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Johanna Bright, Appellee, v. Sherman Sorensen, MD; Sorensen Cardiovascular Group, and St. Mark's Hospital, Appellants. Pia Merlo-Schmucker, Appellee, v. Sherman Sorensen, MD; Sorensen Cardiovascular Group, and St. Mark's Hospital, Appellants. Lisa Tapp, Appellee, v. Sherman Sorensen, MD; Sorensen Cardiovascular Group, and IHC Health Services, Inc., Appellants. : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

Johanna Bright, Appellee, v. Sherman Sorensen, MD; Sorensen Cardiovascular Group, and St. Mark's Hospital, Appellants.	**BRIEF OF APPELLANT ST. MARK'S HOSPITAL**
Pia Merlo-Schmucker, Appellee, v. Sherman Sorensen, MD; Sorensen Cardiovascular Group, and St. Mark's Hospital, Appellants.	Case No. 20180528-SC
Lisa Tapp, Appellee, v. Sherman Sorensen, MD; Sorensen Cardiovascular Group, and IHC Health Services, Inc., Appellants.	

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Bright v. Sorensen et al. **(Case No. 20180528-SC)**

Plaintiff/Appellee:	Johanna Bright
Defendants/Appellants:	Sherman Sorensen, MD Sorensen Cardiovascular Group St. Mark's Hospital

Merlo-Schmucker v. Sorensen et al. **(Case No. 20180554-SC)**

Plaintiff/Appellee:	Pia Merlo-Schmucker
Defendants/Appellants:	Sherman Sorensen, M.D. Sorensen Cardiovascular Group St. Mark's Hospital

Tapp v. Sorensen et al. **(Case No. 20180690-SC)**

Plaintiff/Appellee:	Lisa Tapp
Defendants/Appellants:	Sherman Sorensen, M.D. Sorensen Cardiovascular Group IHC Health Services, Inc.

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INTRODUCTION

This consolidated appeal raises an issue that affects these three cases, some 1,400 other pending medical malpractice cases involving similar facts and the same question of law, and health care providers throughout Utah. The central issue involves the Utah Health Care Malpractice Act's four-year statute of repose. The plaintiffs/appellees here and in the 1,400 related cases are seeking to pursue medical malpractice cases against a doctor and two hospitals even through the treatment and the alleged injury flowing from that treatment occurred significantly more than four years before they commenced their actions. These plaintiffs, recognizing the time bar, pleaded generally that the injuries were "fraudulently concealed" from them by the defendants, attempting to take advantage of a narrow exception in the Malpractice Act's statute of repose.

But the plaintiffs have alleged no specific or particularized facts to support the fraudulent concealment allegations, instead making only conclusory allegations. The district courts said that was permissible, and the plaintiffs could proceed into discovery in the otherwise time-barred cases. These district court rulings are inconsistent with the plain language of the Act, the Utah Rules of Civil Procedure, the Legislature's intent, and sound judicial policy. The district court rulings seriously threaten the repose promised by the Act, and they should be reversed.

STATEMENT OF THE ISSUE

Issue No. 1: Appellees Johanna Bright and Pia Merlo-Schmucker (the "Patients") filed complaints (and amended complaints) against St. Mark's alleging events that were, on their face, time-barred by the four-year statute of repose contained in the Utah Health Care Malpractice Act. The only way the Patients could avoid the four-year statute of repose is to allege statutory fraudulent concealment. But neither the complaints nor the amended complaints alleged with particularity that St. Mark's "affirmatively acted to fraudulently conceal [its] alleged misconduct", as required by Utah R. Civ. P. 9(c) and Utah Code §78B-3-404(2)b).

In a case that is time-barred on the face of the complaint's allegations, must the plaintiff plead specific and particularized facts showing the applicability of the narrow exception in § 78B-3-404(2)(b), or may the plaintiff proceed into discovery against the defendant despite pleading no facts showing "affirmative fraudulent concealment"?

Issue No. 2: Assuming, *arguendo*, that a plaintiff must plead particularized facts showing the applicability of the narrow exception in § 78B-3-404(2)(b), did

the district courts err in failing to dismiss the Patients' complaints in their entirety when neither complaint identified:

- who at St. Mark's made the purported statement(s);
- any statement or statements made to the Patients by anyone at St. Mark's that were misleading or were otherwise designed to prevent the Patients from discovering their alleged injury;
- when the statements were made;
- where the statements were made;
- how the statements were made; and/or
- other particularized facts demonstrating that St. Mark's took any affirmative action to deter the Patients from filing suit or discovering their causes of action?

Standard of Review: The district courts' rulings are reviewed for correctness, with no deference given by this Court to the rulings below. The applicability of a statute of limitations (or repose) is a question of law, which this Court reviews for correctness, affording no deference to the district court's conclusions. *Russell Packard Dev., Inc. v. Carson*, 2005 UT 14, ¶18. The district court's denial of a rule 12(b)(6) motion to dismiss presents a question of law that is reviewed for correctness. *See State v. Watson Pharms., Inc.*, 2019 UT App 31 ¶11

(citing *America W. Bank Members, LC v. State*, 2014 UT 49, ¶7). "For the purposes of a rule 12(b)(6) dismissal, [this Court] accept[s] the complaint's factual allegations as true." *Fidelity Nat'l Title Ins. Co. v. Worthington*, 2015 UT App 19, ¶7. The district courts' interpretation of a rule of procedure and its application is a question of law reviewed for correctness. *Drew v. Lee*, 2011 UT 15, ¶7.

Preservation: St. Mark's preserved these arguments in its motions to dismiss the Patients' complaints and amended complaints. (Bright R. 39-81, 196-225; Merlo-Schmucker R. 40-72, 158-186.)

STATEMENT OF THE CASE

A. Facts

1. The PFO litigation generally

This consolidated appeal encompasses three cases: (1) Johannah Bright, which is brought against Dr. Sherman Sorensen ("Sorensen")[1] and St. Mark's Hospital ("St Mark's"); (2) Pia Merlo-Schmucker, likewise brought against Sorensen and St. Mark's; and Lisa Tapp, which is brought against Dr. Sorensen and Intermountain Healthcare (IHC). Because St. Mark's is not a party to the *Tapp*

[1] All claims against Dr. Sorensen are also asserted against his former practice, Sorensen Cardiovascular Group.

case, St. Mark's will focus primarily on the *Bright* and *Merlo-Schmucker* cases as they apply to St. Mark's, addressing the proceedings in *Tapp* only where necessary.

These cases are three of at least 1,400 nearly identical medical malpractice cases currently working their way through DOPL and the Utah court system, all of whom are represented by counsel for Appellees. (*See, e.g.*, Merlo R. 98; *see also* Bright R. 727 (where plaintiff's counsel states "There's 1,400 of these cases so far.") The cases all relate to coronary procedures performed by Dr. Sorensen.

2. Allegations common to the Amended Complaints

The Patients involved in these three cases on appeal, along with the other 1,400 plaintiffs, all assert that Dr. Sorensen performed an unnecessary medical procedure upon them, specifically the closure of a septal defect in the heart. (Bright R. 82-101, Merlo R. 96-114, Tapp R. 122-148) Bright's surgery occurred on December 15, 2009, Merlo-Schmucker's on February 10, 2011, and Lisa Tapp's on September 18, 2008. (*Id.*)

The procedure at issue in all these cases is a patent foramen ovale ("PFO") closure surgery. (Bright R. 84-85, Merlo R. 98-99.) The procedure uses a device, deployed by catheter, to close a hole between the upper two chambers of the heart that did not close naturally at birth. (*See id.*) Because of the flow of blood through the heart, blood "shunts" through the hole, especially during straining activities. (*See id.*) If the blood that shunts through the hole has a clot in it, that clot can travel

through the hole into the brain and cause a stroke. Dr. Sorensen closed those holes, eliminating or reducing the risk of such a stroke. (*See id.*) The Patients allege that Dr. Sorensen breached the standard of care by performing these PFO closure surgeries. (*See generally* Bright R. 82-101, Merlo R. 96-114, Tapp R. 122-148.)

As against St. Mark's, the hospital where some of the closures were performed, the Patients allege that St. Mark's was institutionally negligent because it knew that Dr. Sorensen performed an unusually high number of PFO closures and yet failed to provide appropriate oversight to prevent the allegedly unnecessary procedures from taking place. (Bright R. 85-87, Merlo R. 99-101) They made conclusory allegations that St. Mark's somehow "actively concealed its knowledge about Dr. Sorensen's rogue and fraudulent" conduct from "patients, third parties, and the public." (Bright R. 92, Merlo R. 105) Continuing on, the Patients say they were non-experts who trusted Dr. Sorensen and St. Mark's, and because of unidentified "fraudulent statements and misrepresentations" they were "until recently unaware of their causes of action." (Bright R. 92, Merlo R. 105) Dr. Sorensen also had privileges at an Intermountain Health Services, Inc. ("Intermountain") hospital and a majority of these PFO cases—including *Tapp*—

are lodged against Intermountain and Sorensen, under the same theories of liability. (Tapp R. 126.[2])

In proceedings below, no one disputed that the Patients' complaints are facially repose-barred based on the dates of the procedures stated in the Amended Complaints.[3] Instead, the Patients argued that they are entitled to proceed—including with fraud-related discovery—under a statutory exception in the Act that tolls the statute of repose in circumstances where the plaintiff has sufficiently alleged that the medical provider has affirmatively and fraudulently concealed their malpractice. Utah Code § 78B-3-404(2)(b).

3. Significant dates, as to each Appellee

Appellee Bright's PFO closure was performed on December 15, 2009. (Bright R. 88.) She did not apply for prelitigation review of her medical malpractice claim until January 3, 2017, more than seven years after the procedure. (Bright R. 69).[4]

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[2] The amended complaint in *Tapp* alleged that Dr. "Sorensen performed more than 4,000 PFO and ASD closures, the majority of those at IHC" (Tapp. R. 126.)

[3] Also, because Dr. Sorensen stopped practicing in early 2012 (Bright, R. 85; Merlo-Schmucker, R. 99) and no requests for pre-litigation review in any of these cases were received in DOPL before 2017, each and every one of the 1,400 Sorensen PFO cases pending in DOPL and in the district courts is similarly facially repose-barred.

[4] Because this is a health care malpractice case, the date of filing of the Request for Prelitigation Panel Review ("Request for Review") is the relevant date for statute of limitations and repose purposes. *See* Utah Code Ann. § 78B-3-416(3)(a) ("The filing of a request for prelitigation panel review under this section tolls the applicable statute of limitations. . . "); *Jensen v. Intermountain Healthcare Inc.*, 2018 UT 27, ¶ 28 ("Filing a request for Prelitigation Review tolls the statute of repose."). A copy of the Request for Review was attached to St. Mark's motions to dismiss the Patients' Amended Complaints. (Bright R. 69, Merlo R. 70.) This did not convert the motions to dismiss into motions for summary judgment because the Patients' Requests for Review are

Appellee Merlo-Schmucker's PFO closure was performed on February 10, 2011. (Merlo R. 102.) She did not apply for prelitigation panel review of her medical malpractice claim until January 3, 2017, almost six years after the procedure. (Merlo R. 70.)

Appellee Tapp's PFO closure was performed on September 18, 2008. (Tapp R. 132.) She did not apply for prelitigation panel review of her medical malpractice claim until January 6, 2017, more than eight years after the procedure. (Tapp R. 354.)

In these three cases, the Patients filed complaints following the conclusion of the statutorily-required DOPL prelitigation review process: Bright's complaint was filed on September 25, 2017 (R. 1-17), Merlo-Schmucker's on September 26, 2017 (R. 1-16), and Tapp's on August 4, 2017 (R. 1-17.) St. Mark's and the other defendants moved to dismiss the complaints as time-barred. (Bright R. 39-81, Merlo R. 40-72.) The Patients voluntarily filed amended complaints, and St. Mark's and Dr. Sorensen once again moved to dismiss, arguing again that the amended complaints were barred by the four-year statute of repose and the exception for

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"referred to in the complaint and [are] central to [their] claim[s]." *See* Merlo R. 97, Bright R. 83; *Mitchell v. ReconTrust Co., NA*, 2016 UT App. 88, ¶ 16 ("In evaluating a motion to dismiss, the district court may 'consider documents that are referred to in the complaint and [are] central to the plaintiff's claim' and may also 'take judicial notice of public records.'" (*quoting BMBT, LLC v. Miller*, 2014 UT App. 64, ¶ 7)).

fraudulent concealment was not applicable as a matter of law. (Bright R. 196-225, Merlo R. 158-186.)

B. Procedural History

In all three cases in this interlocutory appeal, the Defendants moved to dismiss because the plaintiffs had not sufficiently alleged the fraudulent concealment that they claim prevented them from timely discovering the injury of which they now complain.

Petitions for interlocutory appeal were filed in all three cases and motions to stay the underlying litigation were granted. (Bright R. 393, 465, 760; Merlo R. 466, 496, 712; Tapp R. 772, 782, 805.) On January 24, 2019 the appellants in all three cases filed an unopposed motion to consolidate the three cases on interlocutory appeal. That motion was granted, and on February 15, 2019 this Court granted the motion to consolidate and established a briefing schedule.

C. Disposition of the district courts

In all three cases in this consolidated appeal, the district courts denied portions of the motions to dismiss, albeit with slightly different rationales.[5]

In *Merlo-Schmucker*, Judge Corum acknowledged that the allegations were time-barred on the face of the Amended Complaint and recognized that "[i]t is not

[5] In *Tapp*, Judge Lawrence issued multiple rulings related to the motions to dismiss filed by Dr. Sorensen and IHC. That court's rulings will be addressed by Dr. Sorensen and IHC in their briefs on appeal.

clear from the Amended Complaint whether any Defendant acted affirmatively within the meaning of the statute to fraudulently conceal anything." (Merlo R. 402.) The court also commented that "Defendants' argument that inaction or omission by a defendant is not sufficient to overcome the time bar appears to be well taken." (*Id.*) Despite these acknowledgments, the court said it "has discretion to address these issues under a 12(b) motion" and, in a "close call" said "the Court feels the Plaintiff in this case has done enough to move her case into the next stage." (*Id.* at 402-403.)

Similarly, Judge Scott's order denying the defendants' motions to dismiss in *Bright* concluded that a 12(b)(6) motion to dismiss was not an appropriate vehicle for ruling on the statute of repose issue, noting that it was "not convinced that Rule 9(c) requires a plaintiff to plead defensive fraudulent concealment in her complaint in anticipation that a defendant may assert the statute of limitations or statute of repose in a motion to dismiss." (Bright R. 380.) Again, the core issue was whether the plaintiff must plead particularized facts alleging *affirmative* fraudulent concealment consistent with Rule 9(c) in order to survive a motion to dismiss in a repose-barred case. The District Court stated that it was not "convinced" Bright needed to do so. (*Id.*)

SUMMARY OF THE ARGUMENT

The district courts erred by failing to dismiss all of the Patients' claims and allowing them to proceed with fraud discovery because their complaints—facially time-barred by the statute of repose—failed to plead particularized facts of any affirmative fraudulent concealment by St. Mark's such that the time to file their claims would be tolled under Section 78-B-3-404(2)(b).

It is undisputed that because the Patients' claims arise from health care provided to them by the appellants, the claims are subject to Utah Code Ann. §78B-3-404, which establishes a four-year statute of repose. The parties (and the district courts) all further acknowledge that Patients' claims arose more than four years before suit was filed; that section 78B-3-404 applies to the Patients' claims; and that to avoid being time-barred, the delay in bringing their claims must have been due to St. Mark's affirmative fraudulent concealment of their claims.

As the statute makes clear, the Patients' claims can be saved from the statute of repose only if their complaints include allegations of affirmative, fraudulent concealment that prevented discovery of the malpractice. Utah Rule of Civil Procedure 9 and a long-settled body of dispositive case law make clear that "in alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." (Utah R. Civ. P. 9(c) (emphasis added)).

But here, the Patients' attempts to plead around the statute of repose did not contain the "who, what, when, where, and how" of the alleged fraudulent concealment by St. Mark's. In fact, even after amending their complaints, the Patients made no allegations of affirmative fraudulent concealment by St. Mark's, let alone *particularized* allegations. Accordingly, the district courts erred in failing to dismiss the Patients' complaints in their entirety because absent allegations of particularized facts establishing St. Mark's affirmative fraudulent concealment, their complaints failed to satisfy rule 9(c) and were barred by section 78B-3-404(2)(b).

Furthermore, the Merlo-Schmucker court erred in concluding that the sufficiency of the Patients' pleading for purposes of avoiding the statute of repose was not "ripe" for decision at the 12(b)(6) stage. Indeed, under controlling Utah case law and persuasive federal authority, a rule 12(b)(6) motion to dismiss is the appropriate vehicle and the appropriate time for appellants to assert their statute of repose defense. The district courts' rulings ignore that rule 12(b)(6) was specifically designed as the principal vehicle for parties to raise perceived deficiencies in their opposing parties' pleadings, and for the courts to dismiss those complaints that fail to comply with the relevant pleading standards, including rule 9(c).

Ultimately, the district courts' procedural ruling that untimeliness cannot be resolved on a 12(b)(6) motion to dismiss was incorrect, contrary to well-settled Utah law, and, if allowed to stand, would thwart the policies underlying the statute of repose, rendering it ineffectual. That procedural ruling should be reversed, and St. Mark's dismissed.

ARGUMENT

1. THE PATIENTS' CLAIMS ARE BARRED BY THE FOUR-YEAR STATUTE OF REPOSE

The facts pertaining to the timing of the care at issue are not in dispute. Appellee Bright's PFO procedure occurred in 2009, appellee Merlo-Schmucker's PFO procedure occurred in 2011, and appellee Tapp's PFO procedure occurred in 2008.[6] None of the Patients commenced the mandatory prelitigation review until 2017—more than seven years after the fact in Bright, almost six years after the fact in Merlo-Schmucker, and more than eight years after the fact in Tapp.[7] Accordingly, unless the Patients qualify for at least one of the two enumerated exceptions, their claims are barred by the four-year statute of repose.

[6] Bright R. 88, Merlo R. 102, Tapp R. 132.

[7] Bright R. 69, Merlo R. 70, Tapp R. 354.

A. The Utah Health Care Malpractice Act Governs Patients' Claims

By its plain language, the Utah Health Care Malpractice Act ("the Act"), Utah Code §78B-3-401 et seq., applies to all of the Patients' claims. The Act defines "malpractice action against a health care provider" as "any action against a health care provider, whether in contract, tort, breach of warranty, wrongful death, or otherwise, based upon alleged personal injuries relating to or arising out of health care rendered or which should have been rendered by the health care provider." Utah Code §78B-3-403(17) (emphasis added). The Act further defines "health care" as "any act or treatment performed or furnished, or which should have been performed or furnished, by any health care provider for, to, or on behalf of a patient during the patient's medical care, treatment, or confinement." *Id.* at 78B-3--403(10).

This Court has previously held that the Act controls claims arising out of the medical treatment at issue, regardless of whether the claim is cast as a negligence claim, a fraud claim, or something else. *Id.* at § 78B-3-403(17) (defining a "malpractice action against a health care provider" as "any action against a health care provider, whether in contract, tort, breach of warranty, wrongful death, or otherwise, based upon alleged personal injuries relating to or arising out of health care rendered or which should have been rendered by the health care provider" (emphasis added)); *Jensen v. IHC Hosps., Inc.*, 944 P.2d 327, 331, 336 (Utah 1997);

Smith v. Four Corners Mental Health Ctr., 2003 UT 23, ¶36 ("Because [plaintiff's] own allegations arise out of the fact that [defendant] provided mental health services directly to him, [plaintiff] was required to follow the procedural requirements of the [Act]." Utah law is clear that the negligence, fraud, and civil conspiracy claims alleged in this case are all governed by the procedural requirements of the Act.

Here, St. Mark's and the other appellants all qualify as health care providers under the Act,[8] and there is no dispute that the Patients' claims arise out of health care provided to the Patients by the appellants.[9] In fact, the Patients' Amended Complaints assert that St. Mark's alleged misconduct occurred exclusively within the context of its provision of health care to the Patients.[10] In other words, any duties owed by St. Mark's to the Patients arose out of their provider-patient relationship. Accordingly, any alleged breach of that duty is properly actionable under the Act, and not as separate claims. Utah Code Ann. §§ 78B-3-403(17) and -404(a).

