

2008

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

Utah Supreme Court

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Larry R. White; Paul D. Van Komen; Daniel R. Harper; Burbidge and White; Attorneys for Appellant.

Roger P. Christensen; Karra J. Porter; Sarah E. Spencer; Christensen and Jensen P.C.; Attorneys for Appellees.

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IN THE UTAH SUPREME COURT

GINA M. ARNOLD, and CHARLIE S.
ARNOLD,

Plaintiffs and Appellees,

vs.

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

Defendants and Appellants.

Case No. 20080255-sc

APPEAL FROM A JUDGMENT
UTAH COURT OF APPEALS

BRIEF OF APPELLEES

Roger P. Christensen, 0648
Karra J. Porter, 5223
Sarah E. Spencer, 11141
CHRISTENSEN & JENSEN, P.C.
15 West South Temple, Suite 800
Salt Lake City, Utah 84101
Attorneys for Appellees Arnold

Larry R. White
Paul D. Van Komen
Daniel R. Harper
BURBIDGE & WHITE, LLC
15 West South Temple, Suite 905
Salt Lake City UT 84101
Attorneys for Appellant Grigsby

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15 West South Temple, Suite 800
Salt Lake City, Utah 84101
Attorneys for Appellees Arnold

Larry R. White
Paul D. Van Komen
Daniel R. Harper
BURBIDGE & WHITE, LLC
15 West South Temple, Suite 905
Salt Lake City UT 84101
Attorneys for Appellant Grigsby

LIST OF PARTIES TO THE PROCEEDINGS

All parties to the proceedings below are identified in the caption on appeal. The only parties to this appeal are plaintiffs/appellees Gina and Charlie Arnold and defendant/appellant David Grigsby.

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JURISDICTION

Jurisdiction is proper in this Court pursuant to Utah Code Ann. § 78A-3-102(3)(a).

ISSUE PRESENTED FOR REVIEW

Issue: Did the Court of Appeals correctly hold that the out-of-state tolling statute, Utah Code Ann. § 78-12-35, tolled the two-year statute of limitations in the Utah Health Care Malpractice Act, Utah Code Ann. § 78-14-4, during the periods of time that defendant Grigsby was absent from the state of Utah after the Arnolds' causes of action accrued?

Preservation: At the Court of Appeals, this issue was addressed in appellees' Brief in Opposition to Appellant's Petition for Writ of Certiorari. In the trial court, the issue was addressed in plaintiff's memorandum opposition defendant's motion for summary judgment (R. 685-750), and in the reply memorandum in support of defendant's motion for summary judgment (R. 768-834).

Standard of Review: On a writ of certiorari, this Court reviews the decision of the Court of Appeals, not that of the trial court. *Willey v. Willey*, 951 P.2d 226, 230 (Utah 1997). The Court reviews the Court of Appeals' conclusions of law for correctness, giving its conclusions of law no deference. *State v. Casey*, 2003 UT 33, ¶ 10, 82 P.3d 1106. Application of the statute of limitations is a question of law. *In re Hoopiaina Trust*, 2006 UT 53, ¶ 19, 144 P.3d 1129.

DETERMINATIVE STATUTES AND RULES¹

Utah Code Ann. § 78-12-35, the out-of-state tolling provision:

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, the time of his absence is not part of the time limited for the commencement of the action.

Utah Code Ann. § 78-14-4, the medical malpractice statute of limitations, in pertinent part:

(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

(2) The provisions of this section shall apply to all persons, regardless of minority or other legal disability under § 78-12-36 or any other provision of the law, and shall apply retroactively to all persons, partnerships, associations and corporations and to all health care providers and to all malpractice actions against health care providers based upon alleged personal injuries which occurred prior to the effective date of this act; . . .

Utah Code Ann. § 78-12-36, the disability tolling provision:

If a person entitled to bring an action, other than for the recovery of real property, is at the time the cause of action accrued, incompetent and without a legal guardian, the time of the disability is not part of the time limited for the commencement of the action.

¹ Title 78 of the Utah Code was recently recodified. For clarity, this brief cites to the version of the Code in effect at the time of, and cited in, the Court of Appeals opinion.

STATEMENT OF THE CASE

Nature of the Case, Course of Proceedings, and Disposition Below

Gina and Charlie Arnold brought this action against defendants Gary White, M.D., David Grigsby, M.D., and the Uintah Basin Medical Center alleging medical malpractice in connection with the perforation of Gina Arnold's colon and certain subsequent treatment beginning July 22, 1999. (R. 185-186.)

On December 4, 2001, plaintiffs filed the underlying Complaint and Jury Demand in the Third Judicial District. (R. 1; R. 854.) Although Dr. Grigsby was listed as a defendant, the Arnolds did not include him in the medical malpractice pre-litigation process, and he was not served with the Complaint. (As discussed *infra*, the plaintiffs did not have a basis for doing so until October 2003.)

Dr. White successfully challenged venue, obtaining a transfer of the case to the Eighth Judicial District. (R. 15; R. 101.) The case then proceeded to the discovery phase. On October 29, 2003, plaintiffs deposed Dr. White. During that deposition, Dr. White averred for the first time that it has actually been Dr. Grigsby, not Dr. White, who was directing Gina Arnold's care after the initial perforation of Mrs. Arnold's colon. Upon learning this (alleged) information, plaintiffs served Dr. Grigsby with the complaint and initiated the medical malpractice pre-litigation process with respect to him. The parties subsequently stipulated to a dismissal without prejudice of plaintiffs' claims against Dr. Grigsby pending completion of the pre-litigation hearing. (R. 174; R 177.)

By stipulation, the Arnolds filed an Amended Complaint and Jury Demand on August 6, 2004. (R. 182; R. 184.) On September 22, 2005, after additional discovery,

defendant Grigsby filed a motion for summary judgment on the grounds that the two-year statute of limitations on the Arnolds' claims against him had expired on August 17, 2001, approximately three and a half months before the original complaint was filed on December 4, 2001. (R. 579-584.) (In his reply memorandum, defendant Grigsby moved the alleged date upon which the Arnolds discovered their cause of action to November 16, 1999, under which the statute of limitations would have run on November 16, 2001.) (R. 774-776.)

In opposing the motion for summary judgment, the Arnolds argued that Dr. Grigsby had not adduced any evidence (let alone uncontroverted evidence) as to when they "discover[ed], or through the use of reasonable diligence should have discovered the injury, whichever first occurs," as required to establish the accrual (and expiration) of the statute of limitations. (R. 686-687.) The Arnolds argued that the two-year statute of limitations did not begin to run on claims against Dr. Grigsby until they first obtained information as to his potential negligence, as contrasted with information about another defendant's potential negligence. (R. 689-693.) Plaintiffs argued that, if Dr. White was telling the truth, the medical records prepared by Drs. White and Grigsby were misleading, and appellants could not have known that Dr. Grigsby was allegedly directing her care rather than Dr. White until Dr. White's deposition in October 2003. (R. 688-693, 695-700.) Finally, the Arnolds argued that, where Dr. Grigsby had departed the state of Utah in approximately June 2000, his absence from the state tolled the statute of limitations under Utah Code Ann. § 78-12-35 (the out-of-state tolling provision). (R. 700-703.)

By orders dated November 21 and December 20, 2005, the trial court granted Dr. Grigsby's motion, dismissing plaintiffs' claims against him. (R. 853; Appendix Exh. B and

C.) In reaching this conclusion, the trial court first found that the statute of limitations began to run more than two years before the filing of the complaint on December 4, 2001. (R. 853-860.)

The trial court then turned to whether the statute of limitations was tolled by Dr. Grigsby's move from Utah to Tennessee in 2000. (R. 853-860.) In support of his contention that the out-of-state tolling statute did not apply, Dr. Grigsby asserted two theories. First, he argued that the language of the medical malpractice act, Utah Code Ann. § 78-14-4(2), precludes the application of any tolling statute. (R. 782-785.) Second, he argued that even if the out-of-state tolling statute did apply to medical malpractice actions, it would not apply to him because he remained amenable to service of process while he was out of state. (R. 786-790.)

The trial court rejected Dr. Grigsby's argument that the Health Care Malpractice Act precluded application of the out-of-state tolling statute. However, the court granted summary judgment based upon Dr. Grigsby's "more compelling argument" that the tolling statute does not toll the statute of limitations against persons who depart the state after the claim arises if the defendant remains amenable to service under Utah's long-arm statute. (R. 854-855.)

After the claims against Dr. Grigsby were dismissed, Dr. White filed a Notice of Intent to allocate Fault to Dr. Grigsby. (R. 894.) On May 2, 2006, the court certified its November 21, 2005, order as final under U.R.Civ.P. 54(b) (R. 904.) The Arnolds filed their notice of appeal on May 22, 2006 (R. 907), and the trial court stayed the remaining claims pending the appeal. (R. 905.)

At issue in the Utah Court of Appeals were (1) whether the trial court improperly resolved issues of fact as to when the statute of limitations began to run, and (2) whether the trial court erred in ruling that Dr. Grigsby's departure from the state of Utah did not toll the statute of limitations. After the Arnolds' opening brief was filed, this Court resolved in their favor what had been a principal issue on appeal, holding that "section 78-12-35 [the out-of-state tolling provision] *does toll* the applicable statute of limitations when a person against whom a claim has accrued has left the state of Utah and has no agent within the state upon whom service of process can be made, even where that person was at all times amenable to service pursuant to Utah's long-arm statute." *Olseth v. Larsen*, 2007 UT 29, ¶ 40, 158 P.3d 532 (emphasis in original).

Inasmuch as *Olseth* eliminated the primary argument upon which Dr. Grigsby prevailed at the trial level, Dr. Grigsby's focus on appeal shifted to his contention that the tolling statute simply did not apply to medical malpractice claims at all, the argument that the trial court had rejected. (R. 853-860.)

The Court of Appeals issued its opinion on February 28, 2008. (Appendix Exh. A.) The court held that the Health Care Malpractice Act is subject to the out-of-state tolling provision, and therefore the statute of limitations was tolled by Dr. Grigsby's departure from the state. Because its ruling on that issue was dispositive, the court did not reach the Arnolds' argument that the trial court improperly resolved issues of fact as to when the statute of limitations began to run.

Dr. Grigsby filed his Petition for Writ of Certiorari on March 26, 2008. This Court granted the writ on June 13, 2008.

Statement of Facts

The record contains the following facts presented to the Court of Appeals, including reasonable inferences therefrom:

Dr. Gary White perforated Gina Arnold's colon while performing a colonoscopy on July 22, 1999. Dr. Grigsby had no involvement in that event. (R. 716.) The day after her colonoscopy, Mrs. Arnold went to the emergency room at Uintah Basin Medical Center ("UBMC") complaining of pain in her lower abdomen. Dr. Grigsby was not involved in that visit. (R. 715.)

