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Johannah Bright, Lisa Tapp, and Pia Merlo-Schmucker, Appellees/ Respondents, v. Sherman Sorensen, M.D.; Sorensen Cardiovascular Group; St. Mark's Hospital; and Ihc Health Services, Inc., Appellants/Petitioners : Reply Brief

Utah Supreme Court

IN THE UTAH SUPREME COURT

Johannah Bright, Lisa Tapp, and Pia Merlo-Schmucker, Appellees/Respondents, v. Sherman Sorensen, M.D.; Sorensen Cardiovascular Group; St. Mark's Hospital; and IHC Health Services, Inc., Appellants/Petitioners.	**REPLY BRIEF OF APPELLANTS SHERMAN SORENSEN, M.D. AND SORENSEN CARDIOVASCULAR GROUP** Supreme Court No. 20180528-SC

On Consolidated Interlocutory Appeal from the Third District, Salt Lake County

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Appellees filed facially stale complaints. By their own account, Dr. Sorensen has not provided medical care since before 2012 and their procedures were performed more than eight years ago. It could not be more obvious the statute of repose has elapsed.

But Appellees contend they may continue with their stale complaints because they have asserted they were never notified of the purported wrongdoing. But the fraudulent concealment exception applies when a health care provider's fraudulent actions "prevented" the plaintiff from discovering the original misconduct. Utah Code Ann. § 78B-3-404(2)(b). This is a serious allegation—it asserts that a health care provider first committed some misconduct and then later engaged in fraud to prevent the discovery of that misconduct. These claims must not be made lightly. *Fidelity Nat'l Title Ins. Co. v. Worthington*, 2015 UT App 19, ¶ 11, 344 P.3d 156.

Otherwise, a plaintiff could circumvent the statute of repose, engage in a fishing expedition, and accuse defendants of acts involving moral turpitude by casually alleging fraud. *Id.* This would eviscerate the applicable limitations period. And, as in this case, it would open the flood gates to stale medical malpractice

actions simply because a lawyer advertisement notified the public of the potential for a lawsuit.

The Court should therefore determine whether the statute of repose may be tolled and, even if it can be tolled, whether the Legislature intended to allow Appellees to toll the repose period by merely parroting the language of the fraudulent concealment exception. The answer to both questions is no.

Appellees have raised many arguments in an effort to complicate the issues. But the issues are not as complicated they suggest. The Court need only decide whether Appellees' broad and conclusory allegations are enough to circumvent a clearly established statute of repose. They are not for the following reasons: (I) the statute of repose cannot be tolled; (II) even if it could, Appellees carry the burden to make sufficient pleadings to trigger the foreign object and fraudulent concealment exceptions; and (III) Appellees' pleadings are insufficient.

I. The Statute of Repose Is Absolute.

On appeal, Appellees contend that the statute of repose "does not apply." (Appellees' Br. 16, 20–22.) They argue the one-year limitations period in the exceptions apply "instead of the repose period." (*Id.* at 22) This nuanced argument has not been raised before and is therefore not preserved. *See State v. Johnson*, 2017

UT 16, ¶ 15, 416 P.3d 443 (explaining that a "failure to preserve an issue in the trial court generally precludes a party from arguing that issue in an appellate court"). That said, Appellees' argument is unpersuasive because the exceptions necessarily exist within the context of the repose period and it ultimately leads to an absurd result.

A. The Act's Repose Serves No Other Purpose than to Create an Absolute Cutoff.

The inclusion of a repose period where the statute already contains a statute of limitations has no significance "other than to impose an outside limit." *See Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991), *overruled on other grounds by Merck & Co., Inc. v. Reynolds*, 130 S. Ct. 1784 (2011). "By establishing a fixed limit, a statute of repose implements a legislative decisio[n] that as a matter of policy there should be a specific time beyond which a defendant should no longer be subjected to protracted liability." *California Pub. Employees' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2051 (2017) (alteration in original).

Here, the Act has a general two-year statute of limitations. In circumstances involving foreign objects and fraudulent concealment, the Legislature allows some additional time—one year from discovery or from when the patient should have discovered—to commence an action. It also has a four-year statute of repose. When

effect is given to every word and the Act is read in a way that renders no parts inoperable, the statute of repose only serves to create an absolute cutoff or outside limit for commencing malpractice actions. *See Buckle v. Ogden Furniture & Carpet Co.*, 216 P. 684, 685 (Utah 1923).

Appellees' argument that the exceptions' one-year limitations period applies independently of the statute of repose leads to a result the Legislature never would have intended. Essentially, under their reading, if a patient has surgery and discovers the doctor negligently left a sponge in her body a few months later, the patient's limitations period would be reduced from standard two-years to one simply because the misconduct involves a foreign object. This is an absurd result. *See Marion Energy, Inc. v. KFJ Ranch P'ship*, 2011 UT 50, ¶ 26, 267 P.3d 863 (explaining that absurd results are those that are so nonsensical that "the legislative body which authored the legislation could not have intended it").

B. The Repose Period Cannot Be Tolled.

Appellees rely heavily on *Day v. Meek*, 1999 UT 28, 976 P.2d 1202, and *Jensen v. IHC (Jensen III)*, 2003 UT 51, 82 P.3d 1076, to support their argument that the statute of repose can be tolled. (Appellees' Br. 24–27.) But *Day*'s decision relies on the interpretation of a prior and materially different version of the Act and its

holding leads to a nonsensical result. Indeed, its oversight is recognized in *Jensen III*.

