

1992

# G. Kevin Jones v. The State of Utah, The University of Utah, The University of Utah Hospital and Medical Center, and James M. Becker, M.D. : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

G. KEVIN JONES,  
JONES/ Appellant,

vs.

THE STATE OF UTAH; THE  
UNIVERSITY OF UTAH; THE  
UNIVERSITY OF UTAH HOSPITAL AND  
MEDICAL CENTER  
and JAMES M. BECKER, M.D.  
Defendants/Appellees,

920403-CA

NO:   
PRIORITY NO. 16

BRIEF OF APPELLANT

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT SALT LAKE COUNTY,  
JUDGE LESLIE A. LEWIS, PRESIDING, CASE NO. C88-2736

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**NO: 920191**

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## I. STATEMENT OF JURISDICTION

This Court has jurisdiction over the final judgment rendered below pursuant to Utah Code Ann. §78-2-2(j) (1953).

## II. STATEMENT OF ISSUES PRESENTED FOR REVIEW AND STANDARDS OF REVIEW

A. Whether the District Court's Findings of Fact numbered 5, 6, 10, 16, 17, 18, 19, 21 and 26 were clearly erroneous being without any evidentiary foundation requiring reversal of the judgment and a new trial.<sup>1</sup>

B. Whether the District Court erred in concluding that JONES' action was not commenced within the time required by Utah Code Ann. §78-14-4 (1953), when JONES did not know and had no reason to know that he had sustained a legal injury prior to September 15, 1987.<sup>2</sup>

C. Whether the District Court erred, by failing to properly consider that the "knowledge of injury" prong of the Foil test,

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<sup>1</sup>The appellate court will not set aside a trial court's findings of facts unless they are clearly erroneous. A finding is "clearly erroneous" when the appellate court, after reviewing the record, is left with a definite and firm conviction that a mistake has been made. An appellate court will regard a finding as clearly erroneous when the finding is unsupported by the evidence. To challenge a trial court's findings of fact, an appellant must demonstrate the findings are against the clear weight of the evidence.

<sup>2</sup>A trial court's interpretation of a statute presents a question of law reviewed on appeal de novo. Ward v. Richfield City, 798 P.2d 757 (Utah 1990). Similarly, the appellate court accords the trial court's conclusions of law no particular deference, but reviews them for de novo. Bonham v. Morgan, 778 P.2d 497, 499 (Utah 1989); State v. Rio Vista Oil, Ltd., 786 P.2d 1343, 1347 (Utah 1990); Gonzales v. Morris, 610 P.2d 1285, 1286 (Utah 1980); Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985); Zions First Nat'l Bank v. National Am. Title Ins., 749 P.2d 651, 656 (Utah 1988).

tolled the two year limitations period until JONES knew or should have known of the full nature, extent, severity and permanence of his injury.<sup>2</sup>

D. Whether the District Court erred, as a matter of law, by failing to properly apply the "knowledge of negligence" prong of the Foil which tolled the two year limitations period until JONES knew or has reason to know the cause of his injury and the potential negligence of Defendants.<sup>2</sup>

E. Whether the District Court erred, in concluding that the "continuing treatment doctrine" adopted by the Supreme Court in Peteler v. Robinson, 17 P.2d 244, 250 (Utah 1932) is no longer applicable law in light of Utah Code Ann. §78-14-4 (1953).<sup>2</sup>

F. Whether the District Court erred, in concluding that the "continuing treatment doctrine" would not apply to this case, where JONES was under continuous treatment by Defendants from 1984 until after December, 1987, because JONES knew of the existence of his injury and possible.<sup>2</sup>

### III. APPLICABLE STATUTES

Utah Code Ann. §§78-14-4, 78-14-8, 78-14-12 (1953), as amended. See infra Addendum.

#### IV. STATEMENT OF THE CASE<sup>3</sup>

##### A. NATURE OF THE CASE

This is a medical malpractice action in which Plaintiff/Appellant G. Kevin Jones (JONES) seeks damages for injuries which include, among other things, permanent sexual dysfunction as a result of negligent surgery and care rendered by Defendants and their agents. PL. at 2-8, Plaintiff's Complaint.

##### B. COURSE OF THE PROCEEDINGS AND DISPOSITION BELOW

On December 4, 1987, a Notice of Intent to Commence Action was served on Defendants pursuant to the provisions of Utah Code Ann. §78-14-8 (1953). See Plaintiff's Exhibit No. 1; PL. at 3, Plaintiff's Complaint ¶5. On January 15, 1988, a Request for Pre-litigation Panel Review and a copy of said Notice of Intent to Commence Action were filed with the Utah State Department of Business Regulation and served on Defendants pursuant to the provisions of Utah Code Ann. §78-14-12 (1953). Plaintiff's Exhibit No. 2; PL. at 3, Plaintiff's Complaint ¶5. A pre-litigation hearing was held before the Division of Occupational and Professional Licensing, Department of Business Regulation. The Division of Occupational and Professional Licensing subsequently issued and mailed to the parties its opinion and its affidavit of compliance with the provisions of Utah Code Ann. §78-14-12 (1953).

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<sup>3</sup>The record in this action consists of three volumes of pleadings (hereinafter PL.), four volumes of trial transcripts (hereinafter TR.) and exhibits. References in Plaintiff's Brief are noted first to the record or exhibit, and then to the paginated page. For example, PL. at \_\_\_\_\_, TR. at \_\_\_\_\_ or Plaintiff's Exhibit No. \_\_\_\_\_.

Plaintiff's Exhibit No. 3; PL. at 3, Plaintiff's Complaint ¶5.

JONES' Complaint was filed on April 26, 1988. PL. at 2-9. The trial was bifurcated to determine whether JONES' claim was timely filed pursuant to the Utah Health Care Malpractice Act, Utah Code Ann. §78-14-4 (1953). The bifurcated trial was prosecuted to the District Court without a jury on November 12, 13 and 15, 1991. PL. at 1090.

The District Court ruled that the claim was barred by the statute of limitations because JONES had failed to commence the action within two years from the date he knew or reasonably should have known that he sustained an injury that was caused by an act of Defendants. PL. at 1046, (Court's Decision); PL. at 1085, (Findings of Fact); PL. at 1091, (Judgment).

The District Court, with some changes, approved Defendant's Findings of Fact and Conclusions of Law. PL. at 1064a-1070; PL. at 1083-1088; PL. at 1093. Judgment was entered on January 23, 1992. PL. at 1091. On February 3, 1992, JONES filed a Motion to Alter or Amend Judgment, or, in the Alternative, for a New Trial. PL. at 1095-1105. JONES' Motion for New Trial was denied on March 6, 1992. PL. at 1118. JONES thereafter filed a timely Notice of Appeal on April 6, 1992. PL. at 1120-1121.

#### V. STATEMENT OF FACTS<sup>4</sup>

1. From December 29, 1983 through January, 1987, JONES was under the care of Defendant James M. Becker, M.D. ("BECKER"), who was an agent and employee of other Defendants named herein

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<sup>4</sup>For a more detailed statement of facts, see PL. 531-45.

("HOSPITAL"). PL. at 532; TR. at 1393 lines 7-11, at 1395 lines 16-20, at 1430 lines 12-20, at 1432 lines 17-19, (testimony of G. Kevin Jones); TR. at 1180 lines 14-15, (testimony of Dr. J. Becker).

2. JONES was admitted to University Hospital to undergo the Ileal Pouch - Anal Anastomosis, a new, major surgical procedure for the treatment of chronic ulcerative colitis. TR. at 1391 lines 6-8, at 1395 lines 16-25, at 1396 lines 1-25, at 1397 lines 1-5, (testimony of G. Kevin Jones); TR. at 1192 lines 12-25, at 1193 lines 1-25, at 1194 lines 1-25, at 1195 lines 1-25, at 1209 lines 13-14, at 1212 lines 1-25, at 1213 lines 1-2, (testimony of Dr. J. Becker); Plaintiff's Exhibit No. 5.

3. Within weeks of being released from the University Hospital on April 16, 1984, for treatment arising from his second surgery on February 27, 1984, JONES began to be aware that he was suffering some sexual disability. TR. at 1410 at lines 8-25, at 1411 lines 1-25, (testimony of G. Kevin Jones). JONES' sexual dysfunctions, which still exist today, include: (1) loss of ejaculation, (2) diminished quality of erections, and (3) interrupted climax. TR. at 1410, lines 19-25; TR. at 1411, lines 1-25; TR. at 1412, lines 1-10, (testimony of G. Kevin Jones).

4. During the ongoing physician-patient relationship between JONES and Defendants, JONES believed and BECKER testified that he was the best qualified physician in the Salt Lake City, Utah, and Intermountain areas to care for and treat JONES' inflammatory bowel disease. TR. at 1256 lines 2-5, 17-23, at 1259 lines 23-25, at

1260 lines 1-5, (testimony of Dr. Becker). BECKER was the only physician in the Intermountain area performing the ileo-anal surgical procedure on adults when JONES was operated on in 1984. TR. at 1255a, lines 7-19; TR. at 1256, lines 24-25; TR. at 1257, lines 1-2, 14-20; TR. at 1258, lines 1-13; TR. at 1259, lines 23-25; TR. at 1260, lines 1-18, (testimony of Dr. Becker).

5. Prior to the surgical procedures, BECKER identified the risks of surgery to include pelvic infections and anesthesia complications. TR. at 1398 lines 5-21, at 1404 lines 18-25, at 1405 lines 1-7 (testimony of G. Kevin Jones); TR. at 1494 lines 10-13 (testimony of Marie Jones). BECKER specifically represented to JONES that there was no risk of impairment to his sexual function and that the surgeries were performed in such a manner that it was almost surgically impossible from an anatomical standpoint to damage nerves that control JONES' sexual function. TR. at 1399 lines 3-8, at 1405 lines 4-7 (testimony of G. Kevin Jones); Plaintiff's Exhibit No. 4; TR. at 1514 lines 14-19, at 1516 lines 15-17 (testimony of Dr. Garth N. Jones).

6. Prior to the surgeries, BECKER refused to implement JONES' request to store JONES' sperm. Again, BECKER represented to JONES there was no need to exercise this precaution because there was no risk of injury to his sexual function from the surgeries or care. TR. at 1399 lines 14-18, at 1400 lines 19-22, at 1405 lines 10-19 (testimony of G. Kevin Jones); TR. at 1497, lines 13-19, 25; TR. at 1498, lines 1-6; 15-22; TR. at 1501, lines 16-17 (testimony of Marie Jones); TR. at 1514 lines 1-13 (testimony of Dr. Garth N.

Jones). JONES had normal sexual functions before his second surgery. TR. at 1402 lines 8-16 (testimony of G. Kevin Jones); TR. at 1229 lines 15-25, at 1230 lines 1-25, at 1231 lines 1-25, at 1232 lines 1-13 (testimony of Dr. Becker); TR. at 1499 lines 19-25, at 1500 lines 1-12 (testimony of Marie Jones).

7. JONES reported his awareness of his sexual dysfunction to BECKER in April or May, 1984. TR. at 1410 lines 8-12 (testimony of G. Kevin Jones). BECKER repeatedly and consistently informed and represented to JONES that his sexual disorders were in no way related to the surgeries, that the surgical procedures had been properly performed, that no damage to nerves had been sustained, and that the surgeries were performed in such a manner that it was almost anatomically impossible to damage nerves controlling his sexual functions. TR. at 1399 lines 3-8, at 1405 lines 4-7, at 1414 lines 7-10, 22-25, at 1415 lines 1-10, at 1416 lines 8-13, at 1417 lines 1-4, at 1445 lines 2-9 (testimony of G. Kevin Jones); Plaintiff's Exhibit No. 4. HOSPITAL and BECKER further advised JONES that his sexual disorders were mental not physical and recommended general psychotherapy. TR. at 1322 lines 6-10, at 1417 lines 5-23, at 1419 lines 16-21, at 1420 lines 1-4, at 1421 lines 12-15, at 1424 lines 22-24 (testimony of G. Kevin Jones); TR. at 1261 lines 9-17, at 1262 lines 8-22 (testimony of Dr. Becker); TR. at 1569 lines 1-3, at 1575 lines 9-16, at 1591 lines 7-10 (testimony of Terri Stoker); TR. at 1677 lines 16-22 (testimony of Dr. Segal); TR. at 1310 lines 6-19 (testimony of Dr. Hammond); Defendants' Exhibit 6 (Dr. Hammond's findings); TR. at 1661 lines

6-12 (testimony of Dr. Middleton).

JONES was also told by Defendants that his sexual disorders were temporary, and due to prolonged use of drugs for medical treatment, serious illness, trauma of surgery, malnourishment, fatigue, infrequent sex, and that in time his sexual functions would return. TR. 1322 lines 6-10, at 1323 lines 11-17, at 1333 lines 7-9, at 1414 lines 11-20, at 1417 lines 13-23, at 1421 lines 15-18, at 1466 lines 11-13 (testimony of G. Kevin Jones); TR. at 1207 lines 15-25, at 1208 lines 1-2, at 1249 lines 11-20 (testimony of Dr. Becker); TR. at 1657 lines 4-12, at 1662 lines 7-18 (testimony of Dr. Middleton); TR. at 1165 lines 15-20, at 1172 lines 17-25 (testimony of Dr. Dayton).

8. In a telephone conversation initiated by JONES' father, Dr. Garth N. Jones, in May, 1984, BECKER represented to Dr. Jones that the operations could not have caused any sexual problems for JONES. That conversation was communicated by Dr. Jones to JONES. TR. at 1516 lines 12-25, at 1517 lines 1-25, at 1518 lines 1-12 (testimony of Dr. Garth N. Jones). BECKER also assured JONES' mother, Marie Jones, that JONES not suffering any sexual dysfunctions experienced were not as a result of the surgeries. TR. at 1502 lines 13-21 (testimony of Marie Jones).

9. In addition to sexual dysfunction, since the surgery, JONES has consistently suffered from recurrent prostatitis, urinary infections, persistent diarrhea, frequent yeast infections and skin irritations in the rectum; interrupted sleep, incontinence and infections of the anal pouch. PL. at 677-20; TR. at 1632 lines 19-



20, at 1633 lines 1-8 (testimony of Dr. Harman). Moreover, JONES was later informed in 1991 that Defendant BECKER'S original diagnosis of ulcerative colitis was probably erroneous. Instead, JONES suffers from Crohns Disease, a disease that requires entirely different surgical treatment than what JONES received from BECKER. TR. at 1633 lines 8-15, at 1639 lines 13-24, at 1645 lines 11-25 (testimony of Dr. Harman); Plaintiff's Exhibit No. 5.

