

2016

**Erik Jensen, Appellee, v. Intermountain Healthcare, Inc., Ihc Health Services, Inc. Dba Lds Hospital, and Ihc Health Services, Inc. Dba Intermountain Medical Group, Appellants.**

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_sc2](https://digitalcommons.law.byu.edu/byu_sc2)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah.

---

**Recommended Citation**

Brief of Appellant, *Jensen v Intermountain Healthcare*, No. 20160362 (Utah Supreme Court, 2016).  
[https://digitalcommons.law.byu.edu/byu\\_sc2/3284](https://digitalcommons.law.byu.edu/byu_sc2/3284)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (2000– ) by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

IN THE  
SUPREME COURT OF THE STATE OF UTAH

---

ERIK JENSEN,  
*Appellee,*

v.

INTERMOUNTAIN HEALTHCARE, INC.,  
IHC HEALTH SERVICES, INC. DBA LDS HOSPITAL, AND  
IHC HEALTH SERVICES, INC. DBA INTERMOUNTAIN MEDICAL GROUP,  
*Appellants.*

---

BRIEF OF APPELLANTS

---

On appeal from the interlocutory order of the  
Third Judicial District Court, Salt Lake County,  
Honorable Barry G. Lawrence, District Court No. 150900735

---

Charles H. Thronson  
PARSONS BEHLE & LATIMER  
201 South Main Street, Suite 1800  
Salt Lake City, Utah 84111

*Attorneys for Appellee Erik Jensen*

Troy L. Booher (9419)  
Beth E. Kennedy (13771)  
Alexandra Mareschal (16097)  
ZIMMERMAN JONES BOOHER  
341 South Main Street, Fourth Floor  
Salt Lake City, Utah 84111  
tbooher@zjbappeals.com  
bkennedy@zjbappeals.com  
amareschal@zjbappeals.com  
(801) 924-0200

*Attorneys for Appellants Intermountain  
Healthcare, Inc., IHC Health Services, Inc.  
dba LDS Hospital, and IHC Health  
Services, Inc. dba Intermountain Medical  
Group*

---

Additional Counsel on Following Page

## Additional Counsel

Brinton R. Burbidge (0491)  
Paul D. Van Komen (7332)  
Nathan W. Burbidge (11520)  
BURBIDGE & WHITE, LLC  
102 South 200 East, Suite 600  
Salt Lake City, Utah 84111  
bburbidge@burbidgewhite.com  
pvankomen@burbidgewhite.com  
nburbidge@burbidgewhite.com  
(801) 359-7000

*Attorneys for Appellants Intermountain  
Healthcare, Inc. and IHC Health Services,  
Inc. dba LDS Hospital*

Robert G. Wright (5363)  
Brandon B. Hobbs (8206)  
Courtney Kochevar (11157)  
Sean C. Miller (12169)  
RICHARDS BRANDT MILLER NELSON  
PO Box 2465  
Salt Lake City, Utah 84110-2465  
robert-wright@rbmn.com  
brandon-hobbs@rbmn.com  
cortney-kochevar@rbmn.com  
sean-miller@rbmn.com  
(801) 326-3656

*Attorneys for Appellant IHC Health  
Services, Inc. dba Intermountain Medical  
Group*

## Table of Contents

Jurisdictional Statement.....	1
Introduction.....	1
Statement of the Issues.....	2
Determinative Provisions.....	3
Statement of the Case.....	4
1.    Nature of the Case.....	4
2.    Statement of Facts.....	4
Summary of the Argument .....	8
Argument.....	10
1.    The Four-Year Period in Section 404 is a Statute of Repose.....	11
2.    The District Court Erred When it Ruled that Section 416 Tolls the Four-Year Statute of Repose.....	15
3.    Neither the Absurd Consequences Canon Nor the Absurdity Doctrine Warrant A Reading Contrary to the Plain Unambiguous Statutory Language.....	26
3.1    The Absurd Canon of Construction Does Not Apply Because “Statute of Limitations” is Unambiguous .....	27
3.2    The Absurdity Doctrine Does Not Apply Because the Legislature’s Decision Not to Toll the Repose Period Is Not Overwhelmingly Absurd .....	28
3.2.1    It is Not Overwhelmingly Absurd that the Legislature Limited Liability to a Specific Period .....	31
3.2.2    It is Not Overwhelmingly Absurd that Claimants May File a Premature Lawsuit to Avoid the Operation of a Statute of Limitation or Repose .....	33
Conclusion .....	36



## **Addenda**

- A 2010 version of the Malpractice Act
- B 1977 version of the Malpractice Act
- C 1985 version of the Malpractice Act
- D Order Denying Defendants' Motion for Summary Judgment Re Statute of Repose (R.412-25)

## Table of Authorities

### Cases

<i>Anderson Dev. Co. v. Tobias</i> , 2005 UT 36, 116 P.3d 323 .....	19
<i>Arnold v. Grigsby</i> , 2012 UT 61, 289 P.3d 449 .....	8, 14, 23
<i>Beaver Cty. v. Utah State Tax Comm’n</i> , 2006 UT 6, 128 P.3d 1187 .....	35
<i>Berry ex rel. Berry v. Beech Aircraft Corp.</i> , 717 P.2d 670 (Utah 1985) .....	11, 14, 28
<i>CTS Corp. v. Waldburger</i> , 134 S.Ct. 2175 (2014) .....	12, 16
<i>Forbes v. St. Mark’s Hosp.</i> , 754 P.2d 933 (Utah 1988) .....	17, 22, 23, 24
<i>Fort Pierce Indus. Park Phases II, III &amp; IV Owners Ass’n v. Shakespeare</i> , 2016 UT 28, 379 P.3d 1218 .....	2
<i>In re Adoption of Baby B.</i> , 2012 UT 35, 308 P.3d 382 .....	26
<i>In re Estate of Strand</i> , 2015 UT App 259, 362 P.3d 739 .....	11, 12, 20, 25
<i>In re Marriage of Kunz</i> , 2006 UT App 151, 136 P.3d 1278 .....	20
<i>Lee v. Gaufin</i> , 867 P.2d 572 (Utah 1993) .....	passim
<i>Marion Energy, Inc. v. KFJ Ranch P’ship</i> , 2011 UT 50, 267 P.3d 863 .....	16, 17
<i>McBride-Williams v. Huard</i> , 2004 UT 21, 94 P.3d 175 .....	33, 34

<i>McDougal v. Weed</i> , 945 P.2d 175 (Utah Ct. App. 1997) .....	22
<i>Penunuri v. Sundance Partners, Ltd.</i> , 2013 UT 22, 301 P.3d 984 .....	14
<i>Platts v. Parents Helping Parents</i> , 947 P.2d 658 (Utah 1997) .....	22
<i>Raithaus v. Saab-Scandia of Am., Inc.</i> , 784 P.2d 1158 (Utah 1989) .....	11, 16, 27, 28
<i>Russell Packard Dev., Inc. v. Carson</i> , 2005 UT 14, 108 P.3d 741 .....	12
<i>Sorensen v. Larsen</i> , 740 P.2d 1336 (Utah 1987) .....	8, 14, 23
<i>State ex rel. Z.C.</i> , 2007 UT 54, 165 P.3d 1206 .....	29
<i>State v. Watkins</i> , 2013 UT 28, 309 P.3d 209 .....	27
<i>Summit Operating, LLC v. Utah State Tax Comm’n</i> , 2012 UT 91, 293 P.3d 369 .....	16
<i>Utleay v. Mill Man Steel, Inc.</i> , 2015 UT 75, 57 P.3d .....	passim
<i>Willis v. DeWitt</i> , 2015 UT App 123, , 350 P.3d 250 .....	passim

