

²Significantly the Plaintiffs do not include Section 78-14-2 as a determinative statute in the “Determinative Statutes and Rules” section of their Brief of Appellees before this Court or their Brief to the Utah Court of Appeals.

maxim is “sometimes helpful” when a court must determine the meaning of an “otherwise **questionable** statute.” *Id.* However, the Plaintiffs continue to claim that there is nothing questionable about the meaning of Section 78-14-4(2); therefore, this maxim would not seem to be helpful according to the Plaintiffs’ position. (Plaintiffs/Appellees’ SC Brief, p. 13.)

The Utah Supreme Court reiterated that the proper application of such rules of construction are “to carry out the purpose of the statute.” *Rio Grande*, 445 P.2d at 991. The Plaintiffs’ brief is almost completely devoid of any discussion or any analysis of how their interpretation of Section 78-14-4(2) carries out the purpose of the Utah Health Care Malpractice Act, as expressly stated in Section 78-14-2. Instead, the Plaintiffs merely restate the conclusory allegation that “application of the out-of-state tolling statute to medical malpractice claims does not defeat the purpose of the Act.” (Plaintiffs/Appellees’ SC Brief, p. 10.)

The Plaintiffs imply that Dr. Grigsby’s interpretation of Section 78-14-4(2)--that the Utah Health Care Malpractice Act’s statute of limitations applies to all claims of all persons, wherein the phrase “regardless . . . of any other provision of law” is utilized as a general catchall phrase, which would include Section 78-12-35--would “render[] portions of, or words in, a statute superfluous or inoperative.” (Plaintiffs/Appellees’ SC Brief, p. 13, quoting *Platts v. Parents Helping Parents*, 947 P.2d 658, 662 (Utah 1997).) Although the Plaintiffs fail to provide any direct analysis of how the Utah Supreme Court’s statement in *Platts* applies to Defendant Dr. Grigsby’s interpretation of Section 78-14-4(2), the unstated

assumption seems to require that the phrase “or any other provision of law” must render as superfluous the specific statutory reference--minority or legal disability under Section 78-12-36--that precedes it. However, an analysis of the phrase “any other provision of law” in other statutes clearly indicates that the legislature repeatedly utilizes this phrase as a general catchall phrase, even though, technically, it would render as “superfluous” specific statutory references that precede it in each of the following sections.

For example, in the “Municipal Land Use, Development, and Management Act,” the legislature utilized “any other provision of law” as a catchall phrase despite the specific references that preceded it:

(ii) The approval of an owner or operator under Subsection (4)(c)(i):

....

(B) does not affect a right that the owner or operator has under:

- (I) Title 54, Chapter 8a, Damage to Underground Utility Facilities;
- (II) a recorded easement or right-of-way;
- (III) the law applicable to prescriptive rights; or
- (IV) **any other provision of law.**

Utah Code Ann. § 10-9a-603(4)(c)(ii). (Emphasis added.) Similarly, the legislature utilized “or any other provision of law” as a catchall phrase in the Air Conservation Act when describing the powers of the board despite the specific references that preceded it:

[The board may] consult, upon request, with any person proposing to construct, install, or otherwise acquire an air contaminant source in the state concerning the efficacy of any proposed control device, or system for this source, or the air pollution problem which may be related to the source, device, or system, but a consultation does not relieve any person from compliance with this chapter, the rules adopted under it, **or any other provision of law**;

Utah Code Ann. § 19-2-104(3)(m). (Emphasis added.) The legislature also utilized “any

other provision of law” as a catchall phrase in Utah Code Ann. § 76-10-1212 despite the specific references that preceded it:

(b) This section does not prevent the obtaining of allegedly pornographic material or material harmful to minors by purchase, subpoena duces tecum, or under injunction proceedings as authorized by this act **or by any other provision of law** of the state.

Utah Code Ann. § 76-10-1212(5)(b). (Emphasis added.) These other statutes clearly indicate that “any other provision of law” is often utilized as a legislative catchall phrase and that interpreting the phrase “or any other provision of law” as a general catchall phrase does not render the words that precede it, “minority or legal disability under § 78-12-36,” superfluous or inoperative.

Despite the Plaintiffs’ claim to the contrary, Defendant Dr. Grigsby continues to maintain that the plain language of Section 78-14-4(2) indicates that the Utah Health Care Malpractice Act’s two-year statute of limitation applies to all persons, regardless of minority or legal disability under Section 78-12-36 or any other provision of law, including the out-of-state tolling statute contained in Section 78-12-35. In other words, Defendant Dr. Grigsby’s asserts that the plain language of Section 78-14-4(2) indicates that the Utah Health Care Malpractice Act’s two-year statute of limitation applies to **all** persons’ claims, including minors’ claims, legally incompetent individuals’ claims, and *competent adults’ claims when the defendant physician moves out of state*, notwithstanding any other provision of law.

The fact that the plain language of Section 78-14-4(2) refers to “all persons” indicates that the legislature intended that the two-year statute of limitations for medical

malpractice claims applies to all person's claims, including the Plaintiffs'. This straightforward reading of the plain language of Section 78-14-4(2) was the basis for the Tenth Circuit Court of Appeals' holding and the Federal District Court of Utah's holding that medical malpractice claims are exempt from the general tolling statute. In the medical malpractice case of *Griffiths-Rast v. Sulzer Spoine Tech, Inc.*, 2005 WL 223765 (D. Utah) attached as Exhibit A, the Federal District Court for the District of Utah held that the plain language of Section 78-14-4(2) "provides an explicit exception to section 78-12-35 by requiring the two year statute of limitations to apply to 'all persons'":

The Malpractice Act specifically provides that its two-year limitations period "shall apply to all persons, regardless of minority or other legal disability under Section 78-12- 36 or any other provision of the law. . . ." Utah Code Ann. § 78-14-4(2). As the Utah Court of Appeals has explained, "[t]he Utah Legislature has demonstrated that if it seeks specifically to exempt a statute from the tolling statute, it will do so with clear, explicit language." *Bonneville Asphalt v. Labor Comm'n*, 91 P.3d 849, 852 (Utah Ct. App. 2004). **Because the Malpractice Act provides an explicit exception to section 78-12-35** by requiring the two year statute of limitations to apply to "all persons," section 78-12-35 does not apply in medical malpractice cases.

Id. at 4. (Emphasis added.) The Tenth Circuit Court of Appeals affirmed that federal district court's interpretation of Section 78-14-4(2):

The district court held that medical malpractice actions were excepted from the tolling provision of § 78-12-25 because under § 78-14-4(2) the two-year statute of limitation period "shall apply to all persons, regardless of minority or other legal disability under Section 78-12-36 or *any other provision of the law.*" The court held that this provision was an "explicit exception to section 78-12-35" and that the limitations period was not tolled during [defendant's] absences. We agree.

Griffiths-Rast v. Sulzer Spoine Tech, Inc., 2007 U.S. App. LEXIS 3607 (10th Cir.) attached as Exhibit B (emphasis in original.)

On the other hand, the Utah Court of Appeals interpretation of Section 78-14-4(2) would “render[] portions of, or words in, a statute superfluous or inoperative.” *Platts*, 947 P.2d at 662. Although Section 78-14-4(2) specifically states that the Utah Health Care Malpractice Act’s statute of limitations shall apply to “all persons,” the Utah Court of Appeals’ interpretation effectively renders the term “all persons” inoperative by claiming that the statute of limitations applies to minors and legally incompetent adults but not to competent adults when the defendant physician moves out of state.³ In other words, the Utah Court of Appeals’ holding requires an interpretation that the Utah legislature singled out minors’ and mentally incompetent individuals’ medical malpractice claims for tolling preclusion, while allowing a competent adult’s claims to be tolled indefinitely if the physician happens to move out of state, despite the fact that the physician would still be subject to service of process under Utah’s long-arm statute. According to the Plaintiffs, the Utah Court of Appeals interpretation is “the only reasonable interpretation.” (Appellees’ Brief, p. 12.) However, “all persons” should apply to all persons, including the Plaintiffs. Dr. Grigsby maintains that is the more reasonable interpretation of Section 78-14-4(2), and other credible courts have agreed.

II. Whether Section 78-14-4(2) Can Reasonably Be Characterized as Ambiguous, This Court Still Needs to Interpret Its Provisions in Harmony with Other Statutes in the Same Chapter and Related Chapters.

The Plaintiffs claim that Defendant Dr. Grigsby’s position--that Utah Code Ann. §

³Recognizing that the application of Section 78-14-4(2) to minors has already been determined by the Utah Supreme Court’s holding in *Lee v. Gaufin*, 867 P.2d 572 (Utah 1983), see footnote 1 *supra*.

78-14-4(2) is ambiguous as this statutory section has been understood by four different courts to have more than one meaning-- as set forth in his Brief of Appellants to this Court is “an about face from his position in the lower courts.” (Plaintiffs/Appellees’ SC Brief, p. 13.) However, this is now an appeal from a judgment of the Court of Appeals of Utah, not the trial court. As the Utah Supreme Court has pointed out, “On certiorari, we review the decision of the court of appeals, not the trial court.” *John Holmes Constr., Inc. v. R.A. McKell Excavating, Inc.*, 2005 UT 83, ¶ 6, 131 P.3d 199. The mere fact that Defendant Dr. Grigsby has acknowledged that the Utah Court of Appeals understood Section 78-14-4(2) to have a different meaning than other courts, and therefore this statute can reasonably be characterized as ambiguous is not an “about face” from Dr. Grigsby’s position in the lower courts. Instead, Defendant Dr. Grigsby maintains that his present position merely provides the appropriate deference to the opinions of the trial court, the Utah Court of Appeals, the the Federal District Court of Utah, and Tenth Circuit Court of Appeals.

However, despite these courts’ differing interpretations, the Plaintiffs continue to assert that there is only one “reasonable interpretation of Section 78-14-4.”

(Plaintiffs/Appellees’ SC Brief, p. 12.) The Plaintiffs allege that the interpretation of the Tenth Circuit Court of Appeals and the Federal District Court of Utah are unreasonable.

(Plaintiffs/Appellees’ SC Brief, p. 15.) However, Utah courts have indicated:

A statute is ambiguous if it can be understood by **reasonably well-informed persons** to have different meanings.

Tanner v. Phoenix Ins. Co., 799 P.2d 231, 233 (Utah Ct. App. 1990). (Emphasis added.) It is Dr. Grigsby’s position that jurists of the Utah Court of Appeals and the Tenth Circuit

Court of Appeals, as well as the trial court and the Federal District Court of Utah, qualify as “reasonably well-informed persons” who have understood Section 78-14-4(2) to have different meanings. Giving these jurists the proper deference they warrant, it seems a bit dismissive for the Plaintiffs to claim that there is only one “reasonable interpretation of Section 78-14-4(2).” (Plaintiffs/Appellees’ SC Brief, p. 13.)

