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Gary Griffiths, Kevin G. Meeham, and Patrick B.  
Meeham, and Marian J. Meeham v. J. Dallas  
Vanwagoner : Reply Brief

Utah Supreme Court

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9005-95

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IN THE UTAH SUPREME COURT

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GARY GRIFFITHS, as guardian	)	
ad litem for KEVIN G. MEEHAN	)	
and PATRICK B. MEEHAN; and	)	Case No. 900595
MARIAN J. MEEHAN,	)	
	)	Priority No 10
Plaintiffs and Appellants,	)	
	)	
vs.	)	
	)	
J. DALLAS VANWAGONER,	)	
	)	
Defendant and Respondent.	)	

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REPLY BRIEF OF APPELLANTS

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APPEAL FROM A JUDGMENT OF THE THIRD JUDICIAL DISTRICT  
COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH  
JUDGE PAT B. BRIAN

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Plaintiffs/appellants (hereinafter "plaintiffs") reply to the brief of defendant/respondent (hereinafter "defendant") as follows:

As discussed extensively in appellants' prior brief, under the Condemarin and Berry cases, the "rational basis" standard of review is not sufficient in testing the constitutionality of either the two-year statute of limitations (as applied to minors) or the four-year statute of repose in the medical malpractice act because both statutes infringe rights protected by the open courts clause. The appropriate "intermediate standard of review" places the burden on defendant to show that:

1. There was a medical malpractice insurance "crisis," and, if so, that it was caused by medical malpractice claims (not by investment losses of insurance companies);

2. Denying minors the protection of the tolling statute actually helps in a substantial way to solve that crisis; and

3. It is reasonable to attempt to solve a medical malpractice crisis by a measure so drastic as denying to some minors a remedy for their injuries.

It is against this backdrop that respondent's brief and the following reply should be considered.



I. REPLY TO POINT I OF DEFENDANT'S ARGUMENT REGARDING THE MEDICAL MALPRACTICE STATUTE OF LIMITATIONS.

A. The Perceived Medical Malpractice Insurance Crisis of the 1970's and The Enactment of Medical Malpractice Legislation.

On pages 8-12 and 15-16 of defendant's brief, he asserts the following:

a. Minors' rights are being adequately protected in Utah even under the medical malpractice statute of limitations.

b. Thirty malpractice claims are being filed in Utah each month. With approximately one-seventh of those being claims by minors, it means that 51 malpractice claims are being brought by minors each year.

c. Minors are receiving increasingly greater damage recoveries in Utah for medical malpractice.

d. There was a medical malpractice insurance crisis in Utah.

e. That crisis is a "clear social and economic evil" that needs to be eliminated.

f. Justification for the medical malpractice statute of limitations is found in the "express legislative findings regarding the mounting medical malpractice insurance crisis."

g. If minors' medical malpractice claims were tolled during minority under the general tolling statute, it would result in potential liability of health care providers for so long a period that it would be difficult for insurance companies to determine the extent of their exposure and to calculate premiums,

and many insurers would therefore withdraw from malpractice liability insurance markets.

h. It is rational to conclude that taking away from minors the protection of the tolling statute would be helpful in "containing the malpractice insurance crisis" by "controlling malpractice insurance costs and ensuring continued health care services in this state."

Plaintiffs' responses to those claims are as follows:

1. Defendant cites no authority or source for the statement on page 8 of his brief that 30 malpractice claims are being filed (by adults and minors) in Utah each month.

2. The 1990 federal census showed a total population in Utah of 1,722,850, with 1,095,406 of those persons being age 18 or over, leaving 627,444 persons under age 18. Minors in Utah therefore comprise 36.4% of the population, yet defendant assumes on page 8 of his brief that only one-seventh (14.3%) of medical malpractice claims in Utah are filed by minors. Suits by minors therefore represent a disproportionately small number of medical malpractice suits filed. (Plaintiffs request the court to take judicial notice of the census figures referred to above. A copy of the pertinent pages of the 1990 census is included in the Addendum.)

For defendant's assumption that one-seventh of the medical malpractice claims involve minors, he cites Jenkins, California's Medical Injury Compensation Reform Act: An Equal Protection Challenge, 52 S. Cal. L. Rev. 829, 960-61 (1979). What

Jenkins actually stated was that "statistics show that less than one-seventh of all medical malpractice claims filed are brought by or on behalf of individuals under the age of 20." Id. at 960 (emphasis added), citing U.S. Dep't of Health, Education & Welfare, The Report of the Secretary's Commission on Medical Malpractice at 12 app. (1973). Thus the ratio of suits involving minors (persons under 18, not persons under 20) would appear to be more on the order of one-eighth (12.5%). As to how many minors would have brought claims after the period of the new medical malpractice statute of limitations in California (which, like Utah's, took away the protection of the tolling statute) but before expiration of the traditional limitations period (where the statute was tolled during minority), Jenkins said it is impossible to determine, but that "extrapolation from the available statistics . . . arguable leads to the conclusion that the number of minors' claims in this category is small." Id. at 961. Accordingly, the statutory scheme singling out children is not justifiable. Not only are they the most innocent and helpless of all classes of the society and, therefore, the most deserving of the protection of the law, they bring a relatively small number of claims. Therefore, defendant is clearly unable to meet his burden to demonstrate that infringing on the rights of children to bring their claims will solve the alleged crisis or that it is a reasonable approach. This is particularly true in light of the allegation in the defendant's brief (page 8) that in 15 years there have been only four tardy medical malpractice claims asserted by minors. If this is true as

defendant has alleged, then there is no way that depriving four children of their claims could possibly be said to be a reasonable or effective way to solve the purported crisis.