## Statutes

Utah Code § 30-1-4.5 .....	20
Utah Code § 75-3-107 .....	20, 25
Utah Code § 78-12-25.5 (1991).....	18
Utah Code § 78-12-33.5 (1988).....	17
Utah Code § 78-12-48 (1988).....	17

Utah Code § 78-14-4 to -16.....	29, 30
Utah Code § 78-14-12 (1985).....	17, 18, 29
Utah Code § 78-14-13 (1985).....	30
Utah Code § 78B-2-116.....	17
Utah Code § 78B-2-117.....	17
Utah Code § 78B-2-205.....	20
Utah Code § 78B-2-225.....	18, 19, 25
Utah Code § 78B-3-402.....	32
Utah Code § 78B-3-404.....	passim
Utah Code § 78B-3-405.....	21
Utah Code § 78B-3-412.....	6, 17, 24, 30
Utah Code § 78B-3-416.....	passim
Utah Code § 78B-3-418.....	30, 35
Utah Code § 78B-3-423.....	30, 33, 35
<u>Other</u>	
Black’s Law Dictionary (10th ed. 2014) .....	12, 27, 28

## **Jurisdictional Statement**

This court has jurisdiction under section 78A-3-102(3)(j) of the Utah Code.

## **Introduction**

Unlike statutes of limitation, statutes of repose typically are not tolled. At a minimum, there is nothing absurd about a legislature's choice to toll a statute of limitation but not toll a statute of repose. That observation is dispositive here.

Section 78B-3-404 of the Utah Health Care Malpractice Act contains a two-year statute of limitation that begins when a plaintiff "discovers" his injury and a four-year statute of repose that begins on "the date of the alleged act, omission, neglect, or occurrence." A different section, section 78B-3-416(3)(a), "tolls the applicable statute of limitations," but does not mention the statute of repose. The district court nonetheless interpreted section 416 to toll the statute of repose because enforcing the plain language would be unfair.

Under the absurdity doctrine, courts can ignore plain language only if its enforcement produces results that are "overwhelmingly absurd." But there is nothing overwhelmingly absurd about a legislature's choice to toll a statute of limitation but not a statute of repose. And if section 416 did not toll the statute of repose here, then Mr. Jensen's claim is untimely.

The district court erred in tolling the statute of repose, contrary to the plain language of section 416. This court should reverse and remand with instructions for the district court to dismiss Mr. Jensen's claim as untimely.

## Statement of the Issues

**Issue 1:** Whether the district court erred in interpreting the four-year time period for commencing a malpractice action against a health care provider in section 78B-3-404(1) of the Utah Code to be a statute of limitation rather than a statute of repose, where the four-year period begins at the time of an “alleged act, omission, neglect, or occurrence” instead of at the time the plaintiff discovers a legal injury.

**Issue 2:** Whether the district court erred in interpreting section 78B-3-416(3) of the Utah Code, which “tolls the applicable statute of limitations,” to toll the four-year statute of repose, in addition to various statutes of limitation, set forth in section 78B-3-404.

**Standard of Review:** This court reviews a district court’s legal conclusions and denial of summary judgment for correctness, viewing the facts in the light most favorable to the nonmoving party. *Fort Pierce Indus. Park Phases II, III & IV Owners Ass’n v. Shakespeare*, 2016 UT 28, ¶ 17, 379 P.3d 1218.

**Preservation:** Intermountain preserved these issues in its motion for summary judgment at R.186-92.

## **Determinative Provisions**

The following statutes are determinative of the appeal and are set forth at Addendum A:

Utah Code § 78B-3-404 Statute of Limitations – Exceptions – Application

Utah Code § 78B-3-416 Division to provide panel – Exemption –  
Procedures – Statute of limitations tolled –  
Composition of panel – Expenses – Division  
authorized to set license fees

## Statement of the Case

### 1. Nature of the Case

This is a medical malpractice action arising out of medical care that Erik Jensen received from Intermountain Healthcare, Inc. and IHC Health Services dba LDS Hospital (collectively, Intermountain). (R.223,412.) Mr. Jensen filed his action beyond the four-year statute of repose set forth in section 78B-3-404(1) of the Utah Health Care Malpractice Act. (R.412-13.) Intermountain filed a motion for summary judgment, arguing that Mr. Jensen's action was time barred. (R.186.) Mr. Jensen opposed the motion, arguing that his action was timely because the statute of repose was "tolled" by section 78B-3-416, which "tolls the applicable statute of limitations." (R.226-35.) The district court agreed with Mr. Jensen and denied the motion for summary judgment. (R.424.)

### 2. Statement of Facts

Erik Jensen was admitted to LDS Hospital with abdominal pain and cramping. (R.224.) On April 1, 2010, while at the hospital, he went into cardiac arrest and suffered severe and permanent injuries.<sup>1</sup> (*Id.*) He alleges that his injuries were caused by Intermountain's negligence. (R.3-4.) He filed his lawsuit on February 2, 2015, more than four years after the alleged negligence. (R.8.)

Intermountain moved for summary judgment on the ground that Mr. Jensen's claims were barred by the four-year statute of repose in the Utah

---

<sup>1</sup> Because the act occurred in 2010, Intermountain cites to the 2010 version of the Utah Code.



Health Care Malpractice Act. (R.186.) The Act provides that a malpractice action must be filed within two years after discovery of the injury, “but not to exceed four years after the date of the alleged act.” Utah Code § 78B-3-404(1).

“Notwithstanding” those provisions, the Act provides a one-year statute of limitation for actions alleging fraudulent concealment and for actions alleging that an object has been wrongfully left within a patient’s body. *Id.* § 78B-3-404(2). Neither one-year statute of limitation applies here. Thus, the Act provides three statutes of limitation and one statute of repose. *Id.* § 78B-3-404.

Mr. Jensen opposed Intermountain’s motion for summary judgment, arguing that the statute of repose had been “tolled.” (R.226-35.) Mr. Jensen relied on section 416 of the Act, which provides that filing a request for prelitigation panel review “tolls the applicable statute of limitations” until 60 days after the division issues a certificate of compliance. Utah Code § 78B-3-416(3)(a)(i). Mr. Jensen argued that the “statute of limitations” language should be read to include the statute of repose, and he concluded that he had until February 24, 2015, to file his complaint. (R.226-35.)

The following dates are relevant to Mr. Jensen’s argument:<sup>2</sup>

Apr. 1, 2010	Alleged medical negligence (R.3-4)
--------------	------------------------------------

---

<sup>2</sup> The date of the certificate of compliance listed in the court’s order is incorrect, but the error does not affect Intermountain’s argument. (R.413,226.)