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[8] Utah Code Ann. §78B-3-403(11) (defining "health care facility"), -403(12) (defining "health care provider"), and -403(13) (defining "hospital").

[9] *See* Bright R. 83, ¶6 ("At all material times, Defendants were health care providers within the meaning of the Utah Healthcare Malpractice Act, Utah Code Ann. §78B-3-401 et seq., and each defendant provided health care services to Plaintiff."); Merlo-Schmucker R. 97, ¶6 (same).

[10] Bright R. 82-101; Merlo R. 96-114.

B. The four-year statute of repose and its two narrow exceptions

Because the Patients' claims are subject to the Utah Health Care Malpractice Act as a whole, they are also subject to the Act's statute of repose. Section 78B-3-404 of the Act establishes a four-year statute of repose:[11]

> (1) A malpractice action against a health care provider shall be commenced within two years after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered the injury, whichever first occurs, **but not to exceed four years after the date of the alleged act, omission, neglect, or occurrence.**

Utah Code Ann. 78B-3-404 (emphasis added). After the Patients' complaints were filed and appellants moved for dismissal under Utah Rule of Civil Procedure 12(b)(6), Patients filed Amended Complaints, presumably in an effort to plead around the statute of repose. However, the allegations in the Amended Complaints still demonstrated, by their very terms, that the Patients' claims are barred by the four-year statute of repose.

Section 78B-3-404 provides just two narrow exceptions to the statutes of limitation and repose:

> (2) Notwithstanding Subsection (1):
>
> (a) in an action where the allegation against the health care provider is that a foreign object has been wrongfully left within a patient's body, the claim shall be barred unless commenced within one year after the

[11] The statute also established a two-year statute of limitations. Although the Patients' claims are also untimely under the statute of limitations, only the statute of repose is at issue at this point.

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

The first exception, subsection -404(2)(a), does not apply to the Patients' claims because the device implanted to close their PFOs was an intended "object" – a surgical implant meant to close the hole between the chambers of the heart;[12] this subsection applies when an unanticipated, unexpected object is "wrongfully" left in a patient's body and may not be discovered until years later. The classic example is a surgical sponge that should have been removed before the incision was closed, but was wrongfully left in the patient's body. *See, e.g., Day v. Meek*, 1999 UT 28. Although the Patients half-heartedly asserted this exception in oral argument on the motions to dismiss, the *Tapp* court rejected this argument eloquently, stating that the first "exception *does not* apply on its face . . . Here, the 'device' that was placed into [Tapp] was the precise device that was contemplated

[12] Bright R. 88, ¶29; Merlo R. 102, ¶27.

for the surgery[.] . . . It would be non-sensical to apply this statute to medical devices that were the very object of a patient's surgery." (Tapp R. 750 (emphasis in original).) The *Bright* and *Merlo-Schmucker* courts did not address the Patients' "foreign object" arguments in their written rulings.

The Patients are thus left with only subsection -404(b)(2) to save their claims from being barred by the four-year statute of repose. As discussed below, because the Patients did not plead fraudulent concealment with the particularity required by Utah R. Civ. P. 9(c), they are not entitled to this narrow exception and their claims are thus barred by the statute of repose.

C. Allegations of fraud must be pleaded with particularity

To invoke the protection of the statue of repose exception in 78B-3-404(b)(2), the Patients' amended complaints must "allege[ ] that [they have] 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(b)(2) (emphasis added). As discussed below, the district courts all seemed puzzled by when and how the defendant would challenge the time-barred plaintiffs' failure to sufficiently allege affirmative, fraudulent concealment of the misconduct. But the statute provides the answer: the medical malpractice plaintiff must have alleged affirmative, fraudulent concealment in order to get the benefit of the narrow exception. Thus, the parties

are not, as the trial courts incorrectly surmised, in the realm of affirmative defenses. The statute places the onus on the plaintiff to allege affirmative, fraudulent misconduct, and, as discussed below, the rules of civil procedure require detailed allegations of such misconduct.

All allegations of fraud must be pleaded with particularity. Utah Rule of Civil Procedure 9(c) provides 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). "Rule 9(b)'s[13] specificity requirement modifies the general rule that requires only a 'short and plain' statement for the claim demonstrating entitlement to relief and a demand for judgment identifying the relief sought." *Fidelity Nat. Title Ins. Co. v. Worthington*, 2015 UT App ¶11 (Pearce, J.).

Rule 9(c) "also serves to deter filing exploratory suits with little information in the hopes that discovery will uncover information to support the allegations." *Id.* (citing *Republic Bank & Trust Co. v. Bear Stearns & Co.*, 683 F.3d 239, 255 (6th Cir. 2012) ("Rule 9[c] [of the Federal Rules of Civil Procedure] is designed, not only to put defendants on notice of alleged misconduct, but also to prevent fishing

[13] The "particularity" pleading requirement of Utah R. Civ. P. 9 is currently found at rule 9(c). Before an amendment to the Utah Rules of Civil Procedure, however, the particularity requirement was contained in rule 9(b). Although some of the cases cited in this argument section refer to rule 9(b) instead of 9(c), the substance of the particularity requirement is the same.

expeditions . . . ."); *Cornejo v. JPMorgan Chase Bank*, No. CV 11-4119 CAS(VBKx), 2012 WL 628179, at *4 (C.D. Cal. Feb. 27, 2012) ("Plaintiffs' assertion that they will 'not know until discovery' the specific misrepresentations made is precisely what Rule 9(b) [of the Federal Rules of Civil Procedure] seeks to prevent.")).

Allegations of fraud required to overcome the timeliness bar are subject to the same rule 9(c) particularity requirement applicable to all allegations of fraud. Utah R. Civ. P. 9(c) ("In *all* averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity" (emphasis added)); *see Roth v. Pedersen*, 2009 Utah App. LEXIS 320, *7-8; *see also Shah v. Intermountain Healthcare, Inc.*, 2013 UT App. 261, ¶10 (explaining Rule 9(c) pleading requirements).

"[T]he mere recitation by a plaintiff of the elements of fraud in a complaint does not satisfy the particularity requirement." *Robinson v. Robinson*, 2016 UT App 33, ¶35 (quoting *Armed Forces Ins. Exch. V. Harrison*, 2003 UT 14, ¶16 (internal quotation marks omitted)). Moreover, "[c]onclusory allegations, unsupported by a recitation of relevant surrounding facts, are insufficient to carry that burden." *Id.* "The relevant surrounding facts must be set forth with sufficient particularity to show which facts the plaintiff believes support the allegations." *Id.*[14]

[14] In *Robinson*, the district court dismissed husband's complaints as untimely on a rule 12(b)(6) motion. Because the dates establishing the trigger for the statute of limitations were not contained in the complaint's allegations (but instead were derived from pleadings filed in a companion

As directly relevant here, the plaintiff must allege with particularity that the defendant has prevented her from timely discovering the alleged negligence that forms her cause of action by "affirmatively act[ing] to fraudulently conceal the alleged misconduct[.]" Utah Code Ann. §78B-3-404(2)(b). Because the statute's plain language demands allegations that a health care provider "has *affirmatively* acted to fraudulently conceal the alleged misconduct", allegations that the defendant has been silent about known malpractice is not enough. Utah Code Ann. §78B-3-404(2)(b) (emphasis added). The court in *Tapp* agreed with this proposition, noting that "the legislature used the word *'affirmatively acted* to fraudulently conceal the alleged misconduct' . . . [a]ccordingly, it would appear that Plaintiff cannot rely on Defendants' silence alone in seeking an exception to the statute of limitations; she must be able to show 'affirmative acts' by IHC and by Dr. Sorensen." (Tapp R. 312)[15] The *Merlo-Schmucker* court also acknowledged that "[i]t is not clear from the Amended Complaint whether any Defendant acted affirmatively within the meaning of the statute to fraudulently conceal anything" and that "Defendants' argument that inaction or omission by a defendant is not sufficient to overcome the time bar appears to be well taken." (Merlo R. 402.)

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case), the district court erred by not converting the motion to a summary judgment. *Robinson*, 2016 UT App 33, ¶18. That error was "rendered harmless, however, by [the court of appeals'] determination . . . that Husband failed to plead fraud with particularity." *Id.* at ¶19.

[15] However, the *Tapp* court concluded that Tapp "*has* alleged affirmative conduct by the Defendants, albeit around the time of the medical care." (Tapp R. 312)

Roth, another case arising out of alleged medical malpractice, is a particularly instructive example of what must be pleaded. *Roth v. Pedersen*, 2009 Utah App. 313, 2009 WL 3490974 (unpublished opinion[16]). In *Roth*, the plaintiff had a colon surgery in 2004 and, six months later, a doctor realized that the wrong section of the colon had been removed and a second surgery was performed in early 2005. *Id.* at *2. The plaintiff filed a lawsuit against a general surgeon in May 2006 and filed another complaint against a second doctor (Dr. Pedersen) in August 2008. *Id.* Because the plaintiff was obviously aware of his legal injury in May 2006 when he filed the first complaint, Dr. Pedersen moved for judgment on the pleadings, arguing the complaint was time-barred by the two-year statute of limitations. *Id.* at *3. The district court agreed with Dr. Pedersen and dismissed the plaintiff's complaint. *Id.*

On appeal, among other things, the plaintiff argued that the district court should not have dismissed the case against Dr. Pedersen because he had alleged in his complaint that Dr. Pedersen had engaged in fraudulent concealment of his role in causing the legal injury, thereby saving the claim under Section 78B-3-404(2)(b) of the Malpractice Act. *Id.* at *2. Specifically, Roth alleged that it "appeared" that there had been concealment of the malpractice because the

[16] "[U]npublished decisions of the Court of Appeals issued on or after October 1, 1998, may be cited as precedent in all courts of the State." Utah R. App. P. 30(f).

physician knew of various specific problems with the procedure at issue but did not speak up about them, despite a legal duty to do so, and that this "failure to speak" prevented him from discovering his injury, sufficient to toll the statute of limitations. *Id.* at *2-3.

The *Roth* court considered but ultimately rejected the plaintiff's argument. *Id.* at *4. Relying on Rule 9(c)'s particularity pleading standard, the *Roth* court recognized that the fraudulent concealment allegations must be stated with particularity: "mere conclusory allegations in a pleading, unsupported by a recitation of relevant surrounding facts, are insufficient to preclude dismissal." *Id.* at *3 (quoting *Chapman v. Primary Children's Hosp.*, 784 P.2d 1181, 1186 (Utah 1989)). The court explained that plaintiff's allegations were insufficient to grant relief on a fraudulent concealment theory because the plaintiff did not sufficiently plead "affirmative act[ion] to fraudulently conceal the alleged misconduct" from the plaintiff, as required by the Malpractice Act. *Id.* at *3 (emphasis added). For example, Roth did not allege that he had ever "consulted with [Dr.] Pedersen regarding the surgery or that Pedersen had ever given information to Roth that "misrepresented or concealed his involvement in the surgery." *Id.* Moreover, nowhere in the complaint did Roth allege that he was "precluded from further discussing the surgery." *Id.* Ultimately, without any specific allegations of active and fraudulent concealment of the malpractice by the defendant, the plaintiff's

allegations of fraudulent concealment were "nothing more than a mere conclusory allegation that is insufficient to preclude dismissal" on the pleadings.[17] *Id.* at *3 (citing *Chapman*, 784 P.2d at 1186).

The court's decision was based, in part, on its analysis of Rule 9(c)'s particularity requirement in *Chapman v. Primary Children's Hospital*, 784 P.2d 1181, 1186 (Utah 1989). In *Chapman*, this Court helpfully distinguished between sufficient and insufficient allegations in this context. The plaintiffs alleged that the hospital defendants "withheld information regarding the cause of [the patient's] injuries and 'misinformed [the Chapmans] by, among other things, *advising them* that the brain damage sustained by [the patient] was an unavoidable event which was not caused by any misconduct on the part of any of the defendants.'" *Id.* at 1186 (emphasis added). In other words, the Chapmans alleged that the hospital defendants acted affirmatively by "advising them" in a way that prevented their discovering the injury. Because the Chapmans' allegations relied upon affirmative action rather than passive inaction, this Court concluded that the plaintiffs' allegations against the hospital defendants were a "sufficiently clear and specific description of the facts underlying the Chapmans' claims of fraudulent

[17] The *Roth* court's dismissal on the pleadings presented functionally the same procedural posture as in these cases, where the motions to dismiss were brought under rule 12(b)(6).

concealment to support our conclusion that the requirement of Rule 9[c] has been met." *Id.* at 1186 (alteration to reflect current numbering of Rule 9(c)).

But the *Chapman* court "took a different view of the Chapmans' claims" against another defendant, Dr. Myer. *Id.* Specifically, this Court held that "[i]n contrast to the fact-specific claims against the hospital defendants, the charges against Dr. Myer are vague and conclusory, telling virtually nothing about what Dr. Myer allegedly did or neglected to do." *Id.* This Court reiterated that "[t]he sufficiency of plaintiff's pleadings . . . must be determined by the facts pleaded rather than the conclusions stated", *id.* (citation and internal quotation marks omitted) and therefore affirmed the grant of summary judgment as to Dr. Myer. *Id.* (citing *Peteler v. Robison,* 81 Utah 535, 17 P.2d 244 (Utah 1932) (discussed further, *infra*)).

While not a statute of limitations or repose case, *Shah* is also instructive on the pleading requirements under Rule 9(c). *Shah,* 2013 UT App. 261. In *Shah,* the plaintiff alleged that his healthcare provider had engaged in fraudulent concealment and other torts. *Id.* In support of her claims, the plaintiff "generally [alleged] that all of the Defendants failed to provide them with complete and accurate information regarding [the patient's] health and treatment after she received that treatment and therefore breached their fiduciary duty to her and conducted acts of fraud or negligent misrepresentation." *Id.* at ¶12. But these

generalized allegations were found to be insufficient to state a fraud claim (including a fraudulent concealment claim) under Rule 9(c) because the plaintiff had failed to "explain which defendants had what knowledge, which defendants made what statements, or how the Defendants specifically breached their individual fiduciary duties." *Id.*

Ultimately, absent facts setting forth the "who, what, when, where and how" of the fraud, a plaintiff's "general assertion of wrongdoing against the Defendants" will not meet the particularity requirement for pleading a claim of fraud under Rule 9(c). *Id. Shah* reiterates the well-recognized doctrine that, in pleading fraud, a plaintiff must identify the "who, what, when, where and how" of the fraud. *Shah*, 2013 UT App. 261 at ¶¶10, 12. In sum, to avoid the repose bar, the Patients must sufficiently allege affirmative fraudulent concealment. The duty to state sufficient facts is the plaintiff's duty at the outset of the case.

D. The Patients' allegations were not pleaded with the particularity needed to withstand a motion to dismiss

In the cases at bar, the Patients did not sufficiently plead their affirmative fraudulent concealment allegations. At the very end of the complaints, there is a "fraudulent concealment/equitable tolling"[18] claim that is nothing but conclusory

[18] The concept of equitable tolling has no application to this case, because the Malpractice Act contains provisions that govern a potential tolling of the statute of limitations and statute of repose. There cannot be equitable tolling when there is a statutory discovery rule. *See Russell Packard Dev., Inc. v. Carson*, 2005 UT 14, ¶ 25 (internal citation omitted) ("[W]e now clarify and emphasize that these equitable exceptions apply only where a statute of limitations does not, by

buzzwords, unsupported and vague allegations that appellants took "affirmative steps," made "misrepresentations," engaged in "misleading conduct," and otherwise "concealed" their malpractice. This is simply insufficient under the rule 9 case law discussed above.

The Patients do not allege who concealed anything from them, what specifically was concealed, when the purported concealment happened, where it happened, or how the actor did what he or she did to prevent them from discovering their injury/claims. Importantly, the Patients do not identify *any* conversations with *anyone* at St. Mark's, let alone a specific effort to deter them from filing suit or discovering their injury. Indeed, the Patients admit that the discovery of their supposed claims came as a result of an advertisement campaign perpetrated by counsel, not because of any actual injury they incurred. (Bright R. 92, Merlo R. 105.) The lack of any such allegations against St. Mark's is not surprising given that St. Mark's merely provided a catheterization laboratory in which an independent, licensed physician performed various procedures. Indeed, the Patients' Amended Complaints focused primarily on their allegations that Dr.

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its own terms, already account for such circumstances—i.e., where a statute of limitations lacks a statutory discovery rule."); *Stephenson v. Elison*, 2017 UT App. 149, ¶ 29 ("tolling under statutory and equitable discovery rules is usually mutually exclusive"); *Moore v. Smith*, 2007 UT App 101, ¶26.

Sorensen had breached the standard of care in multiple respects. (Bright R. 82-101, Merlo R. 96-114.)

The Patients argued below that St. Mark's never affirmatively reached out to them, by, for instance, sending a mailing or making a public statement informing them that their procedures had not been medically necessary. (Bright R. 99, Merlo R. 112.) The Patients allege at one point that St. Mark's "did nothing to notify" them of Dr. Sorensen's "fraudulent and/or negligent practices" of which it allegedly had "awareness." (Bright R. 92, Merlo R. 105.) But "not doing something" is simply not *affirmative* conduct.[19] And, again, the Patients did not allege that any particular individual at St. Mark's knew that their particular procedure was not necessary, nor have they alleged facts, or cited case law, to suggest that St. Mark's would have an affirmative duty to investigate all procedures performed in its catheterization laboratory for medical necessity, make the post-facto determination that a procedure was indeed unnecessary, and then inform the Patients of that.

Conclusory allegations of fraudulent concealment mixed with general allegations that the hospital did not "reach out" at some point are simply not sufficient allegations of *affirmative,* fraudulent misconduct. Simply put, the

[19] *See, e.g.* Bryan A. Garner, ed., *Black's Law Dictionary* (10th ed. 2014) (defining "affirmative" as "involving or requiring effort <an affirmative duty>.").

Patients' claims are time-barred on the face of their Amended Complaints. And because they failed to plead the fraudulent concealment exception to the four-year statute of repose with the particularity required by Rule 9(c), the district courts should have dismissed the claims in their entirety, with prejudice.

E. The district courts erred in ruling that the Patients' Amended Complaints were sufficient to avoid the statute of repose

The district courts operated under the assumption that the claims alleged were untimely on their faces and that there was no question but that the statutes of limitation and repose in 78B-3-404 applied to the Patients' claims.[20] (Merlo R. 400-405; Bright R. 374-389; Tapp R. 309.)

All three courts also agreed, to varying degrees, that the Patients did not adequately allege *affirmative* fraudulent concealment. In *Merlo-Schmucker*, the court found that the defendants' argument that inaction or omission were not "affirmative acts" within the meaning of 78B-3-404 was "well-taken". (Merlo R. 402.) In *Bright*, when discussing the Patient's "fraudulent non-disclosure or concealment" claim, the court stated that:

> With respect to St. Mark's, the court agrees that Ms. Bright fails to state a claim upon which relief can be granted. She does not plead any facts from which the court may infer that St. Mark's knew that her particular surgery was not medically necessary prior to the surgery. And while St. Mark's alleged failure to notify patients

[20] Judge Lawrence, in *Tapp*, found that expressly. (Tapp R. 309 (*"[all]* of Plaintiff's claims are governed by the . . . four-year statute of repose") (emphasis in original).)

> that Dr. Sorensen's privileges had been suspended for performing unnecessary closure procedures may be sufficient to defeat a motion to dismiss based on the statute of repose, it cannot form the basis of an affirmative fraudulent concealment claim. Indeed, Ms. Bright could not have relied on St. Mark's silence regarding the suspension in agreeing to the surgery because the suspension happened after her surgery."

(Bright R. 384-85.) And in *Tapp*, the court recounted the defendants' argument that "there must be 'affirmative' concealment, rather than concealment by silence", and commented that "[a] plain reading of the statute appears to support that view." (Tapp R. 312.)