First, in *Day*, the Utah Supreme Court analyzed a prior version of the Act, rejecting Appellees' argument that the foreign object and fraudulent concealment exceptions stand as an independent statute of limitations. 1999 UT 28, ¶ 7, 976 P.2d 1202. There, a woman had an ovarian cyst removed in September 1994, and in December 1994 discovered a sponge had been left in her vaginal cavity. *Id.* ¶ 2. She filed a notice of intent to commence an action a little over a year after discovering the sponge. *Id.* ¶ 3. The defendant doctor moved to dismiss, arguing the same argument as Appellees' here—that the exceptions in the Act create a distinct and independent one-year limitations period. *Id.* ¶ 7. The plaintiff countered that the exception acted to "toll" the two-year statute of limitations in the Act. *Id.*

At that time, in relevant part, the Act stated:

> (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 . . . .

Utah Code Ann. § 78-14-4 (1) (1999) (emphasis added).

The Court primarily focused its analysis on the phrase "except that." *Day*, 1999 UT 28, ¶ 9. Using the "last antecedent" rule, it explained, "except that" are qualifying words "which are immediately preceded by the discussion of the four-year statute of repose." *Id.* ¶ 10. The Court reasoned that the "last antecedent" rule discourages an interpretation of the Act that would apply the exceptions to the more remote two-year statute of limitations. *Id.*

Yet, the Court's analysis shows that it was on the fence about the application of the exceptions. It acknowledged "the language 'except that' is subject to more than one reasonable interpretation." *Id.* ¶ 15. The Court explained a "reasonable and disinterested reader" could find there is more than one plausible interpretation of the statute. *Id.* ¶ 10–11. Ultimately, the Court determined "except that" could not possibly be read to apply to the two-year period because that would displace the two-year statute of limitations for a one-year limitations period in cases involving foreign objects and fraudulent concealment. *Id.* ¶ 12.

The phrase "except that" is not only removed from subsection (1), but the exceptions are recodified in a way that makes the "last antecedent rule" inapplicable. *Compare* Utah Code Ann. § 78B-3-404 (2018), *with id.* § 78-14-4(1) (1999). So, the Court's analysis of a single provision with multiple subparts and

thorough reading of "except that" no longer applies. For that reason, this Court should interpret the express language in the current statute and acknowledge the Legislature had the opportunity to adopt the *Day* court's interpretation and chose not to.

Second, *Day* and *Jensen III* creates a fractured and nonsensical precedent. The Court in *Day* ultimately determined that the foreign object exception (and by consequence the fraudulent concealment exception too) only applies once the statute of repose has lapsed. 1999 UT 28, ¶ 20. But failed to account for the gap between the two-year statute of limitations and the four-year repose period. If the plaintiff in *Day* had discovered the sponge anytime between the two-years from her treatment to the four-year repose period, she could not benefit from the foreign object exception. Yet, at the same time, if the plaintiff instead discovered the sponge more than four years after her surgery, she could commence the action. Put another way, under *Day*'s construction of the Act, the plaintiff would be barred from commencing the action if she discovered the sponge a bit more than two years from her treatment but would have a year to commence her claim if she discovered the sponge more than four years from her surgery. This is an absurd result. *See Marion*, 2011 UT 50, ¶ 26.

Indeed, the predicament was raised in *Jensen III*—the plaintiffs' malpractice action was commenced after the two-year limitations period but before the repose period. *Jensen*, 2003 UT 51. At the trial court, the plaintiffs argued they did not need to show fraudulent concealment because the claim was not brought beyond the repose period. *Id.* ¶ 27. Similarly, on appeal, they argued "*Day* modified [the law of the case in] *Jensen II* because it clarified that fraudulent concealment only comes into play *after* the four-year repose period . . . has expired." *Id.* ¶ 73 (internal quotation marks omitted). Notably, the plaintiffs never challenged the holding in *Day*. *Id.* ¶¶ 71–80.

The Court acknowledged that *Day*'s holding did not account for the gap between the lapse of the two-year limitations period and the end of the repose period. But it was able to reject plaintiffs' arguments without deciding the correctness of the holding in *Day*. The Court determined *Day* did not affect the requirement to make a showing of fraudulent concealment because the equitable discovery rule still applied. *Id.* ¶¶ 74–79. Essentially, rather than deciding whether *Day* was correct, the Court was able to fall back on the equitable discovery rule to reject the plaintiffs' arguments.

Jensen III's holding shows why *Day* is unreliable. It confirms that when a plaintiff raises a foreign object claim after the limitations period but before the end of the repose period, the plaintiff would not be able to utilize the Act's foreign object exception. But, unlike the fraudulent concealment claim, there is no common law foreign object rule to fall back on. So, under *Day*'s and *Jensen III*'s decisions, any foreign object claim raised in the gap would be barred.