Mar. 21, 2014	Mr. Jensen serves notice of intent to commence action <sup>3</sup> (R.225)
Mar. 21, 2014	Mr. Jensen files request for prelitigation panel (R.225)
Dec. 26, 2014	Division issues certificate of compliance (R.226)
Feb. 2, 2015	Mr. Jensen files complaint (R.1,8)

The district court denied the motion for summary judgment. (R.424.) The court questioned, but ultimately did not decide, whether the four-year period was a statute of repose. (R.492-93.) The court instead concluded that section 416 “tolls both the two- and four-year limitations” periods even though the statute states that it tolls only “the applicable statute of limitations.” (R.424.) The court ruled that the legislature did not intend to treat the two time periods differently. (R.414.)

The court articulated four grounds for its ruling. First, the court noted that the title of the section containing the statute of repose is titled “Statute of limitations – Exceptions – Application.” (R.418.) Second, the court noted that section 416 “refers to the ‘*applicable* statute of limitations,’” which suggests that the statute contains more than one statute of limitation. (R.418.) Third, the court noted that the legislature did not use the phrase “statute of repose” in the Act, and that appellate courts have been “similarly imprecise” when discussing the

---

<sup>3</sup> Because the notice was served within 90 days of the expiration of the statute of repose, Mr. Jensen’s time to file a complaint was “extended to 120 days from the date of service of notice,” which was July 19, 2014. Utah Code § 78B-3-412(4).

difference between the two. (R.419.) And fourth, the court noted that, unlike other statutes of repose, the four-year period in the Act is subject to other tolling exceptions, such as the provision in section 412. (R.419.)

The district court seemed to recognize that its ruling contradicted the plain language of section 416, and it articulated three reasons for its refusal to enforce the plain language interpretation. First, the court noted that the plain language reading “does nothing to advance the policy concerns recognized by the legislature when it passed the Act.” (R.422.) Second, the court ruled that applying the plain language would force claimants to file premature lawsuits to avoid the effect of the statute of repose. (R.423.) And third, the court ruled that it would be “unfair” to require claimants to comply with the procedures outlined in the Act but not to toll the time the division takes to complete its process. (R.422.) The district court did not analyze the absurdity doctrine, which is the doctrine that must apply before a court may refuse to enforce the plain language of a statute.

Intermountain filed a petition for permission to appeal the district court’s interlocutory order, and this court granted the petition. (R.448.) This court also decided to retain jurisdiction to address the issue of how to interpret the tolling language in section 78B-3-416.

## Summary of the Argument

It is undisputed that Mr. Jensen filed his claim against Intermountain beyond the four-year limitation period in section 78B-3-404(1). The only issue is whether section 78B-3-416(3) operated to toll the statute of repose. It did not.

Section 78B-3-404(1) of the Utah Health Care Malpractice Act contains three different statutes of limitation and a four-year statute of repose. The statute of repose precludes any action not filed within “four years after the date of the alleged act, omission, neglect, or occurrence.” Utah Code § 78B-3-404(1). This is a classic statute of repose, something this court has recognized repeatedly. *Arnold v. Grigsby*, 2012 UT 61, ¶ 13, 289 P.3d 449 ( “[t]he Utah Health Care Malpractice Act provides . . . a four-year statute of repose for the filing of medical malpractice actions”); *Lee v. Gaufin*, 867 P.2d 572, 576 (Utah 1993) (referencing “[t]he four-year repose period” in the Act); *Sorensen v. Larsen*, 740 P.2d 1336, 1336 (Utah 1987) (“plaintiff’s claim was barred by the four-year statute of repose” in the Act).

Because the four-year period is a statute of repose, it is not tolled under section 78B-3-416(3). The plain language of section 416 “tolls the applicable statute of limitations” during the review of the prelitigation panel, but does not toll the statute of repose. Utah Code § 78B-3-416(3)(a). Despite the plain language of section 416 referencing only statutes of limitation, the district court interpreted section 416 to toll the statute of repose because enforcing the plain language would be unfair and could produce harsh results. The district court appears to

have refused to enforce plain language under the absurdity doctrine, without providing sufficient grounds for doing so.

Under the absurdity doctrine, courts may refuse to enforce the plain language of a statute – and adopt alternative language – only when the operation of the plain language is “so overwhelmingly absurd that no rational legislator could have intended the statute to operate in such a manner.” *Utley v. Mill Man Steel, Inc.*, 2015 UT 75, ¶ 48, 57 P.3d 992 (Durrant, J., concurring and dissenting). Applying the absurdity doctrine is a “momentous” and “drastic step” because it overrides the plain language of the statute and applies an interpretation that is “contrary to its plain meaning.” *Id.* ¶¶ 47-48 (internal quotation marks omitted). The court applies the doctrine “with caution,” and the court will not override statutory language “even if it leads to results [this court] regard[s] as impractical or ill-advised.” *Id.* ¶ 48. Instead, for this court to apply the absurdity doctrine to override the statutory language, “the operation of the plain language must be more than improvident, it must be so overwhelmingly absurd that no rational legislator could have intended the statute to operate in such a manner.” *Id.*

Here, it is not overwhelmingly absurd to toll a statute of limitation but not a statute of repose. Statutes of repose by their nature can be unfair from the perspective of plaintiffs because they rarely are tolled. The operation of statutes of repose, even when unfair, is not absurd, let alone overwhelmingly absurd. This court should reverse because the absurdity doctrine does not apply.

## **Argument**

The district court erred in its interpretation of sections 78B-3-404 and 78B-3-416 of the Utah Health Care Malpractice Act. The court refused to enforce the plain language of both sections and instead ruled that section 416 tolls the well-established four-year statute of repose in section 404, despite the plain language in section 416 that tolls only the “applicable statute of limitations.” Utah Code § 78B-3-416(3)(a). The district court should have enforced the plain language and dismissed Mr. Jensen’s claim as untimely under the four-year statute of repose.

This brief proceeds in three stages. In the first stage, Intermountain demonstrates that the four-year period in section 404 is a statute of repose, not a statute of limitation, because it begins with the occurrence of an alleged wrongful act, not with the discovery of a claim or a legal injury. In the second stage, Intermountain demonstrates that the plain language of section 416 tolls only the “applicable statute of limitations,” not the statute of repose. In the third stage, Intermountain demonstrates that the absurdity doctrine does not apply, and, therefore, the district court erred when it ignored the plain language of section 416 and instead ruled that section 416 tolled the statute of repose.

## 1. The Four-Year Period in Section 404 is a Statute of Repose

Section 404 contains a two-year statute of limitation, two different one-year statutes of limitation, and a four-year statute of repose. Before examining the language in section 404, it is worth contrasting, in general, statutes of limitation with statutes of repose.

Both statutes of limitation and statutes of repose operate to bar a plaintiff's suit, so "to some extent they serve the same ends." *Berry ex rel. Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 672 (Utah 1985). When precision is not required, "courts, legislatures, and commentators have been sometimes inconsistent in their use of the terms." *Raithaus v. Saab-Scandia of Am., Inc.*, 784 P.2d 1158, 1161 (Utah 1989). But as this court has noted, "[b]ecause the goals, functions, and characteristics of each type of statute differ, statutes of repose and statutes of limitations are not interchangeable." *Id.*

Whether a provision is a statute of limitation or a statute of repose is determined by how it operates, not by its label. Courts routinely recognize that a provision is a statute of repose even when the statute does not label it as such. *E.g., In re Estate of Strand*, 2015 UT App 259, ¶ 8, 362 P.3d 739 (holding that the three-year limitation in section 75-3-107 is a statute of repose); *Willis v. DeWitt*, 2015 UT App 123, ¶¶ 8-9, 350 P.3d 250 (holding that the six-year period in section 78B-2-225 is a statute of repose).