The district courts correctly perceived that, as discussed above, the Patients did not even allege that they had *interacted with* St. Mark's, let alone that St. Mark's had somehow caused them to delay timely filing their claims against the hospital. Yet despite recognizing that the Patients' allegations were conclusory and lacking the requisite specificity as to the "who, what, when, where, and how" of the alleged fraudulent concealment, the district courts nonetheless ordered further discovery, rather than wholesale dismissal of the Patients' claims, on the theory that it was "too early" to dismiss the Patients' claims.

The district courts erred, however, in concluding that a rule 12(b)(6) motion was not the appropriate vehicle for addressing the timeliness and sufficiency of the pleadings. And, as noted above, these conclusions were based on a misperception that the it was the defendant's duty to raise the statute of repose as

an affirmative defense, as opposed to the plaintiff's statutory duty to plead sufficient facts regarding affirmative, fraudulent concealment at the outset of the case.

In *Merlo-Schmucker*, for instance, the court stated that it "is not convinced this issue is procedurally ripe at the Rule 12(b) stage and questions whether the Plaintiff is obligated to combat an affirmative defense, however likely or inevitably it is to be raised, in its initial pleading." (Merlo R. 402). In *Bright*, the court noted that it was "unable to conclude at this time that the statue of repose was not tolled" and that it was "not convinced that rule 9(c) requires [the Patients] to plead defensive fraudulent concealment in [their] complaint[s] in anticipation that a defendant may assert the statute of limitations or statute of repose in a motion to dismiss." (Bright R. 379-380) In Tapp, the court ruled that "A plaintiff is not required to forecast the defenses a defendant may assert" and noted that "before this issue is resolved, a plaintiff must have an opportunity to present facts supporting its response to a statute of limitations defense". (Tapp R. 314, 316)

A Rule 12 motion is a well-recognized vehicle for challenging the timeliness of a claim. *See Tucker v. State Farm Mut. Auto. Ins. Co.*, 2002 UT 54, ¶8 (inclusion of dates in the complaint indicating that the action is untimely renders it subject to dismissal for failure to statue a claim' . . . under Rule 12(b)(6).")

Similarly, the Utah Court of Appeals has stated that

> Rule 12(b)(6) of the Utah Rules of Civil Procedure permits the dismissal of complaints that fail to state claims upon which relief can be granted. In the context of fraud-based causes of action, rule 9(b) provides that the circumstances constituting fraud must be pleaded with particularity in order to state a claim.

Fidelity Nat. Title Ins. Co. v. Worthington, 2015 UT App 19, ¶8 (Pearce, J.). In *Fidelity*, the court of appeals affirmed the 12(b)(6) dismissal of Fidelity's complaint because it "fails to allege the elements of a fraud claim with the particularity our rules require." *Id.* at ¶11 (citing Utah R. Civ. P. 9[c]). Fidelity "did not identify any false representation Worthington made to Fidelity [but] rather asserted only that the Defendants as a group had failed to disclose information to Fidelity". *Id.* at ¶12 (noting that "[o]ur supreme court has explained that a cause of action for fraud against multiple defendants must 'supply . . . information regarding [each defendant's] personal participation in fraud").

More recently, in *Young Resources*, the Utah Court of Appeals affirmed the 12(b)(6) dismissal of untimely claims because "the face of the complaint . . . establish[es] that the claims are time-barred" and because the allegations did not give any "factual basis for tolling the statute." *Young Resources Ltd. Partnership v. Promontory Landfill LLC*, 2018 UT App 99, ¶31 (citing *Aldrich v. McCulloch Props., Inc.*, 627 F.2d 1036, 1041, n.4 (10th Cir. 1980) and *Butler v. Deutsche Morgan Grentell, Inc.*, 140 P.3d 532 (2006)); *see also Christensen v. Am. Heritage Title Agency, Inc.*, 2016

UT App 36, ¶30 (affirming dismissal under rule 12(b)(6) because "the complaint contain[ed] no allegations that the . . . defendants were involved in fraudulent conduct or committed any wrongdoing" such that statute of limitations should be equitably tolled); *Mast v. First Madison Servs., Inc.*, 2009 UT App 162, *1 n.2 (stating "[d]ismissal under Rule 12(b)(6) . . . is appropriate where the claim is time-barred based on the allegations of the complaint itself" and rejecting equitable discovery allegations (unpublished)); *Lowery v. Brigham Young Univ.*, 2004 UT App 182, *1 (affirming dismissal under rule 12(b)(6) based on facial untimeliness and inadequate pleading of allegations that tolling should be based on alleged mental illness (unpublished)); *see also Bivens v. Salt Lake City Corp.*, 2017 UT 67, ¶54, n.6 (affirming dismissal because complaint facially pleaded the absence of exhaustion of administrative remedies, which is an affirmative defense); *Peteler v. Robison*, 81 Utah 535, 17 P.2d 244 (Utah 1932) (evaluating adequacy and particularity of the plaintiff's allegations of fraudulent concealment on demurrer);[21] *Coroles v. Sabey*,

[21] In *Peteler*, the plaintiff alleged medical negligence and defensively alleged that the defendant doctor had fraudulently concealed his negligence over a continuing course of treatment lasting years. *Id.* at 245-46. The doctor demurred, arguing that the claim was barred by the catch-all four-year statute of limitations (there was no statute of limitations specific to medical negligence claims at the time). *Id.* at 246. Although *Peteler* is an old case, it shows that this Court has long assessed the sufficiency of fraudulent concealment allegations in a plaintiff's complaint. In fact, this Court stated that if the plaintiff's complaint had alleged fraud "merely in general terms, or that the defendant through 'fraud' or 'fraudulently' induced the plaintiff to refrain from bringing an action against the defendant without any accompanying statement of facts upon which the statement of fraud is based", then the demurrer would have been warranted. *Id.* at 250. Ultimately, though, in *Peteler*, this Court concluded that "sufficient accompanying facts are stated with respect to the alleged fraud . . . to entitle her to give evidence with respect thereto", and therefore reversed the trial court's grant of defendant's demurrer. *Id.* Unlike in *Peteler*, in these

2003 UT App 339, ¶¶28, 30 (affirming dismissal on 12(b)(6) motion because plaintiffs failed to plead the circumstances constituting fraud with particularity and citing as examples that plaintiffs did not "identify exactly who made the alleged representations" or "indicat[e] who made [a] statement to them").

Similarly, in *Russell Packard*, this Court applied the same methodology to test the untimeliness of a pleading, concluding that the plaintiff's allegations were adequate to avoid 12(b)(6) dismissal, but only because the plaintiff "made a prima facie showing of fraudulent concealment". *Russell Packard Dev., Inc. v. Carson*, 2005 UT 14, ¶¶13, 40. Likewise, in *Tucker*, this Court cited to federal authority supporting the proposition that dismissal under rule 12(b)(6) is procedurally proper when a complaint facially alleges facts showing that a limitations period has run and tolling allegations are not adequately pleaded under rule 9. *Tucker*, 2002 UT 54, ¶8 (quoting 5A Wright & Miller, Federal Practice & Procedure §1357 at 345 (2d ed. 1990)).[22]

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cases the Patients have not stated "sufficient accompanying facts . . . with respect to the alleged fraud[.]"

[22] Ample federal authority on this point exists, and it appears to be uniform. *See Boettcher v. Conoco Phillips Co.*, 721 Fed. Appx. 823, 824-25 (10th Cir. 2018) (affirming dismissal because untimeliness is evident from allegations and tolling is supported only by a "conclusory statement as to the application of [tolling without relevant] factual allegations"); *Lee v. Rocky Mtn. UFCW Unions and Employers Trust*, 13 P.3d 405, *1 (10th Cir. 1993) (limitations defense "may be appropriately resolved on a 12(b)(6) motion [because] the dates given in the complaint make clear that the right sued upon had been extinguished"); *Ballen v. Prudential Bache Sec., Inc.*, 23 F.3d 335, 336-37 (10th Cir. 1994) (affirming 12(b)(6) dismissal based on facial untimeliness and because plaintiff did not meet obligation to "plead with particularity the facts which give rise to the claim of fraudulent concealment"); *Summerhill v. Terminix, Inc.*, 637 F.3d 877, 879-80 (8th Cir. 2011) ("once it is clear

The district courts' rulings in these cases are inconsistent with this settled precedent. Instead, the district courts here concluded that the Patients do not need to plead specific, particularized facts showing affirmative fraudulent concealment. The court's rationale for this conclusion in *Merlo-Schmucker* is somewhat unclear; that court recognized that the plaintiff had the obligation to identify these facts and did not present such facts, but the court appeared to take a wait-and-see approach, improperly invoking its "discretion" on this matter of law. In *Bright*, again, the court seemed hesitant to hold the plaintiff to her pleading obligation, saying it was not "convinced" plaintiff had the duty to plead specific facts supporting a claim for affirmative, fraudulent concealment "at this juncture".

Similarly, in *Tapp* the court acknowledged that the "additional allegations" contained in paragraphs 79-84 of Tapp's amended complaint "appear to be conclusory in nature without any measure of particularity." (Tapp R. 313) In spite of that recognition, the court concluded that Tapp "did not have a duty in the first instance to plead those allegations with particularity" and asserted that "[t]here is no authority requiring a plaintiff to plead facts in her complaint that are responsive

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from the face of the complaint that an action is [untimely plaintiff must] meet the burden of sufficiently pleading that the doctrine of fraudulent concealment saves his otherwise time-barred claims"); *Adams v. Am. Med. Sys., Inc.*, 2014 WL 1670090, *2 (D. Utah April 28, 2014) (rule 12(b)(6) dismissal where the complaint's dates made clear that the right sued upon has extinguished and the plaintiff fails to come forward with a factual basis to toll); *Warnick v. McCotter*, 2003 WL 23355718, *3-4 (D. Utah Dec. 29, 2008) (Rule 12(b)(6) dismissal where dates in complaint made clear that clam was untimely and assertion of fraudulent concealment was unsupported).

to a yet-to-be-asserted affirmative defense." (Tapp R. 313) The district court's reluctance was echoed when it stated it "cannot conclude that a plaintiff is required to plead facts that would be needed to defeat an affirmative defense in its opening pleading." (Tapp R. 313)

The district courts' rulings were erroneous. Most fundamentally, they ignored the plaintiff's statutory obligation to allege affirmative, fraudulent concealment and the duty created by rule 9 and supporting case law to plead affirmative fraudulent concealment with particularity. Instead, the trial courts treated appellants' statute of repose argument as any other affirmative defense that would get fleshed out in discovery. That is simply inconsistent with the requirements of the Act, , the Utah (and Federal) Rules of Civil Procedure, and the case law. Moreover, as discussed below, it creates bad judicial policy that sharply undermines the purposes of the statute of repose and the courts' role in deciding pure legal issues prior to using the courts' and the parties' resources to chase discovery into claims that are time-barred by statute.

II. THE DISTRICT COURTS' RULINGS UNDERMINE THE POLICY UNDERLYING STATUTES OF REPOSE

The Utah Legislature enacted the Utah Health Care Malpractice Act in 1976, including a policy statement titled "Legislative findings and declarations - Purpose of Act", with three subsections outlining the important public policy goals meant to be served by the Act. Utah Code Ann. §78B-3-402. Importantly, one

of those three subsections was devoted solely to the statutes of limitations and repose contained in §78B-3-404:

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

Utah Code Ann. §78B-3-402(3) (emphasis added).

Statutes of repose serve important public polices and are strictly followed. *CTS Corp. v. Waldburger,* 134 S. Ct. 2175, 2182-83 (2014) ("[s]tatutes of repose effect a legislative judgment that a defendant should be free from liability after the legislatively determined period of time"); *Sun Valley Water Beds of Utah, Inc. v. Herm Hughes & Son, Inc.*, 782 P.2d 188, 189 (Utah 1989) ("Statutes of repose promote the public goal of certainty and finality ... and terminate liability at a set time."). Consequently, courts do not expand legislatively-created exceptions to a repose period, such as the narrow circumstances defined in § 78B-3-404(2)(b) that the Patients fail to meet. *Id.*

This important policy has been recognized by Utah courts in a variety of contexts. *See Craftsman Builder's Supply, Inc. v. Butler Mfg. Co.*, 974 P.2d 1194 (Utah 1999) (holding builder's statute of repose does not violate Open Courts clause); *Sorensen v. Larsen*, 740 P.2d 1336 (Utah 1987) (holding medical malpractice statue

of repose barred complaint filed nine years after care at issue); *Dayley v. USA*, 2018 WL 1590254 (D. Utah 2018) (rejecting argument that medical malpractice statute of repose violates Open Courts clause).

If the district courts' rulings in these cases are allowed to stand, the Patients' unsupported fraudulent concealment theory will be advanced not just in the three cases currently on appeal, but in the 1,400 similar cases currently in the pipeline.[23] And there is little doubt that other plaintiffs in other types of medical malpractice litigation would see these rulings as an invitation to completely disregard not just the statute of limitation but also the statute of repose.

Allowing these rulings to stand would thoroughly undermine the purposes of finality that statutes of repose are designed to promote and would create damaging policy, increase the burden on our courts, and expressly contravene the Legislature's clearly stated intent in enacting a medical malpractice statute of repose. Indeed, under the Patients' theory, the statute of repose creates essentially no barrier to entry into the court system for facially stale claims. That is, a medical provider would be subject to costly litigation indefinitely, so long as a plaintiff

[23] In the lower court proceedings, the parties expressly acknowledged that these cases were "test" or "bellwether" cases that would be brought to ruling on the motions to dismiss (since all the claims were time-barred on their faces). *See, e.g.*, Bright R. 726-727, Tapp R. 999-1002. In *Bright*, at oral argument on the motions to dismiss, the court noted that "there was some discussion generally between the judges about whether a consolidation would be appropriate so that the parties don't end up - I assume there are similar issues in all cases with, you know, five, ten different rulings on the same motions to dismiss." (Bright R. 726.)

merely vaguely alleged in the complaint that the provider knew the procedure involved malpractice and did not affirmatively tell the plaintiff that. Whether or not the allegation was true, and whether or not the provider took any affirmative action to fraudulently conceal the alleged misconduct, the mere conclusory allegation would be enough to initiate costly discovery and consume the time and resources of health care providers. This underscores why the exceptions to the statute of repose bar are supposed to be very narrow, and why the affirmative fraudulent concealment exception is required to be pleaded with particularity.

III. NEGLIGENT CREDENTIALING IS NOT A RECOGNIZED CAUSE OF ACTION AND THEREFORE THE DISTRICT COURT SHOULD HAVE DISMISSED COUNT IV IN MERLO-SCHMUCKER

Because all of the Patients' claims are barred by the statute of repose as argued above, and because the Patients failed to plead with the particularity required by rule 9(c) to avail themselves of the statutory exception to the four-year repose period, all of their claims should have been dismissed by the district courts.

As an additional basis for dismissal of Count IV in the Patients' Amended Complaints, negligent credentialing is not a recognized cause of action under Utah law. The *Bright* court ruled correctly on this issue—albeit without much discussion—and ordered dismissal of the Fourth Claim for Relief for negligent credentialing "because it is not recognized in Utah[.]" (Bright R. 388) The *Merlo-Schmucker* court did not address the negligent credentialing claim in its order on

the motions to dismiss, but because it did not list Count IV as a dismissed claim, it is presumably still alive in that case.

The *Bright* court's dismissal of Count IV was correct as a matter of law. In 2011 the Utah Legislature enacted Utah Code §78B-3-425, entitled "prohibition on cause of action for negligent credentialing". That statute provides, in its entirety, that "[i]t is the policy of this state that the question of negligent credentialing, as applied to health care providers in malpractice suits, is not recognized as a cause of action." *Id.*

By the plain language of §78B-3-425, then, Count IV of Merlo-Schmucker's Amended Complaint is ineffective and should be dismissed on that separate basis. *See Waddoups v. Noorda*, 2013 UT 64, ¶13 (holding that §78B-3-425 did not apply retroactively to care at issue before the statute's enactment); *Andresen v. Salt Lake Regional Med. Ctr.*, 2014 WL 7387281 (Utah Dist. Ct.) (granting motion to dismiss negligent credentialing claim and rejecting plaintiff's claim that statute was unconstitutional).

For this additional reason, St. Mark's asks this Court to reverse the *Merlo-Schmucker* court's denial of its motion to dismiss Count IV for negligent credentialing, based on the application of §78B-3-425.

CONCLUSION

The Patients' claims in these three cases—and in the 1,400 related cases—are barred, on the face of the complaints, by the four-year statute of repose found in the Utah Health Care Malpractice Act. Because the claims are time-barred, and because the Patients failed to plead with the particularity required, the district courts' denial of the defendant health care providers' motions to dismiss was in error. St. Mark's respectfully requests that this Court reverse the decisions of the district courts below, dismissing the *Bright* and *Merlo-Schmucker* cases with prejudice.

DATED this 18th day of March, 2019.

HALL PRANGLE & SCHOONVELD, LLC

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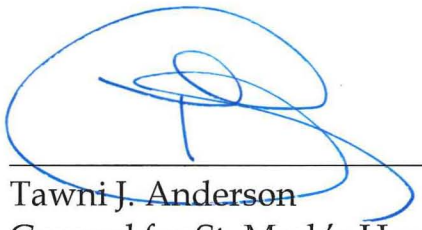
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 24(a)(11) of the Utah Rules of Appellate Procedure, I hereby certify that the foregoing brief of St. Mark's Hospital complies with the type-volume limitation in that the brief contains approximately 10,159 words.

DATED this 18th day of March, 2019.

HALL, PRANGLE & SCHOONVELD



Tawni J. Anderson
Counsel for St. Mark's Hospital

CERTIFICATE OF SERVICE

This is to certify that 2 copies of the foregoing BRIEF OF APPELLANT ST. MARK'S HOSPITAL were mailed, postage prepaid, this 18th day of March, 2019, to each of the following:

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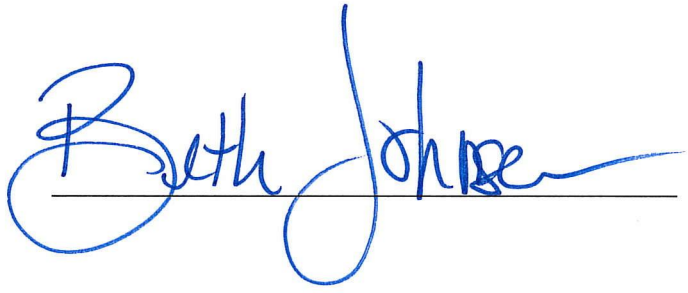

ADDENDUM

Addendum A

Utah Rules of Civil Procedure 9 and 12

Utah Code Ann. § 78B-3-401 through -404

Print Version (https://www.utcourts.gov/resources/rules/urcp/urcp009.html)

Previous Page

Rule 9. Pleading special matters.

(a) Capacity or Authority to Sue; Legal Existence.

(1) In General. Except when required to show that the court has jurisdiction, a pleading need not allege:

(A) a party's capacity to sue or be sued;

(B) a party's authority to sue or be sued in a representative capacity; or

(C) the legal existence of an organized association of persons that is made a party.

(2) Raising Those Issues. To raise any of those issues, a party must do so by a specific denial, which must state any supporting facts that are peculiarly within the party's knowledge.

(b) Unknown parties.

(b)(1) Designation. When a party does not know the name of an opposing party, it may state that fact in the pleadings, and designate the opposing party in a pleading by any name. When the true name of the opposing party becomes known, the pleading must be amended.

(b)(2) Descriptions of interest in quiet title actions. If one or more parties in an action to quiet title are designated in the caption as "unknown," the pleadings may describe the unknown persons as "all other persons unknown, claiming any right, title, estate or interest in, or lien upon the real property described in the pleading adverse to the complainant's ownership, or clouding its title."

(c) Fraud, mistake, condition of the mind. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

(d) Conditions precedent. In pleading conditions precedent, it is sufficient to allege generally that all conditions precedent have been performed or have occurred. When denying that a condition precedent has been performed or has occurred, a party must do so with particularity.

(e) Official document or act. In pleading an official document or official act it is sufficient to allege that the document was legally issued or the act was legally done.