More importantly, it seems unrealistic or improbable the Legislature intended for plaintiffs to resort to equitable exceptions only in the gap between the limitations and repose period. But at the same time it would expect plaintiffs to comply with the statutory exceptions only after the four-year repose period expired. This is nonsensical. *See Marion*, 2011 UT 50, ¶ 26. Indeed, the Court holds that where statutory exceptions exist, equitable discovery rules do not apply. *Russell Packard Dev., Inc. v. Carson*, 2005 UT 14, ¶ 25, 108 P.3d 741.

Sorensen's reading of the Act makes the most sense. And the holdings in *Day* and *Jensen III* are inapplicable and nevertheless lead to results the Legislature would not have intended.

II. Even If the Statute of Repose Could be Tolled By the Fraudulent Concealment Exception, Appellees Must Do More than Broadly Allege a "Failure To Disclose" to Survive a Motion to Dismiss.

As Appellees point out, "a motion to dismiss may properly raise a statute of limitation or repose defense when 'the complaint on its face shows the existence of [the] affirmative defense.'" (Appellees' Br. 37 (quoting *Tucker v. State Farm Mut. Auto. Ins. Co.*, 2002 UT 54, ¶ 7, 53 P.3d 947).) Appellees even explain that a complaint shows a limitations or repose period has elapsed "for example, when a complaint alleging malpractice shows not only the date of a surgery, but also the date the patient discovered [the alleged malpractice]." *(Id.)*

Here, the affirmative defense could not be more obvious on the face of the complaints. Indeed, Appellees raised the fraudulent concealment exception and equitable tolling action in the first instance—they actually anticipated the affirmative defense and pleaded the affirmative defense as a separate action. (Bright 12–17; Merlo-Schmucker 11–16; Tapp 13–17.) Even more, each Amended Complaint alleges the specific dates of the alleged malpractice—the dates they were treated by Sorensen, the dates they underwent the procedure, *and* the dates they purportedly discovered the alleged misconduct. (Bright 87–91, 131; Merlo-Schmucker 98–101, 105; Tapp 132–38, 145–46.) So, by their own account, this is

exactly the type of case in which a motion to dismiss is properly raised.[1] Thus, Sorensen's motion to dismiss was appropriate and the Court should assess whether Appellees' claims are sufficiently pleaded.

Appellees' amended complaints should be dismissed because they failed to meet their burden to demonstrate that the fraudulent concealment tolled the limitations or repose period.

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1. Consequently, Appellees' arguments that Sorensen's statute of limitations and repose defense could only be raised in a summary judgment are misplaced. Quoting *Tucker*, Appellees assert "'a defendant may raise a statute of limitations defense in a motion to dismiss . . . , *provided that the trial court treats the motion as one for summary judgment*.'" (Appellees' Br. 39 (quoting *Tucker*, 2002 UT 54, ¶ 11.)) Appellees mischaracterize that case and omits the explanation that the court need only convert the motion to dismiss to a summary judgment motion "in the narrow instance where a plaintiff's complaint describes events which establish a statute of limitations begins to run but fails to explicitly set forth the relevant date on which those events occurred." *Tucker*, 2002 UT 54, ¶ 11. Again, the amended complaints describe the events and state the relevant dates, including the dates they discovered the alleged malpractice.

Although the allegations in Appellees' amended complaints make clear that the repose period has ended, Appellees fail to refute or even address Sorensen's argument that "when the face of the complaint would otherwise establish that the claims are time-barred, a plaintiff presumably bears some burden to invoke the discovery rule." *Young Res. Ltd. P'ship v. Promontory Landfill LLC*, 2018 UT App 99, ¶ 31, 427 P.3d 457. To meet this burden at the pleading stage, the plaintiff must *plead* facts sufficient to toll the applicable limitations period. *Tolle v. Fenley*, 2006 UT App 78, ¶ 55, 132 P.3d 63 (emphasis added); *accord Tracey v. Blood*, 3 P.2d 263, 266 (Utah 1931) ("Apparently all courts are agreed, and in this case it is conceded that the burden was upon the plaintiff to plead and prove facts sufficient to toll the statute of limitations.").

Even under the fraudulent concealment version of the discovery rule, Utah law holds "the plaintiff must make an initial showing that he did not know nor should have reasonably known the facts underlying the cause of action in time to reasonably comply with the limitations period." *Berneau v. Martino*, 2009 UT 87, ¶ 23, 223 P.3d 1128. "If a plaintiff had no such burden, 'a statute of limitations defense that is subject to the discovery rule could never be successfully asserted in a motion to dismiss, and that is clearly not the rule.'" *Young Res.*, 2018 UT App 99,

¶ 31 (quoting *Butler v. Deutsche Morgan Grenfell, Inc.*, 2006-NMCA-084, ¶ 33, 140 P.3d 532).

Thus, to survive a motion to dismiss, Appellees must allege facts that, if true, would show they were prevented from discovering their cause of action because of Sorensen's affirmative act to fraudulently conceal his purported misconduct. *Alpine v. Homes, Inc. v. City of West Jordan*, 2017 UT 45, ¶ 7 n.2, 424 P.3d 95.