10. It was not until September 15, 1987, that JONES became aware for the first time of the true nature of his injuries, the cause and the possibility of negligence. TR. at 1447 lines 18-25, at 1448 lines 1-25, at 1449 lines 1-25, at 1450 lines 19-25, at 1451 lines 1-25, at 1452 lines 1-21 (testimony of G. Kevin Jones). On this date JONES received medical examination and treatment from Dr. Merrill T. Dayton. At that time Dr. Dayton informed JONES that the most likely cause of his sexual dysfunctions was that "something went wrong during the surgeries to damage nerves." TR. at 1450 lines 12-16. See also TR. at 1449 lines 18-21 (testimony of G. Kevin Jones). Prior to Dr. Dayton's statement on September 15, 1987, JONES had no reason to believe that the surgery performed in 1984 may have been improperly done and caused his sexual dysfunction. TR. at 1450 lines 24-25, at 1451 lines 1-8 (testimony of G. Kevin Jones); TR. at 1577 lines 13-21 (testimony of Terri Stoker). Dr. Dayton is an employee of HOSPITAL and the successor surgeon to BECKER. TR. 1130 at lines 13-25, at 1131 lines 1-10, at 1155 lines 11-19, at 1168 lines 6-15 (testimony of Dr. Dayton); TR. at 1401 lines 23-25, at 1402 lines 1-4 (testimony of Dr. Becker).

Dr. Dayton was the first physician trained and experienced in the ileo-anal procedure, a unique medical specialty in 1984, whom JONES had seen, other than Dr. Becker, since undergoing surgery. JONES' treatment from Dr. Dayton was the first time JONES consulted with a knowledgeable, independent physician about his medical condition. TR. at 1398 lines 7-19, at 1399 lines 2-5, 17-25, at 1400 lines 1-2, 14-20, at 1401 lines 23-25, at 1402 lines 1-4, 23-25, at 1403 lines 1-5 (testimony of Dr. Becker).

11. JONES relied upon agents and employees of HOSPITAL during the course of his continuing care and treatment with respect to his condition. TR. at 1322 lines 6-10, at 1332 lines 11-17, at 1333 lines 7-9, at 1405 lines 19-21, at 1407 lines 4-25, at 1408 lines 1-25, at 1409 lines 1-3, at 1445 lines 20-23, at 1469 lines 5-8, at 1481 lines 7-15 (testimony of G. Kevin Jones); TR. at 1519 lines 18-24 (testimony of Dr. Garth N. Jones); TR. at 1497 lines 15-20, at 1498 lines 20-25, at 1499 lines 1-2, at 1501 lines 11-13, at 1504 lines 1-2, 20-23 (testimony of Marie Jones); TR. at 1564 lines 20-25, at 1565 line 1, at 1569 lines 11-13 (testimony of Terri Stoker).

#### VI. SUMMARY OF ARGUMENT

The statute of limitations in medical malpractice actions begins to run when a plaintiff knows or should know that he has sustained an injury, the injury's cause and that the injury is attributable to negligence. The District Court erred in ruling that mere awareness of a temporary condition constitutes knowledge of injury and begins the limitations period. Knowledge of injury

sufficient to commence the limitations period occurs only when a plaintiff has knowledge of the full nature, extent and permanency of his injuries. Mere awareness of a physical condition alone does not constitute notice of a legal injury for purposes of statutory accrual. Further, knowledge of injury cannot occur when a person relies upon physicians representations that the condition is not an injury but rather, is routine, temporary or non-existent. Further, the District Court's ruling would encourage baseless claims merely to stop the statute from running where a plaintiff possesses knowledge of injury absent knowledge of a causal link between the injury and negligence. Permitting the statute to accrue upon the mere awareness of a medical condition would also reward health care providers who withhold relevant information from a patient until the statute has run. Therefore, in cases where the condition is represented by the health care providers to be temporary and unrelated to medical treatment, the statute must be tolled until the plaintiff knows that his condition is not merely temporary.

The requisite "knowledge of negligence" occurs only when a plaintiff knows that he had suffered an "injury," its "cause" and that it may have resulted from "negligence." The record reveals no evidence which indicates that JONES was ever informed, prior to his consultation with Dr. Dayton on September 15, 1987, that his described and represented "temporary" dysfunction was permanent, caused by the surgery and was the result of negligence. In cases, such as this case, where there are multiple potential causes of injury, the statute of limitations must be tolled until the

plaintiff becomes aware of the actual cause of his injury.

The continuous treatment doctrine recognized by the Utah Supreme Court also tolls the running of the statute of limitations until the termination of a course of treatment for the same or related illnesses out of which the claim for malpractice arises. The District Court held that the doctrine was inconsistent with Utah Code Ann. §78-14-4. However, other states which have similar statutory limitations periods based on "discovery" still follow the continuous treatment rule, citing Utah as authority. Furthermore, the doctrine applies even if the plaintiff is aware of the negligence before the continuing period of treatment ends.

The unique facts of this case justify this Court to apply the "exceptional circumstances" rule to toll the statute of limitations until September 15, 1987, when JONES first learned of the permanent nature of his dysfunction, its cause and possible negligence.

## VII. ARGUMENT

### A. THE DISTRICT COURT'S FINDINGS OF FACT NUMBERED 5, 6, 10, 16, 17, 18, 19, 21 AND 26 ARE CLEARLY ERRONEOUS.

1. FACTS 5, 6, & 10. Findings of Fact numbered 5, 6, and 10 state that JONES and his parents were fully informed by BECKER concerning the risks of the ileo-anal surgical procedure, including the risk of sexual dysfunction as a result of the procedure. PL. at 1084-85. This factual finding is devoid of any basis in the testimony or evidence presented at the trial. In fact, the contrary is true. See supra Statement of Fact, 5. The only significant evidence presented indicates that BECKER specifically

rejected JONES' request to store his sperm in the event of problems which might result from the surgery. Id. BECKER further represented that sexual dysfunction was not one of the risks of the procedure. Statement of Fact, 5.

Moreover, the bifurcation of issues and trial was to address the issue of what point in time JONES knew or should have known that his sexual dysfunction was caused by the surgery and likely resulted from negligence. The issue of informed consent is irrelevant to a proper resolution of the statute of limitations issue. Accordingly, the Court's findings were clearly erroneous and contrary to the overwhelming, contrary evidence, thus mandating reversal and a new trial.

2. FACT 16. Finding of Fact number 16 states that beginning in May, 1984, JONES knew that his second surgery on February 27, 1984, was a possible cause of his sexual dysfunctions and that he might have a cause of action against Defendants. PL. at 1085. This finding is also contrary to the only evidence offered on this point. See supra Statement of Facts, 7, 8, 10, and 11. JONES specifically denied any knowledge that his dysfunction was caused by the operation of February 1984. At best JONES testified that he reported the existence of dysfunction to BECKER in April or May of 1984. He reported the dysfunction, not because he believed it was caused by the surgery or negligence, but because he had a medical problem and sought medical attention from his treating physician. Further, his inquiry as to whether it was possible that the surgery had caused his dysfunction was met with BECKER'S suggestion that

not only was it causally impossible but that there were a multitude of other causes for his problem. He was also told that the dysfunction was probably temporary and to let time pass, and concentrate on recovery from his other health problems before worrying about his sexual abilities.

3. FACT 17. Finding of Fact numbered 17 states that JONES did not rely upon Defendants' opinion that his sexual dysfunctions were caused by psychological factors. PL. at 1085. This finding is clearly erroneous. See JONES' Statement of Facts numbered 7 and 11. To the contrary the only evidence presented to the Court was that JONES followed the advise of BECKER and sought additional treatment based on BECKER'S representation that the dysfunction was psychological and temporary.

4. FACTS 18 & 19. Findings of Fact numbered 18 and 19 state that JONES was never misled in any manner concerning the possible causes of his sexual dysfunction and that the Defendants did not conceal any information relevant to JONES' condition. PL. at 1086. However, even a brief review of the record indicates incontestably that BECKER entirely discounted any possibility of a causal relationship between the surgery and his dysfunction. He was told that his dysfunction was psychological, temporary, caused by his general health at the time, and was more perceived than real. See supra Statement of Facts, 5, 7, 8 and 10. There is no evidence in the record which tends to show JONES was told or informed that the surgery could cause or did cause permanent, serious sexual dysfunction. Defendants repeatedly denied any causation between

the surgery and the dysfunction, telling JONES the cause was to be found elsewhere. Absent any basis in the record, the finding is clearly erroneous and the Court's decision must be reversed.

5. FACT 20. Findings of Fact numbered 20 states that during the years 1984 and 1985 JONES considered suing Defendants for medical malpractice. PL. at 1086. This finding is also clearly erroneous and has no basis in the record. The only testimony introduced showed JONES rigorously denied that he contemplated suing the University before his September 15, 1987 consultation with Dr. Dayton. TR. at 1319 lines 3-5, at 1320 lines 5-7 (testimony of G. Kevin Jones). The record demonstrates that during that particular time, JONES' disappointment was directed not at the cause or blame for his dysfunction but at "the way in which [he] was treated as an individual and as a patient" by Defendants. TR. at 1314a lines 20-23 (testimony of G. Kevin Jones); TR. at 1634 lines 10-19, at 1642 lines 8-15 (testimony of Dr. Harman). Feelings of anxiety and disappointment do not replace the knowledge of legal injury required to commence the statutory period under Utah law. The Court's finding was contrary to the overwhelming evidence in the record and must be reversed for a new trial.

6. FACT 26. Findings of Fact numbered 26 states that JONES' action was not timely commenced within two years after JONES knew of his sexual dysfunctions, and that he might have a claim for malpractice. PL. at 1086-87. This conclusion of law is clearly erroneous. As will be shown below, there is no evidence in the record that JONES knew or had reason to know he sustained a legal

injury as a result of the surgery performed until September 15, 1987. See supra Statement of Facts, 5, 6, 7, 8, 10 and 11. The Court's findings to the contrary as without any factual or evidentiary basis and must be reversed.

B. THE DISTRICT COURT ERRED IN ITS INTERPRETATION AND APPLICATION OF THE "KNOWLEDGE OF INJURY" AND "KNOWLEDGE OF NEGLIGENCE" PRONGS OF THE FOIL TEST FOR "LEGAL INJURY"

In Utah, the statute of limitations for medical malpractice suits requires an action be brought "within two years after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered, the injury. . . ." Utah Code Annotated, § 78-14-4. In Foil v. Ballinger, 601 P.2d 144 (Utah 1979), the Utah Supreme Court explained that the statutory period begins to run "when an injured person knows or should know that he has suffered a legal injury." The Court interpreted the, "injury" in Utah Code Ann. §78-14-4 to mean "legal injury". Id.

Under Foil, and its progeny, "legal injury" is deemed to be known when the plaintiff is aware of facts that would lead a reasonable person to conclude that "he has sustained an injury and that the injury was caused by negligent action." Foil, 601 P.2d at 148; See Reiser v. Lohner, 641 P.2d 93, 99 (Utah 1982); Hove v. McMaster, 621 P.2d 694, 696-97 (Utah 1980). Facts which give rise to the requisite knowledge include; (1) the existence of an injury, (2) awareness of its cause and (3) the possibility of negligence. Hargett v. Limberg, 598 F. Supp. 152, 155 (D. Utah 1984); Exnicious v. United States, 563 F.2d 418, 420 (10th Cir. 1977); Cf. Foil, 601



P.2d at 146.

The record below clearly sets forth that JONES did not have any significant information which would have caused him to recognize his condition was a legal injury until at least September 15, 1987. The detailed medical explanation made by Dr. Dayton to JONES at this time provided JONES with the first knowledge that he was actually injured. It also provided the first indication that the cause of his injury may have been the surgery and that negligence during the operation was possible.

Despite this overwhelming evidence of lack of knowledge and the absence of contrary evidence, the District Court found that the statute of limitations had run because JONES "knew or should have known that he had sustained an injury and the causation of the same, on or about May of 1984." PL. at 1046 (Court's Decision). As the following will show, the District Court erred in improperly determining that JONES was aware that he suffered a legal injury prior to September 15, 1987. Plaintiff will show that the district court erred by improperly applying the requirements of Foil to this case. Specifically, the court erred by failing to consider the undisputed facts showing that JONES did not know he was injured within the meaning of Foil, that JONES had no knowledge that his injury was caused by the surgery and that JONES had no reason to believe that the injury was the result of medical negligence before September 15, 1987.

1. The District Court erred, in failing to consider that knowledge of injury prong of the Foil test includes knowledge of the full nature, extent, severity and permanence of the injury.

The first query in this case concerns the extent of JONES' knowledge that he sustained an injury. It must be determined whether JONES had possession of facts necessary to satisfy the "knowledge of injury" prong of the Foil test. In Foil, the Utah Supreme Court reasoned that "knowledge of injury" required a plaintiff's understanding of the full nature, extent, severity and permanency of his condition. Foil, 601 P.2d at 147. The Court stated:

In the health care field it is typically the case that there often is a great disparity in the knowledge of those who provide health care services and those who receive the services with respect to expected and unexpected side effects of a given procedure, as well as the nature, degree, and extent of expected after effects. While the recipient may be aware of a disability or dysfunction, there may be, to the untutored understanding of the average layman, no apparent connection between the treatment provided by a physician and the injury suffered. Even if there is, it may be passed off as an unavoidable side effect or a side effect that will pass with time.

Foil, 601 P.2d at 147 (emphasis added); See also Christiansen v. Rees, 436 P.2d 435 (Utah 1968).

The Court recognized patients are not in a position to know whether their condition is normal or an injury. The Court continued, "Indeed, common experience teaches that one often suffers from pain and other physical difficulties without knowing or suspecting the true cause, and may, as often happens, ascribe a totally erroneous cause to the manifestations." Foil, 601 P.2d at 147. Therefore, mere awareness of a condition or dysfunction in

isolation does not constitute knowledge that the person has sustained an injury requisite to commence the limitations period. In fact, knowledge of an injury, even permanent, severe injury, cannot alone constitute "legal injury " in Utah. As the Court in Foil stated, "We hold that the term discovery of 'injury' in §78-14-4 means discovery of injury and the negligence which resulted in the injury" Id. at 148 (emphasis added).

Subsequent Appellate Court decisions, including this matter, courts have ignored the Supreme Court's instruction and have held that the requisite "knowledge" the plaintiff must have to satisfy the Foil test is mere awareness of a temporary disorder, Reiser, 641 P.2d at 100; Duerden v. Utah Valley Hospital, 663 F. Supp. 781, 785 (D. Utah 1987); or the mere belief that a patient's symptoms were unavoidable side effects of treatment, Floyd v. Western Surgical Assoc., Inc., 773 P.2d 401, 403 (Utah Ct. App. 1989); Deschamps v. Pulley, 784 P.2d 471, 474 (Utah Ct. App. 1989). These cases, including the case at bar, have misapplied the Foil "knowledge of injury" test, undercutting the public policies announced in Foil. Foil, 601 P.2d at 147-48; See Reiser, 641 P.2d at 102-03 (Stewart, J., dissenting); Duerden, 663 F. Supp. at 785 n.6; Maughan v. S.W. Servicing, Inc., 758 F.2d 1381, 1386-87 (10th Cir. 1985).