The Utah Supreme Court has indicated that “if we find a provision ambiguous, which causes doubt or uncertainty as to its meaning or application, we must analyze the act in its entirety and ‘harmonize its provisions in accordance with the legislative intent and purpose.’” *Evans v. State*, 963 P.2d 177, 185 (Utah 1998). However, whether Section 78-14-4(2) is ambiguous is not the central issue to this Court’s analysis as the same approach to interpreting its statutory construction would be followed regardless of ambiguity. The Utah Supreme Court has pointed out:

When interpreting a statute, this court looks first to the statute’s plain language to determine the Legislature’s intent and purpose. *Lovendahl v. Jordan Sch. Dist.*, 2002 UT 130, P 21, 63 P.3d 705. **We read the plain language of the statute as a whole, and interpret its provisions in harmony with other statutes in the same chapter and related chapters.** *State v. Schofield*, 2002 UT 132, P 8, 63 P.3d 667; *State v. Maestas*, 2002 UT 123, P 54, 63 P.3d 621 (Regarding “whole statute” interpretation, the court stated: “A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole.” (quoting Norman J. Singer, 2A Sutherland, Statutory Construction § 96:05 (4th ed. 1984))). **We follow “the cardinal rule that the general purpose, intent or purport of the whole act shall control, and that all the parts be interpreted as subsidiary and harmonious to its manifest object.”** *Faux v. Mickelsen*, 725 P.2d 1372, 1375 (Utah 1986) (quoting Sutherland, *supra*, § 46:05).

Miller v. Weaver, 2003 UT 12, ¶ 17 (Utah 2003). (Emphasis added.) Therefore, whether

this Court finds Section 78-14-4(2) to be ambiguous, it still needs to “read the plain language of the statute as a whole, and interpret its provisions in harmony with other statutes in the same chapter and related chapters.” *Id.* Such a harmonizing approach is clearly warranted when interpreting Section 78-14-4(2) as the purpose of the Act is clearly expressed in the same chapter in Section 78-14-2. The Utah Supreme Court has already indicated that “we ha[ve] no need to speculate as to what purposes the Malpractice Act was intended to serve because the purposes were set forth in § 78-14-2.” *Lee v. Gaufin*, 867 P.2d 572, 580 (Utah 1993). (*See also Allen v. Intermountain Health Care*, 635 P.2d 30, 31-32 (Utah 1981) (“The avowed legislative purpose for treating the class of health providers differently from other defendants is stated in the Act itself.”))

The Utah Court of Appeals stated that the trial court “astutely analyzed the issue” of whether the Utah Health Care Malpractice Act’s two-year statute of limitations, set forth in Section 78-14-4, was subject to the general statutory tolling provision of Utah Code Ann. § 78-12-35. *Arnold v. Grigsby*, 2008 UT App 58, ¶ 14, 180 P.3d 188. However, the trial court’s analysis of Section 78-14-4 failed to “interpret its provisions in harmony with other statutes in the same chapter.” The trial court’s analysis is completely devoid of any mention of other statutes in the same chapter, in particular Section 78-14-2, when concluding that “the language ‘or any other provision of the law’ refers only to other provisions of the law which define ‘legal disability’”:

[I]t is clear to the Court that the language “or any other provision of the law” refers only to other provisions of the law which define “legal disability.” This reading is supported by the fact that this language is contained within a dependent clause which refers back to, and clarifies the meaning of, the term

“all persons.” The clause “regardless of minority or other legal disability under *Section 78-12-36* or any other provision of [the] law” is contained within a single set of commas, indicating to this Court that the legislature intended the clause to refer to party status, rather than to removing this provision from the scope of all other provisions of law.

Arnold, 2008 UT App 58, ¶ 14, quoting trial court’s November 21, 2005 Order. Contrary to these findings, the trial court’s analysis of Section 78-14-4(2) fails to “read the plain language of the statute as a whole, and interpret its provisions in harmony with other statutes in the same chapter.”

Similarly, the Utah Court of Appeals provided minimal discussion of the legislative intent of the Utah Health Care Malpractice Act when it said:

Dr. Grigsby further argues that interpreting section 78-14-4(2) as not preventing the application of section 78-12-35 to medical malpractice actions is contrary to the declared purpose of the Malpractice Act, as set forth in Utah Code section 78-14-2. See Utah Code Ann. § 78-14-2 (2002). That section declares:

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.

Id. We conclude, however, that our interpretation of section 78-14-4(2) is not contrary to the purpose of the act, as it still substantially limits the statute of limitations period for malpractice actions and still provides the needed predictability for insurance companies in the vast majority of cases.

Id. at ¶ 19. Not being “contrary” to the purpose of the Utah Health Care Malpractice Act is not the same as construing Section 78-14-4 in connection with Section 78-14-2 “so as to produce a harmonious whole.” *State v. Maestas*, 2002 UT 123, P 54, 63 P.3d 621. The

Utah Court of Appeals, like the trial court, failed to follow “the cardinal rule that the general purpose, intent or purport of the whole act shall control, and that all the parts be interpreted as subsidiary and harmonious to its manifest object.” *Faux v. Mickelsen*, 725 P.2d 1372, 1375 (Utah 1986) (quoting Norman J. Singer, 2A Sutherland, Statutory Construction § 46:05 (4th ed. 1984))).

The Utah Supreme Court has recognized the connection between Section 78-14-2 and 78-14-4, implicitly acknowledging the need to harmonize these two sections, although it made an exception for minors:

The stated purpose of the Malpractice Act was to curb rising malpractice insurance rates, ensure, the availability of malpractice insurance, and reduce the cost of health care. Utah Code Ann. § 78-14-2. **The Act sought to accomplish these objectives, inter alia, by subjecting the malpractice claims of all persons, including minors, to a shorter statute of limitations than the four-year statute of limitations applicable to most other negligence actions** and by abolishing all malpractice causes of action not filed within four years of the act of malpractice.

Lee v. Gaufin, 867 P.2d 572, 576 (Utah 1993). Similarly, the Utah Supreme Court pointed out the interconnectedness between Section 78-14-2 and 78-14-4 in *Dowling v. Bullen*, 2004 UT 50, ¶ 11, 94 P.3d 915, indicating that the purpose of the Utah Health Care Malpractice Act is to ease health care costs, as stated in Section 78-14-2, by establishing a specific window of time to bring malpractice actions in Section 78-14-4:

However, the stated purpose of the UHCMA is to alleviate health care costs via the establishment of a fixed window of 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.”

Id. Despite the Utah Court of Appeals’ unsubstantiated claims to the contrary, indefinitely

tolling claims against a health care provider who moves out of Utah to practice health care elsewhere clearly defeats the purpose of “limiting that time to a specific period for which professional liability insurance premiums can be reasonably and accurately calculated.” *Id.* It is impossible for an insurance company to estimate or calculate how long a health care provider may remain out of state.

It is difficult to understand how allowing a malpractice claim against physicians, who move from Utah to seek employment in another state, to be tolled for as long as the physician remains employed in another state “still substantially limits the statute of limitations.” *Arnold*, 2008 UT App 58 at ¶ 19. Tolling a medical malpractice claim for an indefinite period of time does not limit the statute of limitations in any meaningful way. The Utah Supreme Court has previously pointed out that allowing an action to be commenced 10, 20, or any indeterminate number of years after its origin does not harmonize with providing a definite limitation of time in which it must be brought:

Under the interpretation and application of our statute contended for by the plaintiff, that the defendants’ absence from the state tolled the running of the statute of limitations, an action against a nonresident motorist would practically never be outlawed. A purported claim could rest in suspense and an action could be commenced 10, 20 or any number of years after its origin, even though the plaintiff could have sued and served process any time he desired. It seems to us that such a result would comport with neither reason nor justice. **Nor would it harmonize with the policy of the law of allowing a reasonable time for the bringing of an action, but of providing a definite limitation of time in which it must be brought or the matter put at rest.**

Snyder v. Clune, 15 Utah 2d 254, 256 (Utah 1964). (Emphasis added.) The Utah Court of Appeals’ interpretation of Section 78-14-4(2) also does not harmonize with the Utah Health Care Malpractice Act’s purpose of “alleviat[ing] health care costs via the establishment of a

fixed window of time ‘in which actions may be commenced against health care providers.’”

Dowling, 2004 UT 50 at ¶ 11.

Similarly, it is equally unclear how the tolling a medical malpractice claim for an indefinite period of time “provides the needed predictability for insurance companies in the vast majority of cases,” as the Utah Court of Appeals claims, when, according to the U.S. Census Bureau, 1 in 6 Americans move each year, and approximately 17% of those Americans will move out of state.⁴ The average American moves 11.7 times during his or her lifetime.⁵ Given the mobility of modern society, tolling the medical malpractice’s abbreviated statute of limitations when a physician moves out of state to practice elsewhere does not provide the needed predictability for insurance companies and, indeed, is contrary to the stated purpose of the Utah Health Care Malpractice Act.

The clearly stated legislative intent of the Utah Health Care Malpractice Act is to treat medical malpractice claims different from other claims. The legislature’s expressed intent in enacting the Utah Health Care Malpractice Act was to limit the time for bringing a malpractice action to a specific period of time for all claims. *See* Utah Code Ann. § 78-14-2. In the medical malpractice context, the abbreviated two-year statute of limitations applies to all persons regardless of any other provision of the law, including general tolling statutes. The Utah Court of Appeals’ interpretation of Section 78-14-4(2) failed to follow “the cardinal rule” that “the general purpose, intent or purport of the whole act shall control” and

⁴<http://www.census.gov/population/www/pop-profile/geomob.html>, visited on September 10, 2008.

⁵*Id.*

Section 78-14-4(2) shall “be interpreted as subsidiary and harmonious to its manifest object.” *Faux*, 725 P.2d at 1375.

III. The Reasoning from the United State Supreme Court’s Holding in *Bendix* and from Other Jurisdictions Indicates That the Court of Appeals’ Interpretation of Utah Code Ann. § 78-14-4(2) Would Negatively Impact Commerce and is Contrary to the Legislative Purpose of the Utah Health Care Malpractice Act; In Addition, Courts Should Avoid Statutory Interpretations That Promote Unconstitutional Infirmary.

In *Butterfield v. Okubo*, 831 P.2d 97, 101 (Utah 1992), the Utah Supreme Court pointed out “that when exercising our certiorari jurisdiction granted by section 78-2-2(3)(a), we review a decision of the court of appeals, not of the trial court. See Utah Code Ann. § 78-2-2(3)(a). Therefore, **the briefs of the parties should address the decision of the court of appeals.**” (Emphasis added.) The Utah Court of Appeals claimed that its interpretation of Section 78-14-4(2) is not contrary to the purpose of the Utah Health Care Malpractice Act because “our interpretation should not cause malpractice insurance rates to increase and will not deter healthcare providers from leaving Utah.” *Arnold*, 2008 UT App 58, ¶ 19. Defendant Dr. Grigsby’s Brief before this Court directly addressed this particular claim of the Utah Court of Appeals.