III. Appellees' Pleadings Are Insufficient And Must Be Dismissed.

The plain language of Subsection (2) makes clear that Appellees' must allege certain information for the exceptions to apply. Appellees argue that "the *statute* governs what must be alleged" in this case and suggests that the Utah Rules of Civil Procedure therefore has no application. (Appellees' Br. 42.) But the Court recently explained:

> The Utah Constitution vests this court with the power and obligation to "adopt rules of procedure and evidence to be used in the courts of the state." Utah Const. art. VIII, § 4. Pursuant to this constitutional grant of authority, we have established rules of civil procedure . . . ."

Bell Canyon Acres Homeowners Ass'n v. McLelland, 2019 UT 7, ¶¶ 16–17 (citation omitted).

The Act contains neither a reference to the rules of civil procedure or a "clear expression of the Legislature's intent to modify" the civil procedure rules.

Accordingly, because nothing in the Act purports to modify the Utah Rules of Civil Procedure, rule 8 and 9 applies.

Nevertheless, Appellees repeatedly claim they merely need to parrot the language of the fraudulent concealment exception in the complaint to survive a motion to dismiss. (Appellees' Br. 29, 35.) But, under Utah law, it is "unacceptable" to simply list the legal elements of a tort without the relevant surrounding facts with sufficient particularity. *Coroles v. Sabey*, 2003 UT App 339, ¶ 40, 79 P.3d 974. In other words, simply asserting the terms "fraud" and "concealment" are but general conclusions of the pleader and "will not stand against a motion to dismiss on that ground." *Heathman v. Hatch*, 372 P.2d 990, 991 (Utah 1962). Therefore, Appellees must allege more than mere conclusory statements to survive a motion to dismiss.

A. Appellees' Failed to Plead Facts Necessary to Support the Fraudulent Concealment Exception.

The fraudulent concealment exception requires the plaintiff to (1) allege they have been prevented from discovering misconduct because the provider has affirmatively acted to (2) fraudulently conceal the alleged misconduct. Utah Code Ann. § 78B-3-404(2)(b).

1. Appellees Failed to Allege Any Subsequent Affirmative Action to Conceal the Original Purported Fraud or Misconduct.

The plain language of the Act requires allegations of active concealment, not mere silence or passive concealment. When interpreting a statute, it is presumed the Legislature "used 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 (citation and internal quotation marks omitted). "[T]he expression of one [term] should be interpreted as the exclusion of another" and we "give effect to omissions in statutory language by presuming all omissions to be purposeful." *Id.* (citations and internal quotation marks omitted). Accordingly, we presume the Legislature used the words "affirmatively acted to fraudulently conceal" advisedly did not include passive inaction. Utah Code Ann. § 78B-3-404(2)(b) (emphasis added).

Affirmative concealment requires "some positive act of fraud, something so furtively planned and secretly executed as to keep the plaintiff's cause of action concealed, or perpetrated in a way that it conceals itself." *Martin v. Arthur*, 3 S.W.3d 684, 687 (Ark. 1999). This differs from passive inaction. *Cf. Graves v. North*

Eastern Servs., Inc., 2015 UT 28, ¶ 19, 345 P.3d 619 (explaining the distinction between "misfeasance (active misconduct) and nonfeasance (omission)").

Indeed, courts in other jurisdictions have explicitly recognized the difference between "passive concealment" and "active concealment," explaining that "passive concealment" exists where nothing has been done to prevent the discovery of malpractice but the person "simply keeps quiet." *See Ikola v. Schoene*, 590 S.E.2d 750, 753–54 (Ga. Ct. App. 2003); *Bierdon v. Anonymous Physcian 1*, 106 N.E.3d 1079, 1090 (Ind. Ct. App. 2018) (explaining that passive concealment is where the physician does not disclose certain material information as opposed to intended to mislead or hinder the plaintiff from learning about the malpractice); *see also Concealment*, Black's Law Dictionary (10th ed. 2014) (recognizing the distinction between "active concealment" and "passive concealment").

Had the Legislature intended for passive concealment or a mere "failure to disclose" to toll the Act's statute of limitations or repose period, it would not have gone to the effort of expressly requiring that the provider "affirmatively acted." And it is presumed that where the Legislature required an affirmative act to fraudulent conceal, it purposefully excluded passive acts.

Here, aside from mere silence, there are no allegations of any acts by Sorensen *subsequent* to the procedures. (Bright 82–102; Merlo-Schmucker 96–115; Tapp 122–148.) On appeal, Appellees contend their allegations that Sorensen falsified medical records and other documents supports their fraudulent concealment claim. (Appellees' Br. 31.) But their arguments are directly contradicted by the allegations in their amended complaints.

Instead, by their own allegations, Sorensen's purportedly false medical records and false documentation was intended to persuade them to undergo the PFO procedures. At most, each complaint offers a few broad allegations stating that Sorensen "created false statements and documents to conceal the fact that Sorensen was performing medically unnecessary closures." (Bright 86–92; Merlo-Schmucker 100–105; Tapp 128–138.) Then, Appellees explicitly allege these false statements "induced and persuaded Plaintiff to undergo a PFO closure." (*Id.*)

Thus, Appellees' assertions on appeal that "each complaint alleged that these affirmative steps prevented the patients from discovering their causes of action" are misleading. (Appellees' Br. 31.) The purported false statements and documents are part of the original tortious behavior, *not* subsequent actions designed to conceal the malpractice. These allegations are not even made under

the fraudulent concealment or tolling causes of action. (Bright 96–101; Merlo-Schmucker 109–113; Tapp 142–146.)