Statutes of limitation start at the discovery of the injury while statutes of repose start at the last act that caused the injury. Put differently, statutes of

limitation begin “based on the date when the claim accrued (as when the injury occurred or was discovered).” *Statute of Limitations*, Black’s Law Dictionary (10th ed. 2014); *CTS Corp. v. Waldburger*, 134 S.Ct. 2175, 2182 (2014) (same). In the case of medical malpractice, a claimant’s action accrues when he discovers, or through reasonable diligence should have discovered, his injury.

Statutes of repose, in contrast, begin on “the date of the last culpable act or omission of the defendant.” *CTS*, 134 S.Ct. at 2182; *Statute of Repose*, Black’s Law Dictionary (10th ed. 2014) (begins on the date the defendant last acted). For medical malpractice, this is the date of the alleged malpractice, “irrespective of whether the malpractice is known or knowable.” *Lee v. Gaufin*, 867 P.2d 572, 576 (Utah 1993).

Statutes of limitation also differ from statutes of repose because they are subject to equitable tolling, which “pauses the running of, or ‘tolls,’ a statute of limitations when the litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action.” *CTS*, 134 S.Ct. at 2183.; *see also Russell Packard Dev., Inc. v. Carson*, 2005 UT 14, ¶ 25, 108 P.3d 741. In contrast, statutes of repose are not subject to equitable tolling. *Willis*, 2015 UT App 123, ¶ 13 (six-year builder’s statute of repose is not subject to equitable tolling); *Strand*, 2015 UT App 259, ¶ 4 (probate statute of repose is not subject to equitable tolling). Instead, statutes of repose are tolled by statute. *Willis*, 2015 UT App 123, ¶ 8 (“Once the statutory period set by a statute of



repose expires, ‘any cause of action is barred regardless of usual reasons for tolling the statute.”) (citing *Perry v. Pioneer Wholesale Supply Co.*, 681 P.2d 214, 219 (Utah 1984)).

The language of section 404 is unambiguous and contains a two-year statute of limitation, two one-year statutes of limitation, and a four-year statute of repose. This is true even though, as the district court noted, section 404 does not use the label “statute of repose.” (R.419.) Section 404 reads:

(1) A malpractice action against a health care provider shall be 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) Notwithstanding Subsection (1):

(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; or*

(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.*

Utah Code § 78B-3-404(1) (emphases added).

The plain language of the statutory text is the best evidence of the legislature's intent. *Penunuri v. Sundance Partners, Ltd.*, 2013 UT 22, ¶ 15, 301 P.3d 984. Here, the plain language reveals that the two-year and one-year periods are statutes of limitation because they run from the time the plaintiff “discovers” or “should have discovered” the injury giving rise to the cause of action. Utah Code 78B-3-404(1), (2); *Lee*, 867 P.2d at 574. The plain language also reveals that the four-year period is a statute of repose because it “bars all actions after a specified period of time has run” from the occurrence of an event—i.e., the act alleged to constitute malpractice. *Berry*, 717 P.2d at 672; *Willis*, 2015 UT App 123, ¶¶ 8-9.

Unsurprisingly, this court has repeatedly recognized that the four-year period in section 404 is a statute of repose. For example, in *Lee v. Gaufin*, this court noted that “[t]he four-year repose period in § 78-14-4(1) [now codified in § 78B-3-404(1)] runs from the commission of the alleged act of malpractice, irrespective of whether the malpractice is known or knowable, and all causes of action for malpractice not filed within that period are abolished.” 867 P.2d at 576. And in *Arnold v. Grigsby*, this court noted that “[t]he Utah Health Care Malpractice Act provides both a two-year statute of limitations and a four-year statute of repose for the filing of medical malpractice actions.” 2012 UT 61, ¶ 13, 289 P.3d 449; *see also Sorensen v. Larsen*, 740 P.2d 1336, 1336 (Utah 1987) (“Plaintiff’s cause of action is barred by the four-year statute of repose”).

Because the four-year period in section 404 is a statute of repose, it is tolled by section 416 only if (i) the phrase “statute of limitations” in section 416 refers to the four-year statute of repose, or (ii) tolling the statutes of limitation and not the statute of repose violates the absurdity doctrine. Neither circumstance applies.

## **2. The District Court Erred When it Ruled that Section 416 Tolls the Four-Year Statute of Repose**

The district court erred when it ruled that section 416 tolls the four-year statute of repose in section 404. Under section 416, filing a request for a prelitigation panel review “tolls the applicable statute of limitations” until 60 days after one of several enumerated events. Utah Code § 78B-3-416(3)(a). By its plain language, section 416 tolls the two- and one-year limitation periods, but not the four-year statute of repose:

(3)(a) The filing of a request for prelitigation panel review under this section *tolls the applicable statute of limitations* until the later of:

(i) 60 days following the division’s issuance of:

(A) an opinion by the prelitigation panel; or

(B) a certificate of compliance under Section 78B-3-418; or the expiration of the time for holding a hearing under Subsection (3)(b)(ii).

*Id.* (emphasis added). The district court erred when it ruled that section 416 tolled the statute of repose in addition to the statutes of limitation.

For questions of statutory interpretation, this court’s “primary goal is to evince the true intent and purpose of the Legislature,” and the best evidence of

that intent is the plain language of the statutory text. *Marion Energy, Inc. v. KFJ Ranch P'ship*, 2011 UT 50, ¶ 14, 267 P.3d 863 (internal quotation marks omitted). Absent a contrary indication, the court will assume “that the legislature used each term advisedly according to its ordinary and usually accepted meaning.” *Id.* (internal quotation marks omitted).

The court will “not view individual words and subsections in isolation” but will instead construe each section “in connection with every other part or section so as to produce a harmonious whole.” *Summit Operating, LLC v. Utah State Tax Comm'n*, 2012 UT 91, ¶ 11, 293 P.3d 369 (internal quotation marks omitted). And important here, the court “presume[s] that the expression of one term should be interpreted as the exclusion of another.” *Marion Energy*, 2011 UT 50, ¶ 14 (alteration and internal quotation marks omitted).