The claim of the Utah Court of Appeals that “our interpretation should not cause malpractice insurance rates to increase and will not deter healthcare providers from leaving Utah” clearly implicates interstate commerce. *Id.* The court in *Tesar v. Hallas*, 738 F. Supp. 240, 241-242 (N.D. Ohio 1990) clarified:

The United States Supreme Court addressed this issue two and a half score years ago, and held that “the movement of persons falls within . . . the Commerce Clause.” *Edwards v. California*, 314 U.S. 160, 172, 86 L. Ed. 119,

62 S. Ct. 164 (1941). Courts since then have followed suit, holding that interstate commerce is affected when persons move between states in the course of or in search for employment.

As the *Tesar* court pointed out, “interstate commerce is affected when persons move between states in the course of or in search for employment.” *Id.* Therefore, claim of the Utah Court of Appeals that “our interpretation . . . will not deter healthcare providers from leaving Utah” clearly implicates interstate commerce. *Arnold*, 2008 UT App 58 at ¶ 19.

The Plaintiffs allege that Dr. Grigsby’s discussion of the impact of the Utah Court of Appeal’s interpretation of Section 78-14-4(2) on interstate commerce is “merely a roundabout way of arguing that the out-of-state tolling statute violates the dormant commerce clause of the United States Constitution.” (Plaintiffs/Appellees’ SC Brief, p. 23.) However, the Utah Supreme Court has clearly indicated that “the briefs of the parties should address the decision of the court of appeals.” *Butterfield*, 831 P.2d at 101. The fact that the Utah Court of Appeals’ decision may have constitutional implications should not improperly limit the parties ability to fully address the court’s decision.

The only basis that the Utah Court of Appeals provides for the claim that its interpretation will not impose an unreasonable burden on interstate commerce is the unsupported conclusion that “all medical providers need do to make sure the statute of limitations is not tolled if they leave Utah is appoint an agent within Utah to receive service of process for them.”⁶ *Arnold*, 2008 UT App 58 at ¶ 19. Neither the Plaintiffs nor the trial

⁶The Plaintiffs allege that “[t]here is no need for a statutory procedure authorizing a person to appoint an agent for limited purposes; the law already affords individuals that ability.” (Plaintiffs/Appellees/ Brief, p. 23.) However, the Plaintiffs fail to provide any specific information as to how the ability afforded by the law translates into a procedure

court made such an argument. The Plaintiffs merely point out the immaterial fact that the “Court of Appeals adopted the very same interpretation of the statute as the trial court, and that the Arnolds urged on appeal.” (Plaintiffs/Appellees’ SC Brief, p. 23.) The material difference is that neither the trial court nor the Plaintiffs have discussed or analyzed whether their interpretation of Section 78-14-4(2) “is contrary to the declared purpose of the Malpractice Act, as set forth in Utah Code section 78-14-2.” *Arnold*, 2008 UT App 58, ¶ 19. Section 78-14-2 is never cited nor indirectly mentioned in either opinion of the trial court or any of the briefs or memoranda filed by the Plaintiffs before the trial court or the Utah Court of Appeals despite having been raised by Dr. Grigsby.

Dr. Grigsby’s primary point on appeal is that its interpretation of Section 78-14-4(2) is the more well reasoned one because it is in harmony with the purpose of the Utah Health Care Malpractice Act as expressly stated in section 78-14-2. On the other hand, the Utah Court of Appeals claims that its interpretation of Section 78-14-4(2) is not contrary to the purpose of the Act as expressed in Section 78-14-2:

We conclude, however, that our interpretation of section 78-14-4(2) is not contrary to the purpose of the act, as it still substantially limits the statute of limitations period for malpractice actions and still provides the needed predictability for insurance companies in the vast majority of cases. Moreover, our interpretation should not cause malpractice insurance rates to increase and will not deter healthcare providers from leaving Utah.

Arnold, 2008 UT App 58 at ¶ 19. Dr. Grigsby has provided this Court with persuasive

that allows an individual to register an appointed agent with the State. Dr. Grigsby was unable to find any readily apparent mechanism for registering an appointed agent with the State for limited purposes on the Utah Court’s online page, “Finding People for Service of Process,” http://www.utcourts.gov/howto/service/finding_people.html, or anywhere else on the Internet.

authority directly on point as to the incorrectness of the claims of the Utah Court of Appeals. However, the Plaintiffs decline to discuss the merits of any of the cited authority. For example, the Plaintiffs decline to discuss the merits of the persuasive authority found in *Mcfadden v. Battifora*, 2004 Cal. App. Unpub. LEXIS 595, 14-15 (Cal. App. 2d Dist. 2004), attached as Exhibit C, that:

There is **no sound basis** for imposing a burden on him that would not have been imposed had he remained a California resident, or **forcing him to choose between a new job in a different state and unlimited exposure to litigation arising from his work in California.**

Similarly, the Plaintiffs decline to discuss the merits of the persuasive authority found in *Tesar v. Hallas*, 738 F. Supp. 240, 242 (N.D. Ohio 1990) that “it seems plainly ‘unreasonable’ for persons who have committed acts they know might be considered tortious to be held hostage until the applicable limitations period expires.”

The Plaintiffs repeatedly claim that the Utah Court of Appeals is the “only reasonable interpretation of Section 78-14-4,” but they decline to directly discuss whether the Utah Court of Appeals’ interpretation is reasonable given the purpose of the Utah Health Care Malpractice Act, as expressly stated in Section 78-14-2. Instead of directly responding to the persuasive authority cited by Defendant Dr. Grigsby in Sections C and D of his Brief before this Court, the Plaintiffs attempt to curtail any discussion or analysis of this persuasive authority by stating that “a party may not raise issues for the first time on appeal.” (Plaintiffs/Appellees’ SC Brief, p. 23.) However, directly addressing the decision of the Utah Court of Appeals does not constitute raising an issue for the first time on appeal.

In fact, the Court of Appeals' brief discussion of Section 78-14-2 was in direct response to the issue raised directly by Defendant Dr. Grigsby as to whether the interpretation of Section 78-14-4(2) is in harmony with the legislative purpose found in Section 78-14-2:

Dr. Grigsby further argues that interpreting section 78-14-4(2) as not preventing the application of section 78-12-35 to medical malpractice actions is contrary to the declared purpose of the Malpractice Act, as set forth in Utah Code section 78-14-2. . . . We conclude, however, that our interpretation of section 78-14-4(2) is not contrary to the purpose of the act, as it still substantially limits the statute of limitations period for malpractice actions and still provides the needed predictability for insurance companies in the vast majority of cases. Moreover, our interpretation should not cause malpractice insurance rates to increase and will not deter healthcare providers from leaving Utah. . . . all medical providers need do to make sure the statute of limitations is not tolled if they leave Utah is appoint an agent within Utah to receive service of process for them.

Arnold, 2008 UT App 58 at ¶ 19. (Emphasis added.) The point of this appeal is to address the decision of the Utah Court of Appeals.

Despite the Utah Court of Appeals' claim that its interpretation of section 78-14-4(2) will "not cause malpractice insurance rates to increase and will not deter healthcare providers from leaving Utah" because Dr. Grigsby merely needed to appoint an agent within Utah to receive service of process for him to toll the statute of limitations, the United States Supreme Court has directly rejected such claims in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988), and its progeny. The Court pointed out:

The suggestion that Midwesco had the simple alternatives of designating an agent for service of process in its contract with Bendix or tendering an agency appointment to the Ohio Secretary of State is not persuasive. . . . As we have already concluded, this exaction is an unreasonable burden on commerce.

Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888, 894-895 (U.S. 1988).

The Utah Supreme Court has clearly indicated that the purpose of the Utah Health Care Malpractice Act is clearly related to commerce: “the purpose of the UHCMA is to alleviate health care costs.” *Dowling v. Bullen*, 2004 UT 50, ¶ 10, 94 p.3d 915. Therefore, it is clearly appropriate to address whether the Utah Court of Appeals’s interpretation of Section 78-14-4(2) will place an “unreasonable burden on commerce” that would undermine the express purpose of the Utah Health Care Malpractice Act. The United State Supreme Court’s holding in *Bendix* clearly represents persuasive authority on this issue without analyzing the constitutional implications of the application of Section 78-15-35 on physicians who leave the state to seek employment elsewhere.

The Utah Court of Appeals has indicated that the reasoning in United States Supreme Court decisions can be persuasive. In *Merrill v. Labor Comm’n*, 2007 UT App 214, ¶ 18, 163 P.3d 741, the Court of Appeals indicated, “We find the reasoning from the United States Supreme Court and other jurisdictions helpful, and the analysis in treatises persuasive.” The reasoning from the United States Supreme Court in *Bendix* and from other jurisdictions is helpful in addressing whether the Utah Court of Appeals’s interpretation of Section 78-14-4(2) is reasonable given the purpose of the Utah Health Care Malpractice Act as expressly stated in Section 78-14-2.

Although the issue of whether the tolling statute, Section 78-12-35, unconstitutionally violates the dormant commerce clause of the United States Constitution is not before this Court, the United States Supreme Court’s holding in *Bendix*, and its progeny, underscore the

potential constitutional infirmities of the Utah Court of Appeals' interpretation of Section 78-14-4. On the other hand, the United States Supreme Court's holding in *Bendix*, and its progeny, is consistent with the legislative intent of the Utah Health Care Malpractice Act, which clearly addresses the commercial impact of health care malpractice claims, and points to Dr. Grigsby's interpretation of Section 78-14-4(2) as being more well reasoned. The Utah Supreme Court has stated, "we have "a duty to construe a statute whenever possible so as to effectuate legislative intent and avoid and/or save it from constitutional conflicts or infirmities.'" *State v. Bell*, 785 P.2d 390, 397 (Utah 1989). This Court should construe the statutory phrase, "or any other provision of law," so as to avoid any conflict with the Commerce Clause and to harmonize with the stated purpose of the Utah Health Care Malpractice Act.

CONCLUSION

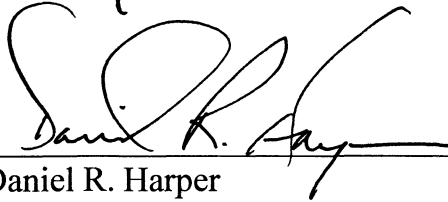
For the reasons set forth above, the Defendant/Appellant Dr. Grigsby respectfully requests that the Utah Supreme Court reverse the judgment of the Utah Court of Appeals and determine that Utah Code Ann. § 78-14-4 is not subject to tolling under Utah Code Ann. § 78-12-35 and uphold the summary judgment of the trial court.

RESPECTFULLY SUBMITTED this 2nd day of October, 2008.

