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Lisa Tapp, Plaintiff-Appellee, v. Sherman Sorensen, M.D.; Sorensen Cardiovascular Group; and Ihc Health Services, Inc., Defendant-Appellants. Johanna Bright, Plaintiff-Appellee v. Sherman Sorensen, M.D.; Sorensen Cardiovascular Group; and St. Mark's Hospital, Defendant-Appellants. Pia Merlo-Schmucker, Plaintiff-Appellee v. Sherman Sorensen, M.D.; Sorensen Cardiovascular Group; and St. Mark's Hospital, Defendant-Appellants : Reply Brief

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

LISA TAPP, Plaintiff-Appellee, vs. SHERMAN SORENSEN, M.D.; SORENSEN CARDIOVASCULAR GROUP; and IHC HEALTH SERVICES, INC., Defendant-Appellants.	**REPLY BRIEF OF APPELLANT IHC HEALTH SERVICES, INC.** Appeal No. 20180690-SC Appeal from the Third District Court Case No. 170904956 Judge Barry Lawrence
JOHANNA BRIGHT, Plaintiff-Appellee vs. SHERMAN SORENSEN, M.D.; SORENSEN CARDIOVASCULAR GROUP; and ST. MARK'S HOSPITAL, Defendant-Appellants.	Appeal No. 20180528-SC

PIA MERLO-SCHMUCKER, Plaintiff-Appellee vs. SHERMAN SORENSEN, M.D.; SORENSEN CARDIOVASCULAR GROUP; and ST. MARK'S HOSPITAL, Defendant-Appellants.	Appeal No. 20180554-SC

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INTRODUCTION

Plaintiff-Appellee Lisa Tapp ("Tapp"), seeks to avoid this Court's review of Rule 9(c)'s straightforward language that *when* a party "alleg[es] fraud … a party must state with particularity the circumstances constituting fraud…." Utah R. Civ. P. 9(c). Tapp does so by making four incorrect arguments.

First, Tapp ignores Rule 9(c)'s plain language and the many cases from Utah and elsewhere that uniformly hold Rule 9 applies to fraud allegations offered to extend a limitations period. Second, Tapp mischaracterizes the allegations against Intermountain as being *the same* as those made against Dr. Sorensen (including *Dr. Sorensen* "created medical charts that falsely reflected [conditions] patients had suffered from" (*see* T.R.128 (¶ 28), 134-35 (¶¶ 43-44))[1] or the same as those against St. Mark's (it advertised Dr. Sorensen's services). Third, Tapp seeks an unappealed reversal of substantive rulings by the district court, including that § 78B-3-404(2)(b)'s "affirmatively acted to fraudulently conceal" language is not satisfied by silence (*see* T.R.312,753-56), and that § 78B-3-404(2)(a)'s "foreign object" provision is not applicable. *See* T.R.309-10. Finally, Tapp argues that fairness and public policy favor pursuing fraud discovery when *no* fraud is alleged.

Tapp's arguments lack merit. Cases uniformly hold that a fraudulent concealment defense to a facially untimely claim must be pled with particularity under Rule 9(c).

[1] Intermountain adopts Tapp's citation format for the Tapp Record ("T.R.").

Tapp cites *no case* supportive of her argument that Rule 9(c) applies only to "affirmative claims" and "affirmative defenses," not to a fraud *defense* to an affirmative defense.

Second, Tapp cannot ignore that her First Amended Complaint ("FAC"), as the district court held, alleges "IHC was not involved in any alleged fraud from the outset; instead, plaintiff claims that at some point in time, IHC learned about Dr. Sorensen's malfeasance and thus had a duty to alert plaintiff." T.R.753-56. Consequently, the district court *dismissed* Tapp's fraud and conspiracy claims against Intermountain under Rule 9(c). T.R.734,736-37.

Third, to seek affirmation of the district court's denial of Intermountain's motion to dismiss based upon *alternative* arguments, including that silence constitutes "affirmative" concealment, or that a "foreign object" exception applies, Tapp was required to appeal the district court's adverse rulings on these issues. *See* T.R.309-10, 312, 753-56; *State v. Coble*, 2010 UT App 98, ¶ 11, 232 P.3d 538.

Finally, this Court should reject Tapp's argument that fraud discovery should proceed against a party that Tapp admits did not participate in fraud because it never interacted with her and therefore did not contribute to her delayed filing. Tapp has never articulated what fraud she hopes to "discover," and her interpretation of Utah Code § 78B-3-404(2)(b) would allow fraud discovery in *every case* where a plaintiff alleges it should have been told of alleged malpractice. Such a ruling would eviscerate the repose statute and cannot be squared with the Utah Health Care Malpractice Act's ("UHMA") explicitly stated public policy.

RESPONSE TO PLAINTIFFS' STATEMENT OF THE CASE

Tapp incorrectly states that "the hospitals … fraudulently concealed [Dr. Sorensen's] misconduct by telling patients that the heart procedures were necessary," Br. 5 (citing T.R.124–27), and that the "hospitals created false medical records to make the heart procedures appear to be medically necessary." *E.g.*, Br. 10 (emphasis added) (citing T.R.128). *Tapp does not make these allegations against Intermountain*. She has not alleged *any interaction* with Intermountain, let alone that it "told" her that her "heart procedure [was] necessary." Br. 5. Further, the FAC describes only instances of *Dr. Sorensen* allegedly falsifying medical records and making misstatements. *See* T.R.128 (¶¶27-28),134 (¶¶43-44). As the district court *correctly held*, Tapp's FAC contains no allegation of an "affirmative act of fraud by [Intermountain]." T.R.754.[2] Plaintiff's only allegation of "fraudulent concealment" by Intermountain is a legal conclusion based on silence. T.R.130–132(¶¶ 33-35), 145(¶¶ 103-105).