3. At the top of page 9 of defendant's brief, he states that "minors' medical malpractice claims are being both heard and vindicated in Utah courts with increasingly greater damage recoveries being awarded", but defendant cites no authority for that statement other than to refer to two large jury awards in 1984 and 1983 (seven and eight years ago, respectively), and one of those (Barson v. E.R. Squibb & Sons, Inc., 682 P.2d 832 (Utah 1984)), was not even a medical malpractice case. It was an action against a pharmaceutical company for negligence in failing to adequately test a drug and to warn of its dangers.

4. On page 10 of the defendant's brief, he refers to the "express legislative findings" regarding the medical malpractice insurance crisis. Those supposed "findings" are set forth in Utah Code Ann. § 78-14-2 as ostensibly justifying the various measures adopted by the legislature in the Utah Health Care Malpractice Act (Utah Code Ann. §§ 78-14-1 through -16, sometimes called herein the "medical malpractice act") to reduce access to the courts and otherwise to restrict exposure of health care providers and their insurance carriers for malpractice. Similar medical malpractice acts were enacted in many states in the mid-1970's (Utah's was enacted in 1976) as a result of lobbying efforts by politically powerful insurance and medical groups, who threatened drastic curtailments in the availability of health care if the legislatures

did not respond to their demands. (See Note, The Unconstitutionality of Medical Malpractice Statutes of Repose: Judicial Conscience vs. Legislative Will, 34 Vill. L. Rev. 397, 405 (1989); Cunningham & Lane, Malpractice - The Illusory Crisis, 54 Fla. Bar J., 114 (Feb. 1980). "Regardless of whether the underlying circumstances were truly severe, the perceptions of a panicked public as well as ferocious lobbying by the medical profession and insurance industry generated intense pressure on state legislatures to enact remedial [medical malpractice] legislation." Learner, Restrictive Medical Malpractice Compensation Schemes: A Constitutional "Quid Pro Quo" Analysis to Safeguard Individual Liberties, 18 Harv. J. on Legis., 143, 144 (1981).

5. Some of the most common provisions included in these medical malpractice acts in the various states, in order to reduce medical malpractice exposure, were: (1) limiting either the amount of recovery by plaintiffs or the liability of health care providers; (2) shortening the statute of limitations period applicable to medical malpractice actions (including eliminating the protection of the general tolling statute for minors); (3) abrogating the collateral source rule in medical malpractice actions; (4) establishing medico-legal screening panel plans; and (5) establishing either compulsory or voluntary arbitration plans. Learner, 18 Harv. J. on Legis., supra at 146.

6. The preambles of those medical malpractice acts typically refer, expressly or impliedly, to a medical malpractice crisis because of increasing numbers of claims and increasing

amounts of settlements and judgments. The information used by the insurance industry and medical profession in their lobbying efforts and the legislative "findings" based on that information have come under increasing attack in the years since those malpractice acts were enacted, and a number of courts have made their own independent evaluations of whether the legislative findings were justified. Note, 34 Vill. L. Rev., supra at 415; Cunningham & Lane, 54 Fla. Bar J., 114 (Feb. 1980); see cases cited on pages 16-21 of plaintiffs/appellants' initial brief.

7. The so-called medical malpractice insurance crisis of the 1970's was actually caused in major part by the insurance companies having suffered heavy losses in their investments during that period and then raising malpractice insurance premiums to recoup those losses. See, e.g., McKay, Rethinking the Tort Liability System: A Report from the ABA Action Commission, 32 Vill. L. Rev. 1219-1221 (1987); Learner, 18 Harv. J. on Legis., supra at 144; Aitken, Medical Malpractice: The Alleged "Crisis" in Perspective, Medical Malpractice, Feb. 1976, p. 90.

An illustration is provided in one of the law review articles cited in defendant's brief. Argonaut Insurance Company threatened to cancel all its New York physicians' policies on July 1, 1975 after it was denied a rate increase of 196.8% in January 1975, after having been granted an earlier rate hike of 93.5% in July 1974. Even though the president of Argonaut claimed his company lost \$10 million in 1974 in medical malpractice costs, yet Argonaut actually collected \$15 million in premiums in 1974 and

paid out only \$250,000 in claims, enabling it to pay a \$10,200,000 dividend to its parent company, the conglomerate Teledyne Corporation. In that same year Argonaut experienced a \$90 million decrease in the value of its bond and stock portfolio. The average payout in 1974 for the industry as a whole was \$750 per doctor, whereas the average premium collected per doctor was \$3,500. Note, The Indiana Medical Malpractice Act: Legislative Surgery on Patients Rights, 10 Val. U. L. Rev. 303-305, notes 7 and 10 (1976).