On that date, July 23, 1999, Dr. White diagnosed Mrs. Arnold as having a perforation of the colon. (R. 715.) That same day, he admitted Gina Arnold into UBMC and treated her in the hospital for four days with antibiotics. (R. 703, 705, 715.) He discharged Mrs. Arnold from UBMC on July 27, 1999. At that time, he directed her to continue taking oral antibiotics and to obtain IV antibiotics at the emergency room twice a day until he could see her again three days later. (R. 703.)

Despite the antibiotic treatment, Gina Arnold's condition worsened. On August 3, 1999, she returned to Dr. White, who admitted her to UBMC to perform laparoscopic surgery. (R. 707, 719-720.) Dr. White performed the surgery that same day. (R. 709, 721.)

At some point after Dr. White began the August 3, 1999, laparoscopic surgery on Gina Arnold, Dr. Grigsby entered the operating room and assisted with the procedure. (R. 721.) (Dr. White's Operating Report states that Dr. White was the surgeon and Dr. Grigsby only assisted him. *Id.*) Dr. Grigsby did not prepare an operative report for the procedure.

On August 5, 1999, Dr. White performed another exploratory laparoscopic surgery with irrigation and drainage on Gina Arnold. Dr. Grigsby was not present at this surgery. (R. 726.) A fourth laparoscopy was performed on Mrs. Arnold by Dr. Grigsby on August 11, 1999. (R. 800.) On or about August 16, Mrs. Arnold was transferred to St. Mark's Hospital for treatment. (R. 806, p. 36.)

In late 1999, the Arnolds consulted with an attorney to help them investigate what had happened with regard to Mrs. Arnold's medical treatment at UBMC. On November 16, 1999, Harold A. Hintze mailed a letter to UBMC requesting a copy of Gina Arnold's medical records. Hintze's letter indicated that he represented Mrs. Arnold "relative to treatment she received following complication arising from an initial diagnosis and treatment of her for an intestinal condition by Dr. Gary White. We are still in the investigatory stage of our representation." (R. 825.)

The sequence of events described above is what the medical records reflected at that time. On October 29, 2003, Dr. White was deposed. During the deposition, White contradicted his own written medical records and those of Dr. Grigsby, suddenly claiming that Grigsby had been making the decisions regarding Gina Arnold's care, even with respect to surgeries at which he was not present. For example:

Dr. White claimed for the first time that, as soon as Dr. Grigsby entered the operating room on August 3, White was no longer Gina Arnold's primary doctor and Mrs. Arnold became Grigsby's case. (R. 722.) Dr. White also claimed in his deposition for the first time that, contrary to the August 3, 1999, Operating Report which said that White was the surgeon and Dr. Grigsby only "assisted" him (R. 709), it was Grigsby who decided not

to convert the laparoscopic procedure that day into an open procedure, contrary to Dr. White's preference. (R. 721-725).

Dr. White further claimed in his deposition that, even though Dr. Grigsby was not present at the August 5 surgery, he nevertheless performed the surgery according to Dr. Grigsby's direction, rather than using his own judgment, which was to perform a different operation. (R. 730-731.)

Dr. White testified in his deposition that from August 3, 1999, when Dr. Grigsby entered the room in which he was operating on Gina Arnold, he deferred to Dr. Grigsby's judgment 100 percent of the time because Dr. Grigsby was in charge and was the patient's doctor. (R. 731-732).²

The Arnolds were never informed of this alleged transformation of Dr. Grigsby's role in Gina Arnold's treatment. On the contrary, Dr. White led them to believe that he was the doctor directing Mrs. Arnold's care. For example, when Charlie Arnold spoke to Dr. White around August 12th or 13th and raised the possibility of involving another doctor or hospital, Dr. White strongly resisted, saying: "Have you lost faith in me? You don't trust me?" (R. 749-750.) Nor is there any evidence that Dr. Grigsby advised the Arnolds that he was now directing Gina Arnold's care.

Dr. Grigsby lived in Roosevelt, Utah, until approximately July, 2000, when he moved to Oneida, Tennessee. (R. 735.)

² In his deposition (R. 736-746), Dr. Grigsby disputed this testimony, and plaintiffs are skeptical of its accuracy. Nevertheless, it is apparent that White's strategy is to try to pass responsibility to Grigsby as an empty chair, hence the Notice of Intent to Allocate Fault.

SUMMARY OF ARGUMENT

This Court should affirm the judgment of the Court of Appeals that the two-year statute of limitation set forth in the Utah Health Care Malpractice Act, U.C.A. § 78-14-4(2) (“malpractice statute of limitation”), is tolled by the out-of-state tolling statute, U.C.A. § 78-12-35 (“out-of-state tolling statute”), while a healthcare malpractice defendant is absent from the State of Utah. The Court of Appeals properly rejected Dr. Grigsby’s assertion that the plain language of the malpractice statute of limitation renders the out-of-state tolling statute inapplicable, and correctly held that the plain language of the statute only precludes tolling during periods of the plaintiff’s minority or legal disability, as opposed to precluding tolling during periods of the defendant’s absence from the state.

The Court of Appeals properly concluded that the Utah Legislature has not evidenced a clear legislative intent in any other provision of the Healthcare Malpractice Act (“Act”) to exempt the malpractice statute of limitation from the out-of-state tolling statute. In fact, the legislative history of Section 78-14-4 reinforces the Court of Appeals’ analysis.

Contrary to Grigsby’s assertions, the Court of Appeals properly held that the general legislative declaration in 78-14-2 does not require a finding that the out-of-state tolling statute is inapplicable to claims against health care provider defendants, because application of the out-of-state tolling statute to medical malpractice claims does not defeat the purpose of the Act, and “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.” Opinion at ¶ 19. The appointment of an agent for service of

process, an inexpensive and simple procedure, previously approved by this Court, alleviates the alleged ill effects of the tolling statute.

Finally, Dr. Grigsby's attempt to raise constitutional objections to the out-of-state tolling statute for the first time on *certiorari* is untimely and improper. This Court has repeatedly held that a party may not raise issues for the first time on appeal.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT UTAH CODE ANN. § 78-12-35 TOLLS THE HEALTH CARE MALPRACTICE ACT STATUTE OF LIMITATIONS DURING A DEFENDANT'S ABSENCE FROM THE STATE.

The medical malpractice statute of limitation reads, with the language interpreted by the Court of Appeals underlined, as follows:

(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

(2) The provisions of this section shall apply to all persons, regardless of minority or other legal disability under § 78-12-36 or any other provision of the law, and shall apply retroactively to all persons, partnerships, associations and corporations and to all health care providers and to all malpractice actions against health care providers based upon alleged personal injuries which occurred prior to the effective date of this act; . . .

Utah Code Ann. § 78-14-4 (emphasis added).

Although Dr. Grigsby's primary argument to the Court of Appeals was that the medical malpractice statute of limitation is plain and unambiguous, and he made the same

assertion in his Petition for Writ of Certiorari³, he now argues to this Court that the statute is actually ambiguous. Accordingly, he asks this Court to look to other provisions in the Act to divine a legislative intent that the out-of-state tolling statute should be inapplicable.

As discussed below, Dr. Grigsby had it right the first time: the malpractice statute of limitations is clear and unambiguous. The Court of Appeals' and trial court's interpretation is the only reasonable interpretation of the structure and wording of the statute. Even if the statute were considered ambiguous, however, legislative history and this Court's precedent reinforces the correctness of the Court of Appeals' decision.

A. Section 78-14-4 is unambiguous, and it is irrelevant whether federal courts have ascribed a different meaning to it.

As this Court has repeatedly made clear, “[w]hen interpreting a statute, we turn to standard canons of statutory construction. In so doing, our primary goal is to give effect to the legislature's intent. We first look to the plain language of the statute and give effect to that language unless it is ambiguous. Only where that language is ambiguous do we consult

³ “By the *plain language* of the Act, it is clear that other general tolling provisions are inapplicable to medical malpractice claims.” Brief of Appellee Grigsby at 16; “The *plain language of the Act demonstrates that the specific language* of Section 78-14-4(2) was included to accomplish this purpose. Disregarding the plain language that “The provisions of this section shall apply to all persons, regardless of ... any other provision of the law” would render the words used in the Act superfluous or inoperative.” Brief of Appellee Grigsby at 20; “This particular provision [78-14-4(2)] *clearly provides that the Utah Legislature did not intend* tolling provisions – such as section 78-12-35 – to affect the limitations period.” *Id.* at 26. “The *express statutory language* specifying that these provisions apply regardless of any other provision of the law *clearly demonstrates* the intent of the legislation [sic] that the Act be exempted from any other tolling statutes.” Grigsby Pet. Writ Cert. at 7; “*The plain and clear language of the Act demonstrates that the specific language of Section 78-14-(2) was included to accomplish this purpose[.]*” *Id.* at 9. (Emphasis added to all citations).

other sources for its meaning.” *Progressive Cas. Ins. Co. v. Ewart*, 2007 UT 52, ¶ 16, 167 P.3d 1011.

The Court of Appeals noted that courts are charged with honoring, not ignoring, the actual wording of statutes. Courts “presume that the legislature used each word advisedly and gave effect to each term according to its ordinary and accepted meaning,” and “will avoid an interpretation which renders portions of, or words in, a statute superfluous or inoperative.” Opinion at ¶ 12, citing *Arrendondo v. Avis Rent A Car Sys., Inc.*, 2001 UT 29, ¶ 12, 24 P.3d 928, and *Platts v. Parents Helping Parents*, 947 P.2d 658, 662 (Utah 1979).

The only reasonable interpretation of Section 78-14-4 is exactly what it says: that its statute of limitations applies despite a plaintiff’s *minority or legal disability* under any provision of law, including under U.C.A. 78-12-36. Dr. Grigsby takes no position in his brief before this Court regarding the proper interpretation of Section 78-14-4, but rests entirely on the assumption that this Court will find it ambiguous. Nonetheless, it bears noting that the interpretation urged by Dr. Grigsby in the proceedings below and in his Petition for Writ of Certiorari would be contrary to the plain language of Section 78-14-4(2). A contention that malpractice claims are never subject to tolling under any provision of Utah law would require an awkward and strained reading of the statute’s language, and would disregard the structure and punctuation of the provision.⁴

⁴ 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. Thus, Dr. Grigsby condensed Section 78-14-4 (2) to state, “The provisions of

As the Court of Appeals determined, the trial court “astutely analyzed the issued as follows:

[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 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. Therefore, the Court rejects Defendants’ argument on this point.”

Opinion, ¶ 14, quoting R. 854-855. This conclusion, in addition to giving meaning to all words in the statute, is consistent with standard principles of statutory construction. “Under the last antecedent doctrine, relative and qualifying words, phrases, and clauses are to be applied to the immediately preceding words or phrase.” *Corpus Juris Secundum* Statutes § 333; *Sandy City v. Salt Lake County*, 827 P.2d 212, 219 (Utah 1992).