The phrase “statute of limitations” unambiguously refers to the two- and one-year limitation periods in section 404 and does not encompass the four-year statute of repose.<sup>4</sup> As this court has recognized, statutes of limitation and statutes of repose are “distinct entities” that “are not interchangeable.” *Raithaus v. Saab-Scandia of Am., Inc.*, 784 P.2d 1158, 1161 (Utah 1989). This court should assume

---

<sup>4</sup> It is worth noting that statutes of limitation were originally categorized as a type of statute of repose at a time when the term “statute of repose” had a broader meaning that encompassed *any* time restrictions on bringing suit. *CTS Corp. v. Walburger*, 134 S.Ct. 2175, 2186 (2014). While all statutes of limitation were statutes of repose, not all statutes of repose were statutes of limitation. But contemporary law distinguishes statutes of limitation from statutes of repose. *Id.* at 2185; *Raithaus v. Saab-Scandia of Am., Inc.*, 784 P.2d 1158, 1161 (Utah 1989).

that the legislature used “statute of limitations” advisedly, and according to its ordinary and accepted meaning. *Marion Energy*, 2011 UT 50, ¶ 14. And this court should presume that the expression of one phrase — “statute of limitations” — should be interpreted as the exclusion the other — “statute of repose.” *Id.*

Notably, elsewhere in the Utah Health Care Malpractice Act, the legislature used different language that encompasses all limitation periods in the Act. For example, section 412 extends “the time for commencing the malpractice action” if the plaintiff serves the notice within 90 days of the “expiration of *the applicable time period*.” Utah Code § 78B-3-412(4) (emphasis added); *Forbes v. St. Mark’s Hosp.*, 754 P.2d 933, 934 (Utah 1988) (because “applicable time period” broadly refers to all time periods, section 412 extends the statute of repose).

Elsewhere, the Utah Code uses the phrase “statute of repose.” This shows that the legislature uses “statute of limitation” and “statute of repose” according to their ordinary — and distinct — meanings. For example, with respect to claims involving asbestos, the legislature has expressly stated that “[a] statute of limitation or repose may not bar an action.”<sup>5</sup> Utah Code § 78B-2-117(1)(a); *id.* § 78B-2-116(1)(a) (same). And with respect to claims involving improvements to real property, the legislature has stated that “it is in the best interest of citizens of the state to impose the periods of limitation and repose provided in this chapter

---

<sup>5</sup> This language first appeared in 1988, only three years after the language in section 416 was enacted. Utah Code §§ 78-12-33.5, 78-12-48 (1988); Utah Code § 78-14-12(3) (1985).

upon all causes of action,” and that the statute “does not extend the period of limitation or repose otherwise prescribed by law.”<sup>6</sup> *Id.* § 78B-2-225(2)(e), (9). The legislature does not use the phrase “statute of limitation” to refer to statutes of repose. Thus, by its plain language, section 416 tolls only the “applicable statute of limitations” in section 404, not the statute of repose.

Intermountain explained in the district court that Mr. Jensen’s claim was time-barred because section 416 tolled only the “statute of limitations,” not the statute of repose. (R.413.) But the court “reject[ed] that argument as a matter of statutory interpretation.” (R.413.) The court instead ruled that “[t]he Act—read as a whole—does not manifest an intent by the legislature to treat the four-year statute different from the two-year statute.” (R.414.) The court concluded that section 416 tolls both the applicable statutes of limitation and the statute of repose. (R.424.)

The court articulated four reasons for its ruling, none of which is sufficient to contravene the plain language of section 416.

**Titles** - First, the court ruled that the title of section 404 indicates that the four-year period is a statute of limitation. The court noted that section 404 does not expressly use the phrase “statute of repose,” and that the four-year period is listed within a section entitled “Statute of limitations.” (R.418.) Based upon the title of the statute, the court concluded that section 404 must include only

---

<sup>6</sup> This language was enacted in 1991, only seven years after section 416 was enacted. Utah Code § 78-12-25.5 (1991); Utah Code § 78-14-12(3) (1985).

statutes of limitation. (R.418.) From there, the court concluded that because 416 is titled “Statutes of limitations tolled,” section 416 must toll all limitation periods found within section 404, including the four-year period. (R.418.)

But under Utah law, “a statute’s title is not part of its text and cannot be used as a tool of statutory construction unless the statute’s language is ambiguous.” *Anderson Dev. Co. v. Tobias*, 2005 UT 36, ¶ 42, 116 P.3d 323 (internal quotation marks omitted). Section 404 and 416 are both unambiguous. Indeed, the district court did not rule otherwise. The district court therefore erred in considering the title as a tool of interpretation.

The error in the district court’s reasoning becomes more apparent when its theory is applied to the other statutes of repose in the Utah Code. There is no section of the Utah Code titled “Statute of Repose,” and yet there are several recognized statutes of repose in the Utah Code under various section titles. If the titles were dispositive — as the district court ruled — then there would be no statutes of repose. For example, Chapter 2 of Title 78B is titled “Statutes of Limitations,” but there are several statutes of repose within Chapter 2. Indeed, the section containing the builder’s six- and nine-year statutes of repose is titled “Actions related to improvements in real property.” Utah Code § 78B-2-225; *Willis v. DeWitt*, 2015 UT App 123, ¶ 8-9, 350 P.3d 250 (six-year period in section 225 is a statute of repose by its plain language). And the section containing the four-year statute of repose to challenge the holder of tax title to real property is

titled “Seizure or possession within seven years – Proviso – Tax title.” Utah Code § 78B-2-205.

Titles are no more informative outside of Chapter 2. The one-year statute of repose for establishing an unsolemnized marriage is in a section titled “Validity of marriage not solemnized.” Utah Code § 30-1-4.5; *In re Marriage of Kunz*, 2006 UT App 151, ¶ 21, 136 P.3d 1278 (one-year time limit is a statute of repose). Finally, the three-year statute of repose in the probate code is in a section titled “Probate and testacy proceedings – Ultimate time limit – Presumption and order of intestacy.” Utah Code § 75-3-107(1); *In re Estate of Strand*, 2015 UT App 259, ¶ 4, 362 P.3d 739 (three-year period in the Probate Code is a statute of repose). None of these denote the specific presence of a statute of repose as opposed to a statute of limitation in their titles. The titles of section 404 and 416 are therefore not a basis for ignoring the plain language of section 404 and treating the statute of repose as a statute of limitation.

**“Applicable Statute of Limitations”** – Second, the district court ruled that the four-year period was a statute of limitation because “Section 416 refers to the ‘*applicable* statute of limitations’ which infers that Section 404 contains *more than one* statute of limitation.” (R.418 (citing Utah Code § 78B-3-416(3)(a)).) The court concluded that, to give meaning to the “applicable statute of limitations” language in section 416, the four-year period must be a statute of limitation, not a statute of repose. The district court’s conclusion relies on an incorrect assumption



that section 404 contains only one statute of limitation if the four-year period is a statute of repose.

In fact, section 404 includes three statutes of limitation: (i) a general two-year statute of limitation beginning when the plaintiff discovers or should have discovered the injury, (ii) a one-year statute of limitation for actions alleging fraudulent concealment, and (iii) a one-year statute of limitation for actions alleging that an object has been wrongfully left within a patient's body. Utah Code § 78B-3-405. These are the potential "applicable statute[s] of limitations" referenced in section 416. Contrary to the district court's ruling, the statute of repose need not be treated as a statute of limitation to give meaning to the "applicable" statute of limitation language in section 416.

**Imprecision of Legislature and Appellate Courts** - Next, the district court treated the statute of repose as a statute of limitation because (i) the legislature did not "use the phrase 'statute of repose' in the Act," (ii) the "appellate courts, when addressing this statute, have been similarly imprecise," and (iii) it would therefore "be inequitable and impractical to require litigants to interpret Section 404 with a level of precision that neither the legislature nor appellate courts of this state have recognized." (R.419.)