(f) Judgment. In pleading a judgment or decision of a domestic or foreign court, a judicial or quasi-judicial tribunal, or a board or officer, it is sufficient to plead the judgment or decision without showing jurisdiction to render it.

(g) Time and place. An allegation of time or place is material when testing the sufficiency of a pleading.

(h) Special damage. If an item of special damage is claimed, it must be specifically stated.

(i) Statute of limitations. In pleading the statute of limitations it is not necessary to state the facts showing the defense but it may be alleged generally that the cause of action is barred by the statute, referring to or describing the statute by section number, subsection designation, if any, or designating the provision relied on sufficiently to identify it.

(j) Private statutes; ordinances. In pleading a private statute, an ordinance, or a right derived from a statute or ordinance, it is sufficient to refer to the statute or ordinance by its title and the day of its passage or by its section number or other designation in any official publication of the statute or ordinance. The court will take judicial notice of the statute or ordinance.

(k) Libel and slander.

(k)(1) Pleading defamatory matter. In an action for libel or slander it is sufficient to allege generally that the defamatory matter out of which the action arose was published or spoken concerning the plaintiff.

Rule 12. Defenses and objections.

(a) When presented. Unless otherwise provided by statute or order of the court, a defendant shall serve an answer within 21 days after the service of the summons and complaint is complete within the state and within 30 days after service of the summons and complaint is complete outside the state. A party served with a pleading stating a cross-claim shall serve an answer thereto within 21 days after the service. The plaintiff shall serve a reply to a counterclaim in the answer within 21 days after service of the answer or, if a reply is ordered by the court, within 21 days after service of the order, unless the order otherwise directs. The service of a motion under this rule alters these periods of time as follows, unless a different time is fixed by order of the court, but a motion directed to fewer than all of the claims in a pleading does not affect the time for responding to the remaining claims:

(a)(1) If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 14 days after notice of the court's action;

(a)(2) If the court grants a motion for a more definite statement, the responsive pleading shall be served within 14 days after the service of the more definite statement.

(b) How presented. Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion or by further pleading after the denial of such motion or objection. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) Motion for judgment on the pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) Preliminary hearings. The defenses specifically enumerated (1) - (7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearings and determination thereof be deferred until the trial.

(e) Motion for more definite statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 14 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion to strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 21 days after the service of the pleading, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) Consolidation of defenses. A party who makes a motion under this rule may join with it the other motions herein provided for and then available. If a party makes a motion under this rule and does not include therein all defenses and objections then available which this rule permits to be raised by motion, the party shall not thereafter make a motion based on any of the defenses or objections so omitted, except as provided in subdivision (h) of this rule.

(h) Waiver of defenses. A party waives all defenses and objections not presented either by motion or by answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received.

(i) Pleading after denial of a motion. The filing of a responsive pleading after the denial of any motion made pursuant to these rules shall not be deemed a waiver of such motion.

(j) Security for costs of a nonresident plaintiff. When the plaintiff in an action resides out of this state, or is a foreign corporation, the defendant may file a motion to require the plaintiff to furnish security for costs and charges which may be awarded against such plaintiff. Upon hearing and determination by the court of the reasonable necessity therefor, the court shall order the plaintiff to file a $300.00 undertaking with sufficient sureties as security for payment of such costs and charges as may be awarded against such plaintiff. No security shall be required of any officer, instrumentality, or agency of the United States.

(k) Effect of failure to file undertaking. If the plaintiff fails to file the undertaking as ordered within 30 days of the service of the order, the court shall, upon motion of the defendant, enter an order dismissing the action.

TITLE 78B, CHAPTER 3, PART 4
UTAH HEALTH CARE MALPRACTICE ACT

78B-3-401. Title.

This part shall be known and may be cited as the "Utah Health Care Malpractice Act."

78B-3-402. Legislative findings and declarations - Purpose of act.

(1) The legislature finds and declares that the number of suits and claims for damages and the amount of judgments and settlements arising from health care has increased greatly in recent years. Because of these increases the insurance industry has substantially increased the cost of medical malpractice insurance. The effect of increased insurance premiums and increased claims is increased health care cost, both through the health care providers passing the cost of premiums to the patient and through the provider's practicing defensive medicine because he views a patient as a potential adversary in a lawsuit. Further, certain health care providers are discouraged from continuing to provide services because of the high cost and possible unavailability of malpractice insurance.

(2) In view of these recent trends and with the intention of alleviating the adverse effects which these trends are producing in the public's health care system, it is necessary to protect the public interest by enacting measures designed to encourage private insurance companies to continue to provide health-related malpractice insurance while at the same time establishing a mechanism to ensure the availability of insurance in the event that it becomes unavailable from private companies.

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

78B-3-403. Definitions.

As used in this part:

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

(2) "Certified social worker" means a person licensed to practice as a certified social worker under Section 58-60-205.

(3) "Chiropractic physician" means a person licensed to practice chiropractic under Title 58, Chapter 73, Chiropractic Physician Practice Act.

(4) "Clinical social worker" means a person licensed to practice as a clinical social worker under Section 58-60-205.

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

(6) "Dental hygienist" means a person licensed to engage in the practice of dental hygiene as defined in Section 58-69-102.

(7) "Dentist" means a person licensed to engage in the practice of dentistry as defined in Section 58-69-102.

(8) "Division" means the Division of Occupational and Professional Licensing created in Section 58-1-103.

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

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

(11) "Health care facility" means general acute hospitals, specialty hospitals, home health agencies, hospices, nursing care facilities, assisted living facilities, birthing centers, ambulatory surgical facilities, small health care facilities, health care facilities owned or operated by health maintenance organizations, and end stage renal disease facilities.

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

(13) "Hospital" means a public or private institution licensed under Title 26, Chapter 21, Health Care Facility Licensure and Inspection Act.

(14) "Licensed athletic trainer" means a person licensed under Title 58, Chapter 40a, Athletic Trainer Licensing Act.

(15) "Licensed Direct-entry midwife" means a person licensed under the Direct-entry Midwife Act to engage in the practice of direct-entry midwifery as defined in Section 58-77-102.

(16) "Licensed practical nurse" means a person licensed to practice as a licensed practical nurse as provided in Section 58-31b-301.

(17) "Malpractice action against a health care provider" means any action against a health care provider, whether in contract, tort, breach of warranty, wrongful death, or otherwise, based upon alleged personal injuries relating to or arising out of health care

rendered or which should have been rendered by the health care provider.

(18) "Marriage and family therapist" means a person licensed to practice as a marriage therapist or family therapist under Sections 58-60-305 and 58-60-405.

(19) "Naturopathic physician" means a person licensed to engage in the practice of naturopathic medicine as defined in Section 58-71-102.

(20) "Nurse-midwife" means a person licensed to engage in practice as a nurse midwife under Section 58-44a-301.

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

(22) "Osteopathic physician" means a person licensed to practice osteopathy under Title 58, Chapter 68, Utah Osteopathic Medical Practice Act.

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

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

(25) "Pharmacist" means a person licensed to practice pharmacy as provided in Section 58-17b-301.

(26) "Physical therapist" means a person licensed to practice physical therapy under Title 58, Chapter 24b, Physical Therapy Practice Act.

(27) "Physical therapist assistant" means a person licensed to practice physical therapy, within the scope of a physical therapist assistant license, under Title 58, Chapter 24b, Physical Therapy Practice Act.

(28) "Physician" means a person licensed to practice medicine and surgery under Title 58, Chapter 67, Utah Medical Practice Act.

(29) "Podiatric physician" means a person licensed to practice podiatry under Title 58, Chapter 5a, Podiatric Physician Licensing Act.

(30) "Practitioner of obstetrics" means a person licensed to practice as a physician in this state under Title 58, Chapter 67, Utah Medical Practice Act, or under Title 58, Chapter 68, Utah Osteopathic Medical Practice Act.

(31) "Psychologist" means a person licensed under Title 58, Chapter 61, Psychologist Licensing Act, to engage in the practice of psychology as defined in Section 58-61-102.

(32) "Registered nurse" means a person licensed to practice professional nursing as provided in Section 58-31b-301.

(33) "Relative" means a patient's spouse, parent, grandparent, stepfather, stepmother, child, grandchild, brother, sister, half brother, half sister, or spouse's parents. The term includes relationships that are created as a result of adoption.

(34) "Representative" means the spouse, parent, guardian, trustee, attorney-in-fact, person designated to make decisions on behalf of a patient under a medical power of attorney, or other legal agent of the patient.

(35) "Social service worker" means a person licensed to practice as a social service worker under Section 58-60-205.

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

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

(38) " Unanticipated outcome" means the outcome of a medical treatment or procedure that differs from an expected result.

78B-3-404. Statute of limitations - Exceptions - Application.

(1) A malpractice action against a health care provider shall be commenced within two years after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered the injury, whichever first occurs, but not to exceed four years after the date of the alleged act, omission, neglect, or occurrence.

(2) Notwithstanding Subsection (1):

(a) In an action where the allegation against the health care provider is that a foreign object has been wrongfully left within a patient's body, the claim shall be barred unless commenced within one year after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered, the existence of the foreign object wrongfully left in the patient's body, whichever first occurs; or

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

(3) The limitations in this section shall apply to all persons, regardless of minority or other legal disability under Section 78B-2-108 or any other provision of the law.

78B-3-405. Amount of award reduced by amounts of collateral sources available to plaintiff - No reduction where subrogation right exists - Collateral sources defined - Procedure to preserve subrogation rights - Evidence admissible - Exceptions.

(1) In all malpractice actions against health care providers as defined in Section 78B-3-402 in which damages are awarded to compensate the plaintiff for losses sustained, the court shall reduce the amount of the award by the total of all amounts paid to the plaintiff from all collateral sources which are available to him. No reduction may be made for collateral sources for which a subrogation right exists as provided in this section nor shall there be a reduction for any collateral payment not included in the award

of damages.

Addendum B

Bright v. St. Mark's Hospital, et al – Minutes & Order on Motions to Dismiss

Merlo-Schmucker v. St. Mark's Hospital, et al. – Minutes & Order on Motions to Dismiss

Tapp v. Sorenson, et al. – Minutes & Order on Motions to Dismiss

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

JOHANNAH BRIGHT,	:	MINUTES
Plaintiff,	:	TWO MOTIONS TO DISMISS
	:	
vs.	:	Case No: 170906790 MM
SHERMAN DR SORENSEN Et al,	:	Judge: LAURA SCOTT
Defendant.	:	Date: May 1, 2018

Clerk: emilyac

PRESENT
Plaintiff's Attorney(s): RHOME D ZABRISKIE
RAND PATRICK NOLEN
DAVID HOBBS
Defendant's Attorney(s): MICHAEL J MILLER
KATHLEEN J ABKE
ERIC P SCHOONVELD
ANDREW A WARTH
NATHAN E DORSEY

Audio
Tape Number: S32 Tape Count: 2:04-3:48

HEARING

2:05 The Court summarizes her understanding of the issues.
2:13 Mr. Schoonveld makes argument in support of St. Mark's Hospital's Motion to Dismiss Amended Complaint.
2:41 Mr. Nolen makes argument in opposition to the motion.
3:12 Mr. Miller makes argument in support of Sorensen Defendants' Motion to Dismiss Plaintiff's First Amended Complaint.
3:24 Mr. Nolen makes argument in opposition to the motion.
3:35 Mr. Warth makes argument in support of the motions.
3:43 The Court takes the matter under advisement and will issue a written decision.

3:44 Mr. Nolen answers the Court's questions regarding the status of the related litigation.

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

JOHANNAH BRIGHT, Plaintiff, vs. SHERMAN SORENSEN, M.D.; SORENSEN CARDIOVASCULAR GROUP; AND ST MARK'S HOSPITAL, Defendants.	RULING AND ORDER RE PENDING MOTIONS TO DISMISS Case No. 170906790 June 20, 2018 Judge Laura S. Scott

Before the court is the *Motion to Dismiss Plaintiff's First Amended Complaint* filed by Defendants Sherman Sorensen, M.D. and Sorensen Cardiovascular Group (collectively Sorensen Defendants) and the *Motion to Dismiss Amended Complaint* filed by Defendant St. Mark's Hospital. The court heard oral argument on the Motions on May 1, 2018 and took them under advisement. Having considered the briefing, arguments of counsel, and applicable law, the court now issues the following Ruling and Order:

ALLEGATIONS OF THE FIRST AMENDED COMPLAINT

1. This case involves surgery to close a patent foramen ovale (PFO), which is a hole in the heart that occurs after birth when the foramen ovale fails to close.[1] According to the First Amended Complaint, approximately 25% of the healthy population have a PFO and will never require any treatment or evaluation. PFO closure is not medically necessary unless there is a confirmed diagnosis of recurrent cryptogenic stroke or transient ischemic attack (TIA).[2]

[1] The second type of hole is called an atrial septal defect (ASD), which is considered a birth defect.

[2] *See* First Amended Complaint, ¶¶ 10-14, which was filed on December 21, 2017.

2. Dr. Sorensen is a cardiologist who was practicing interventional cardiology. Dr. Sorensen had privileges at St. Mark's.[3]

3. From approximately 2002 to 2012, Dr. Sorensen performed more than 4,000 PFO and ASD closures, many of those at St. Mark's. He performed these procedures at a rate that dwarfed the rest of the country.[4]

4. St. Mark's was on notice that Dr. Sorensen was engaged in the practice of regularly performing unnecessary and invasive PFO closures on his patients because of the sheer volume of the procedures and complaints from other practitioners and employees.[5]

5. Also, during the hiring and credentialing process, Dr. Sorensen told St. Mark's how and under what conditions he would perform PFO and ASD closures, including that he would perform closures on patients who did not have recurrent cryptogenic strokes.[6]

6. The catheterization lab at St. Mark's became financially dependent on Dr. Sorensen's practice. Consequently, despite knowing that Dr. Sorensen was performing medically unnecessary closures, St. Mark's continued to court his business, provide a platform and assistance to him, and advertise and promote Dr. Sorensen's practice.[7]

7. The Sorensen Defendants and St. Mark's created false statements and documents to conceal the fact that Dr. Sorensen was performing medically unnecessary closures, including medical charts.[8]

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[3] *Id.*, ¶ 16.

[4] *Id.*

[5] *Id.*, ¶ 17.

[6] *Id.*, ¶ 18.

[7] *Id.*, ¶¶ 22, 23.

[8] *Id.*, ¶ 20.

8. In 2007, Plaintiff Johannah Bright was referred to Dr. Sorensen because she was experiencing migraines and a transesophageal echocardiogram showed right to left shunting across the atrial septum. She was seen by Dr. Sorensen on September 21, 2007 at his offices, where she underwent a transthoracic echocardiogram (TTE) with bubble study and transcranial Doppler study (TCD).[9]

9. On October 1, 2007, Western Neurological Associates performed a brain MRI on Ms. Bright, which was interpreted as "normal contrast-enhanced MRI of the brain."[10]

10. On November 28, 2007 at a follow-up office visit, Dr. Sorensen did not recommend closure because "she [did] not have risk stratification features [for stroke] other than migraine.[11]

11. On November 4, 2009, Ms. Bright returned to Dr. Sorensen for a second consultation. Dr. Sorensen's neurologic exam was not comprehensive. Contrary to his 2007 note, Dr. Sorensen's 2009 note states that Ms. Bright "has high risk features for stroke" and "an interatrial septal aneurysm."[12]

12. To induce her to undergo the PFO closure procedure, Dr. Sorensen told Ms. Bright that she had a high risk of a debilitating stroke and that the PFO closure would be effective and was medically necessary in order to prevent strokes. Dr. Sorensen also provided Ms. Bright with a PFO handout that contained fraudulent statements and unsupported data.[13]

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[9] *Id.*, ¶ 25.

[10] *Id.*, ¶ 26.

[11] *Id.*, ¶ 27.

[12] *Id.*, ¶ 28.

[13] *Id.*, ¶ 34.

13. Dr. Sorensen's statements were made with the intent to induce Ms. Bright to undergo the unnecessary procedure. Ms. Bright did not know the statements were false or misleading. And she relied on these statements in agreeing to undergo the procedure.[14]

14. On December 15, 2009, Ms. Bright underwent the PFO closure procedure.[15]

15. On March 18, 2010 and June 28, 2018, Ms. Bright had follow-up tests in Dr. Sorensen's office.[16]

16. On or about June 27, 2011, Dr. Sorensen's privileges at another hospital were suspended. St. Mark's CEO Steve Bateman and physician liaison Nikki Gledhill were aware of the suspension.[17]

17. St. Mark's knew about Dr. Sorensen's practices but did not inform Ms. Bright that she may have had a medically unnecessary surgery and chose not to reimburse her or her insurance company for the procedure. To this day, St. Mark's has actively concealed its knowledge about Dr. Sorensen's practices from patients, third party payors, and the public.[18]

18. Because of their fraudulent statements and omissions, Ms. Bright only learned of Defendants' misconduct as a result of lawyer advertising.[19]

19. Ms. Bright has suffered significant damages, including undergoing an unnecessary surgical procedure and hospital stay, paying significant medical expenses, physical pain, and emotional anguish.[20]

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[14] *Id.*, ¶ 34.

[15] *Id.*, ¶ 29.

[16] *Id.*, ¶¶ 30, 31.

[17] *Id.*, ¶ 19.

[18] *Id.*, ¶ 35.

[19] *Id.*, ¶ 37.

[20] *Id.*, ¶ 38.

RULING AND ORDER

Rule 12(b) Standard

On a rule 12(b)(6) motion, the court determines whether the plaintiff has alleged enough facts in the complaint to state a cause of action.[21] The court presumes "the factual allegations in the complaint are true and . . . draw[s] all reasonable inferences in the light most favorable to the plaintiff."[22] The court's sole concern is "the sufficiency of the pleadings, [and] not the underlying merits of [the] case."[23] Thus, a plaintiff's claims are subject to dismissal only when the allegations of the complaint "clearly demonstrate that the plaintiff does not have a claim."[24]

Collateral Estoppel (Issue Preclusion)

The Sorensen Defendants first argue that Ms. Bright's claims are barred by collateral estoppel because her allegations "are the same basic allegations asserted in the *qui tam* case and are based on the same facts and issues." As discussed at the hearing, the court is not persuaded by this argument because the issue decided in the qui tam case – whether Defendants "submitted objectively false claims for payment" – is not identical to the issues presented in this case. Nor have the Sorensen Defendants established the other elements of collateral estoppel, *i.e.*, that the parties are the same or in privity with each other or that the issues in this case have been completely, fairly, and fully litigated in the *qui tam* case.[25]

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[21] *Alvarez v. Galetka*, 933 P.2d 987, 989 (Utah 1997).

[22] *Commonwealth Prop. Advocates, LLC v. Mortg. Elec. Registration Sys., Inc.*, 2011 UT App 232, ¶ 16, 263 P.3d 397, 404.

[23] *Oakwood Vill. LLC v. Albertsons, Inc.*, 2004 UT 101, ¶ 8, 104 P.3d 1226, 1230 (citing *Alvarez*, 933 P.2d at 989).

[24] *Alvarez* at 989.

[25] *Gunmundson v. Del Ozone*, 2010 UT 33, ¶ 9, 232 P.3d 1059, 1067.

Statue of Repose

Defendants argue that Ms. Bright's claims are barred by the statute of repose set forth in the Utah Medical Malpractice Act. As set forth below and applying the motion to dismiss standard, the court is unable to conclude at this time that the statute of repose was not tolled as result of Defendants' alleged affirmative acts to fraudulently conceal their misconduct.[26]

"As a general rule, a statute of limitations begins to run upon the happening of the last event necessary to complete the cause of action."[27] Once a statute begins to run, a plaintiff must file her claim before the limitations period expires or the claim will be barred.[28] However, there are "two narrow settings in which a statute of limitations may be tolled until the discovery of facts forming the basis for the cause of action."[29] "The first setting . . . involves situations in which a relevant statute of limitations, by its own terms, mandates application of the discovery rule."[30] This setting is referred to as the statutory discovery rule. The second setting, which is referred to as the equitable discovery rule, applies *only* where a statute of limitations does not, by its own terms, already account for such circumstances."[31]

As a preliminary matter, the parties appear to agree that Ms. Bright's claims are subject to the statute of limitations found in the Utah Health Care Malpractice Act, which contains a statutory discovery rule. The Act also includes a statue of repose, which bars claims commenced more than four years after the date of the alleged act, omission, neglect, or occurrence"

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[26] At the hearing, Ms. Bright argued the foreign object exception of § 78B-3-404(2)(A) also applies. The court disagrees. The catheter was not "wrongly left" within her body. And there is no allegation that Ms. Bright did not know that it was placed in her body as part of the closure procedure.