[2] *See also* T.R.736 ("The allegations of [Intermountain's] fraud in inducing Ms. Tapp to have surgery are non-existent."). In the FAC ¶ 25 Tapp alleges: "Sorensen and IHC created false statements and documents to conceal … Sorensen['s] medically unnecessary closures." T.R.128. As the district court correctly found, however, this allegation is a mere conclusion that is inconsistent with Tapp's allegations that *only* Dr. Sorensen falsified *his* records. T.R.736. The lumping of Intermountain with Dr. Sorensen in FAC ¶ 25 does not meet Rule 8 standards, let alone Rule 9(c). *See America West Bank Members LC v. State*, 2104 UT 4, ¶ 7, 342 P.3d 224 (conclusions inconsistent with facts are not accepted under Rules 8 and 12(b)(6)); *Gray v. Univ. of Colo. Hosp.*, 672 F.3d 909, 921, n.9 (10th Cir. 2012) (Rule 8 is not met by allegations that fail to isolate the allegedly unlawful acts of each defendant). Tapp's assertion that Intermountain is legally accountable for Dr. Sorensen's separate medical records fails as a matter of law as the district court correctly ruled. T.R.128 (¶¶27-28),134(¶¶43-44),734,736-37,753-56.

Tapp also overstates the scope of her fraud allegations against Dr. Sorensen. While the district judge held that Tapp adequately pled a fraud by Dr. Sorensen *in inducing* Tapp to have a PFO closure, the district court recognized no subsequent concealment fraud is pled against anyone. T.R.311-12 ("the FAC does not allege any *specific facts* of any *later* fraudulent concealment") (citing FAC ¶¶ 79-84 (T.R.142)); T.R.751-52 ("Dr. Sorensen engaged in fraudulent conduct … by misrepresenting the need and medical efficacy of the surgery … followed by years of perpetuating that falsehood by silence.").[3]

ARGUMENT

I. THE DISTRICT COURT ERRED IN FAILING TO DISMISS TAPP'S FAC AS TO INTERMOUNTAIN PURSUANT TO RULES 12(b)(6) AND 9(c).

The parties agree the "inclusion of dates in [a] complaint indicating that an action is untimely renders it subject to dismissal for failure to state a claim … under Rule 12(b)(6)." *Tucker v. State Farm Mut. Auto. Ins. Co.*, 2002 UT 54, ¶ 8, 53 P.3d 947; Br. 37. The parties further agree that Tapp alleges her closure occurred in 2008, and that she

[3] Tapp's failure to address the absence of an alleged concealment fraud is significant. Tapp never addresses *Allred v. Allred*, 2008 UT 337, ¶ 37, 183 P.3d 337, wherein this Court held that allegations of a prior fraud without a "further showing that the defendant also concealed it from the plaintiff" are insufficient to toll. Tapp's only response to Intermountain's Opening Brief ("Opening") at 19-20 and Sorensen's Opening Brief ("Sorensen Br.") at 47-53 on this issue is to declare she is "not require[d] [to] explain[] how [defendants] took affirmative steps to conceal." Tapp Brief ("Br.") at 30. Tapp also does not address the many medical negligence cases cited on appeal and below that hold a separate concealment fraud is required. Opening at 19-20; Sorensen Br. at 47-53; T.R.176, 303,366-67, 585-87, 838. Tapp apparently believes the district court's incorrect legal ruling finding *Allred* inapplicable need not be addressed. T.R.311. But once *Allred* is properly applied to § 78B-3-404(2)(b), Tapp has *not* alleged subsequent fraudulent concealment by anyone. T.R.311-12, 751-52.

filed suit nearly five years after the UHMA's four-year repose period expired. The parties diverge, however, regarding how the UHMA's affirmative concealment fraud exception, Utah Code § 78B-3-404(2)(b), operates in conjunction with Rules 12(b)(6) and 9(c).

According to Tapp, the exception is triggered—and the statute of repose erased at the pleading stage—upon a naked allegation of "fraudulent concealment" that need not be "pled with particularity" and need not "describe how the [particular] health care provider fraudulently concealed the misconduct." Br. 35, 42. Tapp further argues that a provider's "decision to remain silent" triggers the exception. Br. 33. Under Tapp's reading, merely mentioning the words "fraudulent concealment" opens the door to "concealment" discovery and eliminates the repose period in all cases except where a provider has previously notified the patient that malpractice occurred. *See* Br. 35. Under this reading, any provider that disputes liability, i.e., providers who have not informed patients of malpractice, will be subject to a fraudulent non-disclosure exception.

The Legislature, however, did not intend to permit malpractice plaintiffs to so easily dispense with § 78B-3-404(2)(b)'s carefully-crafted repose provision. Tapp's suggested interpretation is contrary to the language of the exception itself, this Court's applications of it, and, as Tapp admits, *every court* that has evaluated whether fraudulent concealment allegations must meet Rule 9, including cases from five Federal Circuits (including the Tenth Circuit). *See* Br. at 49, n.5.

Intermountain responds to Tapp's arguments below, and explains why the district court erred in failing to dismiss Tapp's *facially untimely claims* against Intermountain pursuant to Rules 12(b)(6) and 9(c).

A. Rules 12(b)(6) and 9(c) Require Dismissal Against Intermountain.

The parties substantively agree that Rule 12(b)(6) applies to a facially untimely complaint. Tapp correctly states that "inclusion of dates in [a] complaint indicating that an action is untimely renders it subject to dismissal for failure to state a claim … under Rule 12(b)(6)." *Tucker*, 2002 UT 54, ¶ 8. Tapp alleges her PFO closure occurred in 2008, nearly nine years before she sued in 2017. T.R.132–37. Consequently, Rules 9 and 12(b)(6) and the UHMA impose a burden on Tapp to plead around the facial untimeliness alleged in the FAC in one way: by "alleg[ing]"—as the statutory exception itself requires—that the health care provider "affirmatively acted to fraudulently conceal" that provider's misconduct. Utah Code § 78B-3-404(2)(b). Only when such facts are sufficiently "alleged" does the exception preclude Rule 12(b)(6) dismissal of a facially stale claim.