In sum, the only affirmative acts alleged in their amended complaints are the original misconduct. And the only purported conduct that Sorensen engaged in after the alleged procedures, was mere passive silence. Thus, without some allegation of a *subsequent* affirmative act, Appellees cannot meet their burden.

2. Appellees Failed to Allege Any Subsequent Action That Amounts to Fraud.

The fraudulent concealment exception applies when a health care provider's fraudulent actions "prevented" the plaintiff from discovering the original misconduct. Utah Code Ann. § 78B-3-404(2)(b). This is a serious allegation—it asserts that a health care provider first committed some misconduct and then later engaged in fraud to specifically prevent the discovery of that misconduct. These claims must not be made lightly. *Fidelity Nat'l Title Ins. Co. v. Worthington*, 2015 UT App 19, ¶ 11, 344 P.3d 156. "It would be circular to toll the statute of limitations for [a malpractice action based on] fraud or breach of fiduciary duty merely because the defendant commits fraud or breaches a fiduciary duty without some further showing that the defendant also concealed it from the plaintiff." *Allred v. Allred*, 2008 UT 22, ¶ 37, 182 P.3d 337.

In fraud-based causes of actions, "the circumstances constituting fraud must be pleaded with particularity in order to state a claim." *Id.* ¶ 8. Under rule 9 of the Utah Rules of Civil Procedure, if fraud is an element of the cause of action (such as fraudulent concealment or civil conspiracy) the fraud element must be pleaded with particularity. *Id.*; Utah R. Civ. P. 9(c). Rule 9's "specificity requirement modifies the general rule that requires only a 'short and plain' statement of the claim demonstrating entitlement to relief and a demand for judgment identifying the relief sought." *Id.* ¶ 11. Accordingly, Appellees cannot meet their burden by simply parroting the fraudulent concealment as they repeatedly suggest. They must meet the pleading requirement of rule 9(c).

Although Utah courts have not addressed the issue, many other jurisdictions agree the plaintiff must plead fraudulent concealment with particularity to show that an exception tolls the applicable statute of limitations where it is clear from the complaint the applicable statute of limitations has ended.[2] For example, in *Summerhill v. Terminix, Inc.*, 637 F.3d 877 (8th Cir. 2011),

2. *See, e.g.*, *Chafin v. Wisconsin Province of Soc'y of Jesus*, 917 N.W.2d 821, 825 (Neb. 2018) (holding that "allegations of fraudulent concealment for tolling purposes must be pleaded with particularity"); *Baker v. Wood, Ris & Hames, PC*, 364 P.3d 872,

the Eight Circuit affirmed the district court's decision to dismiss a complaint. The plaintiffs alleged that a company "failed to disclose to its customers" that it had not erected a barrier that would protect customers' structures from termite infestation. They asserted that because the barrier is invisible, it was impossible for a layman to discover the company's wrongdoing. *Id.* at 880.

On appeal, the court explaining that under rule 9's "heightened pleading standard, allegations of fraud, including fraudulent concealment for tolling purposes, must be pleaded with particularity." *Id.* at 880 (brackets, citation, and internal quotation marks omitted). "[O]nce it is clear from the face of the complaint that an action is barred by an applicable statute of limitations, the burden shifts to the plaintiff to prove that the limitation period was in fact tolled." *Id.* "By failing to allege when and how he discovered [the company's] alleged fraud, [the

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883 (Colo. 2016) (same); *Picher v. Roman Catholic Bishop of Portland*, 82 A.3d 101, 102 (Me. 2013) (same); *Villarreal v. Glacken*, 492 A.2d 328 (1985) (same); *Aldrich v. McCullough Props., Inc.*, 627 F.2d 1036, 1041 n.4 (10th Cir. 1980) (same); *Prather v. Neva Paperbacks, Inc.*, 466 F.2d 338, 340 (5th Cir. 1971) (same); *De Witt v. U.S.*, 593 F.2d 276, 281 (7th Cir. 1979) (same); *Kincheloe v. Farmer*, 214 F.2d 604, 605 (7th Cir. 1954) (applying Federal Rules of Civil Procedure) (same).

plaintiff] has failed to meet his burden of sufficiently pleading that the doctrine of fraudulent concealment saves his otherwise time-barred claims." *Id.* at 881.

The same is true here. Again, there are no allegations of any affirmative *subsequent* fraudulent acts in Appellees' amended complaints. Appellees only allege Sorensen failed to disclose the alleged misconduct. And they have made no allegations to show they used reasonable diligence.

Even under the relaxed standard of pleading promoted by Appellees, a complaint must adduce specific facts supporting a strong inference of fraud. "The allegations may be based on information and belief when facts are peculiarly within the opposing party's knowledge." *Wexner v. First Manhattan Co.*, 902 F.2d 169, 172 (2nd Cir. 1990). But "[t]his exception to the general rule must not be mistaken for license to base claims of fraud on speculation and conclusory allegations." *Id.*

Therefore, as in *Summerhill*, the Court should reverse the district court's orders for Appellees' failure to make particular allegations of fraudulent concealment in compliance with Rule 9(c). Appellees may not rest on mere conclusory allegations.