[27] *Myers v. McDonald,* 635 P.2d 84, 86 (Utah 1981) (citation and internal quotation marks omitted).

[28] *See id.*

[29] *Russell Packard Dev., Inc. v. Carson,* 2005 UT 14, ¶ 21, 108 P.3d 741, 746

[30] *Id.*

[31] *Id.* at ¶ 25

regardless of when a plaintiff discovers her injury.[32] However, "in an action where it is alleged that a patient has been prevented from discovering misconduct on the part of a health care provider because that health care provider has *affirmatively acted to fraudulently conceal the alleged misconduct*, the claim shall be barred unless commenced within one year after the plaintiff or patient discovers, or through the use of reasonable diligence, should have discovered the fraudulent concealment, whichever first occurs."[33] Thus, "[i]n medical malpractice cases, the running of the statute of limitations [can only be] tolled when a patient has been prevented from discovering the malpractice by the health care provider's affirmative acts of fraudulent concealment."[34]

Defendants first argue Ms. Bright failed to plead fraudulent concealment with particularity under Rule 9(c). The court is not convinced that Rule 9(c) requires a plaintiff to plead defensive fraudulent concealment in her complaint in anticipation that a defendant may assert the statute of limitations or statute of repose in a motion to dismiss. With the exception of *Roth v. Pedersen* discussed further below, the appellate courts in the cases cited by Defendants were reviewing the district court's grant of summary judgment, not a dismissal under Rule 12(b).[35] The court accordingly rejects this argument at this juncture.

Turning to their primary argument, as the court understands it from the briefing and oral argument, Defendants assert the statute of repose was not tolled because Ms. Bright has not alleged "active" concealment. "Fraudulent concealment requires that one with a legal duty or

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[32] Utah Code Ann. § 78B-3-404(1).

[33] Utah Code Ann. § 78B-3-404(2) (emphasis added).

[34] *Roth v. Joseph*, 2010 UT App 332, ¶ 31, 244 P.3d 391, 398 (emphasis added) (citing *Chapman v. Primary Children's Hosp.*, 784 P.2d 1181, 1184–87 (Utah 1989) (applying statute)).

[35] *See Berenda v. Langford*, 914 P.2d 45 (Utah 1996) (summary judgment); *Chapman v. Primary Children's Hosp.*, 784 P.2d 1181 (Utah 1989) (summary judgment); *Roth v. Joseph*, 2010 UT App 332, 244 P.3d 391 (summary judgment); *see also Jensen v. IHC Hosps., Inc.*, 944 P.2d 327, 333 (Utah 1997) (motion in limine and trial).

obligation to communicate certain facts remain silent or otherwise act to conceal material facts known to him."[36] Defendants do not dispute that a health care provider is required to disclose "material information concerning the patient's physical condition. This duty to inform stems from the fiduciary nature of the relationship and the patient's right to determine what shall or shall not be done with his body."[37] But, Defendants argue, the statute's inclusion of the phrase "affirmatively acted" means that silence or "pure, uninvited non-disclosure" is not enough. According to Defendants, Ms. Bright must have "directly engaged with each defendant that she accuses of affirmatively fraudulently concealing her injury from her, and then the individual defendant must have done something affirmative to prevent her from discovering her legal injury." Defendants also appear to argue the "engagement" and "affirmative" responsive act must have occurred after the surgery.

Defendants' argument finds some support in the holding in *Roth v. Pedersen*, a short memorandum decision. The Utah Court of Appeals affirmed the grant of the motion for judgment on the pleadings because the plaintiff "failed, as required by the Act, to commence litigation within two years of discovery of his legal injury, which occurred, at the latest, in May 2006" when he initiated legal action against his general surgeon. The Court then addressed the plaintiff's alternative argument regarding fraudulent concealment. Because the plaintiff did not allege that he consulted with the defendant about the surgery or that the defendant provided him with information that misrepresented or concealed his involvement in the surgery, the Court affirmed the district court's dismissal of his claim "for failure to plead fraud with sufficient particularity."[38] In *Roth*, the plaintiff had inquiry notice. There was no such notice here.

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[36] *Jensen,* 944 P.2d at 333.

[37] *Nixdorf v. Hicken*, 612 P.2d 348, 354 (Utah 1980) (citations and internal quotation marks omitted).

[38] *Pedersen v. Roth*, 2009 UT App 313.

Even if the court were to ultimately rule the fraudulent concealment had to occur after the surgery, the court is not convinced that "affirmatively acted" in the context of this case means that Ms. Bright must have "directly engaged" with the Sorensen Defendants and St. Mark's *if* she can demonstrate they were in possession of specific facts they had a duty to disclose and the disclosure of such facts would have put her on notice of the alleged misconduct.[39] For St. Mark's, such facts may include Dr. Sorensen's suspension or any other specific information it may have had regarding Dr. Sorensen's alleged misconduct in connection with Ms. Bright's surgery. Finally, with respect to Dr. Sorensen, Ms. Bright has alleged some affirmative acts that occurred after the surgery, including his follow-up treatment and billing.

Defendants also argue that Ms. Bright has failed to allege she conducted any investigation or inquiry into the medical care she received from Dr. Sorensen, or that her investigation was thwarted by any alleged affirmative act on the part of Defendants. A plaintiff seeking to save her claims under the discovery rule must demonstrate she exercised reasonable diligence in not bringing her claims in a timely manner. This is a fact-intensive matter for the fact finder to ascertain except in only "the clearest of cases."[40] In determining reasonable diligence, the fact finder considers the "difficulty a plaintiff may have in recognizing and diligently discovering a cause of action when a defendant affirmatively and fraudulently conceals it."[41] Here, Ms. Bright's claims relate to an allegedly unnecessary surgery which did not have an adverse outcome or any complications. And, unlike in the cases cited, Defendants have failed to

[39] St. Mark's argues that it has no duty to "analyze and disclose judgments by a treating physician, particularly when no physical complication is alleged" or to "investigate all procedures performed in its cath lab for medical necessity." The court does not necessarily disagree. But the fact that St. Mark's may not have had a duty to analyze or investigate does not necessarily mean that it did not have a duty to disclose specific information it may have had related to Ms. Bright's surgery.

[40] *Russell Packard Dev., Inc.*, at ¶ 39.

[41] *Berenda*, 914 P.2d at 54.

identify any facts that Ms. Bright had knowledge of that would have put her on inquiry notice that the surgery was medically unnecessary.[42] As the Utah Supreme Court observed in *Colosimo*, Ms. Bright cannot be expected to inquire about the existence of a claim that is entirely concealed from her when there is nothing to put her on inquiry notice. Accordingly, the court is unable to conclude that her "failure to investigate possible misconduct" makes this one of the "clearest of cases" that warrants dismissal pursuant to a motion to dismiss.[43]

Having rejected Defendants' statute of repose arguments in light of the motion to dismiss standard, the court now turns to the other possible grounds for dismissing Ms. Bright's claims.

Ms. Bright's Negligence Claim (Second Claim for Relief)

Defendants argue that Ms. Bright's common law negligence claim is duplicative of her negligence (health care malpractice) claim. The court agrees because Ms. Bright has not identified a common law or statutory duty that Dr. Sorensen or St. Mark's owed her that is independent from the duty that arose from their provider-patient relationship. Accordingly, Ms. Bright's Second Claim for Relief should be dismissed because it fails to state a claim upon which relief may be granted.

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[42] *See Daniels v. Gamma West Brachytherapy, LLC*, 2009 UT 66, ¶ 30, 221 P.3d 256 ("it seems somewhat incongruous that an injured person must commence a malpractice action prior to the time he knew, or reasonably should have known, of his injury and right of action."); *Russell Packard Dev., Inc.* at ¶ 28 ("to permit one practicing a fraud and the concealing it to plead the statute of limitations when, in fact, the injured party did not know of and could not with reasonable diligence have discovered the fraud" would be "not only subversive of good morals, but also contrary to the plainest principles of justice"); *Foil v. Ballinger*, 601 P.2d 144, 147 (Utah 1979) (the law ought not to be construed to destroy a right of action before a person even becomes aware of the existence of that right) (all internal citations omitted).

[43] *See Day v. Meek*, 1999 UT 28, ¶ 21, 976 P.2d 1202 (interpreting statute in light of obvious unfairness of unreasonably barring claims that have been fraudulently concealed).

Ms. Bright's Negligent Credentialing Claim (Fourth Claim for Relief)

In support of her negligent credentialing claim against St. Mark's, Ms. Bright alleges that St. Mark's had a duty to "periodically monitor and review the qualifications and competency of its medical staff" and that it breached this duty, presumably in connection with its granting of privileges to Dr. Sorensen. However, "[i]t is the policy of this state that the question of negligent credentialing, as applied to health care providers in malpractice suits, is not recognized as a cause of action."[44] Accordingly, Ms. Bright's Fourth Claim for Relief should be dismissed because it fails to state claim upon which relief may be granted.

Fraudulent Non-Disclosure or Concealment (Fifth Claim for Relief)

To prevail on her fraudulent non-disclosure or concealment claim, "a plaintiff must prove the following three elements: (1) the nondisclosed information is material, (2) the nondisclosed information is known to the party failing to disclose, and (3) there is a legal duty to communicate."[45] Ms. Bright alleges Defendants "owed a duty [to] disclose important facts, such as the medical necessity of [her] medical care." This is simply the converse of her primary fraud and negligent misrepresentation allegation, *i.e.,* Dr. Sorensen told her the procedure was medically necessary because she had a high risk of stroke. Ms. Bright also fails to identify a duty different or separate from the duty that arises from the provider-patient relationship. Thus, the court concludes her fraudulent concealment claim against the Sorensen Defendants is subsumed within her malpractice, fraud, and/or negligent misrepresentation claims.

With respect to St. Mark's, the court agrees that Ms. Bright fails to state a claim upon which relief can be granted. She does not plead any facts from which the court may infer that St.

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[44] Utah Code Ann. §78B-3-425.

[45] *Hermansen v. Tasulis*, 2002 UT 52, ¶ 24, 48 P.3d 235

Mark's knew that her particular surgery was not medically necessary prior to the surgery.[46] And while St. Mark's alleged failure to notify patients that Dr. Sorensen's privileges had been suspended for performing unnecessary closure procedures may be sufficient to defeat a motion to dismiss based on the statute of repose, it cannot form the basis of an affirmative fraudulent concealment claim. Indeed, Ms. Bright could not have relied on St. Mark's silence regarding the suspension in agreeing to the surgery because the suspension happened after her surgery. Accordingly, the court dismisses Ms. Bright's fraudulent concealment claim.[47]

Ms. Bright's Other Claims Are Not Subsumed into a Single Malpractice Claim

Defendants argue Ms. Bright's other claims should be dismissed because they are subsumed into her First Claim for Relief for Negligence – Health Care Malpractice. Specifically, Defendants argue that all alleged breaches of duty in a provider-patient relationship are "properly actionable under the Utah Health Care Malpractice Act and not as separate claims." They base this argument on § 78B-3-403, which defines a malpractice action against a health care provider as "any action against a health care provider, whether in contract, tort, breach of warranty, wrongful death, or otherwise, based upon alleged personal injuries relating to or arising out of health care rendered or which should have been rendered by the health care provider."[48] Although the court agrees that Ms. Bright's negligence claim is subsumed within her malpractice claim, the court is not otherwise persuaded that the Act prevents Ms. Bright from bringing her negligent misrepresentation, fraud, and civil conspiracy claims, which do not necessarily depend upon an "alleged breach of duty to provide accurate information concerning the necessity of

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[46] In general, a hospital does not owe an independent duty to obtain a patient's informed consent to treatment. *See Buu Nguyen v. IHC Med. Servs., Inc.*, 2102 UT App 288, ¶ 11, 288 P.3d 1084.

[47] Additionally, if there is other material information that Defendants failed to disclose prior to her surgery, Ms. Bright has not sufficiently identified it as required by Rule 9(c) of the Utah Rules of Civil Procedure, which is discussed further below.

[48] Utah Code Ann. § 78B-3-403.

medical care relating to the PFO closure procedure" as argued by Defendants. Indeed, duty is not an element of a fraud, negligent misrepresentation, or civil conspiracy claim.

Rule 9(c)'s Particularity Requirement for Affirmative Claims

Ms. Bright's fraud, misrepresentation, and civil conspiracy claims against Defendants implicate Rule 9(c) of the Utah Rules of Civil Procedure, which requires a plaintiff to state with particularity the circumstances constituting the fraud. Pleadings satisfy this standard only if they include a sufficiently clear and specific description of the facts underlying the claim,[49] including the who, what, when, where, and how.[50] Defendants argue Ms. Bright has failed to satisfy this standard and, consequently, these claims should be dismissed. As discussed further below in connection with each claim, the court concludes that Ms. Bright has complied with Rule 9(c).

Negligent Misrepresentation and Fraud Claims (Third and Sixth Claims for Relief)

With respect to her fraud and negligent misrepresentation claims, Ms. Bright must prove "(1) that a representation was made (2) concerning a presently existing material fact (3) which was false and (4) which the representor either (a) knew to be false or (b) made recklessly, knowing that there was insufficient knowledge upon which to base such a representation, (5) for the purpose of inducing [her] to act upon it and (6) that [she], acting reasonably and in ignorance of its falsity, (7) did in fact rely upon it (8) and was thereby induced to act (9) to [her] injury and damage."[51]

The court concludes Ms. Bright has pled her fraud and negligent misrepresentation claims with sufficient particularity as to Dr. Sorensen. Ms. Bright alleges the "who" (Dr. Sorensen), "what" (false statement that she had a high risk of debilitating stroke and PFO closure

[49] *Carlton v. Brown*, 2014 UT 6, ¶ 8, 323 P.3d 571.

[50] *Webster v. JP Morgan Chase Bank, NA*, 2012 UT App 321, ¶19, 290 P.3d 930.

[51] *Fid. Nat. Title Ins. Co. v. Worthington*, 2015 UT App 19, ¶ 10, 344 P.3d 156, 159.

was necessary to prevent strokes), "where" (Dr. Sorensen's offices), "when" (November 4, 2009), and "how" (Dr. Sorensen told her the false statement directly and provided her with a handout containing false statements and data). She sets forth how she reasonably relied on the allegedly false statements in deciding to have the surgery and how she was damaged thereby.

In contrast, Ms. Bright has not pled these claims with sufficient particularity with respect to St. Mark's. It does not appear St. Mark's made any statements to Ms. Bright prior to the surgery. And to the extent her claims against St. Mark's are based on a failure to disclose, Ms. Bright has not alleged facts from which the court can infer that St. Mark's owed a duty to her prior to surgery or that she somehow relied on St. Mark's silence in deciding to have the surgery.

Civil Conspiracy (Seventh Claim for Relief)

With respect to her civil conspiracy claim, Ms. Bright must prove "(1) a combination of two or more persons, (2) an object to be accomplished, (3) a meeting of the minds on the object or course of action, (4) one or more unlawful, overt acts, and (5) damages as a proximate result thereof."[52] In addition, Ms. Bright must prove an underlying tort."[53]

The court determines that Ms. Bright has satisfied Rule 9(c) because she has sufficiently identified the co-conspirators (the Sorensen Defendants and St. Mark's), the object to be accomplished (increasing income for the Sorensen Defendants and profits for St. Mark's by performing medically unnecessary surgeries), the meeting of the minds (discussing during hiring and credentialing how Dr. Sorensen would perform the closures and under what circumstances, ignoring complaints by other physicians, providing special treatment to Dr. Sorensen, and advertising and promoting Dr. Sorenson's closure practice), the unlawful, over acts (making

[52] *Fid. Nat. Title Ins. Co.*, 2015 UT App at ¶ 16 (citing *Israel Pagan Estate v. Cannon,* 746 P.2d 785, 790 (Utah Ct.App.1987)).

[53] *Puttuck v. Gendron*, 2008 UT App 362, ¶ 21, 199 P.3d 971, 978.

fraudulent statements, performing medically unnecessary closures at St. Mark's, falsifying records), and the damages (undergoing and paying for a medically unnecessary surgery and follow-up treatment). Ms. Bright identifies the underlying tort as fraud.[54]

CONCLUSION

For the reasons set forth above, the Motions are granted in part and denied in part.

With respect to the Sorensen Defendants, their Motion is GRANTED as to (a) the Second Claim for Relief (Negligence) because it is duplicative of the First Claim for Relief (Negligence – Malpractice) and (b) the Fifth Claim for Relief (Fraudulent Non-Disclosure/Concealment) because it is subsumed within other claims and/or she has failed to plead it with the requisite specificity. The Motion is DENIED as to all other claims against the Sorensen Defendants.

With respect to St. Mark's, its Motion is GRANTED as to (a) the Second Claim for Relief (Negligence) because it is duplicative, (b) the Fourth Claim for Relief (Negligent Credentialing) because it is not recognized in Utah, and (c) the Third and Sixth Claims for Relief (Negligent Misrepresentation and Fraud) because Ms. Bright has not pled them with particularity. It is also GRANTED as to the Fifth Claim for Relief (Fraudulent Non-Disclosure/Concealment) because it is subsumed within other claims and/or she has failed to plead it with particularity. The Motion is DENIED as to all other claims against St. Mark's.

RULE 16 SCHEDULING CONFERENCE

At counsel's convenience, they should contact the court's judicial team to schedule a Rule 16 scheduling conference to discuss a scheduling order and the status of the other pending cases.

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[54] Although the court has dismissed the fraud claim against St. Mark's, this does not necessarily mean that a civil conspiracy claim based on a fraud also must be dismissed. *See, e.g., Israel Pagan Estate v. Cannon*, 746 P.2d 785, (because defendant did not, by its own actions, defraud plaintiff or authorize another to do so, defendant's liability can only be established by proving that it was engaged in a conspiracy to defraud).

SO ORDERED.

Dated this 20th day of June, 2018

Judge Laura S. Scott
Third Judicial District Court

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 170906790 by the method and on the date specified.

MANUAL EMAIL: KATHLEEN J ABKE kabke@strongandhanni.com
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Date: 06/20/2018

/s/ EMILY AGUILAR-CUESTA

Deputy Court Clerk

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

PIA MERLO-SCHMUCKER,	:	MINUTES
Plaintiff,	:	COURT RULING TELEPHONE CONFERENCE
	:	
vs.	:	Case No: 170906130 MM
SORENSEN CARDIOVASCULAR GROUP Et al,	:	Judge: PATRICK CORUM
Defendant.	:	Date: May 18, 2018

Clerk: nakian
TELEPHONE CONFERENCE

PRESENT
Plaintiff's Attorney(s): DAVID HOBBS
RAND PATRICK NOLEN
Defendant's Attorney(s): KATHLEEN J ABKE
MICHAEL J MILLER
ERIC P SCHOONVELD
ANDREW A WARTH

Audio
Tape Number: N42 Tape Count: 1200-14

HEARING

The matter before the court is set for a ruling via telephone conference.

Counsel and parties are present as listed.

The Court presents findings regarding St. Marks Hospital and issues ruling on the record.

1211
The Court presents findings regarding Dr. Sherman Sorensen and issues ruling on the record.

00346

1213
The Court order Mr. Nolen to prepare and submit formal findings to the court.

1214
Court is in recess.

Addendum B

Bright v. St. Mark's Hospital, et al – Minutes & Order on Motions to Dismiss

Merlo-Schmucker v. St. Mark's Hospital, et al. – Minutes & Order on Motions to Dismiss

Tapp v. Sorenson, et al. – Minutes & Order on Motions to Dismiss

The Order of the Court is stated below:
Dated: June 28, 2018 12:58:05 PM
/s/ PATRICK CORUM
District Court Judge

Rhome D. Zabriskie

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Counsel for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT – SALT LAKE CITY

SALT LAKE COUNTY, STATE OF UTAH

PIA MERLO-SCHMUCKER,	)	**ORDER**
	)	
	)	Case No. 170906130
Plaintiff,	)	**Judge Patrick Corum**
	)	
v.	)	
	)	
SHERMAN SORENSEN, M.D.;		

SORENSEN CARDIOVASCULAR GROUP; AND ST. MARK'S HOSPITAL,

Defendants.