Tapp acknowledges that "[t]he [UHMA] *requires* … an allegation of fraudulent concealment" to avoid dismissal. Br. 35 (emphasis added). In other words, unlike the district court, Tapp now agrees with Intermountain that she has a *burden* to *allege* fraudulent concealment to avoid Rule 12(b)(6) dismissal under § 78B-3-404(2)(b). *Contra* T.R.734–35 (district court "[n]one of [Intermountain's] cases stand for the proposition that a plaintiff in the first instance has the obligation to state facts necessary to defeat a statute of limitations defense at all, let alone with a degree of particularity").

Indeed, this proposition is settled, and finds support in *Tucker*, 2002 UT 54, ¶ 9, *Russell Packard Devel., Inc. v. Carson*, 2005 UT 14, ¶ 8, 108 P.3d 741, *Young Resources Ltd. Partnership v. Promontory Landfill LLC*, 2018 UT App 99, 2018 WL 2470958, and what appears to be *uniform* Federal Circuit treatment. *See* Opening at 12, n.14.

Tapp nonetheless argues a mere legal conclusion suffices to jump over the repose statute and force *discovery* into the possibility of concealment fraud by a party against whom *no fraud allegation is made*. Tapp advocates for this position by repeatedly arguing that Intermountain should have sought summary judgment. *E.g.*, Br. 38. But public policy in Utah and elsewhere is to allow discovery regarding fraud only after fraud has been properly alleged, and thus framed the scope of discovery. *See Shah v. Intermountain Healthcare, Inc.*, 2013 UT App 261, ¶ 12, 314 P.3d 1079 ("a plaintiff alleging fraud must know what his claim is when he files it" and a fraud claim should "seek to redress … a wrong, not … find one") (quoting *Farlow v. Peat, Marwick, Mitchell & Co.*, 956 F.2d 982, 990 (10th Cir. 1992) and *Segal v. Gordon*, 467 F.2d 602, 607-08 (2nd Cir. 1972)); *Fid. Nat. Title Ins. Co. v. Worthington*, 2015 UT App 19, ¶ 11, 344 P.3d 156 ("Plaintiff's assertion that they will 'not know until discovery' the specific misrepresentations made is precisely what Rule 9(b) seeks to prevent"). Additionally, in *Roth v. Pedersen*, 2009 UT App 313, 2009 WL 3490974 *2-3, as detailed below, the court held that Rule 12 is a proper procedural vehicle to seek dismissal of fraudulent concealment allegations under § 78B-3-404(2)(b) that are based exclusively on a party's silence.

Ultimately, Tapp's argument that a motion to dismiss was "procedurally unavailable" (Br. 35) is not based on a disagreement over Rule 12(b)(6), but over whether § 78B-3-404(2)(b) can be invoked by a mere legal conclusion that *admittedly* does not meet Rule 9(c)'s standards. However, as explained below, Rule 9(c) applies to *every* allegation of fraud, including those made under § 78B-3-404(2)(b).

B. Rule 9(c) Governs Tapp's § 78B-3-404(2)(b) Allegations.

Rule 9(c) contains no exception based upon the reason a party alleges "fraud." Rather, 9(c) states that "[i]n *alleging fraud* or mistake, a party must state with particularity the circumstances constituting *fraud* or mistake." Utah R. Civ. P. 9(c) (emphasis added). This Court and it appears *every court* that has addressed Rule 9's application to allegations that a fraud excuses facial untimeliness has held that Rule 9 applies.

In *Chapman v. Primary Children's Hosp.*, 784 P.2d 1181 (Utah 1989), this Court dismissed *a* negligence claim against one physician (Dr. Myer) for failure to *plead fraudulent concealment with particularity* under § 78B-3-404(2)(b). *See id.* at 1185–86. This Court's application of Rule 9(c) to § 78B-3-404(2)(b) has been applied by Utah courts since, consistent with the Federal Circuits' treatment of common law fraudulent concealment allegations that plead a defense to facial untimeliness. *See, e.g.*, *Roth v. Pedersen*, 2009 UT App 313, 2009 WL 3490974, at *3–4; Opening Br. 19 n.22 (citing federal authorities).

Tapp nevertheless argues that Rule 9(c) has no application to "allegations [of fraud] that anticipate affirmative defenses" because "the *statute* governs what must be

alleged." Br. 41–42; T.R.734. But this proposition is unsupported and it contradicts Rule 1 of the Utah Rules of Civil Procedure. *See, e.g.*, Utah R. Civ. P. 1 ("[t]hese rules govern the procedure … in all actions of a civil nature … and in all statutory proceedings….").

Tapp offers no case that makes an exception to Rule 9's particularity requirement, even in the context of a defense to an affirmative defense. Br. 40–49. This contrasts with the wealth of authority Intermountain offers, including this Court's recognition that Rule 9 applies to allegations of fraud made for *any purpose*. *See* Opening Br. 15–19 (citing *Williams v. State Farm Ins. Co.*, 656 P.2d 966, 972 (Utah 1982) ("The purpose of [Rule 9(c)] dictates that it reach *all circumstances* where the pleader alleges … deceptions covered by the term 'fraud' in its broadest dimension." (emphasis added)). Tapp fails to distinguish *Williams* or the uniform federal cases that apply Rule 9 to allegations of fraudulent concealment as an exception (i.e. "defense") to an affirmative defense of facial untimeliness.[4]

1. Tapp Does Not Distinguish On-Point Authority Applying Rule 9(c).

Intermountain previously cited three Utah cases, two from this Court, that apply Rule 9(c)'s particularity requirement to fraud allegations that seek to avoid an affirmative defense. In other words, a "defense" to an "affirmative defense." Tapp offers no contrary authority but instead attempts—unsuccessfully—to distinguish these Utah cases.