The Court of Appeals, agreeing with the trial court’s reading of the statute on this point, correctly observed that, had the Legislature intended the medical malpractice two-year statute of limitation to “be beyond the reach of all other tolling statutes, including those unrelated to ‘minority or other legal disability, it would have explicitly said so.” Opinion at ¶ 18.

this section shall apply to all persons, regardless of . . . any other provision of the law[.]” (Brief of Appellee, p. 18 (ellipse in original); *see also id.*, p. 24: “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**”) (bold in original).)

In an about-face from his position in the lower courts, Dr. Grigsby's primary argument before this Court is that Section 78-14-4(2) is ambiguous, and therefore, he says, the Court should look beyond its plain language and "harmonize" its provisions with other provisions of the Utah Healthcare Malpractice Act. In support of his claim that Section 78-14-4(2) is ambiguous, Grigsby relies not on the actual language of the statute, but instead two decisions from the federal District of Utah and the Tenth Circuit Court of Appeals, as well as to the trial court and court of appeals' interpretation of the statute in this case.

As the Court of Appeals noted, a federal court's interpretation of a Utah statute is of no precedential value to this Court (Opinion at ¶ 13, n.4), and therefore, federal court decisions purporting to construe the statute at issue are not controlling. In addition to lacking precedential value, the analysis set forth in the federal court decisions on which Dr. Grigsby relies is flawed. In the unreported federal district court decision of *Griffiths-Rast v. Sulzer Spine Tech, Inc.*, 2005 WL 2237635 (D. Utah 2005), *aff'd* 216 Fed. Appx. 790 (10th Cir. 2007) (mem.), the judge ignored the plain language of Section 78-14-4(4). The analysis in *Griffiths-Rast* focused solely on the "all persons" language, without consideration of the phrase immediately following it, which "explains the rationale for such a provision: But for the Legislature's desire to make its point about the irrelevancy of 'minority or other legal disability,' there would be no reason to include such a provision at all." Opinion, ¶ 13 n.4. The Court of Appeals correctly discounted the persuasiveness of *Griffiths-Rast* because the analysis in that case, like Dr. Grigsby, ignores the express wording in the medical malpractice statute of limitation. As to the Tenth Circuit's opinion in *Griffiths-Rast v. Sulzer Spine Tech*, 216 Fed. Appx. 790 (10th

Cir. 2007)(unpublished), it is similarly of no precedential value, and represents an incorrect analysis of the statute at issue.⁵

Dr. Grigsby asserts that the lower courts in this very case have also attributed different meanings to Section 78-14-4(2), and then says that this suggests an ambiguity. In making that argument, however, Dr. Grigsby takes the lower courts' opinions out of context and misconstrues the Court of Appeals' holding. The trial court and the Court of Appeals attributed the same meaning to the Section 78-14-4(2), and their respective ruling and opinion do not demonstrate any ambiguity in the statute. To the contrary, the Court of Appeals cited favorably the trial court's ruling in its own analysis of the issue. Both courts concluded that the words "or any other provision of the law" "refer[ed] to party status, rather than to removing this [two-year limitation] provision from the scope of all other provisions of law." Opinion at ¶ 14.

The questioned ambiguity in this case is not whether the latter phrase "or any other provision of the law" modifies the word "minority" or the word "legal disability," but rather, whether the later phrase "or any other provision of the law" applies to the earlier

⁵ One reason for the ruling in *Griffiths-Rast* may be that the statutory-language argument upon which the Court of Appeals ruled here was not raised in the federal district court. In *Griffiths-Rast*, the defendant filed a motion for summary judgment based on the two-year statute of limitations. *Griffiths-Rast v. Sulzer Spine Tech, et al.*, 2:02-cv-01267, U. S. District Court, Central Division (Docket No. 59). In response, the plaintiff raised the out-of-state tolling provision. (Docket No. 65.) In his reply, the doctor asserted for the first time that the out-of-state tolling provision does not apply to medical malpractice claims. (Docket No. 73.) The plaintiff did not have an opportunity to, and did not, argue that the medical malpractice statute addressed only disability-related tolling provisions. Given that the relevant arguments were not raised or briefed before the federal district court, its discussion of the statute provides little insight here.

phrase stating, “the provisions of this section shall apply to all persons, regardless of...”

Both courts below reached the same conclusion – that it does not – and the holdings of the lower courts do not support an argument that the statute is ambiguous.

The medical malpractice statute of limitation in Section 78-14-4(2) is plain and unambiguous, as both lower courts concluded. It provides that the two-year malpractice statute of limitation is not tolled by minority or legal disability arising under any provision of Utah law. It does not provide that the two-year malpractice statute of limitation is excepted from the out-of-state tolling statute. The Court of Appeals’ reasoning was sound.

B. The application of well-accepted principles of statutory construction to Section 78-14-4 mandates the conclusion that the Legislature did not intend to exempt health care malpractice claims from the out-of-state tolling provisions of Section 78-12-35.

The Court of Appeals noted that, had the Legislature intended the malpractice statute of limitation to “be beyond the reach of all other tolling statutes, including those unrelated to ‘minority or other legal disability,’ it would have explicitly said so.” Opinion at ¶ 18. Indeed, “[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*, 2004 UT App 137, ¶ 8, 91 P.3d 849, 852 (Utah App.2004). Here, there is an utter absence of clear, explicit language stating that the tolling statute does not apply to medical malpractice claims.

The multitude of ways that the Legislature could have clearly expressed such an intention is evidence that its absence was intentional. As an example, all the Legislature would have needed to do to resolve the entire question before this Court is to include

another sentence in Section 78-14-4(2) stating something like ‘the two-year statute of limitations set forth in subsection (1) is not subject to tolling under Section 78-12-35.’ That is very plain and unambiguous language. Such language is notably absent, however, and nothing similar is contained anywhere in the Healthcare Malpractice Act.

It is a well-accepted maxim of statutory construction that “*expressio unius est exclusio alterius*” -- that the expression of one thing is evidence of the exclusion of the other. *See, e.g., Carrier v. Salt Lake County*, 2004 UT 98, ¶ 30, 104 P.3d 1208 (““statutory construction presumes that the expression of one should be interpreted as the exclusion of another.”) The Legislature chose to state specifically that the two-year malpractice statute of limitations applies without regard for minority or legal disability under Section 78-12-36. It did not state anything in the Act about other tolling statutes, such as the immediately preceding section, 78-12-35.

In *Olseth v. Larson*, 2007 UT 29, ¶ 39, 158 P.3d 532, a case holding that the out-of-state tolling statute applies without regard for amenability to service of process, this Court stated that it “the Utah Legislature is aware of the tolling statute” and that it “presume[s] the Legislature is aware of [its] case law” regarding the out-of-state tolling statute. This Court has a long jurisprudence of enforcing the provisions of the out-of-state tolling statute. *See, e.g., Keith-O’Brien Co. v. Snyder*, 51 Utah 227, 169 P. 954 (1917); *Buell v. Duchesne Mercantile Co.*, 64 Utah 391, 231 P. 123 (1924); *Goss v. Hunting*, 561 P.2d 1071 (Utah 1977). Although this Court has refined its interpretation of the tolling statute, *see, e.g., Lund v. Hall*, 938 P.2d 285 (Utah 1997), its vitality has not

been called into question. The legislature is thus presumed to be have been aware of Section 78-12-35 when it amended the medical malpractice statute.

Grigsby argues in his brief before this Court that the case of *Blum v. Stone*, 752 P.2d 898 (Utah 1988) supports a conclusion that the out-of-state tolling provision in Section 78-12-35 does not apply to medical malpractice claims. However, that case is inapplicable to the case at bar, because in *Blum*, this Court only construed the interplay between the two-year malpractice statute of limitation and the disability tolling provision in Section 78-12-36. The Court afforded no consideration of Section 78-12-35, nor could it, because there was no issue raised in that case regarding the defendant's absence from the state after the accrual of a cause of action against him.

In sum, the lack of any express intent to exempt malpractice claims from tolling under Section 78-12-36, prior jurisprudence from this Court construing the tolling statute, the presumption that the Legislature chose its wording advisedly, and the express inclusion of a reference to one tolling statute but not another in the malpractice statute of limitation, all support the Court of Appeals' conclusion that the Legislature did not intend to except the out-of-state tolling statute from the medical malpractice statute of limitation.

C. The legislative history giving rise to the 1979 amendment of the malpractice statute of limitations demonstrates that the Legislature had no intent to exempt health care malpractice claims from the out-of-state tolling statute.

While concluding that Section 78-14-4 is unambiguous, the Court of Appeals noted that the statute's legislative history is consistent with the court's interpretation. The medical malpractice statute of limitation in Section 78-14-4 was enacted in 1976. As enacted, the pertinent portion read:

The provisions of this section shall apply to all persons regardless of minority or other disability and shall apply retroactively to all persons, partnerships, associations, and corporations and to all health care providers and to all malpractice actions against health care providers based upon alleged personal injuries which occurred prior to the effective date of this act;

See Laws of the State of Utah, 1976, attached hereto as Exhibit D, and *Blum*, 753 P.2d at 900 (emphasis added).

The Legislature has amended Section 78-14-4 once, in 1979. The amendment was expressly in response to a decision of this Court in *Scott v. School Bd. of Granite School District*, 568 P.2d 746 (Utah 1977), which was decided one year after the malpractice statute of limitation's enactment. In *Scott*, this Court held that the medical malpractice statute of limitations was tolled under the disability tolling statute, Section 78-12-36, as a result of the minor plaintiff's legal age and legal incapacity. In *Scott*, the plaintiff a minor acting through his guardian *ad litem*, filed suit against a school district for injuries received in a shop class. The minor, however, failed to give timely notice of his claim under the Governmental Immunity Act. The trial court granted summary judgment to the school district, holding that the statutory requirement for giving notice under the Governmental Immunity Act trumped the disability tolling statute governing minors. Overruling prior decisions, this Court reversed, holding that minors were entitled to the protection afforded by the disability tolling statute in all cases. *Id.* at 748.

Soon afterward, in 1979, the Legislature amended Section 78-14-4(2) to include the statutory provision at issue herein. The Legislature expressly stated that its intent was to overturn *Scott*. *See Blum*, 752 P.2d at 900 n. 2 (mentioning floor discussions making clear that the amendments to Section 78-14-4(2) were enacted "in order to overturn a

Supreme Court decision which has recently come down,” *i.e. Scott*). The new version of the malpractice statute of limitation said (with the words added by the 1979 amendment underlined):

The provisions of this section shall apply to all persons, regardless of minority or other legal disability under § 78-12-36 or any other provision of the law, and shall apply retroactively to all persons, partnerships, associations, and corporations and to all health care providers and to all malpractice actions against health care providers based upon alleged personal injuries which occurred prior to the effective date of this act;

See Laws of the State of Utah, 1979, pp. 739-740, included herewith in Exhibit D.

The intent of the 1979 amendment was clear—the legislature did not want *minority or legal disability* to toll the medical malpractice limitation period, hence the added reference to Section 78-12-36. Even if Section 78-14-4 were considered ambiguous, this history confirms the correctness of the Court of Appeals ruling.