BURBIDGE & WHITE, LLC

A handwritten signature in cursive script, appearing to read "Larry White".

Larry R. White

A handwritten signature in cursive script, appearing to read "Daniel R. Harper".

Daniel R. Harper
Attorneys for David Grigsby, M.D.

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of October, 2008, I caused to be served by the method indicated below two true and correct copies of the attached and foregoing **REPLY BRIEF OF APPELLANTS** to the following:

___	VIA FACSIMILE	Roger P. Christensen
___	VIA HAND DELIVERY	Karra J. Porter
<input checked="" type="checkbox"/>	VIA U.S. MAIL	CHRISTENSEN & JENSEN, P.C.
___	VIA FEDERAL EXPRESS	800 Gateway Tower West
		15 West South Temple
		Salt Lake City, Utah 84101
___	VIA FACSIMILE	Stephen W. Owens
___	VIA HAND DELIVERY	EPPERSON & RENCHER
<input checked="" type="checkbox"/>	VIA U.S. MAIL	10 West 100 South, Suite 500
___	VIA FEDERAL EXPRESS	Salt Lake City, Utah 84101
___	VIA FACSIMILE	Philip R. Fishler
___	VIA HAND DELIVERY	STRONG & HANNI
<input checked="" type="checkbox"/>	VIA U.S. MAIL	3 Triad Center, Suite 500
___	VIA FEDERAL EXPRESS	Salt Lake City, Utah 84180

Shanne Huet

APPENDIX

- Exhibit A: *Griffiths-Rast v. Sulzer Spoine Tech, Inc.*, 2005 WL 223765 (D. Utah)
- Exhibit B: *Griffiths-Rast v. Sulzer Spoine Tech, Inc.*, 2007 U.S. App. LEXIS 3607 (10th Cir.)
- Exhibit C: *Mcfadden v. Battifora*, 2004 Cal. App. Unpub. LEXIS 595, 14-15 (Cal. App. 2d Dist. 2004)

Tab A

2005 U.S. Dist. LEXIS 46290, *

LEXSEE 2005 U.S. DIST. LEXIS 46290

**VALERIE ANN GRIFFITHS-RAST, an individual, Plaintiff, vs. SULZER SPINE
TECH, INC., a Minnesota Corporation; and PRAVEEN PRASAD, M.D.,
Defendants.**

Case No. 2:02CV1267 DAK

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH,
CENTRAL DIVISION**

2005 U.S. Dist. LEXIS 46290

**September 14, 2005, Decided
September 14, 2005, Filed**

SUBSEQUENT HISTORY: Affirmed by *Griffiths-Rast v. Sulzer Spine Tech*, 216 Fed. Appx. 790, 2007 U.S. App. LEXIS 3607 (10th Cir., 2007)

COUNSEL: [*1] Valerie Ann Griffiths-Rast, an individual, Plaintiff, Pro se, SALT LAKE CITY, UT.

For Valerie Ann Griffiths-Rast, an individual, Plaintiff:
D. Bruce Oliver, LEAD ATTORNEY, SALT LAKE CITY, UT.

For Sulzer Spine Tech, a Minnesota Corporation, also known as Zimmer Spine, Defendant: Rick L. Rose, LEAD ATTORNEY, Kristine M. Larsen, RAY QUINNEY & NEBEKER (SLC), SALT LAKE CITY, UT; Andrea Michelle Roberts, Thomas G. Stayton, BAKER & DANIELS (IND), INDIANAPOLIS, IN.

For Praveen G. Prasad, an individual, Defendant:
Christian W. Nelson, LEAD ATTORNEY, P. Keith Nelson, LEAD ATTORNEY, Brandon B. Hobbs, RICHARDS BRANDT MILLER & NELSON, SALT LAKE CITY, UT.

JUDGES: DALE A. KIMBALL, United States District Judge.

OPINION BY: DALE A. KIMBALL

OPINION

MEMORANDUM DECISION AND ORDER

This matter is before the court on Defendants' motions for summary judgment on the grounds that Plaintiff's claims are barred by the applicable statutes of limitation. A hearing on the motions was held on September 8, 2005. At the hearing, Plaintiff Valerie Ann Griffiths-Rast ("Ms. Griffiths-Rast") was represented by

D. Bruce Oliver. Defendant Praveen Prasad, M.D. ("Dr. Prasad") was represented by Brandon Hobbs, and Defendant Sulzer Spine Tech, Inc. ("Sulzer Spine") [*2] was represented by Andrea Roberts. Before the hearing, the court carefully considered the memoranda and other materials submitted by the parties. Since taking the motions under advisement, the court has further considered the law and facts relating to the motions. Now being fully advised, the court enters the following Memorandum Decision and Order.

1 Sulzer Spine refers to itself in its memoranda as "Zimmer Spine, Inc." However, for purposes of this Memorandum Decision and Order, it will be referred to as "Sulzer Spine."

I. BACKGROUND

The court finds that the following facts are undisputed. Ms. Griffiths-Rast sustained a back injury at work in February 1997. She was referred to Dr. Prasad by her Worker's Compensation carrier. In August 1997, after reviewing Ms. Griffiths-Rast's MRI scan, Dr. Prasad originally recommended physical therapy; however, during a follow-up visit on March 19, 1998, Dr. Prasad suggested that she undergo a surgical procedure, the BAK Cage implantation, to address her ongoing back pain. The BAK Cage is an interbody fusion device manufactured by Sulzer Spine. Ms. Griffiths-Rast stated that prior to her March 19 visit with Dr. Prasad, she was doing better in physical [*3] therapy and able to lift seventy pounds, but she still had residual pain after physical therapy. She also indicated that Dr. Prasad told her with the surgery she had a ninety-five percent chance of going back to work after a six month healing process.

Dr. Prasad performed the surgery on August 3, 1998. Prior to surgery, Ms. Griffiths-Rast signed a consent form that authorized Dr. Prasad to perform the surgery, and it identified the name of device to be implanted in

her spine. Following the surgery, Ms. Griffiths-Rast experienced complications and remained in the hospital for twelve days.

During her deposition, Ms. Griffiths-Rast indicated that she was aware of a problem with the BAK Cage implantation immediately after the surgery during her hospital recovery. When asked if she "felt like there was a problem with the cage implantation" and "with what Dr. Prasad did," she answered affirmatively and further testified that "[e]verything went wrong." She also indicated that she attributed the pain she experienced after surgery "to something Dr. Prasad did or didn't do during the procedure" or "to some problem with the . . . cage device." Ms. Griffiths-Rast stated that she retained counsel [*4] a couple of weeks after her surgery "[w]hen [she] wasn't getting any better."

On November 10, 1998, Ms. Griffiths-Rast received an SI injection from a doctor at Parkview Radiology who informed her that "there was a healing defect on the left side of [the] cage." Ms. Griffiths-Rast admits in her response to Dr. Prasad's motion for summary judgment that the earliest point where she could reasonably be aware of medical malpractice was during this visit to Parkview Radiology.

On November 26, 2001, Dr. Prasad was deposed in a case against another patient. During that deposition, Dr. Prasad indicated that he had moved out of Utah in September 2000. Dr. Prasad also intimated that while he was on Sulzer Spine's advisory board from 1998 to 2000, he may have periodically been out of the state teaching the BAK Cage procedure to his peers around the country.

Also on November 26, 2001, Ms. Griffiths-Rast served Dr. Prasad a Notice of Intent to Commence Action ("Notice") as required by the Utah Health Care Malpractice Act. *See* Utah Code Ann. § 78-14-8 (2002) ("No malpractice action against a health care provider may be initiated unless and until the plaintiff gives the prospective defendant or his [*5] executor or successor, at least ninety days' prior notice of intent to commence an action."). Ms. Griffiths-Rast further claims that she did not discover the name of the manufacturer of the BAK Cage until a meeting with Dr. Prasad on October 4, 2002.

On November 26, 2002, a year after serving Dr. Prasad Notice, Ms. Griffiths-Rast filed a complaint against both Dr. Prasad and Sulzer Spine alleging medical malpractice and products liability respectively. On January 30, 2003, Ms. Griffiths-Rast filed an amended complaint to include certain factual allegations but her claims against both Dr. Prasad and Sulzer Spine remained the same. However, she did not serve Sulzer Spine with the amended complaint until February 11, 2004.

II. DISCUSSION

1. Standard of Review

A motion for summary judgment under *Rule 56 of the Federal Rules of Civil Procedure* is appropriate when the pleadings, depositions, and affidavits on file show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The movant bears an initial burden to demonstrate an absence of evidence to support an essential element of the non-movant's case. If the movant carries [*6] this initial burden, the burden then shifts to the non-movant to make a showing sufficient to establish that there is a genuine issue of material fact regarding the existence of that element. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

The non-movant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). While the non-movant is entitled to the benefit of whatever reasonable inferences there are in its favor, the reasonableness of those inferences is scrutinized in light of the undisputed facts. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A genuine dispute exists only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. "By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there is no *genuine* issue of *material* fact." *Anderson*, 477 U.S. at 247-48 (emphasis in original).

2. Dr. Prasad's Motion

Dr. Prasad argues [*7] that Ms. Griffiths-Rast's claims against him are barred by the Utah Healthcare Malpractice Act ("Malpractice Act") which provides that "[n]o 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 occurs first." Utah Code Ann. § 78-14-4(1) (2002). The discovery of a legal injury occurs "when the injured person knew or should have known of an injury and that the injury was caused by a negligent act." *Collins v. Wilson*, 1999 UT 56, 984 P.2d 960, 966 (Utah 1999). Furthermore, "[d]iscovery of a legal injury, therefore, encompasses both awareness of physical injury and knowledge that the injury is or may be attributable to negligence." *Id.* (quoting *Chapman v. Primary Children's Hosp.*, 784 P.2d 1181, 1184 (Utah 1989)).

Because Ms. Griffiths-Rast served Dr. Prasad with Notice on November 26, 2001, she must have necessarily discovered her legal injury on or after November 26, 1999 in order to pursue her claim. However, Dr. Prasad asserts that at Ms. Griffiths-Rast's deposition she admitted to discovering her injury immediately [*8] after surgery, which was on August 3, 1998, and thus well before November 26, 1999. Dr. Prasad further asserts that the latest possible date on which Ms. Griffiths-Rast discovered or should have discovered her legal injury was November 10, 1998 when a doctor at Parkview Radiology informed her of a "healing defect on the left side of [the] cage." Accordingly, Dr. Prasad concludes that Ms. Griffiths-Rast's claims are barred by the Malpractice Act's statute of limitations whether her cause of action accrued in August 1998 or in November 1998 because she served Notice well after the limitations period expired for either date.