3. Mere Silence or Failure to Disclose is Not An Affirmative Action and Cannot Support An Allegation of Fraud.

"In no case . . . is mere silence or failure to disclose sufficient in itself to constitute fraudulent concealment." *Colosimo v. Roman Catholic Bishop*, 2007 UT 25, ¶ 44, 156 P.3d 806 (brackets, citation, and internal quotation marks omitted). Yet, on appeal, Appellees argue that Sorensen's silence after the procedures "amount to an affirmation." (Appellees' Br. 31–35.)

But additional particular allegations are required for the failure to disclose to amount to fraud. For one thing, a "defendant's failure to disclose must implicate the breach of duty to be actionable." *See Fidelity Nat. Title Ins. Co. v. Worthington*, 2015 UT App 19, ¶ 13, 344 P.3d 156; *see also Russell/Packard Dev., Inc. v. Carson*, 2003 UT App 316, ¶ 33, 78 P.3d 616 (noting that, generally, silence without a duty to speak does not of itself constitute fraud), *aff'd*, 2005 UT 14, 108 P.3d 741; *Gilbert Dev. Corp. v. Wardley Corp.,* 2010 UT App 361, ¶ 21, 246 P.3d 131 (same). Also, more allegations of how a failure to disclose was a breach of a particular duty and how it was done to prevent discovery of the alleged misconduct is required. *See Jensen v. IHC Hospitals, Inc. (Jensen I)*, 944 P.2d 327, 333 (Utah 1997) (explaining that the plaintiff must allege facts to show how the silence constitutes fraud under the circumstances).

Without more particular allegations, a mere failure to disclose could be any number of actions that are not fraud. For example, a failure to disclose may amount to negligent misrepresentation which is similar but different from fraud. *Smith v. Frandsen*, 2004 UT 55, ¶ 9, 94 P.3d 919 (explaining that negligent omissions exist where made "carelessly or negligently" with the expectation that it would be relied on). In other words, the broad assertions do not identify why it amounts to a breach of a particular duty or any circumstances to show that the failure to disclose was an intentional effort to conceal the purported cause of action.

No such actions are alleged in the complaints here. Aside from pure conclusory allegations, Appellees simply assert that Sorensen failed to disclose his alleged wrongdoing. (Bright 96–101; Merlo-Schmucker 109–113; Tapp 142–146.) But even if "failure to disclose" alone amounted to fraud, Appellees' allegations do not indicate the necessary circumstances that would put Sorensen on notice how his failure amounts to fraud.

B. Appellees Failed to Allege Facts Necessary to Support the Foreign Object Exception.

The foreign object exception requires the plaintiff to allege that "a foreign object has been wrongfully left within the patient's body." Utah Code Ann. § 78B-3-404(2)(a). Appellees failed to make any allegations in their Amended Complaints

to show that they are relying on the foreign object exception to toll the statute of repose. (Bright 82–102; Merlo-Schmucker 96–115; Tapp 122–148.) So, the Court's review of this issue could end here as it is beyond the allegations in the amended complaints. But, in any event, the issue is not properly preserved for appellate review and the exception does not apply here.

"A failure to preserve an issue in the trial court generally precludes a party from arguing that issue in an appellate court, absent a valid exception." *State v. Johnson*, 2017 UT 76, ¶ 15, 416 P.3d 443. In two of the three cases, Appellees Lisa Tapp and Pia Merlo-Schmucker never raised the foreign object exception—in the briefing or otherwise. In the third case, *Bright v. Sorensen et al.*, the parties did not brief the issue. (Bright 689–696.) Instead, Appellees briefly mentioned the exception for the first time during oral argument. Judge Scott rejected this argument in a footnote, noting that Ms. Bright knew that the device was placed as part of the closure procedure. (Bright 379.) Accordingly, analysis of the foreign object exception is not preserved because it was never raised in a meaningful way. In two cases the issue was never even raised and, in *Bright*, Appellees merely mentioned the exception at oral argument without offering legal authority or

analysis. (Bright 689–696.) And, on appeal, Appellees have failed to challenge the *Bright* court's decision, rejecting this argument.

Nonetheless, the closure devices placed in these Appellees are not "foreign objects" under the statute and therefore the exception is inapplicable. *See Christiansen v. Rees*, 436 P.2d 435, 436 (Utah 1968). Each Plaintiff understood that she was undergoing a closure procedure and that the anatomical closure would be accomplished through placement of a medical device. That is, placement of the device *is* the closure. Indeed, and as Judge Scott observed, Appellees do not argue that they were ignorant to the fact these devices would be placed during the procedures Dr. Sorensen performed.

Appellees instead argue that because they now believe that their respective closures were unnecessary, the knowingly placed devices have become "foreign objects," entitling them to the exception's tolling benefit. In so arguing, Appellees again attempt to pervert the plain meaning of this exception and statute to suit the facts of these cases.

While Utah case law has not expressly defined "foreign object," as used in this exception, other jurisdictions that have almost exclusively determined that devices *intended* to be left in the body do not amount to a "foreign object" under

medical malpractice statutes.[3] For instance, in *Stuard v. Jorgensen*, 249 P.3d 1156 (Idaho 2011), the Idaho Supreme Court explained a foreign object exception to Idaho's medical malpractice statute contemplates that the leaving of the object "must be inadvertent, accidental or unintentional." *Id.* at 1163. It held "a medical device which is placed in the body intentionally for the purpose of medical treatment is not a 'foreign object' under the statute." *Id.* Accordingly, despite Appellees' arguments that these "foreign objects" were wrongfully placed, the objects must be a "foreign object" for the exception to apply in the first instance.