D. The Court of Appeals correctly held that the application of the out-of-state tolling statute is not contrary to the purposes of the Healthcare Malpractice Act, and no legislative intent to exempt the malpractice statute of limitations from the out-of-state tolling statute is derived or inferred from the other provisions of the Act.

None of the provisions of the Healthcare Malpractice Act cited by Grigsby in his brief to this Court states that the tolling statute set forth in Section 78-12-35 is excepted from the two-year medical malpractice statute of limitation in Section 78-14-4(2). Rather than pointing to a clear and unmistakable express intent, Dr. Grigsby asks this Court to divine that intent from the general Legislative pronouncement in Section 78-14-2, as well as a prior opinion from this Court quoting that section.

First, Dr. Grigsby cites prefatory language in the Act, which states, “the purpose of the legislature [is] to provide a reasonable time in which actions may be commenced

against health care providers while limiting that time to a specific period for which professional liability insurance premiums can be reasonably and accurately calculated.” U.C.A. 78-14-2. However, as the Court of Appeals observed, the legislative declaration in 78-14-2 does not require a finding that the out-of-state tolling statute is inapplicable to claims against health care provider defendants, because application of the out-of-state tolling statute to medical malpractice claims does not defeat the purpose of the Act.

As the Court of Appeals indicated, application of the out-of-state tolling statute “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.” Opinion at ¶ 19. Section 78-12-35 imposes a specific and well-defined period for tolling: the period of the defendant’s absence from the state after the claim arises. This is a explicit and discrete period of time, which is easily comprehended and straightforward from an analytical perspective.

The Court of Appeals also pointed out that its “interpretation should not cause malpractice insurance rates to increase and will not deter healthcare providers from leaving Utah. ... [A]ll 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.” Opinion at ¶ 19. The mere appointment of agent for service of process, an inexpensive and simple procedure, alleviates the effect of the tolling statute on the medical malpractice statute of limitation.

Dr. Grigsby argues that he is “unaware” of any “statutory procedure in Utah that permits a person who wishes to move out of state to register with the state for service of

process.” Brief of Appellant at 25. Notably, Dr. Grigsby does argue that such appointments are prohibited in Utah, but only that there is not a statute dealing with the subject. There is no need for a statutory procedure authorizing a person to appoint an agent for limited purposes; the law already affords individuals that ability.

II. DR. GRIGSBY DID NOT PRESERVE ANY CONSTITUTIONAL ARGUMENTS AGAINST THE APPLICATION OF THE TOLLING STATUTE.

Dr. Grigsby argues for the first time in Sections I.C. and I.D. of his brief that the interpretation of the medical malpractice statute of limitation urged by the Arnolds, and echoed by the trial court and Court of Appeals, imposes an “unreasonable burden on interstate commerce.” Brief of Appellant at 23. Implicitly acknowledging the absence of any such contention in the courts below, Dr. Grigsby attempts to argue that it is the Court of Appeals’ interpretation of the statute that gives rise to the undue burden on interstate commerce, but this is merely a roundabout way of arguing that the out-of-state tolling statute violates the dormant commerce clause of the United States Constitution.

Dr. Grigsby cannot claim that he had no opportunity to raise constitutional objections until the Court of Appeals ruled. The Court of Appeals adopted the very same interpretation of the statute as the trial court, and that the Arnolds expressly urged on appeal. Having chosen not to raise any constitutional arguments in either the trial court or the Court of Appeals, it is too late for Dr. Grigsby to do so now. This Court has repeatedly held that a party may not raise issues for the first time on appeal, and that issues not raised in the trial court are waived. *See Gardner v. Board of County Com'rs of Wasatch County*, 2008 UT 6, ¶ 32, 178 P.3d 893 (declining to address appellant's

constitutional due process regulatory takings argument, and holding that “[b]ecause the Landowners did not present that claim below, the claim is deemed waived and we will not address it for the first time on appeal.”); *Coleman ex rel. Schefski v. Stevens*, 2000 UT 98, ¶ 9, 17 P.3d 1122 (Utah 2000) (holding that plaintiff-appellant was precluded from raising issue of “whether a person has a constitutional right to control his or her medical treatment” because he failed to raise the issue before the trial court); *State v. Holgate*, 2000 UT 74, ¶ 11, 10 P.3d 346 (“[C]laims not raised before the trial court may not be raised on appeal.... [This] preservation rule applies to every claim, including constitutional questions....”).

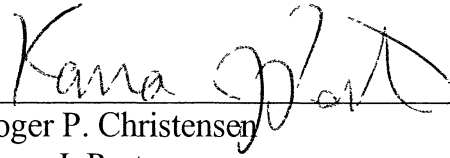
Dr. Grigsby’s brief does not identify any preservation of his constitutional argument in the courts below. None of the record citations in his Statement of Issues contains such an argument. The docket and index of the record on appeal reflect no court filing raising the argument, nor did the trial court or the Court of Appeals address it. Accordingly, it is not properly before this Court on *certiorari*.

CONCLUSION

For the reasons set forth above, plaintiffs/appellees respectfully request that the Court affirm the judgment of the Court of Appeals.

RESPECTFULLY SUBMITTED this 2nd day of September, 2008.

CHRISTENSEN & JENSEN, P.C.

A handwritten signature in cursive script, appearing to read "Karra J. Porter", written over a horizontal line.

Roger P. Christensen

Karra J. Porter

Sarah E. Spencer

Attorneys for Appellees Arnold

CERTIFICATE OF SERVICE

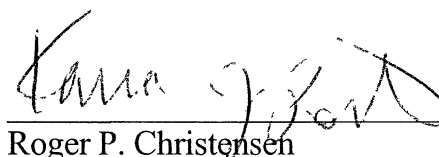
This is to certify that on the 7th day of September, 2008, two true and correct copies of the foregoing BRIEF OF APPELLEES were mailed, first-class postage prepaid, to:

Larry R. White
950 Gateway Tower West
15 West South Temple
Salt Lake City UT 84101
Attorneys for Appellee Grigsby

Stephen W. Owens
10 West 100 South, Suite 500
Salt Lake City UT 84101

Phillip R. Fishler
Strong & Hanni
3 Triad Center, Suite 500
Salt Lake City UT 84180

CHRISTENSEN & JENSEN, P.C.

A handwritten signature in black ink, appearing to read "Karra J. Porter", is written over a horizontal line.

Roger P. Christensen
Karra J. Porter
Sarah E. Spencer
Attorneys for Appellees Arnold

EXHIBIT A

Arnold v. Grigsby, 2008 UT App 58, 180 P.3d 188

This opinion is subject to revision before
publication in the Pacific Reporter.

IN THE UTAH COURT OF APPEALS

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Gina M. Arnold and Charlie S. Arnold,)	OPINION
)	(For Official Publication)
Plaintiffs and Appellants,)	Case No. 20060481-CA
)	
v.)	F I L E D
)	(February 28, 2008)
David Grigsby, M.D.; Gary B. White, M.D.; and Uintah Basin Medical Center,)	
)	2008 UT App 58
Defendants and Appellee.)	

Eighth District, Duchesne Department, 020800066
The Honorable John R. Anderson

Attorneys: Roger P. Christensen and Karra J. Porter, Salt Lake City, for Appellants
Larry R. White and Paul D. Van Komen, Salt Lake City, for Appellee

Before Judges Billings, Davis, and Orme.

ORME, Judge:

¶1 Gina M. Arnold and Charlie S. Arnold appeal the trial court's summary judgment order in favor of David Grigsby, M.D., which concluded that the Arnolds' claims were time-barred by the Utah Health Care Malpractice Act's two-year statute of limitations. See Utah Code Ann. § 78-14-4(1) (2002). By reason of the generally applicable tolling statute, which suspends the running of a statute of limitations when a defendant departs from Utah after a cause of action has accrued against him, see id. § 78-12-35, we reverse.

BACKGROUND¹

¶2 On July 22, 1999, Dr. Gary White performed a colonoscopy and polypectomy on Gina Arnold, in the course of which he negligently perforated her colon. The next day, Gina began experiencing pain in her lower abdomen and sought treatment at the Uintah Basin Medical Center's emergency room. Dr. White determined that her colon appeared to be perforated and admitted her to the hospital, prescribing triple antibiotics. She remained in the hospital for four days, during which time her condition began to improve. Her discharge plan called for her to continue taking one antibiotic tablet orally and to return to the emergency room to receive two additional antibiotics during the next three days.

¶3 Gina's condition worsened, however, and on August 3, 1999, she was again admitted to the hospital where Dr. White performed an exploratory laparoscopic surgery. At some point during the course of the surgery, Dr. David Grigsby entered the operating room and began to participate in the procedure. Dr. White's operative report indicates that he was the surgeon while Dr. Grigsby assisted him. Gina later had two more laparoscopic surgeries at the Uintah Basin Medical Center, one performed by Dr. White on August 5, 1999, and another performed by Dr. Grigsby on August 11, 1999. After the August 11 surgery, she was transferred to St. Mark's Hospital in Salt Lake City.

¶4 The Arnolds filed a complaint on December 4, 2001, naming Dr. White, the Uintah Basin Medical Center, and Dr. Grigsby as defendants. The Arnolds did not, however, serve Dr. Grigsby with a summons and complaint at that time. They maintain that, while they knew Dr. Grigsby had some level of participation in at least some of the surgeries, they did not originally serve him with the complaint or a pre-suit notice of intent to commence an action because they did not want to bring him into the litigation unless they found evidence requiring them to do so. At the time they filed their complaint, they claim they were under the impression from the medical records that Dr. White was Gina's primary care provider during the events in question, directed her course of treatment, and was primarily responsible for any negligence that caused her injury.

1. "[I]n reviewing a grant of summary judgment, we analyze the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." DOIT, Inc. v. Touche, Ross & Co., 926 P.2d 835, 841 (Utah 1996) (citation omitted) (alteration in original). We recite the facts accordingly.

¶5 But when Dr. White was deposed on October 29, 2003, he made several statements that contradicted the medical records. He asserted that when Dr. Grigsby entered the operating room during the August 3 surgery, the surgery became Dr. Grigsby's case and Dr. Grigsby became Gina's primary doctor. Because Dr. Grigsby was in charge, Dr. White said he deferred to Dr. Grigsby's judgment. Dr. White stated that he felt Gina needed more vigorous treatment during the August 3 surgery. He thought that trying to locate a hole and "oversew[ing] the hole," if there was one, was the best way to proceed. According to Dr. White, however, Dr. Grigsby decided that just draining and washing out the abdomen was the best course of action. Dr. White further claimed that when he performed the August 5 surgery, he proceeded according to Dr. Grigsby's instructions, even though he would have performed the surgery differently. He asserted that he would have tried, at that point, to close up the hole in her colon and perform a colostomy, if necessary.