Ruling that the first prong of the Foil test is satisfied by mere awareness of present physical symptomology or dysfunction absent some indication of causation and negligence would "encourage persons who experience minor or temporary injuries, dysfunctions,

or ailments to file lawsuits to prevent the statute of limitations from running on the chance that the full extent of the ailment has not been discovered." Duerden, 663 F. Supp. at 785 n.6. Such a rule "is not consistent with the unarguably sound proposition that unfounded claims should be strongly discouraged." Foil, 601 P.2d at 148. As noted in Foil, "One of the chief purposes of the Utah Health Care Malpractice Act was to prevent the filing of unjustified lawsuits against health care providers, with all the attendant costs, economic and otherwise, that such suits entail." Foil, 601 P.2d at 148. See also Maughan, 758 F.2d at 1386. Moreover, a plaintiff who merely files suit to prevent the statute of limitations from running on the chance that the full extent of the dysfunction would later be discovered would be susceptible to dismissal on grounds of frivolity, Maughan, 758 F.2d at 1387, or merely a symbolic judgment such as an award of nominal damages.<sup>5</sup> Davies v. Krasna, 535 P.2d 1161, 1168 (Calif. 1975).

In addition, to hold that the first prong of Foil is satisfied prior to the time a plaintiff becomes aware of the full extent and

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<sup>5</sup> Nominal damages are awarded to "vindicate a legal right" where no actual loss has occurred. Dobbs, Remedies, §3.8 at 191 (1973); Duerden, 663 F. Supp. at 784 n.4. Nominal damages cannot be recovered in a negligence action because actual loss or damage is an essential element for a cause of action in negligence. Prosser, Torts, §30 at p. 143 (1971); Gazija v. Nicholas Jerns Co., 543 P.2d 338, 341 (Wash. 1975). The mere threat of future harm, not yet realized, will not support a negligence action. Prosser, §30 at p. 143; Bridgford v. United States, 550 F.2d 978, 982 (4th Cir. 1977). Thus, a right to recover nominal damages will not commence the statute of limitations in a medical malpractice case, only the infliction of actual and appreciable damage will trigger the running of the statute of limitations. See Gazija, 543 P.2d at 341; Davies, 535 P.2d at 1168; Bridgford, 550 F.2d at 982.

permanent nature of his injuries would encourage health care providers having relevant information to delay disclosure until after the statute has run. Duerden, 663 F. Supp. at 785 n.6; Maughan, 758 F.2d at 1386; Christiansen, 436 P.2d at 436. The District Court's decision in this case invites this type of delay by ruling "that Dr. Becker did not acknowledge in 1984 or now that JONES has a permanent sexual dysfunction problem caused by surgery, is immaterial to the issue of JONES' knowledge." PL. at 1052 (Court's Decision). Such a ruling is inconsistent with Foil:

[i]t would also be imprudent to adopt a rule that might tempt some health care providers to fail to advise patients of mistakes that have been made and even to make efforts to suppress knowledge of such mistakes in the hope that the running of the statute of limitations would make a valid cause of action nonactionable. . . . The law should foster a fulfillment of the duty to disclose so that proper remedial measures can be taken and damage ameliorated.

Foil, 601 P.2d at 148. These strong policy reasons militate in favor of construing the first prong of the Foil test to require knowledge of the injury for which recovery is sought, as well as full appreciation of the nature, and extent of the injury.

This conclusion is supported by federal cases as well as the Christiansen decision, which held that knowledge of alleged injury requires the injury to manifest itself and be permanent. In Christiansen, the issue was whether the plaintiff could maintain an action for injuries suffered due to alleged negligence in leaving a broken surgical needle in the plaintiff some ten years after the operation. The plaintiff successfully argued that the statute did

not accrue until the plaintiff discovered the existence of the foreign object. The Utah Supreme Court held that when a patient is ignorant of his right of action, it did not accrue on the date of the alleged negligence, but rather at the date he learned of the foreign object in his body. The Court explained "[i]t seems somewhat incongruous that an injured person must commence a malpractice action prior to the time he knew, or reasonably should have known, of his injury and right of action". 436 P.2d at 436 (emphasis added); See also United States v. Kubrick, 444 U.S. 111, 120 n.7, 123-24 (1979); Williams v. Borden, 637 F.2d 731, 735 (10th Cir. 1980); Wilson v. United States, 594 F. Supp. 843, 849 (M.D. Ala. 1984); Rispoli v. United States, 576 F. Supp. 1398, 1401 (E.D. N.Y. 1983).

Furthermore, knowledge of an injury is negated where physicians make specific representations to the plaintiff that he has no injury or that his condition is only temporary. It is a recognized rule that "[p]atients may reasonably rely upon assurances by physicians that complications are normal and do not indicate that an actual injury has occurred." Rosales v. United States, 824 F.2d 799, 804 (9th Cir. 1987); See McDonald v. United States, 843 F.2d 247, 248 (6th Cir. 1988); Peteler, 17 P.2d at 250. A patient has a "right to place trust and confidence in his physician." Otto v. National Institute of Health, 815 F.2d 985, 988 (4th Cir. 1987); See Massey v. Litton, 669 P.2d 248, 252 (Nev. 1983). The patient is "utterly dependent upon the skills and ability of the physician, the patient should not be required to

second-guess his physician's prognosis." McDonald, 843 F.2d at 249. As the Court noted in Foil, "[i]n the health care field it is typically the case that there often is a great disparity in the knowledge of those who provide health care services and those who receive the services." Foil, 601 P.2d at 147. Moreover, a rule requiring patients to scrutinize their doctors diagnosis or prognosis would impose an unfair burden on the patient. McDonald, 843 F.2d at 249. A patient's blameless ignorance of the existence or cause of his injury should not be held against him and, therefore, prevents the statute of limitations from running until the plaintiff receives a correct diagnosis. Urie v. Thompson, 337 U.S. 163 (1949); Christiansen, 436 P.2d at 436. See also Nicolazzo v. United States, 786 F.2d 454, 456 (1st Cir. 1986); Barrett v. United States, 689 F.2d 324, 327 (2d Cir. 1982); Jastremski v. United States, 737 F.2d 666, 670 (7th Cir. 1984).

The extent of JONES' knowledge of his injury (rather than a general awareness of his condition) and medical advice which suggests no casual connection or otherwise lays to rest any suspicion regarding potential causes of his injury is highly relevant and critical to the determination of when a plaintiff should be charged with notice of an injury. Lee v. United States, 485 F. Supp. 883, 886 (E.D.N.Y. 1980); Brower v. Brown, 744 P.2d 1337, 1339 (Utah 1987); DuBose v. Kansas City Southern Railway, 729 F.2d 1026 (5th Cir. 1984); Wehrman v. United States, 830 F.2d 1480, 1484 (8th Cir. 1987); Toal v. United States, 438 F.2d 222, 225 (2d Cir. 1971); Bridgford, 550 F.2d at 982. When a physician informs

a patient that he has not sustained an injury; that no harm had in fact occurred; that complications are temporary or not unusual occurrences and will improve with time; the patient cannot be charged with knowledge of injury and the statute of limitations is not activated. See Peteler, 17 P.2d at 250; Rosales, 824 F.2d at 804; Kegel v. Runnels, 793 F.2d 924, 927 (8th Cir. 1986); Vacura v. Plott, 666 F.2d 1200, 1204 (8th Cir. 1981); Burgess v. United States, 744 F.2d 771, 772, 774 n.7 (11th Cir. 1984); Otto, 815 F.2d at 989; Rispoli, 576 F. Supp. at 1402-03; Toal, 438 F.2d at 225; Cleveland v. Wong, 701 P.2d 1301, 1306 (Kan. 1985); Massey, 669 P.2d at 249. Massey is instructive on the knowledge of injury test because in deciding what "injury" means in Nevada's statutory discovery rule for malpractice, the court relied extensively upon Foil. See Massey, 669 P.2d at 251.

In this case JONES does not dispute that within weeks of being released from the University Hospital on April 16, 1984, for treatment arising from his second surgery on February 27, 1984, he began to experience sexual disability. However, the District Court erred in ruling that mere awareness of his condition is all that is necessary to trigger the limitations period. JONES, argues that although he was generally aware of a medical problem, he lacked any appreciable knowledge of the nature and extent of his injuries. JONES also held the belief, based on specific representations of Defendants that the dysfunction was temporary in nature, did not result from the surgery; was probably caused by other factors or was non-existent. JONES' total lack of medical knowledge and his



justified reliance on Defendants' representations of his condition couple to show the Plaintiff had no "knowledge of injury" sufficient to satisfy the Foill test.

In the instant case, JONES did not know the full nature, extent, severity, and permanency of his injuries until he was advised of these facts by Dr. Merril Dayton on September 15, 1987. Previous to this consultation, Defendants never indicated to JONES that his sexual dysfunctions were related to their care or were permanent. Although following his release from the University Hospital on April 16, 1984, JONES had expressed concerns about his sexual functions, he was given reasonable and credible explanations for the complications that ensued. The record discloses repeated visits to University Hospital physicians where JONES was continually assured that: (1) no injury was present; and (2) that his sexual dysfunctions were temporary and due to non-surgical causes.

BECKER characterized JONES' sexual dysfunction as "ill-defined". TR. at 1189 lines 9-10. See also PL. at 1085 (Findings of Fact ¶15). He was not sure if JONES had a sexual dysfunction problem at all. TR. at 1189 lines 14-23, at 1228 line 25, at 1229 lines 1-3, at 1235 lines 23-25, at 1236 lines 1-3. Dr. Becker stated "that the objective evaluation that [JONES'] had has been equivocal in terms of clarifying what it is, or whether it exists." TR. at 1189 line 25, at 1190 lines 1-2. (emphasis added). See also PL. at 1048 (Court's Decision).

Dr. Middleton, who JONES was referred to by BECKER "to sort

out" the sexual dysfunction question, TR. at 1234 lines 14-15 (testimony of Dr. Becker); TR. at 1649 lines 10-11, at 1651 lines 15-22 (testimony of Dr. Middleton); explained to JONES "that it would be unlikely that [he] would have a permanent disruption of sexual function on the basis of the operations that had been done." TR. at 1657 lines 1-2. See also TR. at 1659 lines 17-20 (testimony of Dr. Middleton). Upon inquiry, JONES was told that it was not unusual for his sexual function to be disrupted by "surgery temporarily." TR. at 1657 lines 9-11 (testimony of Dr. Middleton).

If there was disruption of some of the sympathetic nerve fibers that control ejaculation, JONES was informed that "it was very likely not going to be a permanent or severe one, and that it will improve with time." TR. at 1661 lines 2-5 (testimony of Dr. Middleton); See also TR. at 1660 lines 14-16 (testimony of Dr. Middleton); TR. at 1236 lines 13-25, at 1237 lines 1-13 (testimony of Dr. Becker); TR. at 1322 lines 6-10, at 1332 lines 10-17, at 1333 lines 7-9, at 1445 lines 8-9 (testimony of G. Kevin Jones). Terri Stoker, employed by the University Hospital as a patient advocate for BECKER'S post-surgical recovery team, confirmed that BECKER informed JONES that if his sexual dysfunctions were related to the surgery, the problem would resolve itself with time. TR. at 1569 lines 4-10; TR. at 1575 lines 10-16; See also TR. at 1604 lines 16-19 (testimony of Dr. Mangelson).

BECKER had explained to JONES that two previous male patients who had undergone the same surgeries as JONES, subsequently experienced retrograde ejaculation complications, a sexual

dysfunction where the sperm is ejaculated into the bladder rather than out the penis, but this condition corrected itself over time. TR. at 1655 lines 10-15 (testimony of Dr. Middleton); TR. at 1414 lines 5-7, at 1421 lines 19-22, at 1445 lines 10-11, at 1465 lines 17-22 (testimony of G. Kevin Jones); TR. at 1236 lines 19-25, at 1237 lines 1-13 (testimony of Dr. Becker). Dr. Middleton explained to JONES that if the sympathetic nerve fibers that control ejaculation are disrupted the "sympathetic nerve fibers regenerate and little ultimate harm is done." TR. at 1652 lines 23-25, at 1653 line 1; See TR. at 1237 lines 18-25, at 1238 lines 1-6 (testimony of Dr. Becker).

Dr. Middleton opined JONES' prospects for future recovery were good and that he should be patient and "that in time [JONES'] ejaculation would return." TR. at 1657 lines 11-12, at 1654 lines 8-9; See also TR. at 1658, lines 16-17; TR. at 1660 lines 3-4; TR. at 1662 lines 7-9. Dr. Middleton did not think that solving JONES' sexual dysfunction problems were a "big priority" because restoring "his fundamental health and well-being were much more important than his ability to ejaculate." TR. at 1658 lines 18-22, at 1663 lines 16-20. He recommended postponing further evaluation until a later time when JONES was healthier. TR. at 1662 lines 14-16.

JONES had faith in and relied upon the explanations provided by University Hospital physicians that no injury was present, that his sexual dysfunction problems were temporary, and that his sexual function would return with time. See supra Statement of Facts, 11.

The advice and assurances provided to JONES by University

Hospital physicians was confirmed by physicians practicing outside of the University Hospital. Dr. Clifford G. Harman, JONES' gastroenterologist, counseled JONES to "table the impotence question" until JONES' health improved because it was not high on the list of health priorities. TR. at 1631 lines 18-22. Dr. Mangelson, like Dr. Middleton, is a urologist treating JONES but in private practice. He concurred with Dr. Middleton's conclusion that given time there would be a recovery of JONES' sexual function. TR. at 1599 lines 22-25, at 1600 lines 1-2, at 1602 lines 14-17, at 1603 lines 6-25, at 1604 lines 1-2, at 1607 lines 4-6. JONES consistently received hope and encouragement from his treating physicians that with time there would be a recovery of his sexual functions. See TR. at 1602 lines 7-17, at 1603 lines 5-25, at 1604 lines 1-2, at 1607 lines 4-9 (testimony of Dr. Mangelson); TR. at 1657 lines 11-18, at 1658 lines 11-17, at 1660 lines 3-4, 13-16 (testimony of Dr. Middleton); TR. at 1239 line 7 (testimony of Dr. Becker).

Since a patient may properly rely on the advice and representations of his treating physicians that an actual injury has not occurred and that complications, if any, are not related to surgery or are otherwise temporary, JONES had no reason to believe at that time that he had sustained any injury. See McDonald, 843 F.2d at 248; Raddatz, 750 F.2d at 796; Rosales, 824 F.2d at 804. In this case, based on the evidence in the record, it is only possible to conclude that it was not until after JONES' consultation with Dr. Dayton on September 15, 1987, that JONES

could have possibly developed knowledge that an injury had occurred. Where a patient has been told that complications are not permanent and "is told further that they can be treated, he cannot be deemed to have knowledge of an injury. In such circumstances, he can only be deemed to have knowledge after a sufficient period of time has passed so as to alert him that the treatment is unsuccessful." Rispoli, 576 F. Supp. at 1403. In this case it is unnecessary to determine what constitutes a sufficient period of time since it is entirely reasonable for JONES to have filed his Notice within three months of his contact with Dr. Dayton, when JONES first became aware of the nature of injuries. Therefore, JONES' claim was timely because the assurances given to JONES by his treating physicians precluded knowledge of injury prior to September of 1987.<sup>6</sup>

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<sup>6</sup>Interestingly and quite ironically, the District Court found as a matter of fact that JONES had suffered no injury as a result of the surgery. In its decision, the court wrote: "[I]n the instant case there still appears to be a real fact question about the nature and existence of any sexual dysfunctions and the cause." PL. at 1048 (Court's Decision) (emphasis added). The District Court also characterized JONES' sexual dysfunctions as "ill defined", PL. at 1085 (Findings of Fact ¶15), and "perceived". PL. at 1085 (Findings of Fact ¶17), at 1086 (Findings of Fact ¶ ¶ 18, 19, 20 and 26). It is interesting that neither the Court nor Defendants doctors to this day agree on whether JONES has suffered an injury. To hold JONES to be aware that he has suffered an injury, and then find as a matter of fact, that he has not is plainly inconsistent and evidences the lower court's confusion regarding proper application of Foia. This matter must be reversed to permit trial under the proper legal guidelines.