But as discussed above, there is nothing confusing about whether the four-year period is a statute of repose, as this court recognized in *Grigsby*, *Lee*, and *Sorenson*. It is how the time period operates, not its label, which determines

whether it is a statute of limitation or statute of repose. The four-year period is a statute of repose regardless of whether the legislature labeled it as such.

Next, in support of its assertion that the appellate courts “have been similarly imprecise,” the district court cites three opinions. (R.419.) But none of the opinions were imprecise in their treatments of the repose period. In fact, the four-year period was not at issue in two of the opinions. In *Platts*, the issue was whether a treatment program involved “a ‘health care provider’ under the Malpractice Act.” *Platts v. Parents Helping Parents*, 947 P.2d 658, 661 (Utah 1997). The *Platts* opinion does not mention the four-year period, let alone label it imprecisely. And in *McDougal*, the issue was whether “the two-year medical malpractice statute of limitations is tolled” until the plaintiff discovers the defendant’s identity. *McDougal v. Weed*, 945 P.2d 175, 176 (Utah Ct. App. 1997). The court mentioned the four-year period only in its quotation of the statute. *Id.* at 176-77. The court did not discuss or otherwise imprecisely label the period. *Id.*

In the third opinion, *Forbes*, this court discussed the four-year period, but it did not do so imprecisely. The question in *Forbes* focused upon section 412 (then-codified in section 78-14-8), which extends “the time for commencing the malpractice action.” *Forbes v. St. Mark’s Hosp.*, 754 P.2d 933, 934 (Utah 1988). The question was whether section 412 extends “only the two-year limitation period.” *Id.* Although this court did not label the four-year period as a statute of repose, the question was not before the court. *Id.* And the court repeatedly distinguished

the two time periods, calling the statute of limitation “the limitation period,” “the two-year statute of limitations,” or “the two-year limitation period,” and calling the repose period “[t]he four-year statutory period” or the “four-year statutory time period.” *Id.* at 934, 935. The court did not refer to the four-year period as a statute of limitation.

Instead, as discussed above, this court has repeatedly and consistently recognized that the four-year period in section 404 is a statute of repose. *Arnold v. Grigsby*, 2012 UT 61, ¶ 13, 289 P.3d 449 ( “[t]he Utah Health Care Malpractice Act provides . . . a four-year statute of repose for the filing of medical malpractice actions”); *Lee v. Gaufin*, 867 P.2d 572, 576 (Utah 1993) (referencing “[t]he four-year repose period” in the Act); *Sorensen v. Larsen*, 740 P.2d 1336, 1336 (Utah 1987) (“Plaintiff’s cause of action is barred by the four-year statute of repose” in the Act).

The court has not been imprecise, let alone so imprecise as to justify departing from the plain language and treating the statute of repose as if it were a statute of limitation under section 416.

**“Tolled” for Other Reasons** - Finally, the district court ruled that the four-year period was a statute of limitation because, unlike many other statutes of repose, the four-year period “may be extended or tolled for at least four recognized reasons.” (R.419.) Specifically, the court listed the two one-year statutes of limitation in section 404, the statutory extension in section 412, and the

constitutional exception for periods of minority under what is now section 404. (R.419.) The district court seems to have ruled that, because there are statutory exceptions to the four-year period, it is not a statute of repose.

But the exceptions confirm that the four-year period is a statute of repose. As a preliminary matter, two of the court's four examples – the two one-year statutes of limitation – do not *toll* the statute of repose but instead apply “[n]otwithstanding” the statute of repose. Utah Code § 78B-3-404(2). The court was therefore mistaken when it concluded that they “extended or tolled” the statute of repose. (R.419.)

The statutory extension in section 412 also confirms that the legislature intended the four-year period to be a statute of repose. Section 412 extends “the time for commencing the malpractice action” if the plaintiff serves the notice within 90 days of the “expiration of *the applicable time period.*” Utah Code § 78B-3-412(4) (emphasis added). The statute does not use the phrase “statute of limitations,” but instead broadly refers to “the applicable time period.” Based upon that difference, this court has held that section 412 extends all applicable time periods in section 404. *Forbes*, 754 P.2d at 934-35 (Utah 1988).

And the fact that section 412 operates to extend the four-year period is consistent with its being a statute of repose. As discussed above, it is well-settled that statutes of repose may be extended or limited by statute. *Willis*, 2015 UT App 123, ¶ 8 (“Once the statutory period set by a statute of repose expires, ‘any

cause of action is barred regardless of usual reasons for tolling the statute.’” (citing *Perry v. Pioneer Wholesale Supply Co.*, 681 P.2d 214, 219 (Utah 1984))). Indeed, other well-settled statutes of repose in the Utah Code are subject to statutory exceptions. For example, the builder’s statute of repose provides that a claim must be filed within six years from the date of completion or abandonment of construction, except “[w]here an express contract or warranty establishes a different period of limitations.” Utah Code § 78B-2-225(3)(a); *Willis*, 2015 UT App 123, ¶¶ 8-9 (plain language of section 225 indicates that it is a statute of repose). Similarly, there are three enumerated statutory exceptions to the statute of repose in the probate code. Utah Code § 75-3-107(1); *In re Estate of Strand*, 2015 UT App 259, ¶ 6, 362 P.3d 739 (recognizing exceptions to the statute of repose in the probate code).

The final exception relied upon by the district court, the constitutional exception for periods of minority under what is now section 404, also confirms that the four-year period is a statute of repose. The district court relied upon *Lee v. Gaufin*, an opinion in which this court held that the four-year statute of repose was unconstitutional as applied to minors under the uniform operation of laws provision of the Utah Constitution. 867 P.2d 572, 589 (Utah 1993). The *Lee* court necessarily held that the statute of repose was not *statutorily* tolled, which is why the court reached the constitutional question. *Id.* at 575. The *Lee* opinion therefore confirms that the four-year period is a statute of repose.

**3. Neither the Absurd Consequences Canon Nor the Absurdity Doctrine Warrant A Reading Contrary to the Plain Unambiguous Statutory Language**

Although not entirely clear, at times the district court appears to have refused to enforce the plain language of section 416 on policy grounds, citing unfairness. (R.420,421,423.) Such considerations can be relevant under two distinct doctrines, neither of which applies here.

The first doctrine is the absurd consequence canon of construction. This court applies the canon only after finding that statutory language is ambiguous. *Utley v. Mill Man Steel, Inc.*, 2015 UT 75, ¶¶ 46, 47, 357 P.3d 992. Applying the canon, the court resolves the ambiguity “by choosing the reading that avoids absurd results.” *Id.* ¶ 47 (internal quotation marks omitted). While the district court’s reasoning is unclear, Intermountain will address the absurd consequences canon because the district court cited a case employing that canon. (R.423 (citing *In re Adoption of Baby B.*, 2012 UT 35, ¶ 78, 308 P.3d 382 (discussing absurd canon of construction).) As demonstrated below, the canon does not apply because the phrase “statute of limitations” is not ambiguous.