¶6 After Dr. White's deposition, the Arnolds obtained a dismissal without prejudice as to Dr. Grigsby. They then filed a notice of intent to commence an action, filed an amended complaint on August 6, 2004, and served Dr. Grigsby in Tennessee, where he then lived. Dr. Grigsby moved for summary judgment on September 22, 2005, arguing that the Arnolds' claims were barred by the Utah Health Care Malpractice Act's statute of limitations. See Utah Code Ann. § 78-14-4(1) (2002). The Arnolds opposed the motion, claiming that the statute of limitations period was tolled when Dr. Grigsby moved to Tennessee in July 2000, see id. § 78-12-35,² and that the complaint therefore was timely filed. They additionally argued that, regardless of the tolling statute, they timely filed their complaint within two years of the date they learned that Dr. Grigsby played a more integral role in Gina's healthcare than they had previously known.

¶7 The trial court first determined that the statute of limitations began running in November 1999 because the "[Arnolds] discovered the alleged injury no later than November 1999" and because "[a]t that time, [they] certainly suspected the alleged

2. Section 78-12-35 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, the time of his absence is not part of the time limited for the commencement of the action.

Utah Code Ann. § 78-12-35 (2002).

injury may have been caused by negligence." The trial court reached this determination because "[Gina] Arnold consult[ed] an attorney and initiat[ed] a formal investigation in her potential medical malpractice claim as early as September 1999" and because the Arnolds knew or should have known that Dr. Grigsby had been involved in Gina's healthcare at the time they discovered her injury. Accordingly, the trial court determined that the December 4, 2001, complaint was not filed within the two-year statutory period.

¶8 In reaching its decision, the trial court determined that the tolling statute, section 78-12-35, did not apply. See Utah Code Ann. § 78-12-35 (2002). Rejecting Dr. Grigsby's argument that the tolling statute simply did not apply to medical malpractice cases, the trial court nevertheless determined that because Dr. Grigsby could have been served in accordance with Utah's long-arm statute, see id. §§ 78-27-24 to -25, the tolling statute did not work to suspend the running of the Malpractice Act's two-year limitations period, even though Dr. Grigsby was a nonresident and absent from the state. Consequently, it granted Dr. Grigsby's summary judgment motion. The Arnolds now appeal that ruling.

ISSUES AND STANDARDS OF REVIEW

¶9 The Arnolds claim that the trial court erred in granting summary judgment to Dr. Grigsby on the theory that section 78-12-35 did not toll the running of the statute of limitations even though Dr. Grigsby had moved from Utah.³ "'Summary judgment is appropriate when there is no issue as to any material fact and the moving party is entitled to judgment as a matter of law.'" Emergency Physicians Integrated Care v. Salt Lake County, 2007 UT 72, ¶ 8, 167 P.3d 1080 (quoting Dairyland Ins. Co. v. State Farm Mut. Auto. Ins. Co., 882 P.2d 1143, 1144 (Utah 1994)). "When reviewing a ruling on summary judgment, this court gives no deference to the lower court's legal conclusions and reviews the issues presented under a correctness standard." Id. "[W]e analyze the facts and all reasonable inferences drawn therefrom

3. The Arnolds also argue that even without the tolling statute, they timely filed their lawsuit against Dr. Grigsby because the statute of limitations in medical malpractice actions does not begin to run until the injured party becomes aware of his or her injury and aware that a particular doctor's negligence caused that injury, not just that any doctor's negligence or that some negligent act caused the injury. In light of our reversal of the trial court's determination that section 78-12-35 did not apply, we need not reach this argument.

in the light most favorable to the nonmoving party." DOIT, Inc. v. Touche, Ross & Co., 926 P.2d 835, 841 (Utah 1996) (citation and internal quotation marks omitted).

¶10 In addressing the Arnolds' argument, the first issue is whether the trial court properly concluded that section 78-12-35, the tolling statute, see Utah Code Ann. § 78-12-35 (2002), applies to medical malpractice cases, given the statute of limitations provision of the Utah Health Care Malpractice Act, see id. § 78-14-4(2). The second issue is whether the trial court correctly determined that the tolling statute is inapplicable where a nonresident is subject to the jurisdiction of Utah's courts and is amenable to service of process under Utah's long-arm statute, see id. §§ 78-27-24 to -25. As both the application of a statute of limitations and the interpretation of statutory provisions present questions of law, we review the lower court's determinations on these issues for correctness. See Russell Packard Dev., Inc. v. Carson, 2005 UT 14, ¶ 18, 108 P.3d 741 ("The applicability of a statute of limitations . . . [is a] question[] of law, which we review for correctness.") (quoting Spears v. Warr, 2002 UT 24, ¶ 32, 44 P.3d 742); Sill v. Hart, 2007 UT 45, ¶ 5, 162 P.3d 1099 ("This case presents an issue of statutory interpretation, a question of law that we review for correctness.").

ANALYSIS

I. Interplay of Malpractice Act and Tolling Statute

¶11 Dr. Grigsby argues that "[t]he express statutory language [of section 78-14-4(2)] . . . clearly demonstrates the intent that the [Malpractice] Act be exempted from other tolling statutes." We disagree.

¶12 When interpreting a statute, we "construe[it] as a comprehensive whole." Beaver County v. Utah State Tax Comm'n, 916 P.2d 344, 358 (Utah 1996) (citation and internal quotation marks omitted).

[O]ur primary goal is to give effect to the legislature's intent in light of the purpose the statute was meant to achieve. The best evidence of the true intent and purpose of the legislature in enacting a statute is the plain language of the statute. We therefore look first to the statute's plain language.

Lieber v. ITT Hartford Ins. Ctr., Inc., 2000 UT 90, ¶ 7, 15 P.3d 1030 (citations and internal quotation marks omitted). "In so

doing, [w]e presume that the legislature used each word advisedly and give effect to each term according to its ordinary and accepted meaning." Arredondo v. Avis Rent A Car Sys., Inc., 2001 UT 29, ¶ 12, 24 P.3d 928 (citation and internal quotation marks omitted) (alteration in original). However, "[w]e will avoid an interpretation which renders portions of, or words in, a statute superfluous or inoperative." Platts v. Parents Helping Parents, 947 P.2d 658, 662 (Utah 1997).

¶13 Utah Code section 78-14-4(2) provides in relevant part:

The provisions of this section
[detailing when a patient must file a
malpractice action] 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) (2002) (emphasis added). According to Dr. Grigsby, the language "regardless of . . . any other provision of the law" means that the Legislature intended to exempt medical malpractice actions from the effect of all other statutory provisions that could conceivably toll the statute of limitations. In support of this interpretation, he discusses Griffiths-Rast v. Sulzer Spine Tech, Inc., No. 2:02CV1267, 2005 WL 2237635 (D. Utah Sept. 14, 2005) (mem.), aff'd, 216 F. App'x 790, 792 (10th Cir. 2007) (mem.), a federal court decision that concluded section 78-14-4(2) "provides an explicit exception to section 78-12-35."⁴ Id. at *3. The Arnolds, on the other hand, argue that, as the trial court in the instant case determined, "the phrase 'or any other provision of [the] law' relates to

4. Of course, we are not bound by any federal court's interpretation of a Utah statute, although such cases can surely be persuasive. Moreover, the federal district court based its interpretation that section 78-14-4(2) explicitly precluded application of section 78-12-35 on the "all persons" language, without due regard to the phrase immediately following it. See Griffiths-Rast v. Sulzer Spine Tech, Inc., No. 2:02CV1267, 2005 WL 2237635, at *3 (D. Utah Sept. 14, 2005) (mem.), aff'd, 216 F. App'x 790, 793 (10th Cir. 2007) (mem.). And the phrase that follows the "all persons" language relied on by the federal courts is what explains the rationale for such a provision: But for the Legislature's desire to make its point about the irrelevancy of "minority or other legal disability," there would be no reason to include such a provision at all. That Utah law applies to "all persons" goes without saying by reason of the Uniform Operation Clause of the Utah Constitution. See Utah Const. art. I, § 24.

minors and others with legal disabilities, rather than constituting a free standing clause." We agree with the Arnolds and the trial court.

¶14 In its summary judgment order, the trial court determined that section 78-14-4(2) did not exempt medical malpractice actions from the reach of the tolling statute. It astutely analyzed the issue as follows:

[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. Therefore, the Court rejects Defendant's argument on this point.

We agree with this structural interpretation of the provision and conclude that the phrase "or any other provision of the law" only refers to other provisions of law relating to "minority or other legal disability" that might otherwise affect the limitations period. Tolling statutes that suspend the running of statute of limitation periods for other reasons--like section 78-12-35--still apply.

¶15 We additionally note that, as the Arnolds contend, the legislative history supports our interpretation of section 78-14-4(2). Section 78-14-4(2) as originally enacted provided in relevant part:

The provisions of this section shall apply to
all persons regardless of minority or other
legal disability

Utah Health Care Malpractice Act, ch. 23, § 4, 1976 Utah Laws 90, 94 (codified at Utah Code Ann. § 78-14-4(2) (1977)). In 1979, the Legislature amended this provision in response to Scott v. School Board, 568 P.2d 746 (Utah 1977), see Blum v. Stone, 752 P.2d 898, 900 (Utah 1988), and added the clause "under Section

78-12-36 or any other provision of the law." Malpractice Statute of Limitations Act, ch. 128, § 1, 1979 Utah Laws 739, 740 (codified at Utah Code Ann. § 78-14-4(2) (Supp. 1979)) (current version at Utah Code Ann. § 78-14-4(2) (2002)).

¶16 To more fully explain, section 78-12-36 tolls the running of a statute of limitation, unless the case involves "recovery of real property," for a person who "at the time the cause of action accrued, [was] either under the age of majority or mentally incompetent and without a legal guardian" throughout the period of such person's legal disability. See Utah Code Ann. § 78-12-36 (2002). In Scott, a minor failed to timely comply with the notice requirements of the Governmental Immunity Act, and the trial court granted the school district's motion for summary judgment. See 568 P.2d at 746. The Utah Supreme Court held that "a minor claimant is justly entitled to the protection afforded by said Section 78-12-36(1) . . . in all cases, including notice requirements of the type contained in the Utah Governmental Immunity Act." Id. at 748. In making this ruling, the Supreme Court recognized that its conclusion was contrary to the rationale adopted in other Utah decisions, see id., which held that "specific statutes of limitation take precedence over the general provisions of title 78, U.C.A., 1953, and that the specific requirement of notice takes further precedence at least as it may affect minors in the care of natural guardians," id. at 747.

¶17 After the Scott decision, the Legislature, during floor discussions, indicated that it was amending "section 78-14-4[(2)] in order to overturn a Supreme Court decision," the Scott opinion. Blum, 752 P.2d at 900 n.2 (quoting Transcript of Discussion and Vote in Utah House of Representatives at Third Reading of H.B. 164 (Feb. 13, 1979)). As the Supreme Court noted in Blum, both it and the Legislature "agreed that Scott at least had the effect of tolling all statutes of limitations during minority based upon section 78-12-36, absent clear legislative intent to the contrary." Id. The Supreme Court also concluded that "[t]he amendment evinced the legislature's determination to apply the medical malpractice statute of limitations to all plaintiffs' claims, including those of minors," and that it "was adopted with a view to defeating the effect of the tolling provisions of section 78-12-36." Id. at 900.