2. The District Court erred, as a matter of law, in failing to properly apply the knowledge of negligence prong of the Foil test.

The second prong of the Foil legal injury test requires "knowledge of negligence". Foil, 681 P.2d at 148. In Foil, the Court held that the two year limitation period begins to run when the plaintiff "knew or should have known that he had [1]sustained an injury and [2] that the injury was [i] caused by [ii] negligent action." Foil, 601 P.2d at 148 (emphasis added). The second prong of the Foil legal injury test includes two separate knowledge elements; cause and negligence. A plaintiff must have knowledge of both the cause of the injury and negligent action to satisfy the second prong.

To satisfy the causation element, a plaintiff must know that he has been injured and "who has inflicted the injury." United States v. Kubrick, 444 U.S. 111, 122 (1979); Christiansen, 436 P.2d at 436; Foil 601 P.2d at 146-47. The negligence element requires that a plaintiff know that the injury was the result of improper treatment. Foil, 601 P.2d at 148; Hove, 621 P.2d at 696; Brower, 744 P.2d at 1338-39. In this case the cause and negligence elements were satisfied for the first time only after JONES' consultation with Dr. Dayton on September 15, 1987.

The first question, then, is whether JONES knew the cause of his injuries before he received medical treatment from Dr. Dayton on September 15, 1987. The difficulty in determining the cause of JONES' injuries is amply demonstrated in the record. The record discloses repeated visits to BECKER and University Hospital

physicians who specifically represented that the surgeries were not the cause of his sexual disorders. TR. at 1235 lines 4-15, at 1238 lines 12-14 (testimony of Dr. Becker); TR. at 1653 lines 20-25, at 1654 lines 1-17, at 1657 lines 1-3, at 1659 lines 17-20 (testimony of Dr. Middleton); TR. at 1414 lines 5-25, at 1415 lines 1-10, at 1416 lines 8-13, 23-25, at 1417 lines 1-4, at 1421 lines 12-18 (testimony of G. Kevin Jones); Plaintiff's Exhibit No. 4. BECKER also assured JONES' parents that there was "no sexual problems as a consequence of this operation." TR. at 1518 line 11-12. See also TR. at 1517 lines 20-23 (testimony of Dr. Garth N. Jones); TR. at 1502 lines 16-21 (testimony of Marie Jones).

BECKER and HOSPITAL physicians explained to JONES that one of the great benefits of the surgical procedure was that it was performed in such a manner that there was no real risk to the disruption of a patient's sexual functions. TR. at 1398 line 25, at 1399 lines 1-6, at 1414 lines 22-25, at 1415 lines 1-5, at 1416 lines 8-13, 23-25, at 1417 lines 1-4 (testimony of G. Kevin Jones); TR. at 1653 lines 12-19 (testimony of Dr. Middleton). BECKER told JONES that "it was anatomically almost impossible to disrupt this system that would interfere with sexual functions." TR. at 1399 lines 6-8 (testimony of G. Kevin Jones); TR. at 1196 lines 19-25, at 1197 lines 1-2 (testimony of Dr. Becker). In a letter to Dr. Middleton, BECKER records a consultation with JONES about his sexual functions as follows:

I spent a great deal of time talking about this problem with him in my office this morning. I explained that no true cases of impotence had been reported with the mucosal proctectomy and ileoanal pull-through procedure.

In fact, the operation is performed anatomically such that it is almost impossible to damage the parasympathetic nerves to the penis or to totally destroy the sympathetic innervation. I explained that we had had one case of retrograde ejaculation that resolved spontaneously. (emphasis added).

Plaintiff's Exhibit 4; See also TR. at 1604 lines 5-15 (testimony of Dr. Mangelson).

BECKER was so confident that the surgeries didn't cause JONES' sexual problems that he didn't even think JONES had a sexual dysfunction at all. TR. at 1189 lines 21-25, at 1190 lines 1-2 (testimony of Dr. Becker). In an article provided to JONES by BECKER in 1987 entitled Ileal Pouch-Anal Anastomosis, BECKER describes his surgical experience with a large series of patients at the University of Utah Medical Center. TR. at 1457 lines 3-25, at 1458 lines 1-14 (testimony of G. Kevin Jones); Plaintiff's Exhibit 5. The aim of the study was to assess the operative outcome, including sexual function, in 100 consecutive patients who underwent ileal pouch-anal anastomosis. JONES was included in this study as patient no. 33. TR. at 1187 line 14 (testimony of Dr. Becker); TR. at 1458 lines 6-7 (testimony of G. Kevin Jones). The study records the only sexual disorders in males as retrograde ejaculation in two male patients with no impotence observed. Plaintiff's Exhibit 5 at 378, 383. JONES was not identified as one of the male patients suffering retrograde ejaculation. TR. at 1414 lines 5-7, at 1419 lines 12-14, at 1421 lines 19-22, at 1445 lines 10-11 (testimony of G. Kevin Jones). Thus, as of the date of this article, October, 1986, BECKER had not even identified JONES as one of his patients suffering from sexual disorders as a result of his



surgeries. TR. at 1458 lines 3-14 (testimony of G. Kevin Jones).

BECKER and HOSPITAL physicians explained to JONES that his sexual problems were due to a variety of factors that were not associated with the surgeries or their care. TR. at 1414 lines 7-10, at 1421 lines 12-18 (testimony of G. Kevin Jones). They even told JONES that his sexual problems were mental not physical and recommended general psychotherapy. See supra Statement of Facts, 7. Outside evaluations also concluded that JONES' sexual problems were psychological. TR. at 1685 lines 5-6 (testimony of Dr. Jaspen); and TR. at 1539 lines 8-14 (testimony of Dr. Smith). Other possible causes of JONES' sexual disorders were identified by University physicians as prolonged use of medications, serious illness, trauma of major surgery, malnourishment, infrequent sexual activity, lack of a sex partner, and fatigue. See supra JONES' Statement of Facts No. 7.

The record demonstrates that BECKER really didn't know whether JONES' sexual dysfunctions were "in any way related to the surgery." TR. at 1235 lines 14-16; See also TR. at 1189 lines 14-20; TR. at 1228 line 25; TR. at 1229 lines 1-3 (testimony of Dr. Becker). When asked his opinion as to what was the cause of JONES' sexual dysfunction, BECKER replied: "I'm not sure. Based on all the tests and what has happened . . . and the number of people who have seen [JONES] and consulted on the problem, I think it's still very unclear." TR. at 1235 lines 23-25, at 1236 lines 1-3. Even the District Court found that "in the instant case there still appears to be a real fact question about the nature and existence

of any sexual dysfunctions and the cause." PL. at 1048 (Court's Decision) (emphasis added). See also PL. at 1085 (Findings of Fact ¶ 15) ("Since April or May, 1984, plaintiff has had an ill defined sexual dysfunction, the cause of which has not been definitively determined." ) (emphasis added).

It was unreasonable for the District Court to hold JONES to a higher degree of medical competence and understanding of the cause of his condition than the many medical experts he consulted. See Reis v. Cox, 660 P.2d 46, 50 (Idaho 1982); Harrison v. United States, 708 F.2d 1023, 1028 (1983). "Ordinarily, a plaintiff cannot be expected to discover the general medical cause of his injury even before the doctors themselves are able to do so." Rosales, 824 F.2d at 805; Chamness v. United States, 835 F.2d 1350, 1353 (11th Cir. 1988). As stated in Foil:

Indeed, common experience teaches that one often suffers pain and other physical difficulties without knowing or suspecting the true cause, and may, as often happens, ascribe a totally erroneous cause to the manifestations. Even those who are trained in medical science often require the additional expertise of one possessing specialty training to diagnose properly the cause of certain ailments.

Foil, 601 P.2d at 147.

The fact that JONES had suspicions about the cause of his injuries are not enough to have the statute run in favor of the Defendants. Allen v. United States, 588 F. Supp. 247, 345 (D. Utah 1984) ("[a] finding of reasonable suspicion on the part of the plaintiff was insufficient to initiate the running of the statutory period. Actual knowledge of facts material to his federal cause of

action was required."); Vest v. Bossard, 700 F.2d 600, 604 (10th Cir. 1983). Similarly, a "layman's subjective belief" regardless of its sincerity or ultimate vindication, "in a cause does not start the statute when a competent medical professional would disagree with the belief." Nemmers v. United States, 795 F.2d 628, 631 (7th Cir. 1986); Stoleson v. United States, 629 F.2d 1265, 1269 (7th Cir. 1980); Gould v. United States, 684 F. Supp. 508 (N.D. Ill. 1988). Plaintiffs who seek to understand the cause of an injury may reasonably rely upon advice and assurances by doctors. Brower, 744 P.2d at 1339; Peteler, 17 P.2d at 250; Chamness, 835 F.2d at 1353; McDonald, 843 F.2d at 248. In this case JONES believed he was competently advised that the surgery did not cause his injuries and therefore should not be punished for refusing to press a claim that was apparently baseless at that time. Nemmers, 795 F.2d at 632.

The best medical advice available prior to September 15, 1987 did not establish the cause of JONES' condition. JONES' suspicion or belief that his problems dated from the second surgery on February 27, 1984, was merely one of series of explanations that he seized upon in anguish and desperation to explain his difficulties. JONES was influenced by Defendants' conclusion that his problems were psychological, TR. at 1469 lines 5-8, at 1481 lines 7-15 (testimony of G. Kevin Jones), and was willing to see a psychiatrist to determine the cause. TR. at 1564 lines 20-25, at 1565 line 1 (testimony of Terri Stoker); TR. at 1633 line 19 (testimony of Dr. Harman). During this time, JONES unsuccessfully

searched for the cause of his problems. TR. at 1577 lines 13-21 (testimony of Terri Stoker); TR. at 1634 lines 19-21 (testimony of Dr. Harman). None of JONES' privately conceived notions regarding the possible cause of his condition became knowledge until September 15, 1987 when he was examined by Dr. Dayton. TR. at 1450 lines 19-25, at 1451 lines 1-21 (testimony of G. Kevin Jones). Dr. Dayton diagnosed the most likely cause of JONES' sexual dysfunctions as disruption to nerves during surgery. TR. at 1449 lines 18-21, at 1450 lines 12-16 (testimony of G. Kevin Jones). Dr. Dayton's explanation provided JONES with the first real indication of the cause of his disabilities. TR. at 1450 lines 19-25, at 1451 lines 1-5 (testimony of G. Kevin Jones). Only then did JONES know that his difficulties were caused by the surgical procedures. See Harrison, 708 F.2d at 1028.

To adopt a rule, such as the District Court did in the instant case, that encourages the filing of lawsuits when a plaintiff develops a disorder but has no knowledge of its cause, or which of several possible causes it may be, is inconsistent with the policy that discourages baseless claims, and would needlessly add to an already crowded docket. Foil, 601 P.2d at 148; Maughan, 758 F.2d at 1386. Moreover, to adopt a rule that the statute begins to run as soon as the plaintiff becomes aware that a number of different sources are suspected to be the cause of his difficulties would be absurd. It would force a plaintiff to file suit against all suspected causes simply to prevent the statute from running as to any of them. A plaintiff who did so would be subject to dismissal

*March 22nd C.A.*

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Utah Court of Appeals  
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MAR 9 1993

March 4, 1993

*Mary T. Noonan*  
Mary T. Noonan  
Clerk of the Court

Utah State Court of Appeals  
Mary T. Noonan, Clerk  
230 S. 500 E. #400  
Salt Lake City, Utah 84102

RE: U.R.A.P 24(j) Notice of Supplemental Authority  
Case No. ~~920191~~. *920403-CA*

Dear Clerk,

Pursuant to Rule 24(j) of the Utah Rules of Appellate Procedure, Appellant G. Kevin Jones, hereby notifies the Clerk of the Utah Court of Appeals of pertinent and significant supplemental authority that has come to the attention of Appellant since the Briefs herein were filed. This authority was discovered while counsel was preparing for oral argument in this matter currently set for March 22, 1993.

The supplemental authority of Chadwick v. Nielsen, 763 P.2d 817, 819, n.1. (Utah App. 1988), recognizes the continued application of the "Continuing Treatment Doctrine" to toll the statute of limitations in medical malpractice cases until medical treatment with the negligent physician ends. Chadwick recognizes the continued validity of the doctrine after passage of U.C.A. §78-14-4 (1953), as amended, which became effective July 1, 1976.

The references to Chadwick should be added to the Appellant's Brief and Reply Brief as follows:

APPELLANT'S BRIEF

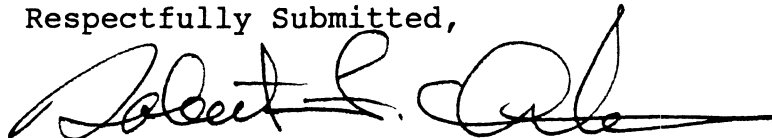
1. At page two (2), insert, "and cited by the Utah Court of Appeals in Chadwick v. Nielsen, 763 P.2d 817, 819, n.1 (Utah App. 1988).", after the citation "Peteler v. Robinson, 17 P.2d 244, 250 (Utah 1932)."
2. At page forty-five (45), insert, "and cited by the Utah Court of Appeals in Chadwick v. Nielsen, 763 P.2d 817, 819, n.1 (Utah App. 1988).", after the citation "Peteler v. Robinson, 17 P.2d 244, 250 (Utah 1932)."
3. At page forty-six (46) insert, "Chadwick, 763 P.2d at 819, n.1." after the statement, "Thus, these cases reflect the continued recognition of the continuing treatment doctrine in Utah jurisprudence,".

4. At page forty-nine (49) insert, "Chadwick, 763 P.2d at 819, n.1.", after the citation "Metzger, 709 P.2d at 417."

APPELLANT'S REPLY BRIEF

1. At page one (1) insert "and cited by the Utah Court of Appeals in Chadwick v. Nielsen, 763 P.2d 817, 819, n.1 (Utah App. 1988).", after the citation "Peteler v. Robinson, 17 P.2d 244, 250 (Utah 1932)."
2. At page thirteen (13) insert, "Chadwick, 763 P.2d at 819, n.1." after the statement, "Absent evidence of intent to abrogate the precedent of Peteler, the enactment of section 78-14-4 should be read as being consistent."
3. At page eighteen (18) insert, "Chadwick, 763 P.2d at 819, n.1.", after the statement "Based on these sound principles, this Court should recognize the continuing treatment doctrine as a valuable and viable exception to section 78-14-4."
4. At page thirteen (21) insert, "Chadwick, 763 P.2d at 819, n.1.", after the statement, "Accordingly, this Court should uphold the continuing treatment doctrine as a consistent exception to section 78-14-4."