[4] Tapp concedes "a few jurisdictions" adhere to the rule Intermountain advocates, Br. 18, but tellingly she fails to identify a jurisdiction that does *not* adhere to this commonsense application.

a. *Chapman*.

In *Chapman*, this Court held that "the requirement of Rule 9(b) had been met" as to concealment allegations under § 78B-3-404(2)(b) against certain hospital defendants, but not as to another defendant, Dr. Myer. *Chapman*, 784 P.2d at 1185–86. Tapp wrongly contends that the same concealment allegations found sufficient as to the hospital defendants were found *insufficient* for purposes of the plaintiffs' *cause of action* for fraudulent concealment against Dr. Myer, meaning "rule 9(c) applies to independent causes of action but not to the fraudulent concealment exception." Br. 46–47. That is not what this Court held.

Chapman's fraud analysis is found exclusively within the context of deciding "the question of whether the Chapmans' lawsuit was [timely] filed … under the [UHMA]." *Chapman*, 784 P.2d at 1184, 1183. The district court determined it was untimely, compelling dismissal *in its entirety*. *Id.* This Court held that the concealment allegations against the hospital defendants were "sufficiently clear and specific … to support our conclusion that the requirement of Rule 9(b) has been met," triggering an exception. *Id.* at 1185. This Court expressly noted that the hospital defendants' "pleadings and affidavits" made it a "close call whether … the Chapmans were sufficiently alerted to the possibility of medical malpractice … to *start the statute of limitations running*." *Id.* (emphasis added).

This Court then found different allegations against Dr. Myer insufficient *under Rule 9(b)*[5] to save a *negligence* claim against Dr. Myer from the repose period. *Id.* at 1186, 1184. Nowhere did this Court indicate that a fraudulent concealment *cause of action* was alleged against Dr. Myer, nor would it have made sense to affirm dismissal of a *negligence* claim against Dr. Myer based on inadequate concealment allegations in a separate *affirmative* claim. In other words, Tapp's attempted distinction between fraudulent concealment "claims" and tolling allegations makes no sense in context. This Court plainly applied Rule 9 to the Chapmans' concealment allegations *under § 78B-3-404(2)(b)*, as the district court should have done here, and dismissed claims against one defendant but not against others where the narrow statutory exception was adequately pled *under Rule 9*.

b. *Norton*.

Tapp next attempts to distinguish this Court's holding in *Norton v. Blackham* that a plaintiff's attempt to argue fraud to defeat the affirmative defense of release "was not properly pleaded" under Rule 9. 669 P.2d 857, 858 (Utah 1983). The trial court granted summary judgment "on the ground that the parties had entered into an agreement releasing the defendant." *Id.* at 858.[6] On appeal, the plaintiff argued "there are factual issues as to whether the defendant obtained the release by fraud or misrepresentation."

[5] Under the prior version of Utah R. Civ. P. 9, the heightened pleading standard was contained in subsection (b).

[6] Tapp emphasizes that "*Norton* is a *summary judgment* case." Br. 36 (emphasis in original). Intermountain agrees, but it cites *Norton* for its application of Rule 9, not Rule 12(b)(6).

Id. This Court rejected that argument, holding "[f]irst the issue was not properly pleaded" under Rule 9. *Id.*

The Court *secondarily* found that "the plaintiff's assertion of fraud or misrepresentation in her affidavit in opposition to summary judgment is legally insufficient." *Id.* Tapp argues the prior Rule 9 ruling is *dicta* because the judgment was affirmed "on the basis that the plaintiff's *evidence* of fraud was legally insufficient." Br. 36 (emphasis in original). But nothing in this Court's discussion of an affidavit supplants the holding that fraud must be pled but "was not properly pleaded" under Rule 9. *Id.* at 858. Consistent with *Chapman*'s discussion of Dr. Myer, this Court again applied Rule 9 to a defense to an affirmative defense. As set forth below, that outcome is logical because Rule 9 expressly applies to *any* fraud allegation, and a defense to an affirmative defense is nonetheless a defense.

c. *Roth*.

In *Roth v. Pedersen*, the Utah Court of Appeals held—citing *Chapman*—that the plaintiff's failure to allege that he consulted with a defendant about prior medical care meant he could not have been affirmatively misled into a delayed filing. 2009 UT App 313, 2009 WL 3490974, at *3–4. A naked allegation of "fraudulent concealment" *based on silence* was found insufficient as a matter of law to meet "particularity as required by rule 9(b)." *Id.*

Tapp responds that the discussion of Rule 9 is *dicta* because the court found Roth's claim to be untimely under the two-year statute of limitations, and the decision "has no precedential value," and "is inconsistent with the opinions from this court." Br.

49. The foregoing discussion of *Chapman*, however, demonstrates that *Roth* correctly applied Rule 9(c) and *Chapman* to legally insufficient allegations of fraudulent concealment under § 78B-3-404(2)(b).