¶18 We conclude that this history shows that the Legislature clearly intended to exempt minors and persons with other legal disabilities from the reach of section 78-12-36 or other provisions that might toll the medical malpractice statute of limitations by reason of such disability. In light of this specific provision enacted in response to case law, we must presume that if the Legislature intended section 78-14-4(1) to

also be beyond the reach of all other tolling statutes, including those unrelated to "minority or other legal disability," Utah Code Ann. § 78-14-4(2) (2002), it would have explicitly said so. See Carrier v. Salt Lake County, 2004 UT 98, ¶ 30, 104 P.3d 1208 ("When examining the plain language, we must assume that each term included in the ordinance was used advisedly. Additionally, 'statutory construction presumes that the expression of one should be interpreted as the exclusion of another.' Thus, we should give effect to any omission in the ordinance language by presuming that the omission is purposeful.") (citations omitted).

¶19 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. Moreover, our interpretation should not cause malpractice insurance rates to increase and will not deter healthcare providers from leaving Utah. As the Arnolds argue, and as indicated in section II of this opinion, 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. Finally, contrary to Dr. Grigsby's assertion, this interpretation does not render the words "other provision of the law" "superfluous or inoperative." The phrase simply refers back to "minority or other legal disability," and meaningfully makes clear that legal disability under any other provision of law will likewise not toll the running of the malpractice statute of limitations.

II. Interplay of Long-Arm Statute and Tolling Statute

¶20 While rejecting Dr. Grigsby's interpretation of section 78-14-4(2), the trial court nonetheless determined that the tolling provision of section 78-12-35 did not apply in this case because, under Utah's long-arm statute, Dr. Grigsby was subject to Utah's jurisdiction and amenable to service of process in the state where he resided. The trial court relied on Snyder v. Clune, 15 Utah 2d 254, 390 P.2d 915 (1964), Van Tassell v. Shaffer, 742 P.2d 111 (Utah Ct. App. 1987), and Ankers v. Rodman, 995 F. Supp. 1329 (D. Utah 1997), and reasoned that, because the Arnolds could serve Dr. Grigsby in Tennessee, "the purpose of the tolling statute . . . 'to prevent a defendant from depriving a plaintiff of the opportunity of suing him by absenting himself from the state during the period of limitation'" was not furthered. While there is a certain logic to the trial court's analysis, we conclude that the trial court erred in making this determination, as the issue was recently put squarely before the Utah Supreme Court, which reached the opposite conclusion.

¶21 In Olseth v. Larsen, 2007 UT 29, 158 P.3d 532, the Utah Supreme Court answered a certified question of state law from the United States Court of Appeals for the Tenth Circuit. See id. ¶ 1. The question was whether

the statute of limitations tolled under Utah Code Ann. § 78-12-35 when a person against whom a claim has accrued has left the state of Utah and has no agent within the state of Utah upon whom service of process can be made instead, but the person is amenable to service pursuant to Utah's long-arm statute, Utah Code Ann. § 78-27-24[.]

Id. (internal quotation marks omitted).

¶22 The appellee in Olseth argued that "when the purpose of the tolling statute conflicts with its literal meaning, the purpose must be given effect." Id. ¶ 20. Accordingly, he claimed that "the tolling statute should no longer apply because the need to delay the running of the statute of limitations ceases to exist" when "the long-arm statute . . . brings a defendant within the personal jurisdiction of the court." Id. After considering the creation and history of section 78-12-35, the plain language of the statute, prior judicial decisions that have interpreted the statute, and the deference owed to the Legislature, see id. ¶ 14, the Supreme Court

h[e]ld that Utah Code section 78-12-35 does toll the applicable statute of limitations when a person against whom a claim has accrued has left the state of Utah and has no agent within the state upon whom service of process can be made, even where the person was at all times amenable to service pursuant to Utah's long-arm statute.

Id. ¶ 40 (emphasis in original). The Supreme Court also indicated that prior Utah judicial decisions show that when a case does not fall within the Nonresident Motor Vehicle Act,⁵ an appellate court should "apply a straightforward application of the tolling statute to [the] claim." Id. ¶ 36.

¶23 The Arnolds claim that Dr. Grigsby left the state of Utah during July 2000; no longer maintained a residence in Utah at which substitute service could be effected, see Utah R. Civ. P. 4(d)(1)(A); but see Olseth, 2007 UT 29, ¶¶ 27-29, 33-34, 36 (discussing Keith-O'Brien Co. v. Snyder, 51 Utah 227, 169 P. 954 (1917)); and never appointed an agent to receive service of process for him in Utah. Dr. Grigsby does not challenge these assertions. Accordingly, under Olseth, when Dr. Grigsby left Utah in July 2000 and did not appoint an agent within Utah, the statute of limitations was tolled, preventing the time of his absence from Utah from being calculated in the limitations period. See Utah Code Ann. § 78-12-35 (2002). Thus, even if the statute of limitations began to run in November 1999, the limitations period stopped running approximately eight months later. Accordingly, the complaint was timely filed in December 2001.

CONCLUSION

¶24 While the trial court correctly determined that the tolling statute, section 78-12-35, applies to medical malpractice claims otherwise governed by the Malpractice Act, it erred in

5. "[T]he Nonresident Motor Vehicle Act . . . authorizes substitute service of process on a nonresident motorist by serving the Division of Corporations and Commercial Code." Olseth v. Larsen, 2007 UT 29, ¶ 29, 158 P.3d 532. See Utah Code Ann. § 41-12a-505 (Supp. 2007). Accordingly, the Utah Supreme Court has held that "a nonresident motorist's absence from the state d[oes] not toll the statute of limitations [because] by statute an agent is appointed within the state to receive service of process on behalf of nonresident motorists." Olseth, 2007 UT 29, ¶ 29 (emphasis omitted).

determining that the tolling statute does not apply to Dr. Grigsby because he was amenable to service of process under Utah's long-arm statute. Under Olseth, the tolling statute suspends the running of the statute of limitations during the time a defendant is absent from the state if he has not appointed a Utah agent to receive service of process. This is true even if the defendant is subject to Utah's jurisdiction and amenable to service of process under Utah's long-arm statute. Accordingly, we reverse the trial court's summary judgment and remand for such further proceedings as are now appropriate.

Gregory K. Orme, Judge

¶25 WE CONCUR:

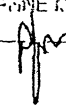
Judith M. Billings, Judge

James Z. Davis, Judge

EXHIBIT B

November 21, 2005 Order of the Eighth District Court

NOV 21 2005

JOANNE MCKEE, CLERK
BY  DEPUTY

IN THE EIGHTH JUDICIAL DISTRICT COURT
IN AND FOR DUCHESE COUNTY, STATE OF UTAH

GINA M. ARNOLD and CHARLIE S.
ARNOLD,

Plaintiffs,

vs.

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

Defendants.

ORDER

Case No. 020800066

Judge JOHN R. ANDERSON

This matter is before the Court on Defendant David Grigsby's (hereinafter "Defendant") Motion for Summary Judgment. The Court received Defendant's motion and supporting memorandum on September 22, 2005. Plaintiff's memorandum in opposition was filed with the Court on October 07, 2005. Defendant's reply memorandum in opposition was filed with the Court on October 24, 2005. The Court will grant Defendant Dr. Grigsby's motion for the following reasons:

This action was commenced in this Court on December 04, 2001, when Plaintiffs filed their complaint with the Court. The Court finds, for purposes of this motion, that Plaintiffs discovered the alleged injury no later than November 1999, which discovery started the running of the two-year statute of limitations, per Utah Code Ann. § 78-14-4. At that time, Plaintiffs certainly suspected the alleged injury may have been caused by negligence. This is evidenced by Mrs. Arnold consulting an attorney and initiating a formal investigation in her potential medical malpractice claim as early as September 1999. Although the alleged injury and suspected negligence was discovered by November 1999, the complaint was filed with the Court more than two years later, in December 2001.

It is clear to the Court that Plaintiffs were aware, or should have been aware, when they discovered the alleged injury that the Defendant had been involved in the medical treatment that Mrs. Arnold had received while at Uintah Basin Medical Center (UBMC). This is

NOV 29 2005

evidenced by: (1) the medical record identifying the Defendant as being involved; (2) their naming Dr. Grigsby as a defendant in the initial complaint; and (3) Plaintiffs deposition testimony indicating they were aware of Defendant's involvement. Of course, whether or not Plaintiffs knew of Defendant's involvement is ultimately immaterial for statute of limitations purposes. The statute of limitations is not tolled simply because the identity of a particular potential tortfeasor has not been discovered. Bank One Utah, N.A. v. West Jordan City, 2002 UT App 271, ¶10, 54 P.3d 135. Therefore, the Court finds that, as a matter of law, the statute of limitations for this action against Defendant, Dr. Grigsby, began running more than two years prior to Plaintiffs filing their complaint on December 04, 2001.

Without further argument, this finding would resolve the issue and bar Plaintiffs' action against Dr. Grigsby. However, Plaintiffs argue that the statute of limitations in this case has been tolled by Defendant moving from the State of Utah. Plaintiffs cite Utah Code Ann. § 78-12-35 (hereinafter "the tolling statute"), emphasizing the following language: "If after a cause of action accrues [a potential defendant] departs from the state, the time of his absence is not part of the time limited for the commencement of the action." The objective of this section was to prevent a defendant from depriving a plaintiff of the opportunity of suing him by absenting himself from the state during the period of limitation. Snyder v. Clune, 15 Utah 2d 254, 255, 390 P.2d 915, 916 (1964). The Utah Supreme Court has held that under the tolling statute, the statute of limitations will not be tolled when a defendant is out of state, as long as he is still amenable to service of process in the state of Utah. Lund v. Hall, 938 P.2d 285, 290 (Utah 1997). The Plaintiffs argue that once the Defendant relocated to Tennessee, he was no longer amenable to service "in the state of Utah," and as a result, the two-year statute of limitations has been tolled since the date of Defendant's departure from the state. Therefore, Plaintiffs argue that the statute of limitations has not yet run on this action.

In response, Defendant argues that, because this action was brought under Utah Code Ann. § 78-14-4 (the "Utah Health Care Malpractice Act"), the tolling statute does not apply. Utah Code Ann. § 78-14-4(2) reads in part, "The provisions of [Utah Code Ann. § 78-14-4] shall apply to all persons, regardless of minority or other legal disability under § 78-12-36 or any other provision of the law,..." In support of this argument, Defendant cites a recent federal district court case (Griffiths-Rast v. Sulzer Spine Tech, Inc., 2005 WL 223765 (D. Utah)) for the proposition that the tolling statute is inapplicable to cases involving Utah Code Ann. § 78-14-4.