Respectfully Submitted,



ROBERT F. ORTON, ESQ.

RFO:bh

cc: David G. Williams, Esq.  
William T. Evans, Esq.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that he/she served a copy of the foregoing U.R.A.P 24(j) Notice of Supplemental Authority upon the following persons, by first class mail, postage prepaid thereon, this 8th day of February, 1993:

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\_\_\_\_\_  
An Employee of Marsden, Orton Cahoon & Gottfredson

on grounds of frivolity. See Maughan, 758 F.2d at 1387.

In cases involving suspected multiple causes such as this one, the statute must be tolled until the plaintiff knows the particular factor that was "the" cause of the injury. The legal injury test requires knowledge of "the" cause of the injury, not "a" cause as determined by the District Court. PL. at 1085 (Findings of Fact ¶16). To know the cause a plaintiff must know "who has inflicted the injury." Kubrick, 444 U.S. at 122; Christiansen, 436 P.2d at 436; See Foil, 601 P.2d at 146-47; Hargett, 598 F. Supp. at 155 (patient must know the existence of an injury and "its" cause); Maughan, 758 F.2d at 1385-87 ; Exnicious, 563 F.2d at 420 n.7 ("[A] person may be quite aware of damages but may be unable to learn the cause of his condition and hence, whether it is related to earlier medical treatment").

The list of suspected causes of JONES' sexual dysfunction was seemingly endless. There were many suspected causes of the difficulties, none of which gave rise to a legal cause of action. In addition, although JONES attempted to determine the cause of his difficulties, he was confronted with complex, controversial, and rapidly changing medical data and opinions. Lacking the expert knowledge necessary to affix causation, JONES relied upon the Defendants' assurance that JONES had not been injured by the surgeries. See supra Statement of Facts, 11. Under these circumstances, JONES was unable to determine the cause of his injuries until after his consultation with Dr. Dayton in September of 1987. See supra Statement of Facts, 10.



The second question in examining the knowledge of negligence prong is whether JONES was aware, along with the knowledge of causation, that the injury may have been caused by negligence. In Foil, as in the instant case, the plaintiff believed that he suffered a physical injury and suspected that the injury may have been related to medical treatment. However, in neither Foil nor this case was there an obvious reason to suppose that the injury was attributable to negligence. In this case the District Court incompletely found that JONES' cause of action against the Defendants had run because the "plaintiff discovered the 'injury' and made the casual connection between the problem and the surgery in April or May of 1984." PL. at 1047 (Court's Decision). Why JONES should have known at that time that his injuries were possibly the result of negligence is simply not explained by the District Court nor is it explicable from the record. Moreover, the burden of proof was on the Defendant to show JONES knew or had reason to know that negligence may have occurred during the operation. TR. at 1128 lines 14-19 (statement of the Court).

The record discloses repeated visits to BECKER and HOSPITAL physicians who consistently told JONES that there was nothing wrong with the surgeries. TR. at 1415 lines 6-7, at 1417 lines 5-23, at 1421 lines 12-17, at 1445 lines 6-8 (testimony of G. Kevin Jones); TR. at 1228 lines 10-12, at 1235 lines 4-10 (testimony of Dr. Becker); TR. at 1653 lines 20-25, at 1654 lines 1-3 (testimony of Dr. Middleton). BECKER stated that there were no complications in any of the three surgical procedures he performed on JONES in 1984.

TR. at 1214 lines 22-25, at 1215 lines 1-21, at 1220 lines 11-17, at 1227 lines 20-25, at 1228 lines 7-12 (testimony of Dr. Becker). BECKER described the second surgical procedure of February 27, 1984, the procedure that JONES and Dr. Dayton suspect may have been the cause of his injuries, as going "very smoothly." See also Plaintiff's Exhibit No. 4 ("The surgery went without difficulty"). TR. at 1220 lines 11-15 (testimony of Dr. Becker). BECKER experienced "no problems" during this procedure. TR. at 1220 lines 15-17 (testimony of Dr. Becker). JONES had no abnormal anatomy or nerve distribution. TR. at 1215 lines 13-15 (testimony of Dr. Becker); See also TR. at 1415 lines 6-8 (testimony of G. Kevin Jones).

BECKER and HOSPITAL physicians explained to JONES that "the operation is performed anatomically such that it is almost impossible to damage the parasympathetic nerves to the penis or to totally destroy the sympathetic innervation." Plaintiff's Exhibit No. 4.(emphasis added); See also TR. at 1196 lines 13-25, at 1197 lines 1-2 (testimony of Dr. Becker); TR. at 1653 lines 12-25, at 1654 lines 1-2, 16-17 (testimony of Dr. Middleton); TR. at 1399 lines 3-8, at 1415 lines 1-25, at 1416 lines 8-13, 23-25, at 1417 lines 1-4, at 1445 lines 3-6 (testimony of G. Kevin Jones). According to BECKER the procedures are performed in such a manner that the nerves which control sexual function are not vulnerable at any stage of the process. TR. at 1196 lines 13-17, at 1197 lines 15-17 (testimony of Dr. Becker). BECKER never said anything to JONES from which JONES could have implied that BECKER was negligent

in performing the surgery. TR. at 1235 lines 4-10, at 1238 lines 12-15 (testimony of Dr. Becker); TR. at 1590 lines 15-21 (testimony of Terri Stoker). JONES eventually was referred to other doctors about his condition, none of whom ever suggested that the cause of his sexual dysfunction was attributable to the negligent surgery or care provided by Defendants. All of the other doctors told JONES that the surgery was properly performed. TR. at 1594 lines 14-21 (testimony of Dr. Mangelson); TR. at 1639 line 25, at 1640 lines 1-2 (testimony of Dr. Harman).

It is undisputed that shortly after discovering his symptoms, JONES investigated their potential cause and received a credible explanation negating injury, causation and negligence. Where a claimant is provided with a credible explanation of his problems not indicating malpractice, he may not be found to have failed to exercise reasonable diligence because he did not earlier pursue his claim. Brower, 744 P.2d at 1339; Peteler, 17 P.2d at 250; Jordan v. United States, 503 F.2d 620, 624 (6th Cir. 1974); Exnicious, 563 F.2d at 421; Foil, 601 P.2d at 148 n.3; Bridgford, 550 F.2d at 981-82. As the Seventh Circuit observed in Nemmers, "the statute of limitations should not be construed to compel everyone who knows of an injury to scour his medical records just in case the . . . physician did something wrong." Nemmers, 795 F.2d at 631.

The record reveals no evidence which indicates that JONES ever witnessed anything prior to his consultation with Dr. Dayton on September 15, 1987, which should have led him to believe he was the victim of malpractice. TR. at 1450 lines 24-25, at 1451 lines 1-8

(testimony of G. Kevin Jones); See also TR. at 1577 lines 13-21 (testimony of Terri Stoker). At this consultation Dr. Dayton told JONES that the most likely was that "something went wrong during the surgeries" to damage nerves. TR. at 1450 lines 12-16; see also TR. at 1449 lines 18-21 (testimony of G. Kevin Jones). Prior to Dr. Dayton's statement on September 15, 1987, there is nothing in the record which would give JONES any reason to believe that the act performed during the February 27, 1984 surgery, which probably caused his impaired sexual function, may have been improperly done and whether or not it conformed to accepted medical practice. TR. at 1450 lines 24-25, at 1451 lines 1-8, 12-21 (testimony of G. Kevin Jones). It was only after the September 15, 1987 consultation with Dr. Dayton that Plaintiff first believed that his sexual problems may have been caused by medical malpractice and that he may have a cause of action against Defendants. See also TR. at 1577, lines 1-8, 12-21. See also TR. 1577 lines 13-21 (testimony of Terri Stoker).

The myriad medical experts JONES consulted could not express a reasoned opinion that the cause of JONES' sexual impairment was probably an error in the medical procedures conducted at the University Hospital. JONES cannot be attributed with sufficient knowledge as a result of the medical evaluations and opinions to satisfy the knowledge of negligence prong of Foia prior to September 15, 1987. Reis, 660 P.2d at 50; Harrison, 708 F.2d at 1026, 1028. It is only when JONES had gleaned sufficient information which reasonably indicated that something in the

performance of or related to the medical treatment that caused the injury was improper that the knowledge of negligence test is satisfied. Cf. Foil, 601 P.2d at 148; Hove, 621 P.2d at 696; Hargett, 598 F. Supp. at 154; Brower, 744 P.2d at 1338-39; See also Jones v. Salem Hospital, 762 P.2d 303, 313 (Or. App. 1988); Niblack v. United States, 438 F. Supp. 383, 386 (D. Colo. 1977); Exnicious, 563 F.2d at 420 n.6; Jordan, 503 F.2d at 621. (During an eye examination, plaintiff was told "by the examining doctor that such visits were no longer necessary as there was nothing more they could do for the eye, and that it was 'too bad they screwed up your eye when they operated on your nose.'").

Simple awareness of an injury that might have been an unavoidable consequence of the medical treatment, or the result of some other cause, or even a temporary side effect of treatment does not mean that the patient had knowledge that the injury was the result of improper treatment. Foil, 601 P.2d at 147; Reiser, 641 P.2d at 103 (Stewart, J., dissenting); See also Exnicious, 563 F.2d at 419 n.6 (a patient "may be aware of his injury and perhaps connect it with prior medical treatment but may be totally ignorant as to what occurred during his treatment and whether or not it conformed to accepted medical practice."); Bridgford, 550 F.2d 982; Rispoli, 576 F. Supp. at 1402; Cleveland, 701 P.2d at 1306. (While the plaintiff knew that he was impotent immediately after surgery he had no reason to suspect that the condition was the result of any negligence by defendant). Similarly, the discovery of injury does not necessarily lead to the discovery of possible negligence.

Imes v. Touma, 784 F.2d 756, 758 (6th Cir. 1986). A patient does not have a cause of action against a physician simply because a surgical procedure "does 'not turn out as it was supposed to have.'" DeWitt v. United States, 593 F.2d at 276, 280 (7th Cir. 1979).

Numerous cases stress that in a plaintiff's effort to understand whether an injury was the result of malpractice, he may reasonably rely upon advice and assurances by doctors that no negligence is present. Brower, 744 P.2d at 1339; Peteler, 17 P.2d at 250; Chamness, 835 F.2d at 1353; McDonald, 843 F.2d at 248; Massey, 669 P.2d at 252; Toal, 438 F.2d at 225; Raddatz, 750 F.2d at 793, 796; Short v. Downs, 537 P.2d 754, 757 (Colo. App. 1975). JONES and his parents did in fact rely upon Defendants' statements that nothing went wrong in the surgeries. See supra Statement of Facts, 11.

In this case, at best, the District Court found that JONES discovered only a "cause" of his injuries. PL. at 1046 (Court's Decision). It did not find or conclude that JONES knew or should have known that the cause of his injuries may have been due to negligence by Defendants. PL. at 1047 (Court's Decision). The District Court's decision erroneously interpreted Foil to mean that the statute runs from two years when a plaintiff knew or should have known that he had suffered an injury which may have been caused by Defendants. However, Foil requires that the plaintiff know or should have known that his injuries may have been "caused" by "negligence" of the defendant. 601 P.2d at 148; See also Hove,

621 P.2d at 696; Hargett, 598 F. Supp. at 154; Brower, 744 P.2d at 1338-39.

The District Court's error in interpreting and applying the knowledge of negligence prong of the Foil test is further demonstrated from the court's own statement that it thought the trial dealt with "liability", TR. at 1436 lines 22-23, when the issue before the court was the statute of limitations. TR. at 1436 lines 17-21, 24-25 (statement of Mr. Orton); TR. at 1437 lines 1-2 (statement of Mr. Williams). A court that is unaware of the issue being tried before it cannot apply the proper legal standard.

In the instant case, the District Court erred in its interpretation and application of the knowledge of negligence prong by barring JONES' claim prior to the time when he had any reasonable cause to believe that the acts which caused his injury were wrongful. See Jordan, 503 F.2d at 624. As this Court stated in Foil, "when injuries are suffered that have been caused by an unknown act of negligence by an expert, the law ought not to be construed to destroy a right of action before a person even becomes aware of the existence of that right." 601 P.2d at 147.

C. THE DISTRICT COURT ERRED, AS A MATTER OF LAW, IN CONCLUDING THAT THE CONTINUING TREATMENT DOCTRINE IS NOT APPLICABLE SINCE THE LEGISLATURE PASSED §78-14-4, UTAH CODE ANNOTATED, 1953, AS AMENDED.

In the instant case the District Court held "the continuing treatment doctrine" was inconsistent with the Utah statute of limitations for medical malpractice as codified in §78-14-4 and rejected its application in this case. PL. at 1052 (Court's Decision); PL. at 1088 (Conclusions of Law ¶6-7). The continuing

treatment doctrine was adopted by the Utah Supreme Court in Peteler v. Robison, 81 Utah 535, 553, 17 P.2d 244, 250 (Utah 1932). The doctrine tolls the running of the statute of limitations until the termination of the course of treatment for the same or related illnesses. Peteler, 17 P.2d at 250.

The District Court did not explain the rationale for its rejection of this precedent. Since the Peteler decision in 1932, Utah has consistently been recognized as a state adopting the view that the limitation period does not begin to run until termination of treatment. See 144 A.L.R. at 227-28 (1943); 80 A.L.R.2d at 380-81 (1961); Ballenger v. Crowell, 247 S.E.2d 287, 294 (N.C. 1978) (citing Peteler); Comstock v. Collier, 737 P.2d 845, 849 n.6 (Colo. 1987) (citing Peteler). Moreover, the Utah Supreme Court has cited Peteler in a decision that post dates the enactment of §78-14-4. In Hooper Water Improvement, the Utah Supreme Court discussed Utah's statutes of limitations and stated that in Peteler it "recognized an exception in medical malpractice cases, which exception is very similar to the 'continuous services exception' urged by the plaintiff in this action." 642 P.2d at 747 (Howe, J., concurring); See e.g. Hooper Water Improvement v. Reeve, 642 P.2d 745, 747 (Utah 1982) (Howe, J., concurring); Chapman v. Primary Children's Hospital, 784 P.2d 1181, 1186 (Utah 1989) (citing Peteler). Moreover, in Foil the Court cited Hundley v. St. Francis Hospital, 327 P.2d 131, 135 (Cal. 1958) in support of its interpretation of §78-14-4. See Foil, 601 P.2d at 148. In Hundley the California Supreme Court held that the statute of limitations



in medical malpractice cases does not commence to run while the physician-patient relationship continues. Hundley, 327 P.2d at 135. Thus, these cases reflect the continued recognition of the continuing treatment doctrine in Utah jurisprudence. Finally, other states which have discovery type limitations periods similar to Utah recognize the continuous treatment rule. See Mills v. Garlow, 768 P.2d 554, 555 (Wyo. 1989); Metzger v. Kalke, 709 P.2d 414, 416-17 (Wyo. 1985).