The second doctrine is the absurdity doctrine. This court applies the absurdity doctrine where there is no ambiguity but “applying the language leads to results so overwhelmingly absurd no rational legislature could have intended them.” *Utley*, 2015 UT 75, ¶ 46. Applying the canon, the court will “interpret the statute contrary to its plain meaning.” *Id.* ¶ 47 (internal quotation marks omitted). Again, while the district court’s reasoning is unclear, Intermountain

will address this doctrine because the district court cited a case applying this doctrine. (R.423 (citing *Savage v. Utah Youth Village*, 2004 UT 102, ¶ 18, 104 P.3d 1242 (discussing absurdity doctrine).) As demonstrated below, this doctrine also does not apply because there is nothing unreasonable, let alone overwhelmingly absurd, about failing to toll a statute of repose.

### **3.1 The Absurd Canon of Construction Does Not Apply Because “Statute of Limitations” is Unambiguous**

The absurd consequences canon allows a court to resolve an ambiguity when the statutory language lends itself to two reasonable interpretations. *Utley*, 2015 UT 75, ¶ 46. In those circumstances, the canon allows the court to reject the interpretation that produces absurd results. *Id.* The canon does not apply here because the statutory language — “statute of limitations” — is unambiguous.

Indeed, “[a] statute is ambiguous only if it is *reasonably susceptible* of different interpretations.” *State v. Watkins*, 2013 UT 28, ¶ 22, 309 P.3d 209 (internal quotation marks omitted). Here, for section 416 to be ambiguous, the language “tolls the applicable statute of limitations” must be susceptible of being read as “tolls the applicable statute of repose.” Utah Code § 78B-3-416(3)(a).

But the phrase “statute of limitations” is a legal term of art with a precise meaning. It is defined as “[a] law that bars claims after a specified period” or “a statute establishing a time limit for suing in a civil case, based on the date when the claim accrued (as when the injury occurred or was discovered).” *Statute of Limitations*, Black’s Law Dictionary (10th ed. 2014); see also, e.g., *Raithaus v. Saab-*

*Scandia of Am., Inc.*, 784 P.2d 1158, 1160 (Utah 1989) (“A statute of limitations requires a lawsuit to be filed within a specified period of time after a legal right has been violated.”); *Berry ex rel. Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 672 (Utah 1985) (same).

As discussed above, statutes of limitation are distinct from and not interchangeable with statutes of repose. Indeed, the Black’s Law definition of “statute of limitations” instructs the reader to compare to “statute of repose,” indicating that the two definitions are distinct. Or as this court put it, “[s]tatutes of repose . . . are different from statutes of limitations, although to some extent they serve the same ends.” *Raithaus*, 784 P.2d at 1160 (internal quotation marks omitted). Thus, there is no ambiguity in the statute. The court erred to the extent its ruling can be read as finding and relying on an ambiguity to interpret “statute of limitations” to mean “statute of repose.”

### **3.2 The Absurdity Doctrine Does Not Apply Because the Legislature’s Decision Not to Toll the Repose Period Is Not Overwhelmingly Absurd**

The absurdity doctrine allows a court to refuse to enforce the plain language of a statute – and adopt an alternative interpretation – when the operation of the plain language is “so overwhelmingly absurd that no rational legislator could have intended the statute to operate in such a manner.” *Utley*, 2015 UT 75, ¶ 48. The doctrine does not apply here because the tolling provision in section 416 produces a rational result, particularly when viewed at the time



the legislature enacted it. *State ex rel. Z.C.*, 2007 UT 54, ¶ 13, 165 P.3d 1206 (“a result must be so absurd that the *legislative body which authored the legislation* could not have intended it” (emphasis added)).

Applying the absurdity doctrine is a “momentous” and “drastic step” because it overrides the plain language of the statute and applies an interpretation that is “contrary to its plain meaning.” *Utley*, 2015 UT 75, ¶¶ 47-48 (Durrant, J., concurring and dissenting) (internal quotation marks omitted). The court applies the doctrine “with caution” and the court will not override statutory language “even if it leads to results [this court] regard[s] as impractical or ill-advised.” *Id.* ¶ 48. Instead, for this court to apply the absurdity doctrine to override the plain language, “the operation of the plain language must be more than improvident, it must be so overwhelmingly absurd that no rational legislator could have intended the statute to operate in such a manner.” *Id.*

To determine whether no rational legislator could have intended section 416 to toll only statutes of limitation, the court looks to the statute at the time it was enacted. *State ex rel. Z.C.*, 2007 UT 54, ¶ 13 (“a result must be so absurd that the *legislative body which authored the legislation* could not have intended it” (emphasis added)). The language of section 416 first appeared in 1985 when the legislature added the prelitigation panel review requirement. Utah Code § 78-14-12(3) (1985) (attached at Add. C). At that time, the Act neither contemplated nor required affidavits of merit or certificates of compliance. *Compare id.* §§ 78-14-4 to

-16 (1985), *with* Utah Code § 78B-3-418, -423. Instead, under the Act at the time, the prelitigation panel lost jurisdiction if it did not act within the specified time period. Utah Code § 78-14-13(3) (1985) (“A panel retains jurisdiction of any claim for 90 days from the date of filing the request.”). Thus, to the extent the requirements later added to the Act led the district court to consider the plain language interpretation to produce “unfair” and “undesired” results, those considerations are beside the point. (R.421-23.)

Regardless, the absurdity doctrine also does not apply under the current version of the Act, which Intermountain will demonstrate next.

**The Prelitigation Process Under the Current Act** - The typical prelitigation procedure progresses as follows: a claimant files a Notice of Intent to make a claim under section 78B-3-412, which provides an extension of 120 days if the claimant is within 90 days of the expiration of any time limitation. The claimant then (usually concurrently) files a request for prelitigation panel review under section 416, which tolls the applicable statute of limitation until 60 days after the issuance of either the panel’s opinion or a certificate of compliance. Utah Code § 78B-3-416(3). If either the panel proceedings exceed 180 days or the respondents are uncooperative, the claimant may file an affidavit of merit to secure a certificate of compliance, which the panel must address within 15 days

of its filing.<sup>7</sup> *Id.* That mechanism places a claimant beyond the whim of the panel or the respondent, and requires that the claim be addressed in a timely manner.

The district court articulated two reasons for reading the statute contrary to its plain language. First, the court ruled that it “would be unfair” to require claimants to comply with the prelitigation procedures without tolling the statute of repose during the time it takes to complete those procedures and that the plain language reading therefore “does nothing to advance the policy concerns recognized by the legislature when it passed the Act.” (R.422.) Second, the court ruled that applying the plain language would force claimants to file premature lawsuits to avoid the effect of the statute of repose. (R.423.) But as discussed below, these results are not “so overwhelmingly absurd that no rational legislature could have intended the statute to operate in such a manner.” *Utley*, 2015 UT 75, ¶ 48. Intermountain will address both reasons in turn.

### **3.2.1 It is Not Overwhelmingly Absurd that the Legislature Limited Liability to a Specific Period**

The operation of the plain language of section 416 does not produce overwhelmingly absurd results, even if it may operate unfairly in a few cases. As

---

<sup>7</sup> The division must complete the prelitigation panel within 180 days after the filing of the request. Utah Code § 78B-3-416(3)(b)(ii)(A). If the division fails to do so, the claimant may file an affidavit of merit including, among other things, an affidavit signed by a health care provider who agrees that the claim is meritorious. *Id.* § 78B-3-416(3)(c)(i). Alternatively, if the respondent “has failed to reasonably cooperate in scheduling the hearing,” the claimant may file an affidavit any time within the 180 days making that allegation, and the division must rule on the affidavit within fifteen days. *Id.* § 78B-3-416(3)(c)(ii), (d)(i).

the district court recognized, the legislature enacted the four-year statute of repose to limit the time by which a claimant must file an actions against a health care provider so that insurance premiums can be managed and calculated:

In enacting this act, it is the purpose of the Legislature to provide a reasonable time in which actions may be commenced against health care providers while limiting that time to a specific period for which professional liability insurance premiums can be reasonably and accurately calculated; and to provide other procedural changes to expedite early evaluation and settlement of claims.