Following full briefing, this matter came before the Court for hearing and argument on May 1, 2018. On May 18, 2018, Rand Nolen, David Hobbs, and Rhome Zabriskie appeared on behalf of Plaintiff Pia Merlo-Schmucker; Eric Schoonveld and Drew Warth appeared on behalf of Defendant St. Mark's Hospital ("St. Mark's"); and Michael Miller and Kathleen Abke appeared on behalf of Defendants Sherman Sorensen and Sorensen Cardiovascular Group ("Sorensen Defendants") for a telephonic ruling, which is reduced to writing here and is the Order of the Court.

The matters before the Court are St. Mark's Motion to Dismiss Plaintiffs' Amended Complaint and the Sorensen Defendants' Motion to Dismiss Plaintiffs' Amended Complaint. St. Mark's Motion to Dismiss will be GRANTED IN PART AND DENIED IN PART, and the Sorensen Defendants' Motion to Dismiss will be DENIED.

Both St. Mark's and the Sorensen Defendants moved to dismiss all claims in the Amended Complaint under Rule 12(b) on the grounds that all claims therein were barred by the four-year statute of repose found in 78B-3-404(1) and (2) of Utah's Medical Malpractice Act. Those provisions require that claims be brought within four-years of the date of the alleged act,

omission, neglect, or occurrence unless 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.

It is not clear from the Amended Complaint whether any Defendant acted affirmatively within the meaning of the statute to fraudulently conceal anything. The word "affirmatively" was presumably and advisedly put into the statute—78B-3-404(1)—with meaning, and it appears to have a meaning different from the common law. Under the statute, some affirmative act of concealment is necessary to maintain an otherwise time-barred action. Defendants' argument that inaction or omission by a defendant is not sufficient to overcome the time bar appears to be well taken.

That being said the Court is not convinced this issue is procedurally ripe at the Rule 12(b) stage and questions whether the Plaintiff is obligated to combat an affirmative defense, however likely or inevitably it is to be raised, in its initial pleading.

The Defendants have presented cases that clearly indicate that the Court has discretion to address these issues under a 12(b) motion, however those cases are distinguishable in the Court's view. *Roth v. Pederson* was a judgment on the pleadings so the procedural context is similar, but, based on what the Court can tell from the opinion, the relevant allegations in the *Roth* complaint regarding fraudulent concealment were extremely sparse and entirely conclusory. 2009 UT App 313, 2009 WL 3490974 (unpublished). That is not the case here; the allegations have more detail and more substance than what was apparently pled in *Roth. Tucker v. State Farm Mut. Auto. Ins. Co.* is more on point than *Roth* as it was a Rule 12(b) motion, converted into a Rule 56 Motion. *Tucker* clearly gives a court discretion to entertain statute of limitations defenses in a motion to

dismiss but did so under limited circumstances, which are not present here. 2002 UT 54, ¶ 8, 53 P.3d 947. In *Tucker* the plaintiff did not appear to offer any argument to counter the application of the statute of limitations and there did not appear to be any dispute as to whether it would have in fact barred the action, the plaintiff only argued that issue should not have be decided at that stage. It is a close call, but the Court feels the Plaintiff in this case has done enough to move her case into the next stage. Accordingly, the Court **DENIES** Defendants' Motions on the statute of limitations/repose issue.

Defendants also seek dismissal of Plaintiff's fraud-based claims for failure to allege them with particularity as required by Rule 9(c). First, as to Plaintiff's claim for negligent misrepresentation, the Court finds the Amended Complaint contains no particular allegations as to misrepresentations made by St. Mark's Hospital. Similarly, Plaintiff's fraud and fraudulent concealment claims (as opposed to the exception to the statute of repose) also fail as to St. Mark's for failing to satisfy Rule 9(c). Accordingly, the Court **GRANTS** St. Mark's Hospital's motion and **DISMISSES** the negligent misrepresentation (Count III), fraudulent concealment (Count V), and fraud (Count VI) claims as to St. Mark's Hospital. As to the Sorensen Defendants, the Court finds the Amended Complaint alleges with particularity the fraud-based claims. Accordingly, the Court **DENIES** the motions to dismiss the negligent misrepresentation, fraudulent concealment, and fraud claims as to the Sorensen Defendants. Further, the Court finds the Amended Complaint adequately alleges civil conspiracy and therefore **DENIES** the motions to dismiss the civil conspiracy (Count VII) claims as to all Defendants.

The Sorensen Defendants further argue that all of Plaintiff's claims should be dismissed under the doctrine of claim preclusion due to the dismissal of the separate *qui tam* action, which

involved claims by a relator under the federal False Claims Act. That dismissal is currently on appeal with the Tenth Circuit. I find that the issues in the *qui tam* and this action are not identical. Further, the parties are not identical, the parties are not in privity, and there has not been a final judgment in the *qui tam* action. Accordingly, the Court **DENIES** the Sorensen Defendants' motion to dismiss all claims under the doctrine of claim preclusion.

Finally, the Sorensen Defendants argue that Plaintiff's claims for negligence, negligent misrepresentation, fraud, and civil conspiracy are not cognizable as claims distinct from Plaintiff's medical negligence claim. While the Utah Health Care Malpractice Act does define a malpractice action to include any action against a health care provider, whether in contract, tort, breach of warranty, wrongful death, or otherwise, based upon alleged personal injuries relating to or arising out of health care rendered or which should have been rendered by the health care provider, it does so to identify the causes of action governed by the Act. But the Act does not foreclose a plaintiff from pleading different causes of action or create one omnibus cause of action. Accordingly, the Court **DENIES** the Sorensen Defendants' motion. The Court's signature appears at the top of the first page of this order.

*****Executed and entered by the Court as indicated by the date and seal at the top of the first page*****

----------**END OF DOCUMENT**----------

CERTIFICATE OF SERVICE

I hereby certify that that a true and exact copy of the foregoing has been served on the following via email on 18th day of June 2018, and was approved to form by all parties via electronic mail on that date:

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Attorney for Defendants Sherman Sorensen, M.D. and Sorensen Cardiovascular Group

/s/ David Hobbs
David Hobbs

The Order of the Court is stated below:
Dated: May 25, 2018
02:32:41 PM

At the direction of:
/s/ BARRY LAWRENCE
District Court Judge

by
/s/ NICOLE ODOHERTY
District Court Clerk

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

LISA TAPP,	:	MINUTES
Plaintiff,	:	TELEPHONE RULING
	:	
vs.	:	Case No: 170904956 MM
SHERMAN MD SORENSEN Et al,	:	Judge: BARRY LAWRENCE
Defendant.	:	Date: May 25, 2018

Clerk: nicoleo
TELEPHONE CONFERENCE

PRESENT
Plaintiff's Attorney(s): RHOME D ZABRISKIE
RAND PATRICK NOLEN
DAVID HOBBS
Defendant's Attorney(s): MICHAEL J MILLER
KATHLEEN J ABKE
ALAN C BRADSHAW
JOHN T NELSON
Audio
Tape Number: W37 Tape Count: 10.33-11.04

HEARING

This is the time set for a Telephone Ruling.

10.33 -The Court read its ruling on the record. The Court DENIED all of the Motions to Dismiss relating to the statute of limitations defense, but GRANTED IHC's Motion to dismiss the fraud claim(s) against it, and GRANTED Sorenson's motion to dismiss the Conspiracy claim for the reasons stated on the record. Mr. Nolan is to prepare the Order.

After reading the Court's ruling, the parties discussed the manner in which to proceed.

At the conclusion of the discussion, the Court entered the following Scheduling Order:

1. The Court would like to proceed with this matter as a bifurcated proceeding as allowable under the Medical Malpractice Act.
2. The parties are to meet and confer by Friday June 8, 2018, to attempt to agree on a discovery plan relating to the statute of limitations issue only. The discovery plan should address the discovery mechanisms to be used and any limits in and and parameters of discovery.
3. In the even the parties are unable to reach a stipulation, the parties will submit their respective proposed discovery plans to the Court by Friday June 22, 2018, after which the matter should be submitted for decision. The Court will then enter an Order stating the parameters of discovery based on its interpretation of the governing statute -- 78B-3-404(2)(b).
4. The Court will hold off signing the Order on the Motion to Dismiss until it enters the Discovery Order.
5. At that point, it might make sense for the parties to seek interlocutory relief regarding the Court's determination regarding the interpretation of the statute and resulting discovery order.

End Of Order - Signature at the Top of the First Page

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

LISA TAPP,	:	MINUTES
Plaintiff,	:	TELEPHONE RULING
	:	
vs.	:	Case No: 170904956 MM
SHERMAN MD SORENSEN Et al,	:	Judge: BARRY LAWRENCE
Defendant.	:	Date: May 25, 2018

Clerk: nicóleo
TELEPHONE CONFERENCE

PRESENT
Plaintiff's Attorney(s): RHOME D ZABRISKIE
RAND PATRICK NOLEN
DAVID HOBBS
Defendant's Attorney(s): MICHAEL J MILLER
KATHLEEN J ABKE
ALAN C BRADSHAW
JOHN T NELSON
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5. At that point, it might make sense for the parties to seek interlocutory relief regarding the Court's determination regarding the interpretation of the statute and resulting discovery order.

End Of Order - Signature at the Top of the First Page

The Order of the Court is stated below:
Dated: August 09, 2018 10:29:54 AM
/s/ BARRY LAWRENCE
District Court Judge

Rhome D. Zabriskie

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Counsel for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT – SALT LAKE CITY

SALT LAKE COUNTY, STATE OF UTAH

LISA TAPP, Plaintiff, v.	))))))	~~**PROPOSED**~~ **ORDER** Case No. 170904956 **Judge Barry Lawrence**

SHERMAN SORENSEN, M.D.; SORENSEN CARDIOVASCULAR GROUP; AND IHC HEALTH SERVICES, INC., Defendants.	)	

This matter having come before the Court on May 25, 2018 before the Honorable Judge Barry Lawrence. Rand Nolen, David Hobbs, and Rhome Zabriskie appeared on behalf of Plaintiff Lisa Tapp. Alan Bradshaw and Jack Nelson appeared on behalf of Defendant IHC Health Services, Inc., and Michael Miller and Kathleen Abke appeared on behalf of Defendants Sherman Sorensen and Sorensen Cardiovascular Group. The matter before the Court was a hearing on Defendants' motions to dismiss Plaintiffs' amended complaint.

The Court notes the relevant procedural history. After plaintiff filed her Complaint, a motion to dismiss was filed, followed by a request to file an amended complaint. On February 20, 2018, the Court held argument on the motion to amend and rejected defendants' futility arguments in an Order dated March 7, 2018. After the Amended Complaint, was filed another set of motions to dismiss were filed; they were heard on May 14, 2018. The Court announced its ruling in a telephone conference on May 25, 2018. That ruling is reflected herein; but to the extent that ruling differs from this Order, the oral ruling should control.

Having considered the motions, the Court dismisses the fraud/misrepresentation claims against IHC Health Services, Inc. and the conspiracy claim as to all Defendants. Other than that, the Court denies the motions, leaving the negligence claims against Dr. Sorensen, the negligence claims against IHC Health Services, Inc., and the fraud/misrepresentation claims against Dr. Sorensen.

The Court concludes that it cannot rule on the statute of limitation/repose defense based on the pleadings. Plaintiff is not obligated to plead with particularity in her complaint facts in response to the statute of limitation/repose defense. The Plaintiff is not obligated to meet a heightened pleading requirement relating to facts that would serve to defeat an impending defense. *Zoumadakis v. Uintah Basin Med. Ctr., Inc.*, 2005 UT App 325, ¶ 6, 122 P.3d 891, 893–94 ("the burden of pleading the inapplicability of [privilege] is not initially on the plaintiff, and it is not incumbent on the plaintiff or party filing a complaint to anticipate an affirmative defense which the answer may disclose").

The Court is not persuaded by the Defendants' argument to the contrary, and there is a distinction for cases where the complaint is "facially invalid" or untimely. The Court reads Defendants' cited cases as standing for the proposition that when all the facts necessary to determine an affirmative defense are stated in the complaint, then the affirmative defense can be resolved in a Rule 12 motion. That is not the case here where the facts of fraudulent concealment are not in the complaint and can't be unless the issue is before the Court in full.

In *Tucker v. State Farm Mut. Auto. Ins. Co.*, 2002 UT 54, ¶ 8, 53 P.3d 947, all of the

applicable dates were in the complaint and so the court ruled as a matter of law. There was no assertion of a defense to the defense of statute of limitation, and so it was not inappropriate for the court to rule. Again, it appears to the Court that all facts necessary to decide the Rule 12 motion were in the complaint, which again is a far cry from this case. *Van De Grift v. State*, 2013 UT 11, 299 P.3d 1043 was dismissed on immunity grounds because there is immunity for claims that arise based on fraud and the complaint alleged facts of fraud. *Bivens v. Salt Lake City Corp.*, 2017 UT 67 involved exhaustion of remedies, which is a jurisdictional issue. There the complaint made clear that there was no exhaustion. And, in footnote the *Bivens* court said: "We do not hold today that a plaintiff's complaint must affirmatively plead exhaustion of legal remedies." And in *Lowery v. Brigham Young University*, 2004 UT App 182, the complaint on its face reflected when the plaintiff discovered his claim, which meant that as a matter of law, the discovery rule could not apply and, therefore, the court could rule on the pleadings. None of these 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. The issue of whether the plaintiff can prove fraudulent concealment required under § 78B-3-404 will have to be based upon what we learn factually in discovery and to be decided at summary judgment or at trial. Accordingly, the Court **DENIES** all of the statute of limitations issues raised by the Defendants.

The Sorensen Defendants argue that Plaintiff's claims should be consolidated into one medical malpractice claim. While the Utah Health Care Malpractice Act does have a broad definition of what a malpractice claim is for procedural purposes, the Court is not aware of any

authority that prevents a plaintiff from asserting alternative facts of fraud or negligence against Dr. Sorensen, and the elements of each would have to be proven at trial. However, the Court notes that it appears that there are multiple claims of negligence and multiple claims of fraud, and The Court will not dismiss those at this time. The plaintiff is certainly entitled to pursue its claims. But ultimately at trial, there will be one negligence claim against Dr. Sorensen and one fraud claim and if the standard of care encompasses various things that's fine, but those are not separate claims. Accordingly, the Court **DENIES** the Sorensen Defendants' motion.

IHC Health Services, Inc.'s motion to dismiss the misrepresentation claims is **GRANTED**. It is important to note that there is a distinction here between the fraud associated with the 2008 surgery and any alleged fraud that took place thereafter that is relevant to statute of limitation/repose. The allegations of IHC Health Services, Inc.'s fraud in inducing Ms. Tapp to have surgery are non-existent. There is nothing but conclusory statements where the plaintiff lumps the "defendants" in together and there is not one fact in the complaint that would support that IHC Health Services, Inc. was somehow involved in a fraud in 2008. There is no fact stated in the complaint that even alleges, let alone with any degree of particularity, as required under Rule 9, U.R.C.P., that IHC Health Services, Inc. was involved in a fraud on Plaintiff in 2008. So that claim against IHC Health Services, Inc. is **DISMISSED**. The fraud claim against Dr. Sorensen will survive and the motion **DENIED**. There are ample allegations of facts supporting this fraudulent inducement theory in 2008 by Dr. Sorensen. But there is absolutely nothing demonstrating any fraud by IHC Health Services, Inc. or any sort of illegal conduct or wrong by IHC Health Services, Inc. and the predicate for a conspiracy claim has not been alleged. There

are no facts alleged against IHC Health Services, Inc. of fraud and conspiracy at the time the surgery was done.

The conspiracy claim, like the fraud claims, is governed by Rule 9 and Rule 9 requires a showing of particularity. *Williams v. State Farm*, 656 P.2d 966 (1982); *Coroles v. Sabey*, 2003 UT App 339, 79 P.3d 974 (2003); *Fidelity Nat. Title Ins. Co. v. Worthington*, 2015 UT App 19, 344 P.3d 156. Having dismissed fraud claims against IHC Health Services, Inc. the Court is compelled to dismiss the conspiracy claim between the Defendants as well. (Having dismissed the underlying predicate for the conspiracy claim (i.e., the fraud claim), there can be no conspiracy claim as a matter of law.). The Court **GRANTS** Defendants' motions as to conspiracy and **DISMISSES** the conspiracy claim against all Defendants.

In summary, the Court:

GRANTS IHC Health Services, Inc.'s motion as to the misrepresentation claims and **DISMISSES** the Third; Fifth; and Sixth Claims for Relief against IHC Health Services, Inc.;

GRANTS the Defendants' motions as to the conspiracy claim and **DISMISSES** the Seventh Claim for Relief against all Defendants; and otherwise

DENIES the motions to dismiss.

*****Executed and entered by the Court as indicated by the date and seal at the top of the first page*****

----------END OF DOCUMENT----------

Approved as to form:

ZABRISKIE LAW FIRM

/s/ Jack T. Nelson (signed with permission on behalf of David Hobbs)
David Hobbs

Attorneys for Plaintiff

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/s/ Jack T. Nelson
Alan C. Bradshaw
John T. (Jack) Nelson
Attorneys for IHC Health Services, Inc.

STRONG & HANNI

/s/ Jack T. Nelson (signed with permission on behalf of Michael J. Miller)
Michael J. Miller
Attorneys for Sorensen Defendants

CERTIFICATE OF SERVICE

I hereby certify that that a true and exact copy of the foregoing has been served on the following via email on 31st day of July 2018:

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Attorney for Defendants Sherman Sorensen, M.D. and Sorensen Cardiovascular Group

/s/ Jack T. Nelson

Addendum C

Bright v. St. Mark's Hospital, et al – Amended Complaint

Merlo-Schmucker v. St. Mark's Hospital, et al. – Amended Complaint

Tapp v. Sorenson, et al. – Amended Complaint

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Counsel for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT – SALT LAKE CITY

SALT LAKE COUNTY, STATE OF UTAH

JOHANNAH BRIGHT, Plaintiff, v. **SHERMAN SORENSEN, M.D.; SORENSEN CARDIOVASCULAR GROUP; AND ST. MARK'S HOSPITAL,** Defendants.	**FIRST AMENDED COMPLAINT** **(Tier 3 Filing)** **(Jury Demanded)** **Civil No. 170906790** **Judge: Laura Scott**

COMES NOW Plaintiff, by and through counsel, and hereby complain for causes of action against the above-captioned Defendants, alleging as follows:

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff Johannah Bright is, and at all relevant times has been, a resident of Davis County, State of Utah.

2. Defendant SHERMAN SORENSEN, M.D. was, at all relevant times, a licensed physician providing health care services in Salt Lake County, State of Utah.

3. Defendant SORENSEN CARDIOVASCULAR GROUP (SCG), was at all material times, a Utah professional corporation in the business of providing health care services to residents of Utah. Defendant SCG's principal place of business is located at 5169 Cottonwood Street, No. 610, Murray, Utah. Defendant Sherman Sorensen owned and operated SCG as his primary medical practice.

4. Defendant ST. MARK'S HOSPITAL. (St. Mark's) is a for-profit corporation based in Salt Lake City, Utah with its principal place of business and corporate office at 1200 E 3900 S Salt Lake City, UT 84124. St. Mark's Registered Agent for Service CT Corporation System, 1108 E South Union Ave., Midvale UT 84047.

5. Upon information and belief, at all material times, each of the Defendants were, or may have been, an agent, servant, employer, employee, joint venture, partner, and/or alter ego of one or more of each of the remaining Defendants, and were at all times acting within the purpose and scope of such agency, servitude, joint venture, alter ego, partnership, or employment, and with the authority, consent, approval, and/or ratification of each remaining Defendant.