It was also the Argonaut Insurance Company that precipitated the crisis in California:

The present crisis was triggered in the fall of 1974, when the Argonaut Insurance Company announced to the doctors of northern California that they were seeking a 380 per cent increase in premiums and ultimately intended to withdraw entirely from the field of medical malpractice insurance. Subsequently, other insurance companies announced proposed increases in premium rates and echoed the claim of the unprofitability in malpractice insurance. In the final analysis, it was Argonaut's abrupt increases coupled with the equally abrupt reaction by northern California physicians that led to the 1975 impasse over malpractice coverage. Almost without questioning the validity of these rate increases, the medical profession lashed out at the legal profession, demanding radical changes in the existing compensatory system for medical malpractice.

Aitken, Medical Malpractice: The Alleged "Crisis" in Perspective, Medical Malpractice, Feb. 1976, 90-91. That led to a doctors' strike, which nearly bankrupted numerous hospitals in the state of California and led to the hastily enacted medical malpractice act in California. Id. at 91.

8. Shortly before passage in the Utah House of

Representatives of the bill that became the Utah medical malpractice act (Utah Code Ann. §§ 78-14-1 through -16), Representative Matheson on the floor of the House made a motion to strike from the bill all the language which now appears in the first paragraph of § 78-14-2 after the first three words ("The legislature finds") and to strike the first 26 words of paragraph 2 of § 78-14-2, ending with the word "system". In other words, he proposed to strike the legislative "findings" to the effect that medical malpractice claims had increased and had caused premiums to rise and had discouraged some health care providers from continuing to provide services, etc.

Representative Matheson's reasons for moving to strike those "findings" were that, based on the information furnished to the legislature, including the report from the "interim study committee," those medical malpractice conditions, while they might then be occurring on a national level, and especially in California, were not occurring in Utah and that there had even been a decrease in medical malpractice claims in Utah.

While Representative Matheson's motion to delete those supposed legislative findings was defeated, no one disputed those statements which he made on the floor of the House. (Representative Matheson's remarks are found on pages 10-13 of the Transcription of Discussion and Vote on January 30, 1976 in Utah House of Representatives on H.B. 35 - Utah Health Care Malpractice Act, a copy of which is included in the Addendum hereto.)

9. The "long tail of liability" (which supposedly made



it difficult for insurance companies to predict future liability and therefore difficult to calculate premiums) actually does not significantly affect premiums because 88% of all medical malpractice injuries which result in claims are reported within the first two years following injury, and 97% are reported within four years; the "long tail" effect is therefore minimal and predictable. Kenyon v. Hammer, 688 P.2d 961, 978 (Ariz. 1984), citing statistics contained in U.S. Department of Health, Education & Welfare, Pub. No. 73-88, Medical Malpractice: Report of the Secretary's Comm'n on Medical Malpractice, 254 (1973); Hayes v. Mercy Hosp. and Medical Center, 557 N.E.2d 873, 887-88 (Ill. 1990) (dissenting opinion).

10. The amount by which medical malpractice legislation has reduced health care costs is so insignificant as to be irrelevant. Kenyon v. Hammer, supra at 977; Hayes v. Mercy Hosp. and Medical Center, supra at 890.

11. With respect to insurance companies which withdrew from the medical malpractice insurance market, most of them were "marginal firms not fully committed to this line of insurance" and their withdrawal "reflected efficient market discipline. The gap left by their departure was filled by newly formed mutual insurance companies owned and operated by medical groups. These provider-owned companies now hold a considerable share of the malpractice market." Robinson, The Medical Malpractice Crisis of the 1970's: A Retrospective, 49 Law and Contemporary Problems, No. 2, pp. 5, 8-9, 19 (Spring 1986).

12. Notwithstanding all of the medical malpractice acts enacted in the 1970's, medical malpractice premiums have continued to rise, but despite the continued increase in premium costs, the ratio of such costs to doctors' incomes has not changed substantially. Mominee v. Scherbarth, 503 N.E.2d 717, 725 (Ohio 1986) (concurring opinion), citing the American Medical Association's own surveys reported in Robinson, The Medical Malpractice Crisis of the 1970's: A Retrospective, 49 Law and Contemp. Probs., 5, 31 (Spring 1986). In addition, malpractice insurance premiums are not a financial burden to the health care consumer (the patient) because even with continued increases in premiums, malpractice insurance costs have remained at about 1% of total health care spending since 1976. Mominee, supra at 725, citing Bovbjerg, Koller & Zuckerman, Information on Malpractice: A Review of Imperical Research on Major Policy Issues, 49 Law and Contemp. Probs., 85, 93 (Spring 1986).

13. There is a growing judicial sentiment that the medical malpractice insurance crisis of the 1970's was illusory and that the legislation enacted in response to it was ill-conceived and inappropriate. Note, 34 Vill. L. Rev., supra at 415; McKay, 32 Vill. L. Rev., supra at 1220. To the extent that there has been or is a medical malpractice crisis, "the consensus of opinion among physicians, other health care providers, lawyers, lawmakers, and disinterested observers - to the extent that such a concensus exists - is that the high incidence of actual medical malpractice occurring throughout the country is the chief cause of the crisis."

Jenkins, California's Medical Injury Compensation Reform Act: An Equal Protection Challenge, 52 S. Cal. L. Rev. 829, 851 (1979), citing a number of authorities.