Ms. Griffiths-Rast concedes that the earliest she could have discovered her legal injury was November 10, 1998. However, she argues that Dr. Prasad's absence from Utah in September 2000 and his periodic absences between 1998 and 2000 tolled the two-year statute of limitations under Utah Code section 78-12-35. This statute provides:

Where a cause of action accrues against a person when he is out of the state, the action may be commenced within the term as limited by this chapter after his return to the state. If after a cause of action accrues he departs from the state, [*9] the time of his absence is not part of the time limited for the commencement of the action.

Utah Code Ann. § 78-12-35. Ms. Griffiths-Rast concludes that the time between September 2000, when Dr. Prasad left Utah, and November 26, 2001, when he was served with Notice, should not be computed against her. She also requests further discovery pursuant to *Federal Rule of Civil Procedure 56(f)* in order to establish other periods of time Dr. Prasad was absent from Utah during 1998 to 2000.

However, the court agrees with Dr. Prasad's argument that section 78-12-35 is inapplicable to toll the statute of limitations. The Malpractice Act specifically provides that its two-year limitations period "shall apply to all persons, regardless of minority or other legal disability under Section 78-12-36 or any other provision of the law" Utah Code Ann. § 78-14-4(2). As the Utah Court of Appeals has explained, "[t]he Utah Legislature has demonstrated that if it seeks specifically to exempt a statute from the tolling statute, it will do so

with clear, explicit language." *Bonneville Asphalt v. Labor Comm'n*, 91 P.3d 849, 852, 2004 UT App 137 (Utah Ct. App. 2004). Because the Malpractice Act provides an explicit exception [*10] to section 78-12-35 by requiring the two year statute of limitations to apply to "all persons," section 78-12-35 does not apply in medical malpractice cases. ² Thus, Ms. Griffiths-Rast's claim against Dr. Prasad was not tolled. Therefore, whether Ms. Griffiths-Rast discovered or should have discovered her legal injury in August 1998 or November 10, 1998 is immaterial because both dates are well before the date she served Dr. Prasad Notice on November 26, 1999. Accordingly, Dr. Prasad's motion for summary judgment is granted.

2 However, the Utah Supreme Court in *Lee v. Gaufin*, 867 P.2d 572 (Utah 1993), held that section 78-14-4(2) is unconstitutional as applied to minors because they have no standing to commence a lawsuit before they reach majority. *See id.* at 579. That reasoning is not applicable in the instant case because Ms. Griffiths-Rast was not a minor when her cause of action accrued.

3. Sulzer Spine's Motion

Sulzer Spine asserts that Ms. Griffiths-Rast's claims are barred by the Utah Product Liability Act's ("UPLA") statute of limitations, which provides that a plaintiff must commence a product liability claim within two years of the date that plaintiff "discovered, or in the exercise [*11] of due diligence should have discovered, both the harm and its cause." Utah Code Ann. § 78-15-3. The harm is the physical injury or illness suffered by the plaintiff as a result of the defendant's conduct. *McKinnon v. Tambrands, Inc.*, 815 F. Supp 415, 418 (D. Utah 1993). In *Aragon v. Clover Club Foods Co.*, 857 P.2d 250 (Utah Ct. App. 1993), the Utah Court of Appeals interpreted the phrase "and its cause" to mean that the limitations period did not begin to run "until the plaintiff discovers, or in the exercise of due diligence should have discovered, the identity of the manufacturer." *Id.* at 253. The court "reasoned that lacking such information, a plaintiff could not know the cause of his or her injury." *Bank One Utah, N.A. v. West Jordan City*, 54 P.3d 135, 2002 UT App 271 (Utah Ct. App. 2002) (discussing *Aragon* and distinguishing the differences between the Malpractice Act's statute of limitations and the UPLA's statute of limitations). Relying on this language from *Aragon*, Ms. Griffiths-Rast asserts that her products liability claim against Sulzer Spine was tolled by her inability to discover the identity of the BAK Cage manufacturer prior to her meeting with Dr. Prasad on October 4, 2002.

"Generally, [*12] the question of when a plaintiff knew, or with reasonable diligence should have known, of a cause of action is a question of fact for the jury."

McCollin v. Synthes Inc., 50 F. Supp. 2d 1119, 1123 (D. Utah 1999). However, this determination can be made as a matter of law when the evidence is such that no issue of material fact exists. *Id.* "What constitutes due diligence 'must be tailored to fit the circumstances of each case. It is that diligence which is appropriate to accomplish the end sought and which is reasonably calculated to do so.'" *Aragon*, 857 P.2d at 253 (citations omitted).

Ms. Griffiths-Rast offers no evidence to suggest that she made the required due diligence inquiry to determine the manufacturer of the BAK Cage prior to meeting with Dr. Prasad. She argues that an affidavit of her counsel's paralegal, Jason Jensen, indicates that the nurse paralegal he contracted with to research the claims against Dr. Prasad provided internet literature for the LT-Cage rather than the BAK Cage and that, because of this, they were led to believe the LT-Cage was the device used. However, this does not demonstrate "due diligence." While Ms. Griffiths-Rast knew the name of the device implanted [*13] in her spine prior to her surgery, and she retained counsel to pursue her claim within a couple of weeks of the surgery, neither she nor her counsel undertook any effort to identify the BAK Cage manufacturer prior to meeting with Dr. Prasad. "The discovery rule does not allow plaintiffs to delay filing suit until they have ascertained every last detail of their claims." *McCollin*, 50 F. Supp. 2d at 1124; see also *McKinnon*, 815 F. Supp. at 421. "All that is required [to trigger the statute of limitations] is . . . sufficient information to apprise [the plaintiffs of the underlying cause of action] so as to put them on notice to make further inquiry if they harbor doubts or questions" about the defendant's actions. *McCollin*, 50 F. Supp. 2d at 1124 (quoting *United Park City Mines Co. v. Greater Park City Co.*, 870 P.2d 880, 889 (Utah 1993)). [*14] Because Ms. Griffiths-Rast had sufficient information immediately after her surgery to put her on notice that she may have a cause of action against the manufacturer of the BAK Cage, and she did not exercise due diligence in discovering the name of the manufacturer, her claim against Sulzer-Spine was not tolled by her failure to discover its identity.

Ms. Griffiths-Rast also asserts that her claim against Sulzer Spine was tolled by its status as a foreign corporation. Specifically, she contends that because

Sulzer Spine is a foreign corporation and, at the time of Ms. Griffiths-Rast's surgery, did not have a registered agent in Utah pursuant to Utah Code section 78-27-21, it is not entitled to assert a statute of limitations defense. However, the case cited by Ms. Griffiths-Rast to support this assertion expressly rejected this argument. See *Clawson v. Boston Acme Mines Development Co.*, 72 Utah 137, 269 P. 147 (1928). The plaintiffs in *Clawson* argued that because the defendant failed to comply with Utah law authorizing foreign corporations to conduct business in Utah, it was not entitled to use a statute of limitations defense. *Id.* at 151. The Utah Supreme Court rejected this argument [*15] and held that foreign corporations may assert a statute of limitations defense even if the corporation failed to register an agent or otherwise comply with statutes governing foreign corporations. *Id.* at 151-52. The court further stated that under the applicable Utah statute, a foreign corporation is only barred from "prosecuting or maintaining any action, suit, counterclaim, or cross-complaint in any court of the state. It does not prohibit such corporation from defending an action brought against it." *Id.* at 152. The court concluded that "[t]here is no condition tolling the statute [of limitations] as to foreign corporations." *Id.* Therefore, Sulzer Spine's status as a foreign corporation did not toll the statute of limitations, and Ms. Griffiths-Rast's claim is untimely. Accordingly, Sulzer Spine's Motion for Summary Judgment is granted.

III. CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED that Defendants' Motions for Summary Judgment [docket # 54 and docket # 58] are GRANTED. Because there are no remaining claims against any Defendants, this action is hereby DISMISSED.

DATED this 14th day of September, 2005.

BY THE COURT:

/s/ Dale A. Kimball

DALE A. KIMBALL

United States District [*16] Judge

Tab B

1 of 3 DOCUMENTS

VALERIE ANN GRIFFITHS-RAST, Plaintiff-Appellant, v. SULZER SPINE TECH, a Minnesota corporation also known as Zimmer Spine; PRAVEEN G. PRASAD, an individual, Defendants-Appellees.

No. 05-4279

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

216 Fed. Appx. 790; 2007 U.S. App. LEXIS 3607

February 15, 2007, Filed

NOTICE: **[**1]** PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

SUBSEQUENT HISTORY: Motion denied by *Griffiths-Rast v. Sulzer Spine Tech, Inc.*, 2008 U.S. Dist. LEXIS 26674 (D. Utah, Mar. 31, 2008)

PRIOR HISTORY: (D.C. No. 2:02-CV-1267-DAK). (D. Utah). *Griffiths-Rast v. Sulzer Spine Tech, Inc.*, 2005 U.S. Dist. LEXIS 46290 (D. Utah, Sept. 14, 2005)

DISPOSITION: AFFIRMED.

COUNSEL: For VALERIE ANN GRIFFITHS-RAST, Plaintiff-Appellant: David B. Oliver, Salt Lake City, UT.

For SULZER SPINE TECH, a Minnesota corporation also known as Zimmer Spine, Defendant-Appellee: Rick L. Rose, Brent D. Wride, Kristine Larsen, Ray, Quinney & Nebeker, Salt Lake City, UT; Andrea Roberts, Baker & Daniels, Indianapolis, IN; Cecilia M. Romero, Ray, Quinney & Nebeker, Salt Lake City, UT.

For PRAVEEN G. PRASAD, an individual, Defendant-Appellee: Christian W. Nelson, Holly Bierkan Platter, Brandon B. Hobbs, Richards, Brandt, Miller & Nelson, Salt Lake City, UT.

JUDGES: Before HARTZ, HOLLOWAY, and BALDOCK, Circuit Judges.

OPINION BY: Bobby R. Baldock

OPINION
[*791]

ORDER AND JUDGMENT

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G)*. The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with *Fed. R. App. P. 32.1* and *10th Cir. R. 32.1*.

[**2] Plaintiff-appellant Valerie Ann Griffiths-Rast appeals the district court's grant of summary judgment to defendants-appellees Sulzer Spine Tech (Sulzer) and Praveen G. Prasad, M.D. Ms. Griffiths-Rast underwent a back surgery on August 3, 1998, during which Dr. Prasad implanted a "BAK Cage" manufactured by Sulzer into Ms. Griffiths-Rast's spine. Ms. Griffiths-Rast subsequently served Dr. Prasad with a notice of intent to commence action on November 26, 2001, and filed her complaint on November 26, 2002, alleging a violation by Dr. Prasad, of the Utah Health Care Malpractice Act, *Utah Code Ann. §§ 78-14-1 through 78-14-16* (1998), and a violation by Sulzer of the Utah Product Liability Act, *Utah Code Ann. §§ 78-15-1 through 78-15-6* (1998). The district court granted summary judgment to Dr. Prasad on the ground [*792] that the claim against him was barred by the two-year statute of limitation found in § 78-14-4(1) and that the limitation period in that statute was not tolled by application of 78-12-35. The district court granted summary judgment to Sulzer on the ground that the claim against it was barred by the two-year statute of limitation [*793] found in § 78-15-3. Ms. Griffiths-Rast appealed, and we exercise our jurisdiction under 28 U.S.C. § 1291 and affirm.