Utah Code § 78B-3-402(3); (R.422).

Tolling the statute of limitation but not the statute of repose upon the filing of a request for prelitigation panel review also is consistent with that policy. Specifically, tolling the statute of limitation until after the division issues a certificate of compliance ensures that a claimant will have a “reasonable time” to bring his claim even if the process would otherwise prevent his filing within the one- or two-year limitation periods. Tolling the statute of limitation ensures that the claimant has a “reasonable” window within which to file a claim.

Enforcing the plain language and refusing to toll the statute of repose, as the legislature put it, “limit[s] that time to a specified period for which professional liability insurance premiums can be reasonably and accurately calculated.” Utah Code § 78B-3-402(3). This rationale is not absurd, and it does not lead to an overwhelmingly absurd result or absurd rationale. Any unfairness

is the same unfairness created by statutes of repose generally. The absurdity doctrine does not apply to negate the plain language of section 416.

### **3.2.2 It is Not Overwhelmingly Absurd that Claimants May File a Premature Lawsuit to Avoid the Operation of a Statute of Limitation or Repose**

Both the Act and opinions from this court have recognized that, in some cases, a claimant may file a premature lawsuit to avoid the effect of the limitation or repose period. The district court erred in ruling that this possible result of enforcing the plain language would be “inoperable and would result in absurd consequences.” (R.423 (internal quotation marks omitted).)

In fact, the Act expressly recognizes that a claimant may file a lawsuit before completing the prelitigation procedures. Section 78B-3-423 states that if a claimant “does not file an affidavit of merit,” then “the division may not issue a certificate of compliance for the claimant *and the malpractice action shall be dismissed by the court.*” Utah Code § 78B-3-423(6) (emphasis added). In other words, while forbidding it in section 412, the Act expressly contemplates that a claimant can file a malpractice action in court before completing the requisite procedures; otherwise, there could never be a malpractice action to dismiss.

This court confirmed this result in *McBride-Williams v. Huard*, 2004 UT 21, ¶ 10, 94 P.3d 175. In *McBride*, this court held that claimants may file medical malpractice claims “irrespective of whether they have heeded the preconditions imposed by the Malpractice Act.” *Id.* Indeed, in *McBride*, the claimant filed a

timely lawsuit before beginning the prelitigation procedures. *Id.* ¶¶ 3-4. Their complaint was dismissed for failure to comply with the procedures. *Id.* ¶ 3. They complied with the procedures but did not file his second complaint until after the statute of limitation elapsed. *Id.* ¶ 4. This court held that the second complaint was timely under the savings statute, now codified as section 78B-2-111. *Id.* ¶ 17.

The court squarely held that a claimant is allowed to file a malpractice lawsuit without first complying with the prelitigation procedures. *Id.* ¶ 10. Specifically, the court held that “[r]ule 3 sets out the manner by which a party may bring a civil matter to the attention of the court. [The prelitigation procedures do] not erect a barrier at the courthouse door, barring entry to medical malpractice claimants who have failed to comply with compulsory prelitigation procedures. Claimants are at liberty to commence an action by filing and serving a complaint under rule 3 irrespective of whether they have heeded the preconditions imposed by the Malpractice Act.” *Id.* The court clarified, however, that it “adopt[ed] this position without endorsing the [claimant]’s apparent wholesale disregard of the prelitigation procedures mandated by the Malpractice Act.” *Id.* ¶ 11.

The district court rejected the *McBride* holding as “dicta.” (R.422,423.) But the *McBride* holding is not dicta. *McBride* squarely addressed – and rejected – the district court’s position here that claimants cannot file premature lawsuits and that it would be absurd to allow claimants to do so in narrow circumstances.

*McBride* reveals that the result of enforcing the plain language of the statute — perhaps requiring a few claimants to file premature lawsuits — is not absurd.

Further, even if a claimant could not file a premature lawsuit, the operation of the statute is not absurd. The statute allows a plaintiff to require the prelitigation panel to hold a hearing within 180 days of a request, and the panel must issue an opinion no later than 30 days after the hearing. Utah Code §§ 78B-3-416(3)(b)(ii)(A), -418(2), (3). If the panel does not hold a hearing before the 180-day deadline, then the plaintiff may submit an affidavit of merit under section 78B-3-423, which then requires the division to provide a certificate of compliance. *Id.* §§ 78B-3-416(3)(c), -418. A claimant therefore can determine, roughly, what is a safe date to request review by a prelitigation panel in relation to the expiration of the four-year statute of repose.

Regardless, to the extent the operation of the statute of repose can produce an unfair result, the result is not overwhelmingly absurd. All legislative decisions to create statutes of repose instead of statutes of limitation sacrifice fairness on legislative policy grounds. “While this outcome may seem harsh in that it deprives the [party] of an opportunity to litigate any claim to the [merits], it is the necessary result of having limitation periods and the accompanying benefit of finality for which these statutes were designed.” *Beaver Cty. v. Utah State Tax Comm'n*, 2006 UT 6, ¶ 46, 128 P.3d 1187. Thus, the operation of the plain


language of the statute is not absurd, let alone so “overwhelmingly absurd” to justify the court’s refusal to enforce the plain language of the statute.

### **Conclusion**

Mr. Jensen’s claims are barred by the four-year statute of repose in section 78B-3-404(1). Section 78B-3-416 did not operate to toll the statute of repose. This court should reverse the district court’s ruling and remand with instructions for the court to dismiss Mr. Jensen’s claims as untimely.

DATED this 4<sup>th</sup> day of January, 2017.

ZIMMERMAN JONES BOOHER



Troy L. Booher  
Beth E. Kennedy  
Alexandra Mareschal  
*Attorneys for Appellants Intermountain  
Healthcare, Inc., IHC Health Services, Inc.  
dba LDS Hospital, and IHC Health  
Services, Inc. dba Intermountain Medical  
Group*



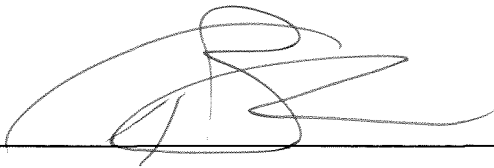
### **Certificate of Compliance With Rule 24(f)(1)**

I hereby certify that:

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because this brief contains 8,784 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).

2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 13 point Book Antiqua.

DATED this 4<sup>th</sup> day of January, 2017.



---

### Certificate of Service

This is to certify that on the 4<sup>th</sup> day of January, 2017, I caused two true and correct copies of the Brief of Appellants to be served on the following via first-class mail, postage prepaid:

Charles H. Thronson  
Parsons Behle & Latimer  
201 South Main Street, Suite 1800  
Salt Lake City, UT 84111