14. On page 16 of defendant's brief he cites Redish, Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implication, 55 Tex. L. Rev. 759 (1977). That Redish article has been referred to (see Hayes v. Mercy Hosp. and Medical Center, 557 N.E.2d 873, 887-88 (Ill. 1990) (dissenting opinion)) as one which took the position that there was a medical malpractice crisis in the 1970's. But Redish prepared his article for (and it was funded by) the American Hospital Association (see footnote in Redish, supra at 759), and the year 1977, when that article was published, was during the period when the medical and insurance industries were engaged in their lobbying efforts and state legislatures were responding by enacting medical malpractice tort reform acts. In that environment it is hard to imagine an article paid for by the American Hospital Association being anything but supportive of their drive for legislation to limit medical malpractice actions.

On page 8 of defendant's brief he cites Jenkins, California's Medical Injury Compensation Reform Act, An Equal Protection Challenge, 52 S. Cal. L. Rev. 829 (1979), which was written four years after California hastily enacted its medical malpractice reform act as emergency legislation prompted by the "apparent crisis" in the medical malpractice insurance industry. Jenkins, supra at 831-32. As a prologue to his article, Jenkins

quotes the following:

Mindful of the adage: Act in haste; regret in leisure, there is concern that this sudden revolution of our tort system may have long-range effects which will change the lives of all citizens - physicians included - without any remedial effect on the curse which provoked the revolt - exorbitant insurance premiums.

Id. at 831. Jenkins concludes that three provisions of the California act, including the statute of limitations as applied to minors, deny malpractice victims equal protection of the laws and should be held to be unconstitutional.

Ironically, in the third law review article referred to by defendant (cited on page 11 of his brief), Note, The Indiana Medical Malpractice Act: Legislative Surgery on Patients' Rights, 10 Valparaiso U. L. Rev. 303 (1976) (examining the Indiana medical malpractice act), the author also concludes that the provision which denies minors the benefit of the tolling statute "must be stricken as an arbitrarily drawn statute which denies minors equal protection of laws." Id. at 350.

B. Plaintiffs' Response to Other Matters Raised in Point I of Defendant's Argument.

On pages 7-8 of defendant's brief he states that because both Kevin and Patrick were not only minors but were also permanently mentally disabled, (and would therefore always need to rely on a guardian to pursue an action for their injuries), "striking the statute of limitations would not provide them any further remedy. They would still have to rely upon a guardian to bring an action on their behalf." It is true that Kevin and

Patrick would always need to have a guardian to bring an action for them, but it is obvious that the medical malpractice statute of limitations has taken away a remedy they otherwise would have. If the antitolling provisions of the statute were stricken, Kevin and Patrick would have the benefit of the tolling statute and would be able to proceed with their present action, whereas, with that statute being in place (including the provision that denies minors the protection of the tolling statute), defendant is claiming that Kevin and Patrick have no right to pursue their action. In addition, the medical malpractice statute of limitations also applies, by its terms, to minors who are not mentally disabled. Those minors, upon reaching the age of majority, would not have to continue to rely on a guardian but would be able to pursue a remedy in their own behalf (were it not for the medical malpractice statute of limitations) for their injuries.

At the top of page 8 of defendant's brief, defendant represents that plaintiffs have suggested that Kevin and Patrick "were deprived [of their opportunity to bring an action] because no one could act for them . . . ." That is not what plaintiffs have suggested. Under the medical malpractice statute of limitations Kevin and Patrick were deprived of their remedy because nobody did act for them, within the time limited by the statute, (although someone did act well within the time normally available to minors in personal injury cases). The reasons why no one acted quickly to pursue a remedy on behalf of Kevin and Patrick for their injuries are apparent and understandable. Their natural father could not

cope with the fact of their severe mental and physical disabilities at their birth and became mentally incompetent himself, having to be committed to a mental hospital, and their mother, Marian J. Meehan, was thus left to bear the burden of caring for the two severely disabled infants. (R. 131-33 - Affidavit of Mrs. Meehan.) That that burden was a consuming one is illustrated by the video tape submitted to the trial court as Exhibit "A" to the Affidavit of Mrs. Meehan, which video tape accurately depicts the mental and physical condition of Patrick. (R. 131-33.) (That video tape will be transmitted to the Supreme Court as part of the record in this case.)

Furthermore, it was not until more than four years had elapsed from the time of their birth that the mother became aware that Kevin and Patrick's having been born prematurely could have been avoided (as well as the injuries they received) if she had received proper medical care. (R. 131-32.)

In addition, experience and common sense teach that most people are naturally reluctant to sue somebody, especially their doctor. They try to cope with the problem. For many parents of children who are victims of medical malpractice, it is only when financial burdens become intolerable as a result of the injury or when the child is not able to be provided with the care he or she needs because of lack of funds, that the parents are driven to pursue the child's legal remedy in order to obtain financial help. Denying children the protection of the tolling statute can often thus penalize the child whose parent initially tries (and often

succeeds) in bearing the burden of the financial impact of the malpractice without resorting to litigation. The shortened statutory period can also undermine the intent of the legislation (curtailing medical malpractice cases) by influencing parents to bring suits quickly instead of waiting to see how the child does (and possibly never filing suit). See Jenkins, 52 S. Cal. L. Rev., supra at 961. A recent study by Harvard Medical Practice Study researchers concludes that only about 2% of patients injured by medical malpractice ever file suit against physicians or hospitals. In other words, of those with valid malpractice claims, 98% do not assert them. Not only does this study suggest that many childrens' parents will not assert claims on behalf of a child, even when they probably should but it also is strong evidence that there is no "malpractice crisis." Localio, Lawthers, Brennan, Laird, Hebert, Peterson, Newhouse, Weiler & Hiatt, Relation Between Malpractice Claims and Adverse Events Due to Negligence, 325 The New England J. of Medicine No. 4, p. 245 (July 25, 1991).