The Court is not persuaded by this argument. First, the Court notes that the decision in Griffiths-Rast is not binding authority upon this Court. While Griffiths-Rast can appropriately be cited and relied upon as persuasive authority, this Court is not obligated to follow such precedent. That said, it 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 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. Therefore, the Court rejects Defendant's argument on this point.

That said, Defendant does make another, more compelling argument, which argument the Court finds very persuasive. Although Defendant relocated away from Utah while the statute of limitations was still running (approximately July 2000), Defendant argues that he, as a nonresident, was still subject to personal jurisdiction in Utah and was amenable to service of process via the Utah long-arm statute, Utah Code Ann. § 78-27-24. This is evidenced by the fact that Plaintiffs ultimately served the Defendant using this very method. The Court finds that, at all times from the date of alleged malpractice to the present, this Defendant has been amenable to service of process and potentially subject to the jurisdiction of this Court for the actions underlying the Plaintiffs' complaint. See Utah Code Ann. § 78-27-24. Therefore, Defendant argues that the tolling statute does not toll the two-year statute of limitations because the section does not apply to nonresidents like him who are subject to service of process by virtue of Utah's long-arm statute.

Defendant cites Ankers v. Rodman, 995 F. Supp. 1329 (D. Utah 1997) to support his argument that, because of the long-arm statute, the tolling statute does not apply in this case. The Ankers court, a federal district court (like the Griffiths-Rast court above), began its analysis by noting that Utah's appellate courts had not considered the specific issue of whether Section 78-12-35 applied to nonresident defendants who are subject to service of process under the long-arm statute. This remains true to date. The Ankers court held that a one-year statute of limitation for an alleged battery had not been tolled by a non-resident defendant's absence from the state of Utah because the state long-arm statute made the defendant amenable to

service of process before the running of the one-year statute of limitations.

To arrive at such a result, the Ankers court cited Snyder v. Clure, 15 Utah 2d 254, 390 P.2d 915 (1964), in which the Utah Supreme Court addressed the applicability of the tolling statute to nonresident motorists. In Snyder, the plaintiff filed suit against the defendants three days after the applicable four-year statute of limitations expired. To avoid dismissal, the plaintiff invoked the tolling statute, claiming the limitations period was tolled because the defendants, California residents, returned to California and remained there after the accident. Although the trial court ruled for the plaintiff, the Utah Supreme Court reversed, concluding the purpose of the tolling statute was "to prevent a defendant from depriving a plaintiff of the opportunity of suing him by absenting himself from the state during the period of limitation." Id. The court noted that, by virtue of the nonresident motorist act, the plaintiff could have served the nonresident defendants any time through the Secretary of State. Therefore, the defendants were never "'absent' from the state in the sense contemplated by the statute, that is, unavailable for the service of process." Id. The court further reasoned a literal interpretation of the tolling statute would permit claims against nonresidents to survive indefinitely, in conflict with the objective of a statute of limitations, although nonresidents could be still be served with process. The court, thus, dismissed the plaintiff's case as untimely.

In this case, Defendant Dr. Grigsby, a nonresident, claims his situation is analogous to that of the nonresident defendants in Snyder and Ankers. In these two cases defendants were deemed not to be "absent" from the state, as contemplated by the tolling statute, because they were subject to service of process, one under the nonresident motorist act (Snyder) and the other under the state long-arm statute (Ankers). Defendant argues he, likewise, has not been "absent" from the state for purposes of the tolling statute. Therefore, Defendant asserts, the limitations period should toll against Plaintiffs because they could have served Defendant under the long-arm statute any time within two years of the discovery of the alleged injury at issue.

In Ankers, the federal district court also cited Van Tassell v. Shaffor, 742 P.2d 111 (Utah App. 1987), where the Utah Court of Appeals examined the tolling statute as it related to plaintiffs who secured judgments against a Utah-resident defendant but waited over eight years before acting to reaffirm those judgments. Despite the

fact that the defendant was a Utah resident amenable to service under the Utah Rules of Civil Procedure, the trial court ruled in favor of the plaintiffs, concluding the limitations period was tolled while the defendant was absent from the state for personal and business purposes. The Van Tassell court determined Utah follows the minority rule that permits statutes of limitations to be tolled while a resident defendant is absent from the state even though service could be effectuated at the defendant's residence. In its survey of Utah law, the Utah Court of Appeals found Snyder inconsistent with Utah's prevailing view and more indicative of the majority rule that "a plaintiff's right of action is not tolled while defendant is outside of the state but remains subject to personal jurisdiction." Van Tassell, 742 P.2d at 112. The Ankers court noted that the Utah Court of Appeals clearly favored the majority rule, stating, "The majority view, which holds that defendant's absence does not toll the statute of limitations where defendant is amenable to personal jurisdiction, would be preferred by this Court as the Utah rule, as we find it to be more consistent with the purposes of statutes of limitations." Id. at 113. Concerning the purposes of statutes of limitations, the Van Tassell court explained:

The purpose of statutes of limitations would be undermined if the tolling statute were applied in cases where defendant is at all times amenable to service of process.... To allow tolling to operate would mean that actions against absent defendants would practically never be outlawed and that claims may be held in suspense for years even though the action could have been commenced through substituted service.

Id. at 113, n.3 (citing Byrne v. Cole, 408 P.2d 716, 717 (Alaska 1971)).

The Van Tassell court noted Snyder did not overrule prior cases nor was it distinguished, explained, or overruled by succeeding Utah cases. Offering one explanation for this inconsistency in Utah law, the appellate court recognized the differences between residents, such as the defendant in Van Tassell, and nonresidents, such as the defendants in Snyder:

Snyder can arguably be distinguished from...other...[similar] cases because it involved defendants who left the state immediately after the [injury] which was the basis of the suit. If the statute of limitations had been tolled due to defendants' absence, the action against the nonresident motorist may have been in suspense forever. In comparison, residents presumably

will eventually return to the state, even though some residents' absences may total many years.

Id. at n.2 (emphasis added). This Court notes that Ankers, and the present action involving Dr. Grigsby, is distinguishable from Van Tassell on the same grounds. Nevertheless, in view of the factual context of Snyder, the Court of Appeals "assume[d] that proceedings under the nonresident motorist act are the only Utah proceedings in which the applicable statute of limitations is not tolled by absence from the state until and unless the Utah Supreme Court states otherwise." 742 P.2d 111 at 113.

After reviewing the Snyder and Van Tassell decisions, the Ankers court undertook the task of anticipating how the Utah Supreme Court would apply the tolling statute to nonresidents subject to service of process under Utah's long-arm statute. The Ankers court was convinced that cases involving the nonresident motorist act are not the only ones in which the Utah Supreme Court would decline to toll the statute of limitations due to absence from the state. That court found that the Utah Supreme Court would not toll the statute of limitations, by applying Section 78-12-35, when a nonresident is subject to the reach of Utah's long-arm statute as well. The Ankers court believed the reasoning of the Utah Supreme Court in Snyder as well as that of the Utah Court of Appeals in Van Tassell supported such a result.

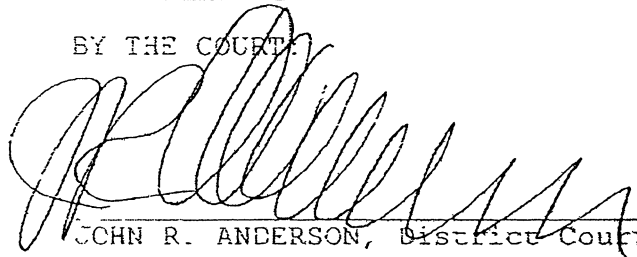
This Court agrees. In keeping with the Snyder court's counsel to interpret a statute "in the light of its background and the purpose sought to be accomplished," Snyder, 390 P.2d at 916, this Court finds that the purpose of the tolling statute is "to prevent a defendant from depriving a plaintiff of the opportunity of suing him by absenting himself from the state during the period of limitation." Snyder, 390 P.2d at 916, Van Tassell, 742 P.2d at 113. Here, because of the effect of the long-arm statute, Defendant Dr. Grigsby's absence from the state did not deprive Plaintiffs of such an opportunity. Moreover, this Court is concerned that applying the tolling statute to nonresident defendants who are subject to service of process conflicts with the purposes behind a statute of limitations, as suits against such defendants could linger indefinitely. See Snyder, 390 P.2d at 916; Van Tassell, 742 P.2d at 113, n.2 and n.3. The instant case is no exception. So long as Defendant remained absent from Utah, Plaintiffs' malpractice claim could remain alive for years, regardless of the fact that Defendant is, and has been, amenable to service under the long-arm statute. Also, as noted by the Ankers court, the Utah Court of Appeals' clear expression in Van Tassell of a preference for a rule that a defendant's absence from Utah does not toll the

applicable statute of limitations when the defendant is subject to personal jurisdiction in Utah leads this Court to believe that the statute of limitations should not be tolled under the facts of this case. This Court notes that because Plaintiffs could have filed suit against Defendant and served process under the long-arm statute within the two-year statute of limitations, declining to apply the tolling statute is not harsh or unjust. Because the court declines to apply Section 78-12-35 to toll the limitations period for Plaintiffs' medical malpractice claim due to Defendant's absence from Utah, the Plaintiffs' claim against Dr. Grigsby is time-barred on its face.

THEREFORE IT IS HEREBY ORDERED that Defendant David Grigsby's Motion for Summary Judgment is GRANTED.

Dated this 14 day of Nov., 2005.

BY THE COURT:


JOHN R. ANDERSON, District Court Judge

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 020800066 by the method and on the date specified.

	METHOD	NAME
Mail		Roger P Christensen
		Joseph W. Stali
		50 S Main St Ste 1500
		Salt Lake City UT 84144
Mail		Stephen W Owens
		10 W 100 S Ste 800
		Salt Lake City UT 84101
Mail		PHILIP R FISHLER
		ATTORNEY DEF
		3 TRIAD CENTER STE 500
		SALT LAKE CITY, UT 84180
Mail		GEOFFREY C HASLAM
		ATTORNEY PLA
		50 S MAIN ST STE 1500
		SALT LAKE CITY UT 84144
Mail		LARRY R WHITE
		ATTORNEY DEF
		50 S MAIN ST STE 1400
		SALT LAKE CITY UT 84144

Dated this 28th day of Nov, 2005.

Pt Mullins
Deputy Court Clerk

EXHIBIT C

December 20, 2005 Order of the Eighth District Court

FILED
DISTRICT COURT
DUCHESNE COUNTY, UTAH

DEC 20 2005

JOANNE MCKEE, CLERK
BY  DEPUTY

IN THE EIGHTH JUDICIAL DISTRICT COURT
IN AND FOR DUCHESNE COUNTY, STATE OF UTAH

GINA M. ARNOLD and CHARLIE S.
ARNOLD,

Plaintiffs,

vs.

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

Defendants.