Moreover, Tapp's argument that *Roth*'s holding under Rule 9(b) is "*dicta*" is incorrect and inconsistent with Tapp's argument that § 78B-3-404(2)(b) is an "exception" to the limitation periods found in § 78B-3-404(1). Br. 16. It is precisely because the plaintiff's claims were untimely under § 78B-3-404(1), including under both the limitation and repose periods, that the court was *required* to address and determine whether an exception within § 78B-3-404(2)(b) was adequately pled under Rule 9. 2009 UT App 313, *2-3 (May 2004 alleged failure in care and August 2008 filing).[7]

It is also important to consider that Roth's allegations of "affirmative[] act[ion] to fraudulently conceal" based on silence are strikingly similar to Tapp's. *Id.* *3. The court found such allegations inadequate as a matter of law under Rule 12(c). *Id.* *2. Tapp attempted to distinguish *Roth* below by incorrectly arguing (as she now incorrectly argues as to *Chapman*) that the case involved "fraudulent concealment *claims*," not a possible exception under § 78B-3-404(2)(b). T.R.532. Intermountain responded by demonstrating that *Roth*'s legal analysis is of the *sufficiency of silence allegations* under § 78B-3-404(2)(b), not an affirmative claim. 2009 UT App 313, *3. To eliminate any doubt on this critical point, Intermountain provided to the district court the appeal briefs in *Roth*. T.R.393-466.

[7] *See also Roth v. Joseph*, 2010 UT App 332, ¶ 3, 244 P.3d 391 (describing care facts).

Roth thus *held* that a health care provider's alleged silence can *never* legally satisfy § 78B-3-404(2)(b) "[e]ven assuming that a fiduciary duty to reveal this information existed." 2009 UT App 313, *3. It is because *Roth* is so directly on point that Tapp goes to great lengths to dismiss this critically illuminating case.

C. Tapp's Other Arguments Regarding Rule 9(c) Lack Merit.

Tapp's only substantive argument regarding Rule 9(c) is based on other rules (Rules 8 and 9(i)), and a plea that the non-application of Rule 9(c) "makes sense" because "the patient has not yet discovered the full details of the fraud." *See* Br. 42. Neither argument has merit.

1. Rules 8 and 9(i) Do Not Limit the Requirements of Rule 9(c).

Tapp seeks to read into Rule 9(c) an unstated exception through *other* rules, none of which modify Rule 9(c)'s unambiguous language. Tapp argues "rule 8 describes what must be alleged in pleadings—claims, defenses to claims, and affirmative defenses," and these are the only "pleadings" to which Rule 9(c) applies. *See* Br. 42. Tapp, however, cites no authority and she does not square her argument with the myriad cases Intermountain cites applying Rule 9(c) to complaints and answers, both of which can contain "allegations" and "defenses." *See* Opening 19, n.22.

Tapp admits that "the 9(c) [particularity] requirement applies to the defenses asserted in a defendant's answer" (Br. at 45) (citing Utah cases) but she argues particularity does not apply to a "defensive allegation" to an "affirmative defense." Rules 8 and 9, however, expressly apply to "defenses" asserted in any "pleading" (complaint or

answer), and an exception to a facially pled affirmative defense is just as much a "defense" as a defense to a "claim."

The same goes for Tapp's argument that Rule 9(i) provides that "a statute of limitation defense 'may be alleged generally,'" and "[i]t is difficult to understand why the burden would be greater in a complaint responding to this defense before it is raised." Br. 41 (quoting Rule 9(i)). This non-sequitur has been rejected by Utah courts applying Rule 9(c) to fraud allegations offered as defenses to affirmative defenses. *Chapman*, 784 P.2d at 1185-87; *Norton*, 669 P.2d at 858; *Roth*, 2009 UT App 313, *3. Moreover, Tapp's burden is the result of the UHMA's *requirement* that Tapp "*allege*[]" affirmative fraudulent concealment before pursuing a facially untimely claim. Utah Code § 78B-3-404(2)(b).

2. Rule 9(c) Requires More than a Legal Conclusion.

Tapp argues that Rule 9(c) shouldn't apply "at the pleading stage, when the patient has not yet discovered the full details of the fraud." Br. 42. This argument is again at odds with Utah law and public policy. Rule 9(c) does not require a plaintiff to plead the "full details" of fraud, nor has Intermountain argued as much.[8] Rather, Tapp was required to allege *that Intermountain* engaged in some "*affirmative[] act[]* to fraudulently conceal" its alleged misconduct. Utah Code § 78B-3-404(2)(b).

[8] Tapp's effort to ride the coattails of a Rule 9 ruling in the *qui tam* lawsuit is unpersuasive. The central issues in that case were falsity (judged subjectively and/or objectively) and medical necessity and there was no dispute that interactions occurred between Intermountain and Medicaid payors. Here, Tapp alleges no interaction, yet she alleges "fraud."

Tapp, however, has not attempted to allege fraudulent conduct by Intermountain because she knows she *never interacted with Intermountain*, and she never relied on anything Intermountain said or did in delaying her filing. *See, e.g.*, T.R.753 ("IHC was not involved in any alleged fraud from the outset; instead [Tapp] claims that at some point later in time, IHC … had a duty to alert her").

Tapp's desire, stated on appeal, to conduct "fraudulent concealment" discovery is also an argument of convenience. She knows she did not rely upon Intermountain in waiting almost nine years to file. Instead, Tapp, and approximately a thousand other plaintiffs seek a *legal ruling* that by putting the words "fraudulent concealment" into a complaint they are thereby granted a procedural pass to pursue claims where the plaintiff knows she will *never discover* an "affirmative[] act[] to fraudulently conceal" *by Intermountain*. Utah Code § 78B-3-404(2)(b).

Moreover, the refuge Tapp seeks in arguing she has yet to discover "the full details of the fraud" is opposite public policy. Section 78B-3-404(2)(b) applies only to *affirmative acts* of concealment by a *particular* health care provider—*i.e.*, fraudulent *interactions*—of which a patient has knowledge. *Id.* Additionally, Utah courts reject pleas to overlook deficient fraud allegations until "after discovery." Br. 43. As stated in *Worthington*, "Plaintiffs' assertion that they will 'not know until discovery' the specific[s of the fraud] is precisely what Rule 9(b) seeks to prevent." 2015 UT App 19, ¶ 11.