6. At all material times, Defendants were health care providers within the meaning of the Utah Health Care Malpractice Act, Utah Code Ann. § 78B-3-401 et seq., and each Defendant provided health care services to Plaintiff.

7. This Court has jurisdiction over this action pursuant to Utah Code Ann. § 78A-5-102.

8. Venue is proper in this Court pursuant to Utah Code Ann. § 78B-3-307.

9. In bringing this action, Plaintiff complied with all statutory requirements regarding pre-litigation review of this matter as set forth in the Utah Health Care Malpractice Act, Utah Code Ann. § 78B-3-416.

BACKGROUND

10. This case is one of more than a thousand cases that are presently working their way through the prelitigation process, which involve the medically unnecessary heart surgery by Dr. Sherman Sorensen related to two kinds of holes in the heart. One is called an atrial septal defect (ASD), and the other is a patent foramen ovale (PFO). Both are holes in the wall of tissue (septum) between the left and right upper chambers of the heart (atria). An ASD is considered a birth defect and is a failure of the septal tissue to form between the atria, PFOs can only occur after birth when the foramen ovale fails to close.[1]

11. Life threatening ASD's are generally discovered at birth and corrected immediately. However, there are billions of adults who have small openings between the left and right atriums of their hearts. The foramen ovale is an opening located in the wall separating the two upper chambers of the heart, the atrial septum, which is used during fetal circulation to redirect blood through the heart. In 75% of the population, the foramen ovale closes at birth when increased blood pressure on the left side of the heart forces the opening to close. In those cases, where the foramen ovale does not close at birth, a patent foramen ovale (PFO) results.

12. Approximately 25% of the healthy population have a PFO and will never require any treatment or evaluation. Apart from extremely rare cases, patients with a PFO remain completely unaware of the presence of the PFO because it's almost never associated with symptoms. Persistent patency of the foramen ovale is considered a normal anatomic variation.

[1] Dr. Sorensen at times earlier in his career referred to these two conditions interchangeably, but for insurance reimbursement purposes decided that all PFO's were ASD's later in his practice. Either way, and no matter what he called them, he closed holes indiscriminately and without medical justification on thousands of people, including the Plaintiff.

13. Only if a patient has a recurrence of cryptogenic (originating from unexplained causes) stroke or transient ischemic attack (TIA), likely due to paradoxical embolization through a PFO, and despite optimal medical therapy, may it be appropriate to close the PFO. Generally, this closure is performed through a percutaneous surgical procedure. In the percutaneous procedure, a patient undergoes a cardiac catheterization to determine the size and location of the PFO.

14. There has long been general agreement in the medical community—as far back as 2003—that PFO closure is not medically necessary, except in the limited circumstances where there is a confirmed diagnosis of a recurrent cryptogenic stroke or TIA, despite optimum medical management. At all material times, no widely accepted medical group specializing in cardiology in the United States has ever recommended, advised, or suggested that closure is appropriate for stroke or migraine prevention to patients that have not had recurrent cryptogenic strokes.

GENERAL ALLEGATIONS

15. The following general allegations are common to all claims alleged herein:

16. As noted, Defendant Dr. Sorensen is a cardiologist and was practicing interventional cardiology. He had privileges at Defendant St. Mark's and at other hospitals. From roughly 2002 to 2012, Defendant Sorensen performed more than 4,000 PFO and ASD closures, many of those at St. Mark's. Dr. Sorensen performed the procedures at a rate that dwarfed the rest of the country by a factor of ten-to-twenty fold, making him a true outlier.

17. The administration at St. Mark's was on notice because of the sheer volume of the procedures performed by Defendant Sorensen and because of complaints from other practitioners and employees that Defendant Sorensen was engaged in a practice of regularly performing

unnecessary, invasive cardiac procedures on his patients. St. Mark's ignored obvious warnings to halt these procedures so that it could secure and maintain a lucrative stream of income.

18. Further, during the hiring and credentialing process at St. Mark's, Sorensen advised St. Mark's representatives of how he would perform closures and under what conditions. And a result, St. Mark's was aware that he would be performing unnecessary closures on patients that did not have recurrent cryptogenic strokes.

19. Further, Sorensen's cardiac privileges at another hospital were suspended on or about June 27, 2011, following an internal investigation concluded that Sorensen had performed multiple, medically unnecessary PFO closures and that Sorensen represented a threat to the health and safety of the patients treated. And St. Mark's CEO Steve Bateman and physician liaison Nikki Gledhill were aware of Sorensen's suspension.

20. Defendants Sorensen and St. Mark's created false statements and documents to conceal the fact that Sorensen was performing medically unnecessary closures. These statements include documenting migraine or stroke history where none existed. For instance, Sorensen often created medical charts that falsely reflected that the patients had suffered from, or were at risk of suffering from, recurrent cryptogenic stroke in order to get insurance to pay for the procedure. The effort to disguise the true diagnosis and reason for the closures shows that Sorensen was always aware of and understood the true standard of care for these procedures.

21. Sorensen would routinely mislead his patients, who had no previous strokes or TIAs, into believing that they were at extreme risk of debilitating stroke because of their PFO or ASD. He would further mislead them that a closure procedure would be effective and was medically necessary in order to prevent strokes. These misrepresentations were made to the vast majority of his patients, including Plaintiff.

22. Despite the fact that St. Mark's knew that Sorensen was performing medically unnecessary closures, and knew that Sorensen had been suspended for performing medically unnecessary closures at another hospital, St. Mark's Hospital continued to court Sorensen's business, provide a platform and assistance to Sorensen, and advertise and promote Sorensen and closure practice to the public for its own financial gain.

23. In particular, the catheterization lab staff at St. Mark's became financially dependent on Sorensen's incredible volume. The majority of patients at St. Mark's cardiac catheterization laboratory came from Sorensen, dwarfing all other cardiology business at St. Mark's. As a result, St. Mark's provided special treatment to Sorensen with staffing and scheduling in its catheterization lab, often to the detriment of true cardiac patients and other cardiologists. St. Mark's also provided open access for PFO industry representatives to the lab and personnel. Industry provided order-in meals were available to those catheterization lab personnel that were willing to share in the largesse.

24. Ultimately, St. Mark's made a deliberate and conscious decision not to inform patients that they may have had a medically unnecessary surgery, and chose not to reimburse Plaintiff, her insurance company, or any of its other patients who had procedures performed unnecessarily. Instead, St. Mark's kept the profits for itself.

PLAINTIFF'S CLOSURE AND INJURIES

25. On 9-21-07, Ms. Bright was seen in referral by Sorensen for migraine headaches and a transesophageal echocardiogram reported to show right to left shunting across the atrial septum. On 9-21-07, in Dr. Sorensen's office, Ms. Bright underwent a transthoracic echocardiogram (TTE) with bubble study and a transcranial doppler study (TCD). The echocardiogram was interpreted to show "severe rest and valsalva shunt by bubble study." The

TCD was interpreted to show conductance grade of 4/5 at rest and 5/5 with calibrated respiratory strain. Dr. Sorensen noted that the patient has described "minor palpitations."

26. On 10-1-07, a brain MRI is performed at Western Neurological Associates. It was interpreted as "normal contrast-enhanced MRI of the brain."

27. On 11-28-07, Ms. Bright was seen in office follow-up by Dr. Sorensen. He did not recommend closure of her septal defect: "The options for closure for stroke prevention [were] reviewed but she [did] not have risk stratification features other than migraine." Dr. Sorensen asked Ms. Bright to consider enrolling in a randomized trial called the PREMIUM trial. That never occurred.

28. On 11-4-09, a repeat consult was performed by Dr. Sorensen. Dr. Sorensen's neurologic exam on Ms. Bright was not comprehensive. For instance, it did not include a sensory exam. In the impression section of this history and physical, Dr. Sorensen dictated: "This woman has high risk features for stroke which include the presence of progressive migraine, moderately severe persistent shunting, severe Valsalva shunting, and an interatrial septal aneurysm." This note was contrary to his previous note of 11-28-07 in which he dictated: "but she does not have risk stratification features other than migraine."

29. On 12-15-09, Dr. Sorensen performed an intracardiac echo-guided septal defect closure. He deployed a 20 mm Gore HELEX device.

30. On 3-18-10, Ms. Bright underwent a TTE and a TCD in Dr. Sorensen's office. Both studies demonstrated the presence of a residual shunt. A bubble study during the echocardiogram showed "mild right to left shunt at rest" and moderate right to left shunt" after valsalva. The TCD is interpreted to show a conductance grade of 2/5 at rest and 4/5 during calibrated respiratory strain. Dr. Sorensen's TCD reports gave slightly different guidelines for a "diagnostic TCD"

versus a "post-device TCD." In the diagnostic TCD, a conductance grade of 4/5 is termed a "mild to moderate" shunt with moderate probability for PFO, ASD, or AVM. There was a "low risk for stroke." In the post device TCD, a conductance grade of 4/5 is termed a "mild residual shunt." A conductance grade of 5 or 5+/5 in a post device TCD is termed a "significant residual shunt" and "further evaluation is indicated."

31. On or about June 28, 2010, Ms. Bright had a 6 month follow TTE and TCD. These studies were interpreted to show a decrease in the magnitude of the residual shunt. The echocardiogram was interpreted to show no right to left shunt at rest and a mild right to left shunt with valsalva. The TCD was interpreted to show 1/5 conductance grade at rest and 3/5 conductance grade with calibrated respiratory strain. The guidelines included in the TCD report indicates that a 3/5 conductance grade means "no significant shunt."

32. The accepted indications for closure of an atrial septal defect include right ventricular chamber enlargement, orthodeoxia-platypnea, and paradoxical embolism. Ms. Bright did not have the first two. And, Dr. Sorensen failed to perform the appropriate assessment as to the last.

33. In a patient with strong or definitive evidence for embolic stroke, the standard of care requires a comprehensive evaluation for all of the causes of embolic stroke. This was not performed by Dr. Sorensen in his care of Ms. Bright. A comprehensive evaluation for causes of "cryptogenic" stroke includes an MRI of the brain, imaging of the extra cranial and intracranial cerebral arteries, 3-4 week rhythm monitoring to look for paroxysmal atrial fibrillation, imaging of the aorta to look for atherosclerotic disease, lower extremity venous doppler/ultrasound, MRV of the abdominal and pelvic veins, and a hyper coagulability workup. Here, Dr. Sorensen did not meet this standard of care by, among other things, failing to give the details of alleged trans

ischemic attacks that Sorensen (not a neurologist) diagnosed, failing to get a neurology consultation, failing to have neuro-cognitive testing performed to document "cognitive decline," and failing to repeat a brain MRI to look for objective evidence of stroke. In short, Sorensen did not perform the required comprehensive evaluation.

34. To persuade Ms. Bright to undergo closure, Sorensen represented to her that she was at high risk of a debilitating stroke due to the presence of her PFO/ASD and that closure was medically necessary. In truth, the mere presence of the defect, without more, including a history of cryptogenic stroke, is not a significant risk factor for stroke. Further, Sorensen passed out a Patient Information Patent Foreman Ovale (PFO) handout to Ms. Bright. Sorensen's patient literature contained fraudulent misrepresentations, unsupported data and statistics, outright falsehoods, and other misleading statements, such as the following:

- "Until recently, 40% of all strokes were unknown cause. We now know that most of these unexplained strokes may be caused by a PFO (Patent Foramen Ovale)"
- "Strokes resulting from septal defects have a 50% mortality rate."
- "PFO is diagnosed in 50-70% of patients with stroke of unknown cause"
- "Continued lifelong risk of stroke ranging from 2-9% each year."
- "Stroke reduction to less than 1%"
- "Septal Defect Closure Safety and Efficacy"
- "Our rigorous Program requirements assure that you are informed and receive the safest and most effective treatment"

In addition, to the handout Sorensen made other misrepresentations to Ms. Bright both orally and in writing. These misrepresentations include:

- "Our approach is a preventative strategy. It is scientifically based, but it is an aggressive strategy." In fact, Dr. Sorenson's method has never been accepted in any scientific journal, organization, been approved for a randomized clinical trial, and/or the peer review process for his data and proposed indication for PFO closure. "We, therefore follow a preventative strategy and risk stratify patients based on the studies...proposed by the American Academy of Neurology." That is false; the AAN did not recommend closure outside of clinical trials and encouraged patients to participate in research protocols.
- "8 studies demonstrate that very high flow is the main feature of stroke risk." In fact, the AAN Practice Parameter did not find an association, much less causation, of shunting and risk of stroke recurrence.
- "Randomized trials are not available currently." In reality, the Closure I trial was opened in Salt Lake City, Utah. It was halted due to Defendant Sorensen's medically unnecessary off-label PFO procedures of patients outside the trial.
- "Coumadin is considered to be unsafe and ineffective...based on studies." In fact, the SPIRIT, WASID and WARRS studies referenced by Sorensen showed no such thing.
- Sorenson certified that his echocardiography lab was certified by ICAEL (Intersocietal Commission for Accreditation Laboratories) using the ICAEL logo on his echochardiogram. In fact, his lab was never accredited by ICAEL and this was false.

These false statements were intended to and did in fact induce Ms. Bright to undergo closure at St. Mark's by inducing fear of an imminent and debilitating stroke, downplaying safer and accepted treatment options, misrepresenting the indication for closure, and downplaying the risks of closure.

35. Despite St. Mark's awareness of Sorensen's fraudulent and/or negligent practices, it did nothing to notify Ms. Bright. Instead, St. Mark's actively allowed Sorensen's practice to continue in order to profit from the thousands of unnecessary procedures performed on patients like Ms. Bright. In fact, St. Mark's has to this day actively concealed its knowledge about Sorensen's rogue and fraudulent practices at its facility from patients, third party payers, and the public, and has retained the money earned off of Sorensen's medically unnecessary surgeries.

36. Ms. Bright could not have known that the information provided by Defendants was false. Instead, she trusted that Defendants Sorensen and St. Mark's, as her health care providers, were being truthful. Further, even if she had been aware of some of the factual mischaracterizations, as a non-expert she could not have understood their implications as it relates the appropriateness of her medical treatment.

37. Because of Defendants' fraudulent statements and omissions, Ms. Bright was until recently unaware of her cause of action. In fact, Ms. Bright only learned of the Defendants' misconduct as a result lawyer advertising. Her diligent investigation resulted in the noticing and filing of this action within the statutory period.

38. Because of Defendants' conduct, Ms. Bright suffered significant damages, including:

i. undergoing an unnecessary surgical procedure and hospital stay,

ii. paying significant medical expenses to Defendants,

iii. physical pain, and

emotional anguish as a result of being told she was at immediate risk of a debilitating or even deadly stroke.

FIRST CLAIM FOR RELIEF: NEGLIGENCE (HEALTH CARE MALPRACTICE)

39. Plaintiff refers to and incorporates the preceding paragraphs as if set forth fully herein.

40. Defendants, individually, collectively, and through the acts and omissions of their agents, servants, employees, physicians, nurses, therapists, and technologists (hereinafter collectively "Defendants") accepted Plaintiff as a patient, and thereby assumed various duties of care.

41. At all relevant times, Defendants held themselves out as being able to provide full care and treatment for patients requiring medical care of the type that Plaintiff required.

42. The degree of care and treatment provided to Plaintiff fell below the acceptable standards of care for the types of medical care and treatment required by Plaintiff and provided by Defendants.

43. Specifically, Defendants breached the applicable standards of care in multiple ways including, but not limited to:

a. Falsifying Plaintiff's medical records to indicate that Plaintiff was an appropriate candidate for closure;
b. Misleading Plaintiff regarding the risks and benefits associated with closure and regarding the necessity of treatment;
c. Failing to obtain an adequate history which resulted in an improper medical diagnosis that Plaintiff was an appropriate candidate for closure;
d. Failing to conduct an adequate physical and to obtain appropriate diagnostic testing, which resulted in an improper medical diagnosis that Plaintiff was an appropriate

candidate for PFO closure; Performing a medically unnecessary medical procedure with a device that was not FDA approved for this use; and

44. As a sole, proximate, and foreseeable result of Defendants' acts and omissions, Defendants caused Plaintiff to undergo unnecessary medical procedures, testing, and follow-up visits, incur unnecessary medical expenses, and experience physical injuries and emotional anguish.

45. As a sole, proximate, and foreseeable result of Defendants' acts and omissions, Plaintiff has suffered personal injuries, including by not limited to unnecessary medical procedures, testing, follow-up visits, medical expenses, and emotional anguish.

46. Plaintiff has therefore been injured and is entitled to recover general and special damages in an amount to be determined at trial.

SECOND CLAIM FOR RELIEF: NEGLIGENCE

47. Plaintiff refers to and incorporates the preceding paragraphs as if set forth fully herein.

48. At all relevant times, Defendants owed Plaintiff various duties of care, including but not limited to common law and statutory duties.

49. Defendants, individually and collectively, breached these duties of care.

50. As a sole, proximate, and foreseeable result of Defendants' acts and omission, Defendants caused personal and other injuries to Plaintiff.

51. Plaintiff has been injured and is entitled to recover general and special damages in amounts to be determined at trial.

THIRD CLAIM FOR RELIEF: NEGLIGENT MISREPRESENTATION

52. Plaintiff refers to and incorporates the preceding paragraphs as if set forth fully herein.

53. Defendants, individually and collectively, represented to Plaintiff that medical procedures, testing, and follow-up visits were medically necessary.

54. Defendants' representations that Plaintiff's medical procedures, testing, and follow-up visits were medically necessary was, in fact, not true.

55. Defendants failed to use reasonable care to determine whether the representations regarding the necessity of Plaintiff's medical care was true.

56. Defendants were in a better position than Plaintiff to know the true facts regarding Plaintiff's medical procedures, testing, and follow-up care.

57. Defendants had a financial interest in performing medically unnecessary procedures, testing, and follow-up care on Plaintiff.

58. Plaintiff relied on Defendants' representations, and it was reasonable for her to do so.

59. Plaintiff has therefore been injured as a result of relying on Defendants' representations and is entitled to recover general and special damages in an amount to be determined at trial.

FOURTH CLAIM FOR RELIEF: NEGLIGENT CREDENTIALING

60. Plaintiff refers to and incorporates the preceding paragraphs as if set forth fully herein.

61. Defendant St. Mark's owes a duty to patients to exercise reasonable care in the selection of its medical staff and in granting specialized privileges to them. It also has the duty to periodically monitor and review the qualifications and competency of its medical staff.

62. Defendant St. Mark's breached its duty to exercise reasonable care in its selection of its medical staff, and in granting specialized privileges to and periodically monitoring and reviewing the qualifications and competency of its medical staff.

63. As a sole, proximate, and foreseeable result of its breach, Defendant St. Mark's caused harm to Plaintiff.

64. Plaintiff has been injured and is entitled to recover general and special damages in an amount to be determined at trial.

FIFTH CLAIM FOR RELIEF: FRAUDULENT NON-DISCLOSURE/CONCEALMENT

65. Plaintiff refers to and incorporates the preceding paragraphs as if set forth fully herein.

66. Defendants owed a duty to Plaintiff to disclose important facts, such as the medical necessity of Plaintiff's medical care, to Plaintiff.

67. Defendants knew that the medical care Defendants provided to Plaintiff was not medically necessary, and failed to disclose this to Plaintiff.

68. Plaintiff did not know that the medical care provided by Defendants was not medically necessary.

69. Defendants' failure to disclose the fact that Plaintiff's medical care was not necessary was a substantial factor in causing Plaintiff's damages. Had Plaintiff known that her closure surgery was not necessary, Plaintiff would not have undergone the surgery.

70. Plaintiff has been injured and is entitled to recover general and special damages in an amount to be determined at trial.

SIXTH CLAIM FOR RELIEF: FRAUD

71. Plaintiff refers to and incorporates the preceding paragraphs as if set forth fully herein.

72. At all relevant times, Defendants had a duty and obligation to disclose to Plaintiff true facts concerning the medical care provided to Plaintiff by Defendants.