ORDER

Case No. 020800066

Judge JOHN R. ANDERSON

This matter is before the Court on Defendant David Grigsby's Motion for Summary Judgment. The Court received Defendant's motion and supporting memorandum on September 22, 2005. Plaintiff's memorandum in opposition was filed with the Court on October 07, 2005. Defendant's reply memorandum in opposition was filed with the Court on October 24, 2005. The Court will grant Defendant Dr. Grigsby's motion for the following reasons:

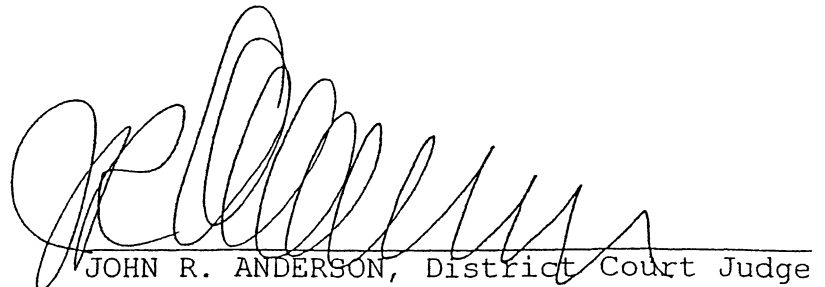
This action was commenced in this Court on December 04, 2001, when Plaintiffs filed their complaint with the Court. The Court finds, for purposes of this motion, that Plaintiffs discovered the alleged injury no later than November 1999, which discovery started the running of the two-year statute of limitations, per Utah Code Ann. § 78-14-4. The complaint was filed with the Court more than two years after the date of discovery. At that time, Plaintiffs certainly suspected the alleged injury may have been caused by negligence. This is evidenced by Mrs. Arnold consulting an attorney and initiating a formal investigation in her potential medical malpractice claim as early as September 1999. It is clear to the Court that Plaintiffs were aware, or should have been aware, when they discovered the alleged injury that Dr. Grigsby had been involved in the medical care and treatment that Mrs. Arnold had received while at Uintah Basin Medical Center (UBMC). This is evidenced by: (1) the medical record identifying Dr. Grigsby as being involved; (2) their naming Dr. Grigsby in the initial complaint, which complaint was filed with this

Court on December 04, 2001; and (3) Plaintiffs deposition testimony indicating they were aware of Dr. Grigsby's involvement. Regardless, the statute of limitations is not tolled simply because the identity of a particular potential tortfeasor has not been discovered. Bank One Utah, N.A. v. West Jordan City, 2002 UT App 271, ¶10, 54 P.3d 135. Therefore, the Court finds that, as a matter of law, the statute of limitations for this action against Dr. Grigsby began running more than two years prior to Plaintiffs filing their complaint on December 04, 2001.

Plaintiffs argue that the statute of limitations in this case has been tolled by Dr. Grigsby moving from the State of Utah. Plaintiffs cite Utah Code Ann. § 78-12-35, emphasizing the following language: "If after a cause of action accrues [a potential defendant] departs from the state, the time of his absence is not part of the time limited for the commencement of the action." The objective of this section was to prevent a defendant from depriving a plaintiff of the opportunity of suing him by absenting himself from the state during the period of limitation. Snyder v. Clune, 15 Utah 2d 254, 255, 390 P.2d 915, 916 (1964). The Utah Supreme Court has held that under Utah Code Ann. § 78-12-35 the statute of limitations will not be tolled when a defendant is out of state, as long as he is still amenable to service of process in the state of Utah. Lund v. Hall, 938 P.2d 285, 290 (Utah 1997). However, although Dr. Grigsby relocated away from Utah while the statute of limitations was still running (approximately July 2000), he was still subject to personal jurisdiction in Utah and was amenable to service of process via the Utah long-arm statute, Utah Code Ann. § 78-27-24.

Dated this 19 day of Dec., 2005.

BY THE COURT:



JOHN R. ANDERSON, District Court Judge

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 020800066 by the method and on the date specified.

METHOD	NAME
Mail	ROGER P CHRISTENSEN ATTORNEY PLA 50 S MAIN ST STE 1500 SALT LAKE CITY, UT 84144
Mail	PHILIP R FISHLER ATTORNEY DEF 3 TRIAD CENTER STE 500 SALT LAKE CITY UT 84180
Mail	GEOFFREY C HASLAM ATTORNEY PLA 50 S MAIN ST STE 1500 SALT LAKE CITY UT 84144
Mail	STEPHEN W OWENS ATTORNEY DEF CRANDALL BLDG STE 500 10 W 100 S SALT LAKE CITY UT 84101-1566
Mail	LARRY R WHITE ATTORNEY DEF 50 S MAIN ST STE 1400 SALT LAKE CITY UT 84144

Dated this 20 day of Dec., 2005.

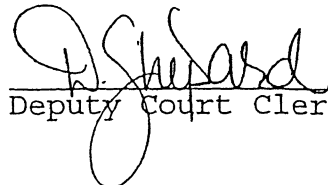

Deputy Court Clerk

EXHIBIT D

Laws of the State of Utah – 1976 & 1979

LAWS
of the
STATE OF UTAH, 1976

Passed at the
BUDGET SESSION
of the
FORTY-FIRST LEGISLATURE

Convened at the Capitol in the City of Salt Lake
January 12, 1976
and Adjourned Sine Die on
January 31, 1976

Published by Authority

(20) "Certified social worker" means a person licensed to practice as a certified social worker as provided in section 58-35-5.

(21) "Social service worker" means a person licensed to practice as a social service worker as provided in section 58-35-5.

(22) "Social service aide" means a person licensed to practice as a social service aide as provided in section 58-39-8.

(23) "Marriage and family counselor" means a person licensed to practice as a marriage counselor or family counselor as provided in section 58-39-6.

(24) "Practitioner or obstetrics" means a person licensed to practice obstetrics in this state as provided in subsection 58-12-3(5).

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

(26) "Commissioner" means the commissioner of insurance as provided in section 31-2-2.

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

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

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

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

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

Section 4. Statute of limitations.

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

(a) In an action where the allegation against the health care provider is that a foreign object has been wrongfully left within a patient's body,

the claim shall be barred unless commenced within one year after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered, the existence of the foreign object wrongfully left in the patient's body, whichever first occurs; and

(b) In an action where it is alleged that a patient has been prevented from discovering misconduct on the part of a health care provider because that health care provider has affirmatively acted to fraudulently conceal the alleged misconduct, the claim shall be barred unless commenced within one year after the plaintiff or patient discovers, or through the use of reasonable diligence, should have discovered the fraudulent concealment, whichever first occurs.

(2) The provisions of this section shall apply to all persons regardless of minority or other legal disability and shall apply retroactively to all persons, partnerships, associations and corporations and to all health care providers and to all malpractice actions against health care providers based upon alleged personal injuries which occurred prior to the effective date of this act; provided, however, that any action which under former law could have been commenced after the effective date of this act may be commenced only within the unelapsed portion of time allowed under former law; but any action which under former law could have been commenced more than four years after the effective date of this act may be commenced only within four years after the effective date of this act.

Section 5. Requirements for damage recovery.

(1) When a person submits to health care rendered by a health care provider, it shall be presumed that what the health care provider did was either expressly or impliedly authorized to be done. For a patient to recover damages from a health care provider in an action based upon the provider's failure to obtain informed consent, the patient must prove the following:

(a) That a provider-patient relationship existed between the patient and health care provider; and

(b) The health care provider rendered health care to the patient; and

(c) The patient suffered personal injuries arising out of the health care rendered; and

(d) The health care rendered carried with it a substantial and significant risk of causing the patient serious harm; and

(e) The patient was not informed of the substantial and significant risk; and

(f) A reasonable, prudent person in the patient's position would not have consented to the health care rendered after having been fully informed as to all facts relevant to the decision to give consent. In deter-

LAWS
of the
STATE OF UTAH, 1979

Passed at the
REGULAR SESSION
of the
FORTY-THIRD LEGISLATURE

Convened at the Capitol in the City of Salt Lake
January 8, 1979
and Adjourned Sine Die on
March 8, 1979

Published by Authority

(1) All class B and class C misdemeanors punishable by a fine less than \$300 or by imprisonment in the county jail or municipal prison not exceeding six months, or by both such fine and imprisonment; and

(2) All infractions and the punishments prescribed for them.

Section 6. Repealer.

Section 77-12-6, Utah Code Annotated 1953, is repealed.

Approved February 28, 1979.

CHAPTER 128

H. B. No. 164

(Passed March 8, 1979. In effect May 8, 1979)

MALPRACTICE STATUTE OF LIMITATIONS

AN ACT AMENDING SECTIONS 78-14-4 AND 78-14-8, UTAH CODE ANNOTATED 1953, AS ENACTED BY CHAPTER 23, LAWS OF UTAH 1976; RELATING TO HEALTH CARE MALPRACTICE; PROVIDING THAT THE LEGAL DISABILITY OF AN INDIVIDUAL SHALL NOT ACT TO EXTEND THE STATUTE OF LIMITATIONS SET FORTH IN THAT SECTION; PROVIDING THAT NOTICES OF INTENT TO BRING MALPRACTICE ACTIONS BE SIGNED BY THE PLAINTIFF OR HIS ATTORNEY; PROVIDING THAT THE NOTICE MAY BE SERVED BY CERTIFIED MAIL; AND EXTENDING THE TIME FOR COMMENCEMENT OF ACTIONS WHERE THE NOTICE IS SERVED LESS THAN 90 DAYS PRIOR TO THE EXPIRATION OF THE STATUTE OF LIMITATIONS.

Be it enacted by the Legislature of the State of Utah:

Section 1. Section amended.

Section 78-14-4, Utah Code Annotated 1953, as enacted by Chapter 23, Laws of Utah 1976, is amended to read:

78-14-4. Statute of limitations—Exceptions—Application.

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

(a) In an action where the allegation against the health care provider is that a foreign object has been wrongfully left within a patient's body, the claim shall be barred unless commenced within one year after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered, the existence of the foreign object wrongfully left in the patient's body, whichever first occurs; and

(b) In an action where it is alleged that a patient has been prevented from discovering misconduct on the part of a health care provider because that health care provider has affirmatively acted to fraudulently conceal the

alleged misconduct, the claim shall be barred unless commenced within one year after the plaintiff or patient discovers, or through the use of reasonable diligence, should have discovered the fraudulent concealment, whichever first occurs.

(2) 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, and shall apply retroactively to all persons, partnerships, associations and corporations and to all health care providers and to all malpractice actions against health care providers based upon alleged personal injuries which occurred prior to the effective date of this act; provided, however, that any action which under former law could have been commenced after the effective date of this act may be commenced only within the unelapsed portion of time allowed under former law; but any action which under former law could have been commenced more than four years after the effective date of this act may be commenced only within four years after the effective date of this act.

Section 2. Section amended.

Section 78-14-8, Utah Code Annotated 1953, as enacted by Chapter 23, Laws of Utah 1976, is amended to read:

78-14-8. Notice of intent to initiate action—Application of act.

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

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

Approved March 20, 1979.