D. THE DISTRICT COURT ERRED, AS A MATTER OF LAW, IN REJECTING THE CONTINUING TREATMENT DOCTRINE TO TOLL THE STATUTE OF LIMITATIONS UNTIL JONES' TREATMENT BY THE DEFENDANT WAS CONCLUDED.

Courts which have addressed the issue uniformly hold that when there has been a course of continuous medical treatment the running of the statute of limitations against medical malpractice actions starts at the end of the treatment if the treatment has been for the same or related injury or complaint out of which the claims for malpractice arose. See, 144 A.L.R. 209, 227 (1943); 80 A.L.R.2d 368, 379 (1961); Borgia v. City of New York, 187 N.E.2d 777 (N.Y. 1962); Farley v. Goode, 252 S.E.2d 594 (Va. 1979); Johnson v. Winthrop Laboratories Division of Sterling Drug, Inc., 190 N.W.2d 77 (Minn. 1971); Williams v. Elias, 1 N.W.2d 121 (Neb. 1941); Metzger, 709 P.2d at 414, 416-17; Otto, 815 F.2d at 985; Comment, The Continuous Treatment Doctrine: A Toll on the Statute of Limitations for Medical Malpractice in New York, 49 Albany L. Rev. 64 (1984) (hereinafter Comment); Stallings v. Gunter, 394 S.E.2d 212 (N.C. App. 1990).

Treatment consists not only of treating the original condition, but also all subsequent care and treatment essential to full recovery. Offerdahl v. University of Minnesota Hospitals & Clinics, 411 N.W.2d 20, 22 (Minn. App. 1987). The subsequent treatment may consist of an "affirmative act or an omission" which is related to the original cause of action. Stallings, 394 S.E.2d at 216, Comment, at p. 76-77. Subsequent treatment can even occur when the physician takes no affirmative action during a patient's office visit or when the patient initiates the office visit "to complain about and seek treatment for a matter related to the initial treatment." McDermott v. Torre, 437 N.E.2d 1108, 1111 (N.Y. 1982); Comment, at p. 79. This treatment by omission may occur "[i]f a patient continues under post-operative observation by his physician and is advised that his condition is being cured." Fonda v. Paulsen, 363 N.Y.S.2d, 841, 844 (N.Y. 1975). Under these conditions "this is as much 'treatment' as affirmative acts such as surgery, therapy, or prescription of medicines. . . [because] there would be little chance for legal redress by a patient who has been the victim of an alleged malpractice who is advised that time is the only barrier to a complete cure, when in reality time is a barrier to a cause of action." Fonda, 363 N.Y.S.2d at 844. Thus, telephone consultations are evidence that the physician is attending and treating the patient. Grondahl v. Bullock, 318 N.W.2d 240, 243 (Minn. 1982); Giles v. Sanford Memorial Hospital & Nursing Home, 371 N.W.2d 635, 637 (Minn. App. 1985).

It is not necessary under the continuous treatment doctrine

that the subsequent treatment itself be negligent. Holdridge v. Heyer - Schulte Corp. of Santa Barbara, 440 F. Supp. 1088, 1098 (N.D.N.Y. 1977); Stallings, 394 S.E.2d at 215; Comment at 77 n.51. The rule of decision in continuing treatment cases is that if the patient was treated for the same or related ailments over a continuous course, then the plaintiff could wait until the end of that treatment to complain of any negligence which occurred during that treatment. Grubbs v. Rawls, 369 S.E. 2d 683, 687 (Va. 1988). Thus, under the continuing treatment doctrine, a plaintiff's cause of action does not accrue until the continuing treatment ends, "even if the plaintiff is aware of the facts constituting negligence before that time." Wehrman, 830 F.2d at 1483; LaBay v. White Plains Hospital, 467 N.Y.S.2d 400, 401 (1983); Kelly v. United States, 554 F. Supp. 1001, 1004 (E.D.N.Y. 2983). Finally, courts have declined to limit the application of the continuing treatment doctrine to a specific number of years. Justice v. Natvig, 381 S.E.2d 8, 10 (Va. 1989)(patient saw defendant physicians over an eight year period).

The record establishes that JONES' attending physician, Dr. Becker, continued to treat JONES for the same medical condition from 1984 until he left his position at the University Hospital in January, 1987, and referred him to Dr. Dayton. TR. at 1430 lines 12-20, at 1432 lines 13-21, at 1446 lines 20-24 (testimony of G. Kevin Jones); TR. at 1180 lines 10-15, 20-25, at 1181 line 1, at 1258 lines 23-25, at 1259 lines 1-4 (testimony of Dr. Becker); TR. at 1167 lines 20-25, at 1168 lines 1-7 (testimony of Dr. Dayton).

On December 5, 1986, Dr. Becker ordered a pelvic CT scan of JONES to evaluate him for abscesses, and also discussed with JONES the results of the CT scan. Plaintiff's Exhibit No. 17; TR. at 1260 line 25, at 1261 lines 1-6 (testimony of Dr. Becker); TR. at 1430 lines 21-25, at 1431 lines 1-25; at 1432 lines 1-22; at 1444 lines 18-24 (testimony of G. Kevin Jones). Moreover, the Defendants stipulated that their medical treatment of JONES related to the operations and extended until Dr. Becker left the University Hospital in January, 1987. TR. at 1440 lines 23-25, at 1441 line 1 (statement of Mr. Williams). See also TR. at 1410 lines 3-7 (testimony of G. Kevin Jones); TR. at 1263 lines 24-25, at 1264 lines 1-12, 19-21 (testimony of Dr. Becker).

Accordingly, the limitation period established by Utah Code Annotated 78-14-4 began to run with respect to JONES' claims against Dr. Becker and the University Hospital in January, 1987, or at the earliest late December, 1986. While the CT scan was performed on December 5, 1987, it was sometime thereafter that Dr. Becker notified JONES of the results. TR. at 1432 lines 1-12, at 1444 lines 21-23 (testimony of G. Kevin Jones). Therefore, JONES had until January, 1989, or at the earliest, late December, 1988, to file his Complaint. Since JONES filed his Notice of Intent to Commence Action on December 4, 1987, he has filed within the statutory period and this action is timely pursuant to Peteler. Plaintiff's Exhibit No. 1; See Callahan, 365 S.E.2d at 719; Metzger, 709 P.2d at 417.

#### VIII. CONCLUSION

The foregoing has demonstrated that the District Court erred in its application of Utah Code Ann. § 78-14-4 to the facts of the present case. The Court made erroneous conclusions of fact, unsupported by any evidence in the record. Further the lower court improperly applied Foil to the case.

Specifically, the court erred in finding that JONES was aware he had sustained an injury when the Doctors, and even the Court later found as a matter of fact no injury occurred. The Court further erred by failing to find factual or legal support for its holding that Plaintiff knew of the cause of his injury. Finally, the Court erred in completely omitting requisite findings regarding knowledge of potential negligence.

Because the Court erred in its applications of the law in this case, reversal of the lower court's decision and a new trial is warranted. Affirmance of the District Court's decision would perpetrate an injustice because it would reward Defendants for delaying disclosure of the true nature of JONES' injuries until after the statute of limitations had run, leaving JONES without a legal remedy.

Respectfully submitted this 20th day of August, 1992.



ROBERT F. ORTON - #A2483  
MARSDEN, ORTON, CAHOON &  
GOTTFREDSON  
ATTORNEYS FOR JONES/  
APPELLANT, G. KEVIN JONES

AFFIDAVIT OF SERVICE

STATE OF UTAH                    )  
                                      : ss.  
COUNTY OF SALT LAKE        )

BRADLEY R HELSTEN, being duly sworn, says that she is employed in the law firm of MARSDEN, ORTON, CAHOON & GOTTFREDSON, Attorneys for Plaintiffs herein: that she served the attached BRIEF of APPELLANT upon the parties listed below by placing true and correct copies thereof in envelopes addressed to the following and causing the same to be mailed first class, postage prepaid, on the 20<sup>th</sup> day of AUGUST, 1992.

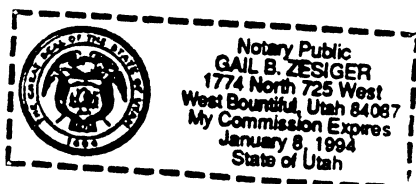
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SUBSCRIBED AND SWORN to before me this 20<sup>th</sup> day of August, 1992.



  
Notary Public

## **ADDENDUM**

professional liability insurance premiums can be reasonably and accurately calculated, and to provide other procedural changes to expedite early evaluation and settlement of claims 1976

### 78-14-3. Definitions.

As used in this act

(1) "Audiologist" means a person licensed to practice audiology under Chapter 41, Title 58, Speech-language Pathology and Audiology Licensing Act

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

(3) "Chiropractic physician" means a person licensed to practice chiropractic under Sections 58-12-50 through 58-12-56, the Chiropractic Improvements Act

(4) "Commissioner" means the commissioner of insurance as provided in Section 31A-2-102

(5) "Dental hygienist" means a person licensed to practice dental hygiene as defined in Section 58-7-11

(6) "Dentist" means a person licensed to practice dentistry as defined in Section 58-7-11

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

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

(9) "Health care provider" includes any person, partnership, association, corporation, or other facility or institution who causes to be rendered or who renders health care or professional services as a hospital, physician, registered nurse, licensed practical nurse, nurse-midwife, dentist, dental hygienist, optometrist, clinical laboratory technologist, pharmacist, physical therapist, podiatrist, psychologist, chiropractic physician, naturopathic physician, osteopathic physician, osteopathic physician and surgeon, audiologist, speech-language pathologist, certified social worker, social service worker, social service aide, marriage and family counselor, practitioner of obstetrics, or others rendering similar care and services relating to or arising out of the health needs of persons or groups of persons and officers, employees, or agents of any of the above acting in the course and scope of their employment.

(10) "Hospital" means a public or private institution licensed under the Hospital Licensing Act

(11) "Licensed practical nurse" means a person licensed to practice as a licensed practical nurse as provided in Section 58-31-10

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

(13) "Marriage and family therapist" means a person licensed to practice as a marriage therapist or family therapist as provided in Section 58-39-6

(14) "Naturopathic physician" means a person licensed to practice naturopathy as defined in Section 58-12-22

(15) "Nurse-midwife" means a person licensed to practice nurse-midwifery as provided in Section 58-44-7

(16) "Optometrist" means a person licensed to practice optometry under Chapter 16a, Title 58, Utah Optometry Practice Act

(17) "Osteopathic physician" means a person licensed to practice osteopathy under Sections 58-12-1 through 58-12-7, Utah Osteopathic Medicine Licensing Act

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

(19) "Pharmacist" means a person licensed to practice pharmacy as provided in Section 58-17-2

(20) "Physical therapist" means a person licensed to practice physical therapy under Part 1, Chapter 24a, Title 58, Physical Therapist Practice Act

(21) "Physician" means a person licensed to practice medicine and surgery under Sections 58-12-26 through 58-12-43, Utah Medical Practice Act

(22) "Podiatrist" means a person licensed to practice podiatry under Chapter 5, Title 58, Podiatrists

(23) "Practitioner of obstetrics" means a person licensed to practice as a physician in this state under Sections 58-12-26 through 58-12-43, Utah Medical Practice Act

(24) "Psychologist" means a person licensed to practice psychology as defined in Subsection 58-25a-2(3)

(25) "Registered nurse" means a person licensed to practice professional nursing as provided in Section 58-31-9

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

(27) "Social service aide" means a person licensed to practice as a social service aide as provided in Section 58-35-5

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

(29) "Speech-language pathologist" means a person licensed to practice speech-language pathology under Chapter 41, Title 58, Speech-language Pathology and Audiology Licensing Act

(30) "Tort" means any legal wrong, breach of duty, or negligent or unlawful act or omission proximately causing injury or damage to another 1991

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

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

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



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

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

(2) The provisions of this section shall apply to all persons regardless of minority or other legal disability under Section 78-12-36 or any other provision of the law, and shall apply retroactively to all persons, partnerships, associations and corporations and to all health care providers and to all malpractice actions against health care providers based upon alleged personal injuries which occurred prior to the effective date of this act, provided, however, that any action which under former law could have been commenced after the effective date of this act may be commenced only within the unelapsed portion of time allowed under former law, but any action which under former law could have been commenced more than four years after the effective date of this act may be commenced only within four years after the effective date of this act

1979

**78-14-4.5. Amount of award reduced by amounts of collateral sources available to plaintiff — No reduction where subrogation right exists — Collateral sources defined — Procedure to preserve subrogation rights — Evidence admissible — Exceptions.**

(1) In all malpractice actions against health care providers as defined in Subsection 78-14-3(29) in which damages are awarded to compensate the plaintiff for losses sustained, the court shall reduce the amount of such award by the total of all amounts paid to the plaintiff from all collateral sources which are available to him, however, there shall be no reduction for collateral sources for which a subrogation right exists as provided in this section nor shall there be a reduction for any collateral payment not included in the award of damages. Upon a finding of liability and an awarding of damages by the trier of fact, the court shall receive evidence concerning the total amounts of collateral sources which have been paid to or for the benefit of the plaintiff or are otherwise available to him. The court shall also take testimony of any amount which has been paid, contributed, or forfeited by, or on behalf of the plaintiff or members of his immediate family to secure his right to any collateral source benefit which he is receiving as a result of his injury and shall offset any reduction in the award by such amounts. No evidence shall be received and no reduction made with respect to future collateral source benefits except as specified in Subsection (4)

(2) For purposes of this section "collateral source" means payments made to or for the benefit of the plaintiff for

(a) medical expenses and disability payments payable under the United States Social Security Act, any federal, state, or local income disability act, or any other public program, except the fed-

eral programs which are required by law to seek subrogation,

(b) any health, sickness, or income disability insurance, automobile accident insurance that provides health benefits or income disability coverage, and any other similar insurance benefits, except life insurance benefits available to the plaintiff, whether purchased by the plaintiff or provided by others,

(c) any contract or agreement of any person, group, organization, partnership or corporation to provide pay for, or reimburse the costs of hospital, medical, dental, or other health care services, except benefits received as gifts, contributions, or assistance made gratuitously, and

(d) any contractual or voluntary wage continuation plan provided by employers or any other system intended to provide wages during a period of disability

(3) To preserve subrogation rights for amounts paid or received prior to settlement or judgment, a provider of collateral sources shall serve at least 30 days before settlement or trial of the action a written notice upon each health care provider against whom the malpractice action has been asserted. The written notice shall state the name and address of the provider of collateral sources, the amount of collateral sources paid, the names and addresses of all persons who received payment, and the items and purposes for which payment has been made