Page 8 of defendant's brief states that if no limit is put on the time in which a guardian has to bring a claim on a minor's behalf, a mentally disabled person would have his entire life span to bring a claim relating to negligence at the time of birth." Under the general tolling statute (Utah Code Ann. § 78-12-36) the guardian for a person who is both a minor and also mentally incompetent would have a time limit. He would have to bring the action within the statute of limitations period, but with that period commencing to run when the minor reaches the age of

majority. That is the rule that applies to actions generally, but the legislature has made medical malpractice actions an exception to that rule. The general tolling statute, which implements a policy of not cutting off a minor's right to a remedy before he has an opportunity to exercise his right, has not been deemed unfair to potential defendants, largely because the vast majority of actions are brought soon after the injury occurs. See paragraph 9 on page 10 above. Furthermore, if in a specific case it is unfair, various equitable remedies are available.

Finally, while defendant's "chamber of horrors" argument may have some appeal in theory, in reality tolling the running of the statute for minors has not been a problem. Plaintiffs are seeking no more rights than the rights minors have had in every other personal injury setting in this state for many, many years. Allowing children such rights has not proved to be a significant problem in other personal injury cases or even in medical malpractice cases prior to 1976. Accordingly, there is nothing suggesting that it would pose a significant problem to afford children the same rights to the tolling statute in medical malpractice cases now. In fact, due to the extensive and detailed record-keeping typical of the medical profession, having a medical claim brought after the passage of substantial time would, in all probability, create less of a problem than would a belated automobile accident claim, by a minor, something Utah law clearly permits. Medical malpractice cases tend to be very document oriented, while other personal injury cases, such as automobile



accidents, tend to be very eye-witness oriented. The memories of witnesses to an auto accident quickly fade, while documents do not.

At the bottom of page 9 of defendant's brief, he cites five cases from other jurisdictions in support of the statement that "the Constitution has never required special, separate treatment of minors." Those five cases are Vance v. Vance, 108 U.S. 514, 521 (1888); Murray v. City of Milford, 380 F.2d 468, 473 (2nd Cir. 1967); Maine Medical Center v. Cote, 577 A.2d 1173, 1177 (Maine 1990); Shaw v. Zabel, 517 P.2d 1187, 1188 (Ore. 1974); and Lametta v. Connecticut Light & Power Co., 92 A.2d 731, 733 (Conn. 1952).

In the Vance, Murray and Lametta cases the minors, in arguing that the statute of limitations should not apply to defeat their claims, (1) did not base their arguments upon the open courts clause nor upon any other provision of a state constitution (state constitutions are generally interpreted to give greater protection to the individual than does the federal constitution), (2) the cases were not medical malpractice cases, and (3) the cases did not involve the situation where one group of minors (those with medical malpractice claims) were singled out and denied the protection of a tolling statute in comparison with all other minors having other types of claims, who did receive that protection. Thus the equal protection issue was not present in those cases.

In addition, in the Vance case the statute in question imposed upon an adult an affirmative duty to act for the minor (unlike a parent or other guardian who has no such legal duty to

bring an action for a minor injured by medical malpractice).

The Shaw case cited by defendant was also not a medical malpractice case. It involved an Oregon statute of limitations that applied to all personal injury claims of minors (not just medical malpractice claims). In addition, no open courts clause was in issue in that case (as it is in the instant case), and the court applied only a "rational basis" standard of review in upholding the statute.

The Maine Medical Center case cited by defendant is discussed on page 24 below.

At the top of page 10 of defendant's brief he states: "Because minors have no special rights beyond others, removal of the exception of the Utah tolling statute, should not be viewed as an 'abrogation of a remedy or cause of action' within the meaning of the Berry open courts analysis." The response to that is as follows:

First, under recent court decisions there has been an increasing awareness of the unfairness and injustice of using a statute of limitations to bar an injured person from exercising his legal remedy before he had any practical opportunity to do so. (See cases from other jurisdictions discussed on pages 16-21 of plaintiffs' initial brief. Cf. Myers v. McDonald, 635 P.2d 84 (Utah 1981), discussed on pages 24-26 of plaintiff's initial brief.) Under state constitutional provisions minors, speaking generally, may well have additional rights beyond adults with regard to statute of limitations issues.

Second, beyond the question of whether the legislature could constitutionally repeal the tolling statute with respect to all claims of minors, an equal protection issue clearly arises when it is not just minors generally that are being denied the benefit of the tolling statute, but only the limited class consisting of minors injured by medical malpractice.

Third, in light of the history of the tolling statute it cannot reasonably be said that the legislature did not "abrogate a remedy" when it denied minors having medical malpractice claims the protection of the tolling statute. Minors in Utah have been protected since at least as early as 1872 from the running of statutes of limitations which would bar their claims for injuries during their minority. Plaintiffs' counsel was not able to locate Utah Laws 1872 in which that protection to minors is apparently provided at Ch. IV, §24, p. 23, but the Compiled Laws of Utah 1876, §1118, continues that protection in the following language:

If a person entitled to bring an action . .  
 . be at the time the cause of action accrued .  
 . . within the age of majority . . . the time  
 of such disability shall not be deemed a part  
 of the time limited for the commencement of  
 the action.