In short, Tapp's argument that Rule 9(c) has no application to "allegations related to exceptions to affirmative defenses," Br. 42, amounts to a request to rewrite Rule 9(c)

and important Utah law and policy. The Court should decline this invitation and reverse the district court's failure to apply Rule 9(c).

D. Section 78B-3-404(2)(b) Applies When Particular Providers "Affirmatively Acted to Fraudulently Conceal" Misconduct.

In claiming she has satisfied Rule 9(c), Tapp argues Intermountain's "choice to remain silent" constitutes an "affirmative act." *See* Br. 30. Tapp's position is premised on the argument that when providers have "actual knowledge" of misconduct, this knowledge imposes a "duty to disclose," after which silence amounts to an "affirmation." Br. 32 (quoting *Jensen v. IHC Hosps., Inc.*, 944 P.2d 327, 333 (Utah 1997)).[9]

Missing from Tapp's argument is any meaningful discussion of the UHMA's plain language, authority supporting the proposition that a hospital owes a "duty to disclose" to a physician's patient that his or her prescribed procedure is unnecessary, or the practical implications of changing a hospital's role in the patient's care. Tapp's argument was also *expressly rejected* by the district judge and *not* appealed:

> The Court assumes that the legislature intended the term "affirmative" to have meaning and the Court must interpret the statute to give that term vitality. [Tapp's] asserted interpretation would violate that rule of construction. [Tapp] cannot rely on [Intermountain's] silence alone in seeking an exception … she must show "affirmative acts" by [Intermountain].

[9] Tapp's reliance on *Jensen* is misplaced because this Court did not address § 78B-3-404(2)(b) and the repose period had not expired. *Jensen* also involved the defendant's *affirmative* fraudulent act of leading the plaintiff to obtain counsel who had a relationship with the defendant. *Id.* at 329. Further, *Jensen's* discussion of common law fraudulent concealment has since been ruled to have no application to statutory discovery rules. *Russell Packard Dev., Inc.*, 2005 UT 14, ¶ 25; *In re Hoopiiaina*, 2006 UT 53, ¶ 35, 144 P.3d 1129. The district court correctly recognized that *Jensen* does not support reading § 78B-3-404(2)(b) to allow "concealment by silence." T.R.312,754-55.

T.R.312 (citations omitted). Having foregone her "own interlocutory appeal or cross-appeal," Tapp cannot raise this issue now. *Coble*, 2010 UT App 98, ¶ 11. Nonetheless, as addressed below, Tapp's position that silence equals affirmative fraud is incorrect.

1. Tapp's Reading Writes the Words "Affirmatively Acted" Out of the Statute.

"The best evidence of the legislature's intent is 'the plain language of the statute itself,'" and thus, this Court assumes "that the legislature use[s] each term advisedly according to its ordinary and usually accepted meaning." *Marion Energy, Inc. v. KFJ Ranch P'ship*, 2011 UT 50, ¶ 14, 267 P.3d 863 (quoting *State v. Miller*, 2008 UT 61, ¶ 18, 193 P.3d 92 and *Hutter v. Dig–It, Inc.*, 2009 UT 69, ¶ 32, 219 P.3d 918). Additionally, this Court "presume[s] that the expression of one [term] should be interpreted as the exclusion of another," and that "all omissions [are] purposeful." *Id.*

Interpretation of § 78B-3-404(2)(b) begins and ends with plain language. A facially untimely claim is potentially excused from the repose period only 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." Utah Code § 78B-3-404(2)(b) (emphasis added). The statute's reference to "***acts***" that are "***affirmative***" and that "***prevent***" discovery leave Tapp no room to argue that silence by Intermountain or a mere "decision not to expose known misconduct" (Br. 32) satisfies the exception. Tapp never explains how silence, even in the face of a duty, can constitute an "affirmative act" that "prevents" the discovery of misconduct. Inherent in the statute's words is the reality that only a

fraudulent interaction with a patient can satisfy the exception; and Plaintiff alleges nothing of the sort against Intermountain. T.R.753–54.

Additionally, the UHMA's reference to "fraudulent concealment" in other contexts further demonstrates that silence is never enough. Regarding consents, the UHMA states that a consent is void when a plaintiff shows "that the execution of a written consent was induced by the defendant's affirmative acts of fraudulent misrepresentation ***or fraudulent omission to state material facts***." *See* Utah Code § 78B-3-406(4) (emphasis added). This Court considers statutes "as a whole" and "in harmony with other statutes in the same chapter and related chapters." *State v. Barrett*, 2005 UT 88, ¶ 29, 127 P.3d 682. Section 78B-3-404(2)(b)'s absence of statutory language regarding "fraudulent omissions" as later used in section 78B-3-406(4) is "purposeful," and must be given effect. *See Marion Energy, Inc.*, 2011 UT 50, ¶ 14. Accordingly, the district court correctly held that "affirmative[] act[s]" means what it says and does not encompass silence.

2. Intermountain's Interpretation Is Consistent with Utah Cases.

No Utah appellate court has ever revived an untimely claim under § 78B-3-404(2)(b) where the plaintiff alleged *silence* as the basis for "fraudulent concealment." In *Chapman*, the plaintiffs' claims against Dr. Veasy survived because plaintiffs alleged they "consulted Dr. Veasy," who "told them [falsely] that tests had been performed which showed that Jennifer's injuries had resulted from a blood clot … unrelated to anyone's negligence." 784 P.2d at 1183.