A. Standard of Review

"We review the district court's grant of summary judgment de novo, applying the same legal standard used

by the district court." *Simms v. Okla. ex rel. Dep't of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1326 (10th Cir. 1999). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a summary judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. A statute of limitation defense is an affirmative defense. *See Fed. R. Civ. P. 8(c)*. Where a defendant seeks summary judgment on the basis of an affirmative defense,

[t]he defendant . . . must demonstrate that no disputed material fact exists regarding the affirmative defense asserted. If the defendant meets this initial burden, the plaintiff must then demonstrate [**4] with specificity the existence of a disputed material fact. If the plaintiff fails to make such a showing, the affirmative defense bars his claim, and the defendant is then entitled to summary judgment as a matter of law.

Hutchinson v. Pfeil, 105 F.3d 562, 564 (10th Cir. 1997) (citations omitted).

B. Claim Against Dr. Prasad

Under § 78-14-8:

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.

Ms. Griffiths-Rast served Dr. Prasad a notice of intent to commence action on November 26, 2001. The district court granted Dr. Prasad summary judgment on the ground that the two-year malpractice statute of limitation barred Ms. Griffiths-Rast's claim because she should have discovered her legal injury prior to November 26, 1999. It further held that the limitation period was not tolled by any periods of time during which Dr. Prasad was absent from the state of Utah. Ms. Griffiths-Rast argues that the grant of summary judgment was improper because a reasonable jury could [**5] have found (1) that the two-year statute of limitation should not have begun to run until July 2, 2001, the date she claims she discovered her legal injury, and (2) that the limitation period was tolled by § 78-12-35.

1. Discovery of Legal Injury

Under § 78-14-4(1):

No malpractice action against a health care provider may be brought unless it is commenced within two years after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered the injury, whichever first occurs, but not to exceed four years after the date of the alleged act, omission, neglect or occurrence.

The two-year statute of limitation in this section begins to run when "the injured person knew or should have known that [she] had sustained an injury and that the injury was caused by negligent action." *Foil v. Ballinger*, 601 P.2d 144, 148 (Utah 1979). "[D]iscovery of legal injury, therefore, encompasses both awareness of physical injury and knowledge that the injury is *or may be attributable to negligence*." *Collins v. Wilson*, 1999 UT 56, 984 P.2d 960, 966 (Utah 1999) (quotation omitted). "[A]ll that is [**793] required [**6] to trigger the statute of limitations is sufficient information to put plaintiff[] on notice to make further inquiry if [she] harbors doubts or questions." *Macris v. Sculptured Software, Inc.*, 2001 UT 43, 24 P.3d 984, 990 (Utah 2001).

Ms. Griffiths-Rast testified in her deposition that "immediately after the [August 3, 1998, surgical] procedure," while she was still in the hospital recovering, she felt that there was a problem with the cage implantation, and there was a problem with what Dr. Prasad did, and that "[e]verything went wrong." *Aplt. App.*, Vol. 1 at 77-78, 80. Ms. Griffiths-Rast also testified that she contacted a lawyer about the problems with her back surgery "a couple of weeks after [her] surgery" when she "wasn't getting any better," and that she signed an agreement retaining the attorney's services at that time. *Id.* at 104. Further, on November 10, 1998, another doctor informed Ms. Griffiths-Rast that there was a defect with the cage implantation. *Id.*, Vol. 2 at 204-05, 210. Ms. Griffiths-Rast produced no evidence in response to Dr. Prasad's summary judgment motion to refute these facts, admitting that she had discovered [**7] the malpractice in November 1998. *See Aplt. App.*, Vol. 2 at 210.¹

¹ The argument presented in her response was that she discovered the malpractice in November 1998. *See Aplt. App.* at 210.

Nevertheless, Ms. Griffiths-Rast argues that she did not discover her legal injury until July 2, 2001, when she received a report from a Dr. Stephen Wood stating that he had been told by the Utah Malpractice Insurance

association that "there have been numerous malpractice suits filed due to complications resulting from 'The Cage' . . . [and that he] ha[d] been told that the procedure is no longer recommended." *Aplt. App.* at 200. Ms. Griffiths-Rast argues that the determination of when she discovered her legal injury is a factual question not suitable for summary judgment.

Ms. Griffiths-Rast misinterprets the summary judgment standard. The question is whether there is a "genuine issue as to any material fact," *Fed. R. Civ. P. 56(c)* (emphasis added), and "an issue of [**8] material fact is genuine only if the nonmovant presents facts such that a reasonable jury could find in favor of the nonmovant," *Garrison v. Gambro, Inc.*, 428 F.3d 933, 935, 150 Fed. Appx. 819 (10th Cir. 2005). Here, no reasonable jury could find that Ms. Griffiths-Rast did not have sufficient information to put her on notice to conduct a further inquiry into whether there was malpractice until after November 26, 1999. In fact, she admitted that she believed that there was something wrong with Dr. Smith's performance immediately after the August 1998 surgery and that she hired an attorney a couple of weeks later to conduct an inquiry into possible malpractice.

2. Tolling of Statute of Limitation

Ms. Griffiths-Rast argues in the alternative that even if she was aware of her legal injury prior to November 26, 1999, the limitation period should have been tolled for some of that time because (1) Dr. Prasad conducted business outside of Utah for periods of time between her surgery and September 2000, and (2) Dr. Prasad moved from Utah to California in September 2000. Under § 78-12-35:

Where a cause of action accrues against a person when he is out of the state, the action may [**9] be commenced within the term as limited by this chapter after his return to the state. If after a cause of action accrues he departs from the state, [*794] the time of his absence is not part of the time limited for the commencement of the action.

Ms. Griffiths-Rast argues that it is a disputed genuine issue of fact whether Dr. Prasad was absent for enough time so that tolling the statute of limitation for that period of time would result in the statute not being violated. She argues that the district court should have conducted a separate trial to decide this issue.

The district court held that medical malpractice actions were excepted from the tolling provision of § 78-12-35 because under § 78-14-4(2) the two-year limitation period "shall apply to all persons, regardless of minority

or other legal disability under *Section 78-12-36 or any other provision of the law.*" (emphasis added). The court held that this provision was an "explicit exception to *section 78-12-35*" and that the limitation period was not tolled during Dr. Prasad's absences. We agree.

Ms. Griffiths-Rast argues on appeal that the tolling provision in § 78-12-35 is applicable despite the language in § 78-14-4(2). [**10] She first directs us to *Jensen v. IHC Hosps., Inc.*, 944 P.2d 327, 333 n.3 (Utah 1997). In that footnote, the Utah Supreme Court noted that the family of a woman who allegedly died of malpractice argued that they should be able to file her suit outside the two-year statute of limitation because under § 78-12-37:

[I]f a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by [her] representatives after the expiration of that time and within one year from [her] death.

The Utah Supreme Court ruled against the family on the ground that the statute of limitation had run prior to the woman's death. *Jensen* therefore does not support Ms. Griffiths-Rast's argument. A ruling that § 78-12-37 did not apply because the limitation period expired prior to the decedent's death, is *not* the same as ruling that § 78-12-37 *would* have applied if the limitation period had not expired. There is no indication that the court even considered the effect of § 78-14-4(2) on § 78-12-37.

Ms. Griffiths-Rast also argues that the Utah Supreme [**11] Court found that § 78-14-4(2) was unconstitutional as applied to minors. In *Lee v. Gaufin*, 867 P.2d 572, 580-81 (Utah 1993), the court found that § 78-14-4(2) created an exception to § 78-12-36, which generally tolls limitation periods as to claims of minors until the minor reaches the age of majority. Since Ms. Griffiths-Rast's brief does no more than note that *Lee* found § 78-14-4(2) unconstitutional in that it nullified § 78-12-36, we can only assume that she is asserting, without argument, that it is also unconstitutional when applied to nullify to § 78-12-35. We disagree.

The Utah Supreme Court's holding in *Lee* was premised on the fact that, since minors had no legal capacity to sue in Utah, application of § 78-14-4(2) in some cases would result in the statute of limitation running prior to the minor coming of age and being legally able to bring his or her action. *Lee*, 867 P.2d at 580. Consequently, application of § 78-14-4(2) would deprive some minors of access to the court system. *Id.* Here, there is no such problem. Considering the provisions of *Fed. R. Civ. P. 4(e)*, *Utah R. Civ. P. 4*

[**12] , and Utah's long-arm statute, § 78-27-24, ² it is clear [*795] that a potential defendant's flight to another state will not immunize him from suit. Dr. Prasad was himself served with process after he moved to California.

2 Under *Fed. R. Civ. P. 4(e)*:

Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed . . . may be effected in any judicial district of the United States:

(1) pursuant to the law of the state in which the district court is located, or in which service is effected, for the service of a summons upon the defendant in an action brought in the courts of general jurisdiction of the State; or

(2) by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

Under the pertinent parts of *Utah R. Civ. P. 4(d)(1)*:

(d)(1) Personal service. The summons and complaint may be served in any state or judicial district of the United States If the person to be served refuses to accept a copy of the process, service shall be sufficient if the person serving the same shall state the name of the process and offer to deliver a copy thereof. Personal service shall be made as follows:

(d)(1)(A) Upon any individual . . . by delivering a copy of the summons and the complaint to the individual personally, or by leaving a copy at the individual's dwelling house or usual place of abode with some person of

suitable age and discretion there residing, or by delivering a copy of the summons and the complaint to an agent authorized by appointment or by law to receive service of process[.]

Under the pertinent parts of § 78-27-24:

Any person . . . whether or not a citizen or resident of [Utah], who in person or through an agent does any of the following enumerated acts, submits himself, and if an individual, his personal representative, to the jurisdiction of the courts of [Utah] as to any claim arising out of or related to:

(1) the transaction of any business within this state;

(2) contracting to supply services or goods in this state;

(3) the causing of any injury within this state whether tortious or by breach of warranty;

[**13]

3 Ms. Griffiths-Rast also raises a brief argument that under § 78-14-8 she was entitled to a 120-day enlargement of the four-year limitation period imposed by the statute of repose found in § 78-14-4(1). This argument is meritless. First, the district court held that Ms. Griffiths-Rast's action was barred under the malpractice act's two-year statute of limitation, not the four-year statute of repose. Second, under § 78-14-8, a malpractice action may not be commenced unless the prospective defendant is given notice of the plaintiff's intent to commence an action at least ninety days prior to the filing of the suit. 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 the notice." *Id.* Ms. Griffiths-Rast served her notice of intent in November of 2001. Ms. Griffiths-Rast *admitted* that she discovered her legal injury in November of 1998. Therefore, even if the date that she admitted discovery is used, the two-year statute of limitation period ran in November 2000, a year prior to the filing of her notice.