Therefore, for over a hundred years (and beginning before the Utah Constitution was adopted in 1896) children in Utah, under the circumstances of the minor plaintiffs in the instant case, were able to seek a legal remedy for injuries caused by medical malpractice, but as a result of the passage of the Utah medical malpractice act in 1976, minor plaintiffs under the facts of the instant case no longer have a right to pursue a legal remedy. It

therefore seems specious for defendant to argue that the medical malpractice act did not take away any legal rights from minors.

On pages 10, 12, 13, 15, 16, 21 and 23 of defendant's brief he cites Allen v. Intermountain Health Care, 635 P.2d 30 (Utah 1981), but that case did not involve the claim of a minor. It held only that the two year statute of limitations in the Utah medical malpractice act was not unconstitutional under equal protection principles as applied to claims by adults. Furthermore, the court in that case applied only a "rational basis" test in reviewing the constitutionality of the statute, and the later Utah case of Condemarin v. University Hospital, 775 P.2d 348 (Utah 1989) (and the Utah cases of Malan v. Lewis, 693 P.2d 661 (Utah 1984), and Berry ex rel. Berry v. Beech Aircraft Corp., 717 P.2d 670 (Utah 1985), on which the majority of the justices in the Condemarin case relied), make it clear that a higher standard of review than "rational basis" should be applied in addressing the constitutionality of the medical malpractice statute of limitations as applied to minors.

On pages 9, 12, 14, 15, 17 and 24 of defendant's brief he cites Hargett v. Limberg, 598 F.Supp 152 (D. Utah 1984). In that case a critical threshold issue for the federal district court was whether to apply only a "rational basis" standard of review or one of "heightened scrutiny." The court (Judge Winder), relying in part on Allen v. Intermountain Health Care, 635 P.2d 30 (Utah 1981) (discussed above), applied only the rational basis test, which, as stated in Condemarin, affords an "almost total deference" to the

legislative scheme. Condemarin, supra at 354. Again, in light of the Malan, Berry and Condemarin cases, supra (all decided since Judge Winder rendered his decision in that Hargett case), there would seem to be little question, in addressing the issue of the constitutionality of a statute which denies minors the benefit of the general tolling statute, that in Utah the "rational basis" test should be rejected in favor of an "intermediate standard of review." (The Hargett case, was reversed on appeal. The appellate court decision is discussed on pages 29-30 below.)

On page 17 of defendant's brief, he quotes from De Santis v. Yaw, 434 A.2d 1273 (Pa. Super. 1981). It is interesting that defendant would cite that case because the majority opinion was opposed to the view that defendant advocates in the instant case. The portion quoted by defendant on page 17 of his brief is not from the main opinion but from a concurring opinion that disagrees with the reasoning of the majority. In that case, the plaintiff, a minor, brought suit for injuries suffered in an automobile accident. The minor's suit was dismissed by the trial court because it was filed after the Pennsylvania two-year statute of limitations had run. On appeal to the Superior Court of Pennsylvania (an intermediate appellate court), the minor argued that the statute of limitations should be unconstitutional as applied to minors. the Superior Court noted that the Supreme Court of Pennsylvania had 30 years earlier held that infants are bound by statutes of limitations equally with adults; the Superior Court stated that it was "bound" to follow that earlier Pennsylvania

decision and therefore had no choice but to affirm the trial court's judgment dismissing the action. The court then stated:

The decision is not a comfortable one, however, and it is our opinion that this question deserves serious reconsideration by the courts at this time. Recent advances in the laws regarding children's rights have made an automatic decision growing out of a tradition that viewed children as possessions completely unpalatable.

De Santis, supra at 1275. The court then traced the development of minors' rights from the early common law (which assumed that a father "owned" his child's chose in action and therefore had the prerogative of allowing that right to lapse) to the present day in which a child's own right to recover for his injuries is recognized. Thus it is now hard to sustain what "appears to be violation of a fundamental right: a chose in action as a form of personal property that without question now belongs to the injured child himself, and yet he is legally debarred from pursuing his claim." Id. at 1276. The Court concluded, "It is time to rethink the law in this area and seriously consider change." Id. at 1279.

On page 17 of the defendant's brief, he cites Bellotti v. Baird, 443 U.S. 622 (1979), and Parham v. J.R., 442 U.S. 584 (1979). The Bellotti case held a Massachusetts statute unconstitutional for involving parents too much (and therefore imposing too great a restriction) on a minor's decision whether to obtain an abortion. The Parham case dealt with a Georgia statute which provided for the commitment of children to state mental hospitals upon the request of their parents. That statute was held to be constitutional but only because it required the

superintendent of the hospital, as a "neutral fact finder," to exercise his independent judgment as to the child's need for confinement. The parents were therefore not given unreviewable discretion to make that decision with regard to their child. Those cases are far afield from the facts and issues involved in the instant case, but, interestingly, both those cases are examples of situations where, the Supreme Court held, minors should not be bound by the decisions of their parents. To that extent those cases are consistent in principle with the notion that a minor should also not be bound by his or her parents' "decision" (made consciously or through oversight) not to bring an action in behalf of the minor within the limitations period, thereby (as defendant argues) taking away from the minor the right to seek redress for an injury.