In *Roth*, the Court of Appeals, relying upon *Chapman*, rejected the silence argument Tapp now makes, holding that "Roth neither avers that he ever consulted with [his physician] about the May 2004 resection surgery nor alleges that [the physician] ever provided Roth with information that misrepresented or concealed his involvement in the surgery." 2009 UT App 313, *3. The Court of Appeals reached this conclusion "[e]ven assuming that a fiduciary duty to reveal this information existed." *Id.*

Though common law fraudulent concealment doctrine has no direct application, this Court's previous decisions are nonetheless instructive. As Tapp concedes, "[t]o obtain the benefit of the equitable discovery rule [including fraudulent concealment], a plaintiff must have been diligent in discovering her claim." Br. 28 (citing *Russell Packard Dev., Inc.*, 2005 UT 14, ¶ 25–26). Thus, under the common law, a plaintiff does not get to the starting line of proving "tolling" unless she alleges that she "actually made an attempt to investigate [her] claim and … such an attempt must have been rendered futile as a result of the defendant's fraudulent or misleading conduct." *Colosimo v. Roman Catholic Bishop of Salt Lake City*, 2007 UT 25, ¶¶ 40, 44, 156 P.3d 806. Tapp alleges she saw "lawyer advertising," T.R.145, not that she conducted a "diligent investigation."

The logical extension of this principle is that "[i]n ***no case*** … is mere silence or failure to disclose sufficient in itself to constitute fraudulent concealment." *Colosimo*, 2007 UT 25, ¶ 44 (quoting *Helleloid v. Indep. Sch. Dist. No. 361*, 149 F. Supp. 2d 863, 869 (D. Minn. 2001)); *Ramsay v. Ret. Bd.*, 2017 UT App 17, ¶ 15, 391 P.3d 1069 (dismissing untimely claims based on *Colosimo*). Section 78B-3-404(2)(b) simply

codifies this established common law principle. And because Tapp has alleged *nothing* but silence by Intermountain, and no allegation that she diligently inquired during the repose period, she simply provides "no factual basis" for fraudulent concealment. *Colosimo*, 2007 UT 25, ¶ 43.

3. Under Duty Analysis Hospitals Can't Interfere with Physicians' Care.

Even if this Court were to take Tapp's expansive interpretation of § 78B-3-404(2)(b) as correct (which it should not), Tapp still—as a matter of law—cannot avoid the repose statute as to claims *against Intermountain*. Tapp contends that "[a]ctual knowledge (not imputed knowledge) of the misconduct requires one to decide whether to disclose it, an affirmative act." Br. 32. In other words, knowledge of misconduct imposes a "duty to communicate that information to their patients." *Id.* Among other flaws, this argument disregards the distinction between the duties of treating physicians and medical facilities as recognized in law. It also ignores that hospitals do not create or access the treating physician's treatment records.

While this Court has not directly addressed whether hospitals owe patients a duty to disclose patient-specific information,[10] in *Buu Nguyen v. IHC Med. Servs., Inc.*, 2012 UT App 288, ¶ 11, 288 P.3d 1084, the Court of Appeals addressed a hospital's duties of disclosure in the context of informed consent. The court held, "consistent with the

[10] Tapp implies that this Court has imposed such a duty, citing *Sorensen v. Barbuto*, 2008 UT 8, ¶ 15, 177 P.3d 614. Br. 32. *Barbuto* relates to a treating physician's (not a hospital's) "fiduciary duty" of confidentiality under Utah R. Evid. 506 during litigation. *See* 2008 UT 8, ¶¶ 11–25. It says nothing of a physician's or hospital's "duty to disclose" alleged malpractice.

overwhelming weight of precedent from other states," that "absent any special circumstances, *a hospital does not generally owe an independent duty* to obtain a patient's informed consent to treatment." *Id.* (emphasis added) (citing cases).[11]

Outside of Utah, in analogous circumstances, the rule is the same. For example, in *Hosp. Corp. of Am. v. Hiland*, 547 N.E.2d 869 (Ind. Ct. App. 1990), *adopted by Cacdac v. Hiland*, 561 N.E.2d 758 (Ind. 1990), the court addressed whether a hospital has a duty to disclose that a physician fraudulently induced plaintiffs to have an unnecessary disc removal surgery "for the sole purpose of benefitting [him] financially." *Id.* at 871. The court dismissed the claims against the hospital, holding that the statute of limitations was not tolled under a fraudulent concealment theory because "there existed no duty on the part of the hospital to disclose any information to [plaintiffs]." *Id.* at 876. The court added that even if a duty existed, the duty would end—and thus tolling would end—once the plaintiff was discharged. *Id.* at 873. In *Walker v. Sonora Reg'l Med. Ctr.*, 202 Cal. App. 4th 948 (2012), the court held that "[w]e do not think it wise to impose upon [the] Hospital the duty to advise a patient or a patient's parents concerning the patient's condition when that duty might substantially interfere with the relationship between the

[11] "Special circumstances" existed in *Nguyen* because the hospital failed to obtain informed consent to use a sales demo ventilator unit ***the hospital*** tested. This unit had not been tested on patients and "was not a standard piece of equipment that a treating physician might or might not have chosen to use, in her discretion." 2012 UT App 288, ¶ 12. It was only because of these unique facts that the special circumstances imposing a duty existed.

patient and her attending physician." *Id.* at 963 (quoting *Derrick v. Ontario Cmty. Hosp.* 47 Cal. App. 3d 145 (1975)).[12]

Thus, under *Nguyen* and other authority, Plaintiff's allegations fail as a matter of law for the additional reason that Intermountain did not have a legal duty to notify Tapp that Dr. Sorensen had allegedly performed "a large number of unnecessary" procedures *on other patients*.[13]

Additionally, as Tapp correctly states, this Court resolves statutory ambiguities in a way that avoids absurd consequences. *See* Br. 34 (citing *Bagley v. Bagley*, 2016 UT 48, ¶ 27, 387 P.3d 1000). Section 78B-3-404(2)(b) is unambiguous but if this Court disagrees, it should reject Tapp's proffered interpretation because it would effectively eliminate the statute of repose—an absurd outcome. Under Tapp's interpretation, medical malpractice would be "affirmatively fraudulently concealed" every time a plaintiff is not expressly told of malpractice. Under this theory, even when a hospital only *thinks* the physician *could have* breached a medical standard—which is rarely