Nonetheless, Appellees argue that any intentionally placed surgical device can be considered a foreign object for purposes of the exception if the device is placed "wrongfully" or "negligently." (Appellees' Br. 54–56.) However, the cases Appellees cite do not support this broad conclusion.

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3. *See, e.g.*, *Walton v. Strong Mem. Hosp.*, 950 N.Y.S.2d 556, (2012) ("The catheter here is not a 'foreign object' because, in the first instance, it was left in the plaintiff's body deliberately with a continuing medical purpose"); *Hills v. Aronsohn*, 152 Cal.App.3d 753, 765 (1984) (same); *Hall v. Ervin*, 642 S.W.2d 724, 727 (Tenn. 1982) (same).

For instance, in *Chambers v. Semmer*, 197 S.W.3d 730 (Tenn. 2006), the patient discovered a surgical clip that was supposed to have been placed on her uterine artery had, in fact, been *misplaced* on her left ureter. *Id*. at 732 (emphasis added). The misplaced clip blocked the flow of urine to the patient's left kidney, causing the organ to atrophy and become non-functional. *Id*. The Tennessee Supreme Court concluded the misplaced clip could be considered a foreign object because it was not placed intentionally because was placed in the wrong location, was not intended to be left in the patient permanently and was not removed from the patient after surgery. *Id*. at 736.

Similarly, in *Beatman v. Gates*, 521 N.E.2d 521 (Ohio Ct. App. 1987), the Ohio Court of Appeals did not actually decide whether an IUD placed by mistake and needed to be surgically removed was a "foreign object." *Id.* at 114–115. Instead, determined that the unique circumstances should be decided by a jury. *Id.*

The devices at issue in these cases completely differ from the PFO closure devices here. Appellees have not alleged the closure devices migrated or were improperly placed in an unintended location. In short, the closure devices were not "wrongfully left" in Appellees as that phrase is used in the foreign object exception. Appellees' attempt to rely on the foreign object exception is

inappropriate and "[t]o extend the foreign body doctrine to a substance which was introduced intentionally for a therapeutic purpose would undermine the clear legislative intent to restrict the foreign body exception to situations where the foreign substance was unintentionally left in a patient's body." *Hills v. Aronsohn*, 152 Cal.App.3d 753, 765 (1984).

Thus, Appellees' foreign object exception argument is not preserved for appellate review, and even if it were, the exception does not apply because the device is not a "foreign object."

C. In Any Event, Appellees Failed to Demonstrate that They Have Used Reasonable Diligence.

At the heart of the Act's exceptions is the principle that a patient or plaintiff may have additional time to commence a malpractice action if they are prevented from discovering the alleged misconduct. Utah Code Ann. § 78B-2-404(2). But both statutory exceptions require the plaintiff to use "reasonable diligence" to discover the alleged malpractice or fraudulent concealment. In particular, the exceptions expressly state that claims are "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 or the existence of the foreign object wrongfully left]. . . *whichever first occurs*." *Id.* In other words, the exceptions do not

simply give Appellees another year to pursue their claims once discovered, the year begins when Appellees should have discovered the fraudulent concealment or foreign object using reasonable diligence.

Appellees concede they have not investigated their claims before apparently being notified by an attorney advertisement. (Appellees' Br. 27.) They simply argue they should not be expected to diligently investigate their cause of action because Sorensen "lied" to them and some information was in Sorensen's "exclusive control." (*Id.* at 27, 49–51.) These arguments fail for several reasons.

First, Appellees' "exclusive control" argument is not preserved and was never alleged in their complaints. "A failure to preserve an issue in the trial court generally precludes a party from arguing that issue in an appellate court, absent a valid exception." *State v. Johnson*, 2017 UT 76, ¶ 15, 416 P.3d 443; *see also O'Dea v. Olea*, 2009 UT 46, ¶ 18, 217 P.3d 704 (To preserve an issue: "(1) the issue must be raised in a timely fashion; (2) the issue must be specifically raised; and (3) a party must introduce supporting evidence or relevant legal authority." (citation omitted)). So, they are inappropriately asking this Court to consider information that is beyond the complaint and that was never raised for consideration below.

By their own allegations in the amended complaints, Appellees arguments that information was in Sorensen's "exclusive control" is wrong. They were in fact given the documents that apparently contained false information. (Bright 90–92; Merlo-Schmucker 103–105; Tapp 127–128.) Indeed, they assert that Sorensen "passed out a . . . handout to Plaintiff" and that "literature contained fraudulent misrepresentations, unsupported data and statistics, outright falsehoods, and other misleading statements." (*Id.*) So, their claim that information was in Sorensen's exclusive control is misleading.

As for any purported falsehoods in the medical records, Appellees allege they were "unaware of the misrepresentations and falsehoods in . . . medical records." (*Id*.) More importantly, by law, Appellees have a right to access their medical records. 45 C.F.R. § 164.524 (giving individuals access to their own medical records). Accordingly, they could have obtained their medical records at any point and simply did not do so. Thus, any suggestion that their reliance on the medical records affected their ability to diligently investigate their cause of action is misplaced.