On pages 18-20 of defendant's brief he discusses the case of Maine Medical Center v. Cote, 577 A.2d 1173 (Maine 1990). In that case the court indulged in the presumption that the Maine medical malpractice statute of limitations was constitutional and adopted only the "rational basis" test in upholding the statute. As discussed in plaintiffs' initial brief, Condemarin v. University Hospital, supra, indicates that when the legislature creates a classification of persons and infringes their rights under the Utah open courts clause, the presumption of constitutionality is reversed, and the cursory "rational basis" standard of review is not sufficient.

In support of that Maine Medical case, defendant, in

footnote 4 on page 20 of his brief, cites eight cases from five jurisdictions, but only one of those cases (Rohrbaugh v. Wagoner) involved an open courts clause in a state constitution, and all five of those jurisdictions employed only a "rational basis" standard in evaluating the constitutionality of the medical malpractice statute of limitations. For example, that Rohrbaugh case stated that "Rationality is . . . the standard by which to judge this classification. . . . The statute is therefore presumed constitutional, and the burden was on appellants below to negative every conceivable basis which might have supported the classification." Rohrbaugh v. Wagoner, 413 N.E.2d 891, 894 (Ind. 1980).

One of those eight cases cited by defendant (Thomas v. Niemann, 397 So.2d 90, (Ala. 1981)) did not even deal with the constitutional issue involved in the instant case. In that Thomas case the "single issue" before the court was whether the Alabama Medical Liability Act enacted in 1975 was defective because it did not comply with the requirement in the Alabama constitution that (1) the subject of an act be clearly expressed in its title and (2) that an act not contain more than one subject. Id. at 91.

Another one of those eight cases cited by defendant in footnote 4 on page 20 of his brief (Petri v. Smith, 453 A.2d 342 (Pa. Super. 1982)) is the same intermediate appellate court that decided the De Santis case (discussed on pages 22-23 above), and the court in Petri referred to the "comprehensive and scholarly opinion" in De Santis, "seriously questioning the rationale of



barring personal injury suits by minors on a statute of limitation basis . . . ." Id. at 348. The court in Petri indicated that De Santis "well expressed" the continued feelings of the court against a statute of limitations that hold minors accountable equally with adults, but that the court was obliged to follow the earlier Pennsylvania precedent (which De Santis identifies as the case of VonColln v. Pennsylvania R.R. Co., 80 A.2d 83 (Pa. 1951)) until that case is overruled. Petri v. Smith, supra at 348.

On pages 20-21 of defendant's brief, he cites three federal cases dealing with the two-year statute of limitations in the federal torts claims act. Two of those cases (Robbins v. United States and Brown v. United States) did not even discuss the constitutional issues but dealt mainly with issues of statutory interpretation such as whether the statute was intended to be tolled by the plaintiff's minority, by misrepresentation and concealment by government doctors, by a plaintiff's not knowing about the negligence of a government doctor, etc. The third case (Pittman v. United States 341 F.2d 739 (9th Cir. 1965)) did involve a brief discussion of the constitutional issue with respect to the statute of limitations in the federal torts claims act running against minors. The court stated:

[C]ounsel for appellant argues rather eloquently that the claim could not accrue until Mark [the minor] had a guardian ad litem appointed by the court to pursue his right or until he reached 21 years of age, because there was nothing he could do for himself. He says that a right without a remedy is no right at all and therefore no claim could have accrued. Such argument has considerable original merit and perhaps has been followed

in some areas of the law outside the Federal Tort Claims Act. But the trouble is that the case law has piled up against Mark.

. . . .

We think that the concept still adheres that the Federal Tort Claims Act was a waiver of government immunity. There are decisions that say that the act should be liberally construed. We think that may be true as to what injuries are within the Act. But as to time, one can see that the Congress was alarmed about stale claims when it passed the Act and provided that there should be only a period of one year during which an action could be brought. (This was later changed to two years.)

Pittman, supra at 740-41.

The Pittman case was decided under the federal constitution (which typically gives less protection than state constitutions), did not involve the constitutional protection of an open courts clause (because the federal constitution has no such clause), was inclined to adopt a restrictive interpretation of the statute of limitations because the Tort Claims Act was a waiver of governmental immunity, did not employ a standard of review higher than "rational basis" (if even that much), and did not involve the classification of minors with a certain type of claim being treated more restrictively than minors having other types of claims (thus raising an equal protection issue).

II. REPLY TO POINT II OF DEFENDANT'S ARGUMENT REGARDING THE MEDICAL MALPRACTICE STATUTE OF REPOSE

On pages 22-23 of defendant's brief he argues that in Allen v. Intermountain Health Care, Inc., 635 P.2d 30 (Utah 1981) the Utah Supreme Court has already upheld the constitutionality of

the medical malpractice statute of repose. However, Allen did not involve the statute of repose but dealt instead with the two-year medical malpractice statute of limitations (which is the more reasonable of the two provisions because it does not begin to run until the patient discovers the injury). Furthermore, the court in Berry ex rel. Berry v. Beech Aircraft, 717 P.2d 670, 683 (Utah 1985) (as quoted on page 22 of defendant's brief) points out that in the Allen case "no issue was raised as to the constitutionality of the statute under [the open courts clause]." Other reasons why the Allen case is inapplicable to the instant case are set forth on page 21 above.