[12] *Brown v. Trover*, 2016 WL 100311 (Ky. Ct. App. Jan. 8, 2016), similarly addresses malpractice and fraud claims regarding a radiologist's alleged carelessness in reading reports. The plaintiffs alleged the facility "failed to disclose that staff at the [facility] had expressed concerns to the administration regarding [the radiologist's] substandard medical practices." *Id.* at *13. The court concluded that "[w]hatever duty [plaintiff] might imagine in this regard would be unworkable. The likely result of recognizing such a duty—*i.e.*, a duty to inform patients of unproven complaints against doctors—is to create more liability than it avoids." *Id.*

[13] Tapp does not allege that Intermountain was aware that *her* PFO closure was unnecessary. Tapp only alleges that the "sheer volume" of procedures "provided the hospitals knowledge that he was performing them [unnecessarily]." Br. 8.

clear—the hospital's failure to "disclose the misconduct" (Br. 1) constitutes "affirmative" fraudulent concealment and thus eviscerates the statute of repose.

Such a duty not only imposes an unworkable burden on hospitals, it also contravenes the UHMA's core purposes of "limiting [the] time [to assert malpractice] to a specific period," and reining in professional liability premiums. Utah Code § 78B-3-402(3). Intermountain accordingly requests that this Court reject Tapp's unprecedented expansion of § 78B-3-404(2)(b)'s narrow statutory exception.

II. THE FOREIGN OBJECT EXCEPTION DOES NOT APPLY.

In another challenge Tapp lost below but failed to appeal, she asks this Court for a judicial expansion of the "foreign object" exception in § 78B-3-404(2)(a). Tapp's argument is procedurally foreclosed (*Coble*, 2010 UT App 98, ¶ 10), but in all events disregards the statute's plain language.

The exception provides that when "a foreign object has been wrongfully left within a patient's body," the patient has one year to bring suit from when the patient discovers "the ***existence*** of the foreign object wrongfully left in the patient's body." Utah Code § 78B-3-404(2)(a) (emphasis added)). The district court correctly held that this exception is inapplicable because the PFO device "was the precise device that was contemplated for the surgery" and "the patient knew all along that a device had been placed in her body." T.R.750. Thus, the device is neither a "foreign object," nor was it "wrongfully ***left*** in the patient's body" such that Tapp only later "discovered [its] existence." Utah Code § 78B-3-404(2)(a) (emphasis added); *see also LaBarbera v. N.Y. Eye and Ear Infirmary*, 691 N.E.2d 617, 621 (N.Y. Ct. of Appeals 1998) ("Thus, [a stent

intentionally placed] may be an 'object,' but it is not 'foreign' and not 'left behind,' in any medical or legal senses.").

Tapp largely ignores the statutory language and argues, based on a 1968 case, that "a medical malpractice claim cannot expire until the patient learns that a foreign object was left in her body, and that leaving that object in the body gives rise to a 'right of action.'" Br. 19 (citing *Christiansen v. Rees*, 436 P.2d 435, 436 (Utah 1968)). *Christiansen* does not stand for this proposition. It holds that "where a foreign object is negligently left in the patient's body during an operation and the patient is ***ignorant of the fact***, and consequently of his right of action for malpractice, the cause of action does not accrue until the patient ***learned of the presence of such foreign object*** in his body." 436 P.2d at 436 (emphasis added). The Court's holding *was not* that "ignorance" of a patient's "right of action" is sufficient.

Tapp also relies on out-of-state cases in an attempt to extend the UHMA's exception. Those cases either do not stand for the proposition Tapp cites them for, or they involve materially different statutory language. Critically, each court construed a "foreign object" exception according to plain language, unlike Tapp's argument.[14]

[14] In *Chambers v. Semmer*, 197 S.W.3d 730 (Tenn. 2006), the court determined that a hemoclip device that was intentionally placed into the patient's body, but "*negligently left*" there following surgery, was a "foreign object." *Id.* at 737. In contrast, the PFO device was both intentionally placed and intentionally left in place. In *Norred v. Teaver*, 740 S.E.2d 251 (Ga. Ct. App. 2013), the involved statute provided that "an action shall be brought within one year *after the negligent or wrongful act or omission is discovered*." *Id.* at 252 (quoting Ga. Code Ann. § 9-3-72 (emphasis added)). *Norred* supports the district court's interpretation of § 78B-3-404(2)(a) because the statute's trigger is discovery of the *foreign object's* "existence," not the alleged "negligent or wrongful act." In *Beatman v. Gates*, 521 N.E.2d 521 (Ohio Ct. App. 1987), the court addressed whether

In sum, Tapp's attempt to apply the foreign object exception to her claims fails for the reasons stated by the district court, and should be rejected if allowed to be raised on appeal.

CONCLUSION

Intermountain respectfully requests that the Court reverse the district court's failure to apply Rule 9(c) to allegations against Intermountain and dismiss Tapp's remaining claims against Intermountain with prejudice.

DATED this 7th day of June, 2019.

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the plaintiff's IUD was a "foreign object," which the court found it was only because it had migrated from its original location. *Id.* at 523.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Rule 24(g) of the Utah Rules of Appellate Procedure. I have relied on the word count function of Microsoft Office Word 2016, which has calculated that the total words in this brief, exclusive of table of contents, table of authorities, addendum, and this Certificate, is 6,986.

/s/ Alan C. Bradshaw
Alan C. Bradshaw

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of June, 2019, I caused to be served in the manner indicated below a true and correct copy of the attached and foregoing **REPLY BRIEF OF APPELLANT IHC HEALTH SERVICES, INC.** upon the following:

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