Therefore, Appellees' are not excused for the deficiencies in their allegations and their assertions that they cannot be expected to use reasonable diligence are

unpersuasive. Assuming the allegations are true, Appellees' actually had the purportedly false documents in their possession and never apparently obtained their medical records even though they had a right to them. And Sorensen is not the only doctor in town, and he is certainly not the only doctor that may have knowledge about the need for the procedure. In fact, Appellees allege that other physicians in the same hospitals apparently had knowledge about the procedures. (Bright 85; Tapp 128–129.)Yet nothing even suggests that Appellees were prevented from discovering information from these sources.

Second, despite their suggestions otherwise, "Plaintiffs are not excused from the due diligence requirement simply by alleging that any investigation into the culpability of the . . . defendants would have been futile." *Colosimo v. Roman Catholic Bishop*, 2007 UT 25, ¶ 47, 156 P.3d 806.

> Mere speculation about the futility of a nonexistent inquiry is insufficient to toll the limitations period. Otherwise, any time a tortfeasor failed to affirmatively disclose potential wrongdoing, any plaintiff, even one who was on inquiry notice, could allege that any inquiry would have been futile, thereby tolling the limitations period. Such a rule would eviscerate our statutes of limitation.

Id. ¶ 51. A "defendant's mere silence in the face of a plaintiff's failure to use reasonable diligence in investigating a claim is insufficient evidence of fraudulent concealment to warrant tolling the statute of limitations." *Id.* ¶ 44.

Accordingly, before they can conduct discovery to decide the merits of their fraudulent concealment claim, Appellees must first allege that, if true, would show that they used reasonable diligence to pursue their claim or discover the fraudulent concealment. *Id.* ¶ 24 (holding that "Plaintiffs have failed to demonstrate how any fraudulent concealment by Defendants would have prevented them from bringing their claim within the limitations periods"). "Indeed, if a plaintiff has made no inquiry, there can generally be no factual basis on which to conclude that an inquiry would have been futile." *Id.* ¶ 43; *Berenda v. Langford*, 914 P.2d 45, 53 (Utah 1996) (refusing "to excuse the diligence requirement [even] when . . . successful concealment would fool even the most diligent hypothetical plaintiff").

There must be "distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether, by ordinary diligence, the discovery might not have been before made." *Wood v. Carpenter*, 101 U.S. 135, 140 (1879), (citation and internal quotation marks omitted). "A general allegation of ignorance at one time and of knowledge at another are of no effect." *Id.* "If the plaintiff made any particular discovery, it should be stated when it was made, what it was, how it

was made, and why it was not made sooner." *Id.* at 141. The same is true for the reasonable diligence required in the foreign object exception.

CONCLUSION

In sum, the Act's repose period cannot be tolled because it serves no other purpose than to create an absolute cutoff deadline. But, even if it could, something more than conclusory allegations that Sorensen failed to notify them of his purported wrongdoing is required. Because the relevant dates and the limitations affirmative defense is clear from the face of Appellees' amended complaints, the burden is on Appellees to make sufficient allegations to survive a motion to dismiss. They must allege a subsequent affirmative act with sufficient particularity to establish their fraud-based claim. Moreover, Appellees are required to allege what they did to discover their cause of action and why they were prevented from discovering it sooner. Therefore, this Court should reverse the district courts' decisions.

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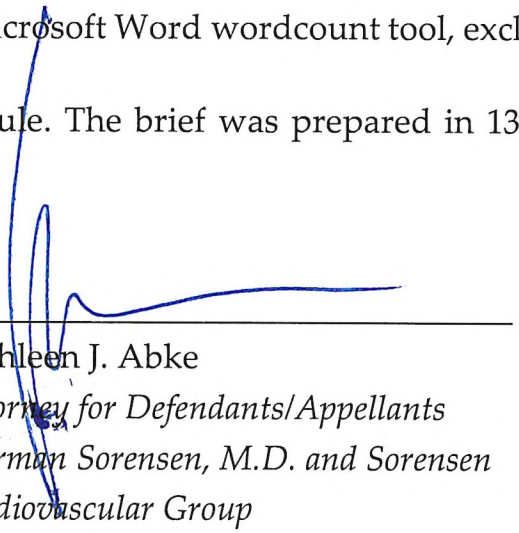
CERTIFICATE OF COMPLIANCE WITH RULES 21(g) and 24 OF THE UTAH RULES OF APPELLATE PROCEDURE

Pursuant to rule 21(g) of the Utah Rules of Appellate Procedure, the undersigned certifies that the foregoing brief contains no non-public information as defined by the rule and in all other respects complies with the rule.

Pursuant to rule 24(f)(1)(C) of the Utah Rules of Appellate Procedure, the undersigned certifies that this brief was prepared in accordance with the rule. It contains 6,993 words, according to the Microsoft Word wordcount tool, excluding the parts of the brief exempted by the rule. The brief was prepared in 13-point Palatino Linotype font.



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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of June, 2019, a true and correct copy of the foregoing document was served upon the parties of record in this proceeding set forth below by the method indicated:

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