[**14] C. Claim Against Sulzer

Under § 78-15-3, a legal action under the Utah Product Liability Act: "shall be brought within two years from the time the individual who would be the claimant in such action discovered, or in the exercise of due diligence should have discovered, both the harm and its cause." The Utah Court of Appeals has held that because the statute of limitation in § 78-15-3 runs from the time the plaintiff discovered or should have discovered both the harm and its "cause," the reference to "cause" in that section "tolls the running of the statute of limitation until the plaintiff discovers, or in the exercise of due diligence should have discovered, the identity of the manufacturer." *Aragon v. Clover Club Foods Co.*, 857 P.2d 250, 253 (Utah Ct. App. 1993). Because Ms. Griffiths-Rast did not file her complaint until November 26, 2002, [*796] her claim is barred unless she did not discover, or in the exercise of due diligence should not have discovered, that the BAK Cage had injured her and that Sulzer manufactured the BAK Cage until after November 26, 2000.

Ms. Griffiths-Rast testified that she felt as if there was a problem with the cage implantation while [*15] she was in the hospital immediately after her surgery on August 3, 1998; that the BAK Cage hurt and "felt" like it was "defective"; and that she had been able to feel that the BAK Cage was defective since its implantation. Aplt. App., Vol. 1 at 80-81, 101-02. Because all that is required to start the running of the limitation period is information sufficient to put the plaintiff on notice to make further inquiry," *Macris*, 24 P.3d at 990, we don't believe a reasonable jury could find that Ms. Griffiths-Rast should not have discovered with the exercise of due diligence that the BAK Cage had injured her until after November 26, 2000.

The more difficult question is whether, as a matter of law, through the exercise of due diligence, she should have discovered that Sulzer was the manufacturer of the BAK Cage prior to November 26, 2000. The district court correctly noted in another case that "[g]enerally, the question of when a plaintiff knew, or with reasonable diligence should have known, of a cause of action is a question of fact for the jury." *McCollin v. Synthes Inc.*, 50 F. Supp. 2d 1119, 1123 (D. Utah 1999). As noted above, however, the relevant [*16] question is whether there is a "genuine issue as to any material fact," *Fed. R. Civ. P. 56(c)* (emphasis added), and "an issue of material fact is genuine only if the nonmovant presents facts such that a reasonable jury could find in favor of the nonmovant," *Garrison*, 428 F.3d at 935. The district court held that no reasonable jury could find that Ms. Griffiths-Rast had exercised due diligence in discovering that Sulzer was the manufacturer of the BAK Cage, and that "her claim against Sulzer-Spine was not tolled by her failure to discover its identity." Aplt. App., Vol. 2 at 361.

On appeal, Ms. Griffiths-Rast argues again that she

did not discover that she had a legal injury until July 2, 2001, when Dr. Wood's letter told her about other malpractice claims that had been raised. Once she discovered that she had a legal injury, she "first commenced the medical malpractice portion of her suit before proceeding with the products liability aspect" of her suit. Br. of Aplt. at 35. She alleges that she did not begin her product liability case at the same time as her medical malpractice case because "she needed confirmation from [*17] Dr. Prasad [regarding] who the manufacturer was." *Id.* She argues that given the "fact" that she did not discover her legal injury until July 2, 2001, and that she did not discover that Sulzer manufactured the BAK Cage until October 4, 2002, "[a] reasonable jury [could] find . . . that she did not reasonably discovery [sic] the name of the manufacturer of the BAKTM Cage until October 2002." Br. of Aplt. at 39-40.

We disagree. As properly noted by the district court, "[w]hat constitutes due diligence must be tailored to fit the circumstances of each case. It is that diligence which is appropriate to accomplish the end sought and which is reasonably calculated to do so." *Aragon*, 857 P.2d at 253 (quotation omitted). It seems clear that in a normal case a reasonable jury could not find that it would take over two years to determine the manufacturer of a trademarked medical device when the party knows the correct name of that device. ' [*797] The question then becomes whether Ms. Griffiths-Rast presented evidence that would allow a reasonable jury to find that even if she had used "diligence which is appropriate to accomplish the end sought and which is reasonably [*18] calculated to do so," *Aragon*, 857 P.2d at 253, she should not have ascertained the identity of the manufacturer prior to November 26, 2000. She presented no such evidence.

4 Sulzer presented the consent form signed by Mr. Griffiths-Rast showing that she was going to have spinal fusion surgery with "BAK cages." Aplt. App., Vol. 2 at 332, 341. In Ms. Griffiths-Rast's appellate brief, she notes that one of the "assumptions" that she had made, that Dr. Prasad eventually corrected, was that the "BAK" in BAK Cage was a typographical error for the word "back." Br. of Aplt. at 35.

In fact, Ms. Griffiths-Rast presented the district court with the affidavit of a paralegal that worked for her attorney to help explain why it had taken four years to determine the manufacturer of the BAK Cage. The paralegal averred that the firm had contracted with an outside "nurse paralegal" who "was employed to research the claims against the doctor." Aplt. App. at 316. According to the affiant, the nurse paralegal "provided [*19] some internet literature" for a "LT-Cage," and that Ms. Griffiths-Rast's attorney was "led to believe that the LT-Cage was a recently approved Cage from the

same manufacturer of the BAK Cage." *Id.* According to Ms. Griffiths-Rast, she and her attorney went to the October 2002 meeting with Dr. Prasad, "with literature concerning a the [sic] LT-Cage product manufactured by different [sic] company believing that was the product implanted into her," and Dr. Prasad informed them that they had the wrong device.

Consequently, the evidence presented to the district court did not show that because of the circumstances of the case a reasonable jury could have found that with the exercise of due diligence she should not have discovered that Sulzer manufactured the BAK Cage until after November 26, 2000. It showed instead that because the outside nurse paralegal led her attorney to the misunderstanding that the "LT-Cage" and the BAK Cage were made by the same company, she misidentified the manufacturer and proceeded under that misidentification until the October 2002 meeting with Dr. Prasad.

It is true that Ms. Griffiths-Rast noted in the district

court that Sulzer had gone through a [**20] number of company name changes and was a foreign corporation without a registered agent in Utah. She made no argument, however, that these facts impeded her ability to identify Sulzer as the manufacturer of the BAK Cage. Consequently, we see no error in the district court's grant of summary judgment on this issue.

D. Conclusion

For the reasons set forth above, the district court's grant of summary judgment to Dr. Prasad and Sulzer is AFFIRMED.

Entered for the Court

Bobby R. Baldock

Circuit Judge

Tab C

1 of 1 DOCUMENT

**LORNA McFADDEN, Plaintiff and Appellant, v. HECTOR A. BATTIFORA et al.,
Defendants and Respondents.**

B160895

**COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT,
DIVISION FOUR**

*2004 Cal. App. Unpub. LEXIS 595***January 23, 2004, Filed**

NOTICE: [1] NOT TO BE PUBLISHED IN OFFICIAL REPORTS CALIFORNIA RULES OF COURT, RULE 977(a), PROHIBITS COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY RULE 977(B). THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF RULE 977.

PRIOR HISTORY: APPEAL from a judgment of the Superior Court of Los Angeles County, Jan A. Plum, Judge. Los Angeles County Super. Ct. No. BC242047.

DISPOSITION: Affirmed.

COUNSEL: Law Offices of Michels & Watkins and Steven B. Stevens for Plaintiff and Appellant.

Fonda & Fraser and Peter M. Fonda for Defendants and Respondents.

JUDGES: CURRY, J. We concur: EPSTEIN, J., Acting P.J., HASTINGS, J.

OPINION BY: CURRY

OPINION

Appellant Lorna McFadden appeals from a judgment entered after a jury found that the statute of limitations barred appellant's medical malpractice action against respondents Hector Battifora, M.D., and Jeffrey Medeiros, M.D. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Certain facts are not in dispute. In May 1997, appellant Lorna McFadden went to see her doctor, Tadao Fujiwara, M.D., to investigate a lump in her left breast. Dr. Fujiwara ordered a mammogram and [*2] biopsy. After the biopsy, a nurse from Dr. Fujiwara's office

called appellant and told her that she was to come in for a mastectomy. Later that same day, however, Dr. Fujiwara telephoned appellant to tell her she did not have cancer and repeated his assurances in person the next day.

In June 1999, appellant, having moved to Las Vegas, went to have her breast examined at a new clinic in connection with a lump she felt at that time.¹ She underwent a mammogram and biopsy in August of that year. This time the diagnosis was cancer, and in September 1999, appellant underwent a mastectomy, including removal of several lymph nodes. In addition, she underwent chemotherapy from November 1999 to February 2000.

1 There was a dispute of fact concerning the location of the lump felt in 1999, and whether it was in the same location as the lump felt in 1997.

In February 2000, appellant contacted a lawyer. The complaint for medical malpractice was filed on December 19, 2000, naming respondents, among others.² It was proceeded [*3] by the "Notice of Intent to Commence Action" required by statute whenever suit is brought against a health care provider. (See *Code Civ. Proc.*, § 364, *subd. (a)*.) The notice was served October 13, 2000.

2 Due to the truncated nature of the proceedings, there is no evidence in the record explaining how respondents were involved in appellant's medical care. Dr. Medeiros is described in the briefs as a former pathologist for the City of Hope who diagnosed the tissue sample from the 1997 biopsy as non-cancerous.

Several defendants, including respondents herein, sought a bifurcated trial on the statute of limitations as permitted by *Code of Civil Procedure section 597.5*.³ Trial commenced on the statute of limitations defense. The only witness called was appellant herself. After hearing her testimony and reviewing certain medical

records introduced as exhibits, the jury answered the following questions in the affirmative: "Did [appellant] suspect, prior [*4] to October 13, 1999, that the alleged misdiagnosis was caused by someone's wrongdoing?" and "Would a reasonable person have suspected, prior to October 13, 1999, that the alleged misdiagnosis was caused by someone's wrongdoing?"

3 Section 597.5 provides that "in an action against a physician" and other types of professional health care providers "based upon the person's alleged professional negligence" if a statute of limitations defense is raised and either party so moves, "the issues raised thereby must be tried separately and before any other issues in the case are tried."

Following the verdict, the parties briefed the issue of whether the limitations statute should have been tolled with respect to Dr. Medeiros due to his absence from the state since May 1998, when he moved to Texas to take a new job. The court ruled that there was no basis for tolling, and judgment was entered in favor of respondents on July 8, 2002. This appeal followed.