(4) Evidence is admissible of government programs that provide payments or benefits available in the future to or for the benefit of the plaintiff to the extent available irrespective of the recipient's ability to pay. Evidence of the likelihood or unlikelihood that such programs, payments, or benefits will be available in the future is also admissible. The trier of fact may consider such evidence in determining the amount of damages awarded to a plaintiff for future expenses

(5) No provider of collateral sources is entitled to recover the amounts of such benefits from a health care provider the plaintiff, or any other person or entity as reimbursement for collateral source payments made prior to settlement or judgment, including any payments made under Chapter 19, Title 26, except to the extent that subrogation rights to amounts paid prior to settlement or judgment are preserved as provided in this section. All policies of insurance providing benefits affected by this section are construed in accordance with this section

1985

**78-14-5. Failure to obtain informed consent — Proof required of patient — Defenses — Consent to health care.**

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

(a) that a provider-patient relationship existed between the patient and health care provider, and

(b) the health care provider rendered health care to the patient, and

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

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

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

(f) a reasonable, prudent person in the patient's position would not have consented to the health care rendered after having been fully informed as to all facts relevant to the decision to give consent. In determining what a reasonable, prudent person in the patient's position would do under the circumstances, the finder of fact shall use the viewpoint of the patient before health care was provided and before the occurrence of any personal injuries alleged to have arisen from said health care, and

(g) the unauthorized part of the health care rendered was the proximate cause of personal injuries suffered by the patient

(2) It shall be a defense to any malpractice action against a health care provider based upon alleged failure to obtain informed consent if

(a) the risk of the serious harm which the patient actually suffered was relatively minor, or

(b) the risk of serious harm to the patient from the health care provider was commonly known to the public, or

(c) the patient stated, prior to receiving the health care complained of, that he would accept the health care involved regardless of the risk, or that he did not want to be informed of the matters to which he would be entitled to be informed, or

(d) the health care provider after considering all of the attendant facts and circumstances, used reasonable discretion as to the manner and extent to which risks were disclosed, if the health care provider reasonably believed that additional disclosures could be expected to have a substantial and adverse effect on the patient's condition, or

(e) the patient or his representative executed a written consent which sets forth the nature and purpose of the intended health care and which contains a declaration that the patient accepts the risk of substantial and serious harm, if any, in hopes of obtaining desired beneficial results of health care and which acknowledges that health care providers involved have explained his condition and the proposed health care in a satisfactory manner and that all questions asked about the health care and its attendant risks have been answered in a manner satisfactory to the patient or his representative, such written consent shall be a defense to an action against a health care provider based upon failure to obtain informed consent unless the patient proves that the person giving the consent lacked capacity to consent or shows by clear and convincing proof that the execution of the written consent was induced by the defendant's affirmative acts of fraudulent misrepresentation or fraudulent omission to state material facts

(3) Nothing contained in this act shall be construed to prevent any person eighteen years of age or over from refusing to consent to health care for his own person upon personal or religious grounds

(4) The following persons are authorized and empowered to consent to any health care not prohibited by law

(a) any parent whether an adult or a minor, for his minor child,

(b) any married person, for a spouse,

(c) any person temporarily standing in loco parentis, whether formally serving or not, for the minor under his care and any guardian for his ward,

(d) any person eighteen years of age or over for his or her parent who is unable by reason of age, physical or mental condition, to provide such consent,

(e) any patient eighteen years of age or over,

(f) any female regardless of age or marital status, when given in connection with her pregnancy or childbirth

(g) in the absence of a parent, any adult for his minor brother or sister and

(h) in the absence of a parent, any grandparent for his minor grandchild

(5) No person who in good faith consents or authorizes health care treatment or procedures for another as provided by this act shall be subject to civil liability 1976

#### 78-14-6. Writing required as basis for liability for breach of guarantee, warranty, contract or assurance of result.

No liability shall be imposed upon any health care provider on the basis of an alleged breach of guarantee, warranty, contract or assurance of result to be obtained from any health care rendered unless the guarantee, warranty, contract or assurance is set forth in writing and signed by the health care provider or an authorized agent of the provider 1976

#### 78-14-7. Ad damnum clause prohibited in complaint.

No dollar amount shall be specified in the prayer of a complaint filed in a malpractice action against a health care provider. The complaint shall merely pray for such damages as are reasonable in the premises 1976

#### 78-14-7.1. Limitation of award of noneconomic damages in malpractice actions.

In a malpractice action against a health care provider, an injured plaintiff may recover noneconomic losses to compensate for pain, suffering, and inconvenience. In no case shall the amount of damages awarded for such noneconomic loss exceed \$250,000. This limitation does not affect awards of punitive damages 1986

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

(1) In any malpractice action against a health care provider as defined in Section 78-14-3, an attorney shall not collect a contingent fee for representing a client seeking damages in connection with or arising out of personal injury or wrongful death caused by the negligence of another which exceeds 33 1/3% of the amount recovered

(2) This limitation applies regardless of whether the recovery is by settlement, arbitration, judgment or whether appeal is involved 1986

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

No malpractice action against a health care provider may be initiated unless and until the plaintiff gives the prospective defendant or his executor or successor, at least ninety days prior notice of intent to commence an action. Such notice shall include a general statement of the nature of the claim, the persons involved, the date, time and place of the occurrence, the circumstances thereof, specific allegations

of misconduct on the part of the prospective defendant, the nature of the alleged injuries and other damages sustained. Notice may be in letter or affidavit form executed by the plaintiff or his attorney. Service shall be accomplished by persons authorized and in the manner prescribed by the Utah Rules of Civil Procedure for the service of the summons and complaint in a civil action or by certified mail, return receipt requested, in which case notice shall be deemed to have been served on the date of mailing. Such notice shall be served within the time allowed for commencing a malpractice action against a health care provider. If the notice is served less than ninety days prior to the expiration of the applicable time period, the time for commencing the malpractice action against the health care provider shall be extended to 120 days from the date of service of notice.

This section shall, for purposes of determining its retroactivity, not be construed as relating to the limitation on the time for commencing any action, and shall apply only to causes of action arising on or after April 1, 1976. This section shall not apply to third party actions, counterclaims or crossclaims against a health care provider. 1979

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

If the commissioner finds after a hearing that in any part of this state any professional liability insurance coverage for health care providers is not readily available in the voluntary market, and that the public interest requires, he may by regulation promulgate and implement plans to provide insurance coverage through all insurers issuing professional liability policies and individual and group accident and sickness policies providing medical, surgical or hospital expense coverage on either a prepaid or an expense incurred basis, including personal injury protection and medical expense coverage issued incidental to liability insurance policies. 1976

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

(1) As used in this section

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

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

(2) In any malpractice action against a health care provider, as defined in Subsection 78-14-3(29), the court shall at the request of any party order that future damages which equal or exceed \$100,000, less amounts payable for attorney's fees and other costs which are due at the time of judgment, shall be paid by periodic payments rather than by a lump sum payment.

(3) In rendering a judgment which orders the payment of future damages by periodic payments, the court shall order periodic payments to provide a fair correlation between the sustaining of losses and the payment of damages. Lost future earnings shall be paid over the judgment creditor's work life expectancy. The court shall also order, when appropriate, that periodic payments increase at a fixed rate, equal to the rate of inflation which the finder of fact used to determine the amount of future damages, or as mea-

sured by the most recent Consumer Price Index applicable to Utah for all goods and services. The present cash value of all periodic payments shall equal the fact finder's award of future damages, less any amount paid for attorney's fees and costs. The present cash value of periodic payments shall be determined by discounting the total amount of periodic payments projected over the judgment creditor's life expectancy, by the rate of interest which the finder of fact used to reduce the amount of future damages to present value, or the rate of interest available at the time of trial on one year U.S. Government Treasury Bills. Before periodic payments of future damages may be ordered, the court shall require a judgment debtor to post security which assures full payment of those damages. Security for payment of a judgment of periodic payments may be in one or more of the following forms:

- (a) a bond executed by a qualified insurer,
- (b) an annuity contract executed by a qualified insurer,
- (c) evidence of applicable and collectable liability insurance with one or more qualified insurers,
- (d) an agreement by one or more qualified insurers to guarantee payment of the judgment, or
- (e) any other form of security approved by the court.

Security which complies with this section may also serve as a supersedeas bond, where one is required.

(4) A judgment which orders payment of future damages by periodic payments shall specify the recipient or recipients of the payments, the dollar amount of the payments, the interval between payments, and the number of payments or the period of time over which payments shall be made. Those payments may only be modified in the event of the death of the judgment creditor.

(5) If the court finds that the judgment debtor, or the assignee of this obligation to make periodic payments, has failed to make periodic payments as ordered by the court, it shall, in addition to the required periodic payments, order the judgment debtor or his assignee to pay the judgment creditor all damages caused by the failure to make payments, including court costs and attorney's fees.

(6) The obligation to make periodic payments for all future damages, other than damages for loss of future earnings, shall cease upon the death of the judgment creditor. Damages awarded for loss of future earnings shall not be reduced or payments terminated by reason of the death of the judgment creditor, but shall be paid to persons to whom the judgment creditor owed a duty of support, as provided by law, immediately prior to his death. In that case the court which rendered the original judgment may, upon petition of any party in interest, modify the judgment to award and apportion the unpaid future damages in accordance with this section.

(7) If security is posted in accordance with Subsection (3), and approved by a final judgment entered under this section, the judgment shall be deemed to be satisfied, and the judgment debtor on whose behalf the security is posted shall be discharged. 1988

**78-14-10. Actions under Utah Governmental Immunity Act.**

The provisions of this act shall apply to malpractice actions against health care providers which are brought under the Utah Governmental Immunity Act in so far as they are applicable, provided, however, that this act shall in no way affect the requirements

for filing notices of claims, times for commencing actions and limitations on amounts recoverable under the Utah Governmental Immunity Act. 1978

**78-14-11. Act not retroactive — Exception.**

The provisions of this act, with the exception of the provisions relating to the limitation on the time for commencing an action, shall not apply to injuries, death or services rendered which occurred prior to the effective date of this act. 1978

**78-14-12. Department of Commerce to provide panel — Exemption — Procedures — Statute of limitations tolled — Composition of panel — Expenses — Department authorized to set license fees.**

(1) (a) The Department of Commerce shall provide a hearing panel in alleged medical malpractice cases against health care providers as defined in Section 78-14-3 filed after July 1, 1985, except dentists.

(b) The department shall establish procedures for prelitigation consideration of personal injury and wrongful death claims for damages arising out of the provision of or alleged failure to provide health care.

(c) The proceedings are informal and nonbinding, but are compulsory as a condition precedent to commencing litigation. Proceedings conducted under authority of this section are confidential, privileged, and immune from civil process.

(2) The party initiating a medical malpractice action shall file a request for prelitigation panel review with the Department of Commerce within 60 days after the filing of a statutory notice of intent to commence action under Section 78-14-8. The request shall include a copy of the notice of intent to commence action. The request shall be mailed to all health care providers named in the notice and request.

(3) The filing of a request for prelitigation panel review under this section tolls the applicable statute of limitations until 60 days following the issuance of an opinion by the prelitigation panel. The opinion shall be sent to all parties by certified mail, return receipt requested.

(4) The department provides for and appoints an appropriate panel or panels to accept and hear complaints of negligence and damages, made by or on behalf of any patient who is an alleged victim of negligence. The panels are composed of:

(a) one member appointed from a list provided by the commissioners of the Utah State Bar, who is a resident lawyer currently licensed to practice law in this state and who shall serve as chairman of the panel;

(b) one member who is licensed under Section 78-14-3, who is practicing in the same specialty as the proposed defendant, appointed from a list provided by the professional association representing the same area of practice as the health care provider; or in claims against only hospitals or their employees, one member who is an individual currently serving in hospital administration and appointed from a list submitted by the Utah Hospital Association; and

(c) a lay panelist who is not a lawyer, doctor, hospital employee, or other health care provider, and who is a responsible citizen of the state, selected and appointed by a unanimous decision of the members comprising the panel.

(5) Each person selected as a panel member shall certify, under oath, that he has no bias or conflict of interest with respect to any matter under consideration.

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

(7) (a) In addition to the actual cost of administering the licensure of health care providers, the Division of Occupational and Professional Licensing of the Department of Commerce may set license fees of health care providers within the limits established by law equal to their proportionate costs of administering prelitigation panels.

(b) The claimant shall bear none of the costs of administering the prelitigation panel except under Section 78-14-16. 1988

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

(1) No record of the proceedings is required and all evidence, documents, and exhibits are returned to the parties or witnesses who provided the evidence, documents, and exhibits at the end of the proceedings. The hearing panel has the authority to issue subpoenas and to administer oaths, and any expenses incurred by the panel in this regard are paid by the requesting party, including, but not limited to, witness fees and mileage. The proceedings are informal and formal rules of evidence are not applicable. There is no discovery or perpetuation of testimony in the proceedings, except upon special order of the panel, and for good cause shown demonstrating extraordinary circumstances.

(2) A party is entitled to attend, personally or with counsel, and participate in the proceedings, except upon special order of the panel and unanimous agreement of the parties. The proceedings are confidential and closed to the public. No party shall have the right to cross-examine, rebut, or demand that customary formalities of civil trials and court proceedings be followed. The panel may, however, request special or supplemental participation of some or all parties in particular respects. Communications between the panel and the parties, except the testimony of the parties on the merits of the dispute, are disclosed to all other parties.

(3) The Department of Commerce shall appoint a panel to consider the claim and set the matter for panel review as soon as practicable after receipt of a request.

(4) Parties may be represented by counsel in proceedings before a panel. 1988

**78-14-14. Decision and recommendations of panel — No judicial or other review.**

The panel shall render its opinion in writing not later than 30 days after the end of the proceedings. The panel shall determine on the basis of the evidence whether each claim against each health care provider has merit or has no merit and, if meritorious, whether the conduct complained of resulted in harm to the claimant.

There is no judicial or other review or appeal of the panel's decision or recommendations. 1988

**78-14-15. Evidence of proceedings not admissible in subsequent action — Panelist may not be compelled to testify — Immunity of panelist from civil liability.**

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

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G. KEVIN JONES,	:	COURT'S DECISION
Plaintiff,	:	CIVIL NO. C-88-2736
vs.	:	
THE STATE OF UTAH; THE	:	
UNIVERSITY OF UTAH; THE	:	
UNIVERSITY OF UTAH HOSPITAL	:	
AND MEDICAL CENTER; and	:	
JAMES M. BECKER, M.D.,	:	
Defendants.	:	

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The above-entitled matter came before the Court for a bifurcated trial commencing on November 12, 1991 on the issue of whether the statute of limitations had run as to the plaintiff's cause of action against the defendants.

The Court having considered the testimony that was adduced, the evidence received, arguments of counsel and the applicable law has reached this decision.

The Court finds from the evidence presented that the plaintiff, Kevin Jones, knew or should have known that he had sustained an injury and the causation of the same, on or about May of 1984.

Exhibit P-4, a letter dated May 29, 1984, from Dr. Becker to Dr. Middleton clearly indicates that Mr. Jones had discussed his sexual dysfunction with Dr. Becker prior to the date of the letter. Further, this letter indicates defendant had been "told by his family doctor that he might be impotent, secondary to his surgery." (line 24 of Exhibit 4).