On page 23 of defendant's brief, he represents plaintiffs' argument in this case to be that "there is really no difference between an equal protection and open courts analysis as applied to the instant case . . . ." Plaintiffs are not aware of any place where they have made that argument. What plaintiffs have maintained is that when a statute infringes on an important, substantive right protected by the open courts clause of the Utah constitution, then the "rational basis" standard of review often used under equal protection analysis is not adequate, and the court should, instead, adopt a higher standard of review as outlined in the Condemarin case.

Utah is hardly alone in striking down statutes of repose. The Berry opinion cites a number of cases where statutes of repose with respect to products liability, medical malpractice, and architects and builders have been held to be unconstitutional by

the supreme courts of other states. (Berry, supra at 677-78.) Specifically with respect to medical malpractice statutes of repose, it has been observed that the trend of court decisions is to find such statutes unconstitutional under state (not federal) constitutional provisions involving guarantees of equal protection, due process and open courts. Note, The Unconstitutionality of Medical Malpractice Statutes of Repose: Judicial Conscience vs. Legislative Will, 34 Vill. L. Rev. 397-98, 409 (1989). Those state constitutional provisions may grant greater rights to citizens than does the federal constitution. Id. at 410. "This trend appears to have coincided with growing judicial sentiment that the medical malpractice insurance crisis of the 1970's was illusory, and that the legislation enacted in response to it was inappropriate" and that such legislation has little effect on the availability of affordable health care. Id. at 415, 418.

III. REPLY TO POINT III OF DEFENDANT'S ARGUMENT REGARDING WHETHER THE TWO-YEAR STATUTE OF LIMITATIONS, AS A MATTER OF STATUTORY INTERPRETATION, APPLIES TO THE MINOR PLAINTIFFS.

On pages 24-25 of defendant's brief, he relies on Hargett v. Limberg, 598 F.Supp 152 (D. Utah 1984) as authority for his argument that a mother bringing a medical malpractice action as guardian ad litem for her minor child should be considered the "plaintiff" (instead of the child) for purposes of the medical malpractice statute of limitations. That statute requires an action to be brought within two years after the "plaintiff or patient" discovers the injury. Plaintiffs response is as follows:

1. As indicated above, the Hargett case was reversed on

appeal. 801 F.2d 368 (10th Cir. 1986). The Tenth Circuit held that the "savings clause" in the medical malpractice statute of limitations permitted the plaintiff's action in that case to be filed within four years after the effective date of the 1979 amendment to that statute. Because plaintiff's action was filed within that period, plaintiff was able to proceed with the action. The appellate court made it clear that it was expressing no opinion on other issues in the case, which it declared to be moot, including the issues of whether the mother's failure to bring the action within two years of the time when she discovered the "injury," should bar the child from filing suit and whether the medical malpractice limitations statute violates the United States and Utah Constitutions.

2. If the "plaintiff" within the meaning of the medical malpractice statute of limitations were considered to be the guardian ad litem instead of the child, who is the real party in interest, it would exalt form over substance because plaintiffs' counsel could simply have appointed as guardian ad litem someone who is a "stranger" to the child, who had no prior knowledge of the child or of his injury or of its negligent cause.

3. In the instant case the guardian ad litem is not the natural parent of the children. With respect to the claims of Kevin and Patrick, their mother, Marian Meehan, is neither the "plaintiff or patient," and it would be more straightforward to hold that in a medical malpractice suit for a minor child, the "plaintiff or patient" (within the meaning of the medical

malpractice statute of limitations) is the child.

#### IV. CONCLUSION.

Under the Condemarin and Berry cases, the "rational basis" standard of review is not sufficient in testing the constitutionality of either the two-year statute of limitations (as applied to minors) or the four-year statute of repose in the medical malpractice act because both statutes infringe rights protected by the open courts clause. The appropriate "intermediate standard of review" places the burden on defendant to show that:

1. There was a medical malpractice insurance "crisis," and, if so, that it was caused by medical malpractice claims (not by investment losses of insurance companies);

2. Denying minors the protection of the tolling statute actually helps in a substantial way to solve that crisis; and

3. It is reasonable to attempt to solve a medical malpractice crisis by a measure so drastic as denying to some minors a remedy for their injuries.

Defendant has failed to sustain his burden on any of those issues.

Finally, depriving a very few children of the right to seek compensation, (which in cases like this one is essential just to cope with the financial burdens created by the injuries), as a method for making up for poor investments of insurance companies, increasing profits or reducing premiums, is not only repugnant to the Constitution, but to basic notions of fairness as well.

Furthermore, even if a true crisis existed, asking a few children to carry a vastly disproportionate share of the overall burden of a society-wide problem is neither an effective nor appropriate approach. If a crisis exists, it has been caused by adults and the burden of it should be borne by adults.

DATED this 5<sup>th</sup> day of December, 1991.

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CERTIFICATE OF SERVICE

I hereby certify that this 5<sup>th</sup> day of December, 1991 the original and nine copies of the Reply Brief of Plaintiffs/Appellants have been mailed, postage prepaid, addressed to the following:

Utah Supreme Court  
332 State Capitol Building  
Salt Lake City, Utah 84114

and that four copies of said Reply Brief have been mailed, postage prepaid, addressed to the following:

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