DISCUSSION

I

The parties agree that the governing [*5] statute of limitations is found in *Code of Civil Procedure* section 340.5, which provides in relevant part: "In an action for injury or death against a health care provider based upon such person's alleged professional negligence, the time for the commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first." As explained in *Kitzig v. Nordquist* (2000) 81 Cal.App.4th 1384, 1391, this statute "sets forth two alternate tests for triggering the limitations period: (1) a subjective test requiring actual suspicion by the plaintiff that the injury was caused by wrongdoing; and (2) an objective test requiring a showing that a reasonable person would have suspected the injury was caused by wrongdoing. [Citation.] The first to occur under these two tests begins the limitations period."

Appellant contends that the essence of the underlying statute of limitations defense was that appellant "should have known, sometime between August 10 and October 13, 1999, that she was misdiagnosed in 1997, because [*6] Dr. Fujiwara's nurse told her in that year that she had cancer" and that respondents' position "rests solely on the belief that the nurse's comment -- corrected by her physician hours later -- should have triggered a suspicion of wrongdoing two years later." Selectively quoting from closing argument, appellant implies that this fact was "the linchpin of

[respondents'] affirmative [statute of limitations] defense."

Appellant misperceives the evidence that supported the jury's findings. The evidence demonstrated that appellant went to see Dr. Fujiwara about a lump in her left breast in May 1997. He ordered a mammogram and biopsy and, having received the results and consulted with other physicians, told her she did not have cancer. Two years later, in the summer of 1999, a new doctor diagnosed cancer in the same breast. Appellant underwent a mastectomy in September 1999. That is the point at which a reasonable person should have been suspicious of the original diagnosis of no cancer. Yet appellant did not submit the required statutory notice to her health care providers until October 2000, more than a year later. ⁴

4 If the statutory notice is submitted within the last 90 days of the limitations period, it extends or tolls the statute for up to 90 days depending on the precise day it was served within the limitations period. (*Code Civ. Proc.*, § 364, *subd. (d)*; *Davis v. Marin* (2000) 80 Cal.App.4th 380, 385.)

[*7] The significance of the call from Dr. Fujiwara's nurse was not that it should have made appellant immediately suspicious of her doctor's 1997 diagnosis. A patient is entitled to believe reassuring news from her doctor or another physician. In *Kitzig v. Nordquist*, *supra*, for example, the patient sought a second medical opinion and was assured in 1994 that she was being treated appropriately. She brought suit in 1996, within a year of being told by other physicians that something was going wrong. The court held that she was not obligated to bring suit within one year of her initial suspicion since a patient should not be "placed in the position of conducting a full investigation" to determine whether litigation is appropriate after "the second doctor confirms that the first doctor is doing everything right." (81 Cal.App.4th at p. 1393.)

To a similar effect is the decision in *Artal v. Allen* (2003) 111 Cal.App.4th 273, discussed in appellant's reply brief. There, appeal was taken from a judgment in favor of defendant based on a statute of limitations defense after the initial phase of a bifurcated nonjury trial. The facts indicated that [*8] plaintiff awoke after pelvic surgery in May 1998 with severe and persistent throat pain. Plaintiff saw at least 20 specialists in the next 18 months and was given numerous conflicting diagnoses. In May 1999, she stated on a medical form that she believed her continuing pain was due to "some sort of trauma [that was] caused during intubation [for anesthesia during the surgery]." (*Id.* at p. 276, *italics omitted*.) In November 1999, plaintiff underwent exploratory surgery and was told that there was a fracture

in her thyroid cartilage, but not that it was or may have been caused by the intubation during the 1998 surgery. Nevertheless, the diagnosis caused plaintiff to attribute the fracture to the intubation. She filed her complaint against the anesthesiologist on October 27, 2000. The Court of Appeal concluded that the evidence did not support the finding that plaintiff knew, or by reasonable diligence should have known, that her throat pain was caused by professional negligence until the 1999 exploratory surgery. The court noted that "[plaintiff] was a model of diligence" in that "she consulted at least 20 specialists in the 18 months following the May 8, 1998, surgery" [*9] and "was given some two dozen possible diagnoses, including tonsil infection, cancer, lupus, emotional and/or mental problems and asthma." (*Id.* at p. 281.) Because "the necessary facts could not be ascertained without exploratory surgery" and diligence did not require plaintiff to immediately resort to surgery, the court could not agree that plaintiff's claim was untimely. (*Ibid.*)

Appellant here admits that her suspicions of negligence were aroused after the 1999 diagnosis of cancer as soon as Dr. Fujiwara's diagnosis of no cancer in the same breast crossed her mind. To support her position that she did not have any misgivings prior to February 2000, she testified that the earlier diagnosis was driven from her head by the 1999 cancer diagnosis, surgery, and followup chemotherapy treatments, and that she "never thought about" the 1997 diagnosis until February 2000 when she was "reminded" of it by a friend. The nurse's call was significant because it cast doubt on appellant's testimony that she did not think about the 1997 diagnosis until February 2000. In response to appellant's theory, counsel for respondents argued in closing: "There are certain things in your [*10] life that you never forget. Being told you have cancer, thinking you are going to die, having the dark cloud surround you as [appellant] talked about, having the light shine back upon you, you never forget." Counsel further pointed out that appellant had been able to provide the doctors in Las Vegas with the names of her prior physicians and releases so that they could obtain her medical records, and told them about the prior biopsy. On those facts, the jury was entitled to believe that appellant was being untruthful when she claimed to have forgotten the traumatic occasion on which she was initially told she had breast cancer and then, a few hours later, told she did not. Accordingly, the jury had ample ground to believe that appellant's suspicion of wrongdoing was or should have been aroused in the summer of 1999, when she was diagnosed with cancer by the Las Vegas doctors and suffered the removal of her left breast.

II

The remaining issue has to do with tolling under

section 351 of the Code of Civil Procedure (section 351) which provides in relevant part: "If, when the cause of action accrues against a person, he is out of the State, the action [*11] may be commenced within the term herein limited, after his return to the State, and if, after the cause of action accrues, he departs from the State, the time of his absence is not part of the time limited for the commencement of the action." ⁵ Because Dr. Medeiros moved to Texas in May 1998, prior to the accrual of the one-year statute of limitations, appellant maintains that the statute has not run as to him. ⁶

⁵ Despite its language, courts have held that a defendant "need not 'enter' or 'return' to the state in order for the plaintiff to commence an action which takes advantage of the tolling provisions of *section 351*." (*Green v. Zissis* (1992) 5 Cal.App.4th 1219, 1223.) In 1979, the California Supreme Court held that the modern availability of alternate methods of service in place of personal delivery of a summons and complaint, such as substituted service and service by publication, had no impact on *section 351*'s continued viability. (*Dew v. Appleberry* (1979) 23 Cal.3d 630, 634-636, 153 Cal. Rptr. 219.)

⁶ Appellant devotes a considerable portion of her brief to the issue of whether *section 351* can ever be applied to toll the one-year medical malpractice limitations period due to a restriction on tolling found in *Code of Civil Procedure section 340.5*. Respondents concede that it can.

[*12] In *Bendix Autolite Corp. v. Midwesco Enterprises* (1988) 486 U.S. 888, 100 L. Ed. 2d 896, the United States Supreme Court held that an Ohio tolling statute similar to *section 351* unnecessarily burdened interstate commerce because it barred foreign corporations from asserting a statute of limitations defense unless they maintained a presence in Ohio, but served no weighty state interest due to the fact that Ohio's long-arm statute permitted service on foreign corporations at any time. *Bendix* was applied to *section 351* by the Ninth Circuit in *Abramson v. Brownstein* (9th Cir. 1990) 897 F.2d 389, which involved a Massachusetts resident who had entered into an agreement with two California residents. The California residents sued for breach of contract and fraud long after the fact, and relied on *section 351* to establish that otherwise applicable statutes of limitations had been tolled. The Ninth Circuit held that applying *section 351* to the situation would impermissibly burden interstate commerce, reasoning that "[*section 351*] forces a nonresident individual engaged in interstate commerce to choose between being present in California for several [*13] years or forfeiture of the limitations defense, remaining subject to suit in California in perpetuity." (*Id.* at p. 392.)

In *Filet Menu, Inc. v. Cheng* (1999) 71 Cal.App.4th 1276, this court considered whether section 351 was constitutionally sound when its provisions were applied to a California resident engaged in interstate commerce. In *Filet Menu*, California resident Warren Cheng was sued for breach of contract and other related claims. The complaint alleged that Cheng was absent from California for periods sufficient to toll the running of the applicable statutory period, but did not allege the specific reasons for Cheng's out-of-state travel. We concluded that "section 351 imposes a special burden on residents who travel in the course of interstate commerce that is not shared by residents involved solely in 'local business and trade . . .'" (*Id.* at p. 1282, quoting *Bendix Autolite Corp. v. Midwesco Enterprises, supra*, 486 U.S. at p. 891.) "Residents engaged in interstate commerce often travel outside the state to facilitate this activity, unlike residents who are otherwise occupied or employed. Thus, section [*14] 351 poses a hard choice to residents who engage in interstate commerce and who face potential liability arising out of this economic activity that section 351 does not pose to other residents. Residents occupied in interstate commerce must curtail their travel outside the state in the course of interstate commerce to avoid the tolling provisions of section 351, or endure extended exposure to litigation because of their travel in the course of interstate commerce." (*Filet Menu, Inc. v. Cheng, supra*, 71 Cal.App.4th at p. 1283.) At the same time, we found no state interest to outweigh this burden since "residents are equally subject to service, regardless of their reasons for traveling out of state." (*Ibid.*)

We found support for our conclusion in the case of *Tesar v. Hallas* (N.D. Ohio 1990) 738 F. Supp. 240, in which the court had held that "interstate commerce is affected when persons move between states in the course of or in search for employment" in applying *Bendix* to a

case involving a defendant who had moved from Ohio to Pennsylvania to take a new job. Relying on numerous cases that held that interstate commerce is impacted when persons [*15] move between states to search for employment (*id.* at p. 242, and cases cited therein), the court concluded that there was no justification in forcing people to choose between an out-of-state job and enjoying the protections of the various statutes of limitations when Ohio's long-arm statute provided jurisdiction over all those alleged to have engaged in wrongful activity in the state (*ibid.*).

We see no reason to depart from the views expressed in *Filet Menu*. Dr. Medeiros, a former California resident, moved to Texas to take a new job in 1998, thereby engaging in interstate commerce. He has been fully amenable to service under California's long-arm statute since that time. There is no sound basis for imposing a burden on him that would not have been imposed had he remained a California resident, or forcing him to choose between a new job in a different state and unlimited exposure to litigation arising from his work in California. Under *Bendix*, section 351 cannot be used to toll the otherwise applicable statute of limitations.

DISPOSITION

The judgment is affirmed.

CURRY, J.

We concur:

EPSTEIN, J., Acting P.J.

HASTINGS, J.