There is other evidence that supports the finding that plaintiff discovered "the injury" and made the causal connection between the problem and the surgery in April or May of 1984. The Court finds there has been no showing of any fraudulent concealment of plaintiff's injury by defendants or anyone else.

Therefore, plaintiff had two years from May of 1984, the point of discovery, in which to file an Intent to Commence Legal Action.

The Court finds the evidence is uncontroverted that the plaintiff's Notice of Intent to Commence Action was not filed until December of 1987.

It is clear from a reading of Deschamps v. Pulley, 784 P.2d 471 (Utah App. 1989), that a medical malpractice claim must be filed within the statute of limitations period and that the fact that a plaintiff's physicians do not render an expert

opinion supportive of malpractice and in fact may have discouraged suit, does not excuse the plaintiff's failure to file a timely claim. The Court in Deschamps v. Pulley, concludes that knowledge of a legal injury does not require an expert opinion confirming malpractice or the "statute would be tolled in every case until a plaintiff. . . found favorable expert medical testimony." (at p. 475).

The Court finds that discovery occurs when a plaintiff knows or should have known he might have a cause of action. There is no legal authority for the proposition that "discovery" does not occur until a plaintiff is absolutely sure of the cause of his injury. For example, in the instant case there still appears to be a real fact question about the nature and existence of any sexual dysfunction and the cause.

The Court finds the testimony of Dr. Becker concerning the plaintiff's condition to be credible. Dr. Becker stated, "Mr. Jones has ill defined sexual dysfunction. . . the cause is hard to pinpoint. Objective evaluation has been equivocal in terms of clarifying what it is and if it exists." This evaluation appears to still be accurate, based upon the totality of testimony adduced. The Court finds Dr. Becker told plaintiff of the risk of surgery, including the risk of sexual

dysfunction, and that the plaintiff knew of this possibility before surgery; and that he related the sexual dysfunction he experienced to the surgical process, shortly after undergoing the second surgery. The Court finds plaintiff's articulated desire to have his sperm banked would not have been made but for knowledge of the risk of sexual dysfunction.

The Court has considered plaintiff's demeanor and testimony, and finds that the plaintiff's demeanor, attitude and the content of his answers, reveals him to be an intelligent, careful man. Plaintiff's answers in court reflected a great attention to detail. The Court so finds and further notes plaintiff is a lawyer, who understands the concept of informed consent. The Court finds the plaintiff had access to the Mayo Clinic pamphlet and read the same. The Court finds that the plaintiff clearly testified that in 1984, he knew of changes in his sexual function or "system", i.e., no ejaculent and diminished erections (Ex. D-4).

Plaintiff's specific testimony at trial was that he masturbated to "test" his sexual function after the first surgery, and again after the second surgery, and that he noticed and reported sexual problems in April or May of 1984. Plaintiff testified that after the "testing", following his



first surgery, he felt relief and stated, "at least I got through that one okay". The plaintiff's reference to "that one" was clearly a reference to surgery. Plaintiff also testified that he masturbated again after the second surgery and discovered what he perceived to be sexual dysfunction. The plaintiff and his parents, Veda and Garth Jones, testified that he disclosed the sexual dysfunction to them in May of 1984 and the surgery was discussed as a cause at that time. Garth Jones testified that he called Dr. Becker and asked questions regarding the "consequences of this operation" in relation to the sexual dysfunction. The evidence supports that in late April or May of 1984, the plaintiff told Dr. Becker he was experiencing no ejaculation. The testimony reflects that Dr. Becker discussed possible causes at that time and made referrals to Dr. Middleton and Dr. Hammond to further explore any sexual dysfunction. All of the physicians to whom plaintiff was referred, were advised of the dysfunction problem and plaintiff's concern about it being linked to the colon surgery.

In Exhibit D-17, the deposition of Dr. Becker, Dr. Becker stated (at p. 98), that he told the plaintiff, referring to plaintiff's complaint of sexual dysfunction, "It is unlikely to

be the result of surgery." However, Dr. Becker goes on to say that surgery as a cause was discussed and "surgery was never ruled out" as a possible cause of the plaintiff's problems. It appears that plaintiff was on notice at this time of the problem and the potential causes, including the surgery.

The Court finds that while the plaintiff testified he didn't relate his sexual dysfunction to nerve injury from surgery until September, 1987, that is belied by the other evidence and by the totality of his own testimony. Further, the Court finds that the plaintiff's contention that he didn't think sexual dysfunction was a real risk, and wasn't advised of the same, is not credible in view of the totality of the testimony, including plaintiff's testimony that he considered and requested his sperm be banked.

The Court finds that when the plaintiff got Dr. Dayton's opinion in September 1987, this only confirmed the plaintiff's own conclusion formed in 1984 as to the problem and its cause.

The Court finds that the plaintiff found other theories on causation unacceptable. For example, plaintiff found Dr. Hammond's explanation, of a possible psychological cause for the dysfunction, incredible and "unsatisfactory" and never believed this to be the cause. The plaintiff's actions,

including his failure to pursue psychological treatment, makes it clear that plaintiff never believed his problems were psychological. Exhibit D-11 establishes that in early 1985, Dr. Franklin L. Smith, a urologist, was asked by the plaintiff if surgery had caused his problem.

The fact that Dr. Becker did not acknowledge in 1984 or now that plaintiff has a permanent sexual dysfunction problem caused by surgery, is immaterial to the issue of plaintiff's knowledge. Dr. Franklin L. Smith's testimony referred to plaintiff's request for information regarding the nexus between surgery and sexual dysfunction (See Exhibit P-14) and this Doctor indicated the plaintiff reported sexual problems starting "after the second operation in February of 1984".

Finally, Terry Stoker's testimony supports the 1984 discovery by plaintiff.

Ms. Stoker testified that the plaintiff indicated he "contemplated suing" repeatedly. She clearly states threats of a lawsuit were made as early as 1985.

The Court finds the continuing treatment doctrine is inconsistent with the statute of limitations passed by the Utah legislature.

Based upon the foregoing, the Court orders that counsel for the defendants, Mr. Williams, is to prepare more detailed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision, and submit them as required under the Third District Court Rules of Practice.

Dated this 18th day of December, 1991:

A handwritten signature in cursive script, appearing to read "Leslie A. Lewis", written over a horizontal line.

LESLIE A. LEWIS  
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy  
of the foregoing Court's Decision, to the following,  
this 19 day of December, 1991:

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FILED  
JAN 23 1992  
THIRD JUDICIAL DISTRICT

JAN 23 1992

*E. Matheson*

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

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G. KEVIN JONES,

Plaintiff,

vs.

THE STATE OF UTAH; THE  
UNIVERSITY OF UTAH; THE  
UNIVERSITY OF UTAH HOSPITAL  
AND MEDICAL CENTER; and JAMES  
M. BECKER, M.D.,

Defendants.

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

Civil No. C88-2736

Judge Leslie A. Lewis

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This matter was tried to the Court, without a jury, on November 12, 13 and 25, 1991. In accordance with § 78-12-47, UCA (1953 as amended) the trial was limited to the issues pertaining to defendants' statute of limitations defense. Plaintiff was present at trial and represented by his counsel of record. Defendants were represented at trial by their counsel of record. Plaintiff and defendants adduced evidence through witnesses and exhibits and each rested. The Court having heard closing arguments from counsel for plaintiff and defendants and having reviewed the

trial briefs submitted by plaintiff and defendants hereby enters the following:

FINDINGS OF FACT

1. In 1981 plaintiff was diagnosed as having chronic ulcerative colitis. He was treated for that condition with <sup>22</sup>~~Azulfadine~~ and Prednisone by Dr. Clifford Harman, a gastroenterologist, through December 1983.

2. In November 1982 plaintiff consulted with Dr. James Becker at the University of Utah School of Medicine concerning surgical options for treatment of his ulcerative colitis, including specifically the ileoanal anastomosis procedure. Between November 1982 and December 1983 plaintiff's parents also visited with Dr. Becker regarding surgical options for treatment of plaintiff's disease.

3. In October 1983 plaintiff visited the Mayo Clinic in Rochester, Minnesota where Dr. Huizenga, a gastroenterologist, confirmed the diagnosis of chronic ulcerative colitis and entered plaintiff into a study protocol for an investigational drug (5ASA) for the treatment of ulcerative colitis.

4. Plaintiff did not respond favorably to the 5ASA treatment and in December 1983 his ulcerative colitis became so severe that he was admitted to Holy Cross Hospital. In the opinion of his treating gastroenterologist, Dr. Harman, medical therapies had been exhausted and surgery was necessary to save plaintiff's life.

5. In January 1984 plaintiff and his parents discussed the surgical options with Dr. Becker. Plaintiff elected to undergo the

ileoanal anastomosis procedure after having been fully informed concerning the risks and benefits of that procedure and of the alternative procedures.

6. Dr. Becker advised plaintiff that the risk of sexual dysfunction was lower with the ileoanal anastomosis procedure than with the alternative procedures, but that sexual dysfunction was a risk of the procedure.

7. In January 1984 Dr. Becker explained to plaintiff that the ileoanal anastomosis procedure would be performed in three separate operations.

8. On January 5, 1984, the first phase of the ileoanal anastomosis, removal of most of the colon and the creation of a temporary ileostomy, was performed by Dr. Becker on plaintiff.

9. The first phase of the procedure was completed without complications. Following completion of the first phase and prior to the second phase of the procedure, plaintiff masturbated to test his sexual function. At that time he felt relieved and stated "at least I got through that one okay", referring to the first surgery.

10. On February 27, 1984, plaintiff underwent the second phase of the ileoanal anastomosis procedure, the mucosal proctectomy or removal of the mucosal lining from the rectum. Again, prior to this procedure the risks were explained to plaintiff by Dr. Becker, including the risk of sexual dysfunction.

11. In April or May 1984 plaintiff discovered what he perceived to be sexual dysfunction, including lack of ejaculation and diminished frequency and quality of erections.



12. In May 1984 plaintiff reported his perceived sexual dysfunction to his parents and to Dr. Becker. At that time he reported to Dr. Becker that he had been told by his family doctor that he might be impotent, secondary to his surgery.

13. In May 1984 Dr. Becker referred plaintiff to Dr. Middleton, a urologist, and to Dr. Hammond, a psychologist and sex therapist, to explore the reported sexual dysfunction.

14. Since May 1984, in discussions and correspondence with various physicians, plaintiff has repeatedly causally related his perceived sexual dysfunction to the second operative procedure performed in February 1984.

15. Since April or May 1984, plaintiff has had an ill defined sexual dysfunction, the cause of which has not been definitively determined. ~~Objective evaluations have been equivocal in terms of clarifying the perceived dysfunction.~~ K

16. Beginning in May 1984 and continuing thereafter, plaintiff knew and reasonably should have known that the second surgery performed in February 1984 was a possible cause of his perceived sexual dysfunction and that he might have a cause of action against defendants.

17. Plaintiff did not accept or rely upon any other theories of causation suggested by defendants or any other physicians. Specifically, plaintiff rejected and did not rely upon any suggestion that there may be a psychological cause of his perceived sexual dysfunction.

18. Plaintiff was never misled or deceived in any manner concerning the possible causes of his perceived sexual dysfunction.

19. Defendants did not fraudulently represent or conceal any information relevant to plaintiff's treatment, recovery or perceived sexual dysfunction.

~~20. Dr. Merril Dayton did not provide plaintiff any information in September 1987 concerning possible causes of plaintiff's perceived sexual dysfunction of which plaintiff was not previously aware.~~

21. During the years 1984 and 1985 plaintiff considered suing defendants for medical malpractice based on his perceived sexual dysfunction and general dissatisfaction with the outcome of his surgeries.

22. On June 28, 1984 the third and final phase of the ileoanal anastomosis procedure was performed and completed.

23. All surgeries and treatment performed and rendered by defendants were provided at the University of Utah Medical Center.

24. Dr. Becker was at all times relevant hereto a full time employee and faculty member in the Department of Surgery at the University of Utah School of Medicine.

25. Plaintiff's Notice of Intent to Commence Action was not served until December 4, 1987.

26. This action was commenced April 26, 1988.

27. Plaintiff's action was not commenced within two years after he knew and reasonably should have known of his perceived sexual dysfunction and general dissatisfaction with the outcome of

his surgeries and that he might have a claim for malpractice against defendants.

Based upon the foregoing Findings of Fact, the Court now makes the following:

CONCLUSIONS OF LAW

1. The applicable statute of limitations in this case is § 78-14-4, UCA (1953 as amended).

2. Plaintiff's action was not commenced within the time required by § 78-14-4 and his action is therefore barred.

3. The two year limitation period provided in § 78-14-4 commences when the plaintiff discovers or through the use of reasonable diligence should have discovered that he or she has an injury and that he or she might have a cause of action based on the injury. Commencement of the limitation period is not delayed until a plaintiff is advised by an "expert" that a valid claim exists or otherwise knows with certainty the cause of the injury or that the defendants were negligent.

4. An action is commenced for purposes of the statute of limitations when the complaint is filed, but in this case the action was not timely whether the commencement of action is deemed to be December 4, 1987 when the Notice of Intent was served, or April 26, 1988 when the Complaint was filed.

5. In addition to the relevant findings of fact, the Court concludes as a matter of law, that defendants did not fraudulently conceal any alleged misconduct and that plaintiff was not prevented

from discovering any misconduct on the part of defendants by any fraudulent concealment.

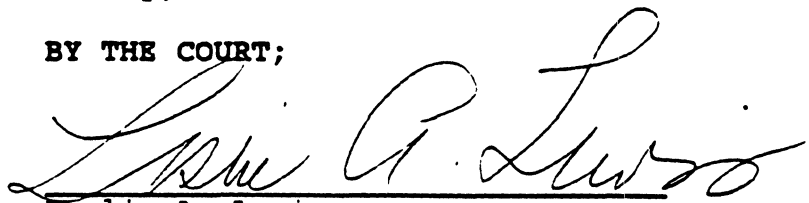
6. The "continuing treatment doctrine" is not applicable since the legislature passed § 78-14-4, UCA (1953 as amended).

7. The continuing treatment doctrine would not apply to this case, even in the absence of § 78-14-4, because of the Court's factual findings that plaintiff possessed all of the knowledge and information pertaining to his alleged injury and possible causes during the time he was being treated by defendants which he possessed at the time he commenced this action and he was not misled or prevented from obtaining any information as a result of the continuing treatment.

8. Because plaintiff's action was not commenced within the time required by § 78-14-4, the applicable statute of limitations, it is not necessary for the Court to rule on defendants' defense that the action was not commenced within the shorter period of time required by § 63-30-12, UCA (1953 as amended).

DATED this 23<sup>rd</sup> day of January, 1992.


BY THE COURT;

  
Leslie A. Lewis  
District Judge

STATE OF UTAH )  
 : ss.  
COUNTY OF SALT LAKE )

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 \_\_\_\_\_  
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09/05/93