73. Defendants intentionally concealed material facts concerning Plaintiff's medical care from Plaintiff including, but not limited to the following:

a. Falsifying Plaintiff's medical records to indicate that she was an appropriate candidate for closure;

b. Performing medically unnecessary medical procedures with a device that was not FDA approved for this use; and

c. Concealing from Plaintiff that medical procedures, testing, and follow-up care was unnecessary.

74. Defendants made false statements and misrepresentations about important facts regarding Plaintiff's medical care.

75. Defendants made these false statements and misrepresentations described above knowing that the statements were false, or with reckless disregard for their truth.

76. Defendants made the false statements and misrepresentations to Plaintiff, with the intent that Plaintiff would rely on the statements.

77. Plaintiff did reasonably rely on the false statements and misrepresentations made by Defendants.

78. As a sole, proximate, and foreseeable result of Defendants' false statements and misrepresentations, Plaintiff has suffered personal injuries, including but not limited to unnecessary medical procedures, testing, follow-up visits, medical expenses, and emotional anguish.

SEVENTH CLAIM FOR RELIEF: CIVIL CONSPIRACY

79. Plaintiff refers to and incorporates the preceding paragraphs as if set forth fully herein.

80. Defendants were acting in a conspiracy to commit fraud, thereby increasing their profits through the performance of medically unnecessary procedures on patients, including Plaintiff.

81. There was an agreement and meeting of the minds among Defendant Sorensen, Defendant SCG, and Defendant St. Mark's to misrepresent the need for and induce patients, including Plaintiff, into undergoing medically unnecessary procedures, testing, and follow-up. Defendants agreed to act in concert in making these misrepresentations about the necessity of medical procedures to Plaintiff.

82. There were multiple unlawful, overt acts by Defendant Sorensen, Defendant SCG, and Defendant St. Mark's in furtherance of their scheme, including without limitation, Defendants' fraud.

83. As a result of this conspiracy, Defendant Sorensen, Defendant SCG, and Defendant St. Mark's, should be held jointly and severally liable for the conduct of the other co-conspirators and the damages that Plaintiff sustained as a proximate result thereof, including without limitation personal injuries and other injuries.

84. Plaintiff would further show that Defendant Sorensen and Defendant SCG were operating as alter egos for the purpose of perpetrating the above described conspiracy. There was such a unity of interest and ownership that the separate personalities of the company and the individual did not exist. Observing the corporate form will sanction this conspiracy, promote injustice, and allow an inequitable result.

EQUITABLE TOLLING/FRAUDULENT CONCEALMENT

85. Plaintiff refers to and incorporates the preceding paragraphs as if set forth fully herein.

86. Because of Defendants' concealment of material facts and misleading conduct, Plaintiff was not aware of her causes of action.

87. Defendants took affirmative steps to conceal Plaintiff's cause of action. Given Defendants' concealment and misleading conduct, a reasonable plaintiff would not have discovered the cause of action earlier.

88. Neither Sorenson, nor St. Mark's ever notified Plaintiff that she had received an unnecessary procedure, that she was never indicated for the surgery to begin with, that the device implanted into Plaintiff was never medically necessary, was retained in her body for no medical purpose, and that the informed consent contained fraudulent, misleading, and/or incomplete statements. Neither Sorenson, nor St. Mark's, ever compensated Plaintiff for the unnecessary medical surgery she underwent by reimbursing the costs of the procedure.

89. Neither Sorensen, nor St. Mark's, ever made a public statement, sent a letter, made a public announcement, or issued a press release to inform patients, such as Plaintiff, that they may have had medically unnecessary closures.

90. Defendants' misrepresentations and misleading conduct constitutes fraudulent concealment that tolls any proffered statute of limitation that may otherwise bar the recovery sought by Plaintiff.

91. Plaintiff did not know, nor should have known, of the causes of action against Defendants prior to being put on notice of Defendants' potential liability recently. She neither discovered, nor reasonably should have discovered, the facts underlying her causes of action before any proffered statute of limitations period expired.

92. As a result of Defendants' concealment of the true character, quality and nature of their conduct, they are estopped from relying on any statute of limitations defense. Defendants' affirmative acts and omissions, before, during, and/or after their actions causing Plaintiff's injury prevented Plaintiff from discovering the injury or cause thereof until recently. Such conduct tolls the limitations pursuant to the Utah Health Care Malpractice Act 78B-3-404(b).

93. Defendants' conduct, because it was purposely committed, was known or should have been known by them to be dangerous, heedless, reckless, and without regard to the consequences or the rights and safety of Plaintiff.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for a judgment (under URCP: Tier 3) against Defendants in an amount to be determined by the trier of fact for the following damages:

a. For special damages in an amount to be determined at trial;

b. For general damages in an amount to be determined at trial;

c. For pre and post judgment interest on all special damages pursuant to Utah law;

d. For costs and attorney fees to the extent allowed by law; and

e. For such other relief as the Court deems appropriate.

RESPECTFULLY SUBMITTED this 21st day of December 2017.

/s/ Rhome D. Zabriskie
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Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that that a true and exact copy of the foregoing has been served on the following via the Court's ECF filing system and/or Email on 21st day of December, 2017:

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Counsel for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT – SALT LAKE CITY

SALT LAKE COUNTY, STATE OF UTAH

PIA MERLO-SCHMUCKER, Plaintiff, v. **SHERMAN SORENSEN, M.D.; SORENSEN CARDIOVASCULAR GROUP; AND ST. MARK'S HOSPITAL,** Defendants.	**FIRST AMENDED COMPLAINT** **(Tier 3 Filing)** **(Jury Demanded)** **Civil No. 170906130** **Judge Matthew Bates**

COMES NOW Plaintiff, by and through counsel, and hereby complain for causes of action against the above-captioned Defendants, alleging as follows:

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff Pia Merlo-Schmucker is, and at all relevant times has been, a resident of Davis County, State of Utah.

2. Defendant SHERMAN SORENSEN, M.D. was, at all relevant times, a licensed physician providing health care services in Salt Lake County, State of Utah.

3. Defendant SORENSEN CARDIOVASCULAR GROUP (SCG), was at all material times, a Utah professional corporation in the business of providing health care services to residents of Utah. Defendant SCG's principal place of business is located at 5169 Cottonwood Street, No. 610, Murray, Utah. Defendant Sherman Sorensen owned and operated SCG as his primary medical practice.

4. Defendant ST. MARK'S HOSPITAL. (St. Mark's) is a for-profit corporation based in Salt Lake City, Utah with its principal place of business and corporate office at 1200 E 3900 S Salt Lake City, UT 84124. St. Mark's Registered Agent for Service CT Corporation System, 1108 E South Union Ave., Midvale UT 84047.

5. Upon information and belief, at all material times, each of the Defendants were, or may have been, an agent, servant, employer, employee, joint venture, partner, and/or alter ego of one or more of each of the remaining Defendants, and were at all times acting within the purpose and scope of such agency, servitude, joint venture, alter ego, partnership, or employment, and with the authority, consent, approval, and/or ratification of each remaining Defendant.

6. At all material times, Defendants were health care providers within the meaning of the Utah Health Care Malpractice Act, Utah Code Ann. § 78B-3-401 et seq., and each Defendant provided health care services to Pia Merlo-Schmucker.

7. This Court has jurisdiction over this action pursuant to Utah Code Ann. § 78A-5-102.

8. Venue is proper in this Court pursuant to Utah Code Ann. § 78B-3-307.

9. In bringing this action, Plaintiff complied with all statutory requirements regarding pre-litigation review of this matter as set forth in the Utah Health Care Malpractice Act, Utah Code Ann. § 78B-3-416.

BACKGROUND

10. This case is one of more than a thousand cases that are presently working their way through the prelitigation process, which involve the medically unnecessary heart surgery by Dr. Sherman Sorensen related to two kinds of holes in the heart. One is called an atrial septal defect (ASD), and the other is a patent foramen ovale (PFO). Both are holes in the wall of tissue (septum) between the left and right upper chambers of the heart (atria). An ASD is considered a birth defect and is a failure of the septal tissue to form between the atria, PFOs can only occur after birth when the foramen ovale fails to close.[1]

11. Life threatening ASD's are generally discovered at birth and corrected immediately. However, there are billions of adults who have small openings between the left and right atriums of their hearts. The foramen ovale is an opening located in the wall separating the two upper chambers of the heart, the atrial septum, which is used during fetal circulation to redirect blood through the heart. In 75% of the population, the foramen ovale closes at birth when increased blood pressure on the left side of the heart forces the opening to close. In those cases, where the foramen ovale does not close at birth, a patent foramen ovale (PFO) results.

12. Approximately 25% of the healthy population have a PFO and will never require any treatment or evaluation. Apart from extremely rare cases, patients with a PFO remain completely unaware of the presence of the PFO because it's almost never associated with symptoms. Persistent patency of the foramen ovale is considered a normal anatomic variation.

[1] Dr. Sorensen at times earlier in his career referred to these two conditions interchangeably, but for insurance reimbursement purposes decided that all PFO's were ASD's later in his practice. Either way, and no matter what he called them, he closed holes indiscriminately and without medical justification on thousands of people, including the Plaintiff.

13. Only if a patient has a recurrence of cryptogenic (originating from unexplained causes) stroke or transient ischemic attack (TIA), likely due to paradoxical embolization through a PFO, and despite optimal medical therapy, may it be appropriate to close the PFO. Generally, this closure is performed through a percutaneous surgical procedure. In the percutaneous procedure, a patient undergoes a cardiac catheterization to determine the size and location of the PFO.

14. There has long been general agreement in the medical community—as far back as 2003—that PFO closure is not medically necessary, except in the limited circumstances where there is a confirmed diagnosis of a recurrent cryptogenic stroke or TIA, despite optimum medical management. At all material times, no widely accepted medical group specializing in cardiology in the United States has ever recommended, advised, or suggested that closure is appropriate for stroke or migraine prevention to patients that have not had recurrent crypotogenic strokes.

GENERAL ALLEGATIONS

15. The following general allegations are common to all claims alleged herein:

16. As noted, Defendant Dr. Sorensen is a cardiologist and was practicing interventional cardiology. He had privileges at Defendant St. Mark's and at other hospitals. From roughly 2002 to 2012, Defendant Sorensen performed more than 4,000 PFO and ASD closures, many of those at St. Mark's. Dr. Sorensen performed the procedures at a rate that dwarfed the rest of the country by a factor of ten-to-twenty fold, making him a true outlier.

17. The administration at St. Mark's was on notice because of the sheer volume of the procedures performed by Defendant Sorensen and because of complaints from other practitioners and employees that Defendant Sorensen was engaged in a practice of regularly performing

unnecessary, invasive cardiac procedures on his patients. St. Mark's ignored obvious warnings to halt these procedures so that it could secure and maintain a lucrative stream of income.

18. Further, during the hiring and credentialing process at St. Mark's, Sorensen advised St. Mark's representatives of how he would perform closures and under what conditions. And a result, St. Mark's was aware that he would be performing unnecessary closures on patients that did not have recurrent cryptogenic strokes.

19. Further, Sorensen's cardiac privileges at another hospital were suspended on or about June 27, 2011, following an internal investigation concluded that Sorensen had performed multiple, medically unnecessary PFO closures and that Sorensen represented a threat to the health and safety of the patients treated. And St. Mark's CEO Steve Bateman and physician liaison Nikki Gledhill were aware of Sorensen's suspension.

20. Defendants Sorensen and St. Mark's created false statements and documents to conceal the fact that Sorensen was performing medically unnecessary closures. These statements include documenting migraine or stroke history where none existed. For instance, Sorensen often created medical charts that falsely reflected that the patients had suffered from, or were at risk of suffering from, recurrent cryptogenic stroke in order to get insurance to pay for the procedure. The effort to disguise the true diagnosis and reason for the closures shows that Sorensen was always aware of and understood the true standard of care for these procedures.

21. Sorensen would routinely mislead his patients, who had no previous strokes or TIAs, into believing that they were at extreme risk of debilitating stroke because of their PFO or ASD. He would further mislead them that a closure procedure would be effective and was medically necessary in order to prevent strokes. These misrepresentations were made to the vast majority of his patients, including Plaintiff.

22. Despite the fact that St. Mark's knew that Sorensen was performing medically unnecessary closures, and knew that Sorensen had been suspended for performing medically unnecessary closures at another hospital, St. Mark's Hospital continued to court Sorensen's business, provide a platform and assistance to Sorensen, and advertise and promote Sorensen and closure practice to the public for its own financial gain.

23. In particular, the catheterization lab staff at St. Mark's became financially dependent on Sorensen's incredible volume. The majority of patients at St. Mark's cardiac catheterization laboratory came from Sorensen, dwarfing all other cardiology business at St. Mark's. As a result, St. Mark's provided special treatment to Sorensen with staffing and scheduling in its catheterization lab, often to the detriment of true cardiac patients and other cardiologists. St. Mark's also provided open access for PFO industry representatives to the lab and personnel. Industry provided order-in meals were available to those catheterization lab personnel that were willing to share in the largesse.

24. Ultimately, St. Mark's made a deliberate and conscious decision not to inform patients that they may have had a medically unnecessary surgery, and chose not to reimburse Plaintiff, her insurance company, or any of its other patients who had procedures performed unnecessarily. Instead, St. Mark's kept the profits for itself.

PLAINTIFF'S CLOSURE AND INJURIES

25. On December 21, 2010, a transthoracic echocardiogram (TTE) was performed on Ms. Merlo-Schmucker in Dr. Sorensen's office. Medical records indicate that the patient was referred by Tyler Williams MD and that the indication is cognitive changes and a murmur. A transcranial doppler study (TCD) is performed as well. The echocardiogram was interpreted to

show "severe right to left shunt after valsalva." The TCD study was interpreted to show 5+/5 conductance with calibrated respiratory strain."

26. On December 28, 2010, a brain MRI was performed at Western Neurological Associates. This did not conclusively demonstrate evidence of a previous stroke. A "tiny nonspecific focus of flair sequence hyperintensity" is described. A differential diagnosis is given that includes "embolic disease." But the radiologist also dictates "imaging artifact is not entirely excluded."

27. On February 10, 2011, a percutaneous closure of a septal defect was accomplished using a 25 mm Gore HELEX ASD device. This was guided by intracardiac echo. Dr. Sorensen referred to the septal defect as an atrial septal defect. Following deployment of the device, color flow doppler showed no left to right flow and a contrast bubble study was negative for right to left shunting.

28. On February 11, 2011, prior to discharge from St. Mark's, a transthoracic echocardiogram was performed. The report states that color flow doppler "does not demonstrate a residual shunt," but a bubble study was not performed.

29. The accepted indications for closure of an atrial septal defect include right ventricular chamber enlargement, which was not seen on Ms. Merlo-Schmucker's echocardiograms, orthodeoxia-platypnea, which was not described by Dr. Sorensen, and paradoxical embolism.

30. In a patient with strong or definitive evidence for embolic stroke, the standard of care requires a comprehensive evaluation for all of the causes of embolic stroke. This was not performed by Dr. Sorensen in his care of Ms. Merlo-Schmucker. A comprehensive evaluation for causes of "cryptogenic" stroke includes an MRI of the brain (which was done in this case), imaging

of the extra cranial and intracranial cerebral arteries, 3-4 week rhythm monitoring to look for paroxysmal atrial fibrillation, imaging of the aorta to look for atherosclerotic disease, lower extremity venous doppler/ultrasound, MRV of the abdominal and pelvic veins, and a hyper coagulability workup. But Sorensen did not perform the required comprehensive evaluation.

31. To persuade Plaintiff to undergo closure, Defendant Sorensen represented to Plaintiff that she was at high risk of a debilitating stroke due to the presence of her PFO/ASD and that closure was medically necessary. In truth, the mere presence of the defect, without more, including a history of cryptogenic stroke, is not a significant risk factor for stroke. Further, Sorensen passed out a Patient Information Patent Foreman Ovale (PFO) handout to Plaintiff. Sorensen's patient literature contained fraudulent misrepresentations, unsupported data and statistics, outright falsehoods, and other misleading statements, such as the following:

- "Until recently, 40% of all strokes were unknown cause. We now know that most of these unexplained strokes may be caused by a PFO (Patent Foramen Ovale)"
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- "PFO is diagnosed in 50-70% of patients with stroke of unknown cause"
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In addition, to the handout Sorensen made other misrepresentations to Plaintiff both in orally and in writing. These misrepresentations include:

- "Our approach is a preventative strategy. It is scientifically based, but it is an aggressive strategy." In fact, Dr. Sorenson's method has never been accepted in any scientific journal, organization, been approved for a randomized clinical trial, and/or the peer review process for his data and proposed indication for PFO closure. "We, therefore follow a preventative strategy and risk stratify patients based on the studies…proposed by the American Academy of Neurology." That is false; the AAN did not recommend closure outside of clinical trials and encouraged patients to participate in research protocols.
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- "Randomized trials are not available currently." In reality, the Closure I trial was opened in Salt Lake City, Utah. It was halted due to Defendant Sorensen's medically unnecessary off-label PFO procedures of patients outside the trial.
- "Coumadin is considered to be unsafe and ineffective…based on studies." In fact, the SPIRIT, WASID and WARRS studies referenced by Sorensen showed no such thing.
- Defendant Sorenson certified that his echocardiography lab was certified by ICAEL (Intersocietal Commission for Accreditation Laboratories) using the ICAEL logo on his echochardiogram. In fact, his lab was never accredited by ICAEL and this was false.

These false statements were intended to and did in fact induce Plaintiff to undergo closure at St. Mark's by inducing fear of an imminent and debilitating stroke, downplaying safer and accepted treatment options, misrepresenting the indication for closure, and downplaying the risks of closure.

32. Despite St. Mark's awareness of Sorensen's fraudulent and/or negligent practices, it did nothing to notify Ms. Merlo-Schmucker. Instead, St. Mark's actively allowed Sorensen's practice to continue in order to profit from the thousands of unnecessary procedures performed on patients like Ms. Merlo-Schmucker. In fact, St. Mark's has to this day actively concealed its knowledge about Sorensen's rogue and fraudulent practices at its facility from patients, third party payers, and the public, and has retained the money earned off of Sorensen's medically unnecessary surgeries.

33. Plaintiff could not have known that the information provided by Defendants was false. Instead, she trusted that Defendants Sorensen and St. Mark's, as her health care providers, were being truthful. Further, even if she had been aware of some of the factual mischaracterizations, as a non-expert she could not have understood their implications as it relates the appropriateness of her medical treatment.

34. Because of Defendants' fraudulent statements and omissions, Plaintiff was until recently unaware of her cause of action. In fact, Plaintiff only learned of the Defendants' misconduct as a result lawyer advertising. Her diligent investigation resulted in the noticing and filing of this action within the statutory period.

35. Because of Defendants' conduct, Plaintiff suffered significant damages, including:

i. undergoing an unnecessary surgical procedure and hospital stay,

ii. paying significant medical expenses to Defendants,

iii. physical pain, and

emotional anguish as a result of being told she was at immediate risk of a debilitating or even deadly stroke.

FIRST CLAIM FOR RELIEF: NEGLIGENCE (HEALTH CARE MALPRACTICE)

36. Plaintiff refers to and incorporates the preceding paragraphs as if set forth fully herein.

37. Defendants, individually, collectively, and through the acts and omissions of their agents, servants, employees, physicians, nurses, therapists, and technologists (hereinafter collectively "Defendants") accepted Plaintiff as a patient, and thereby assumed various duties of care.

38. At all relevant times, Defendants held themselves out as being able to provide full care and treatment for patients requiring medical care of the type that Plaintiff required.

39. The degree of care and treatment provided to Plaintiff fell below the acceptable standards of care for the types of medical care and treatment required by Plaintiff and provided by Defendants.

40. Specifically, Defendants breached the applicable standards of care in multiple ways including, but not limited to:

a. Falsifying Plaintiff's medical records to indicate that Plaintiff was an appropriate candidate for closure;
b. Misleading Plaintiff regarding the risks and benefits associated with closure and regarding the necessity of treatment;
c. Failing to obtain an adequate history which resulted in an improper medical diagnosis that Plaintiff was an appropriate candidate for closure;
d. Failing to conduct an adequate physical and to obtain appropriate diagnostic testing, which resulted in an improper medical diagnosis that Plaintiff was an appropriate

candidate for PFO closure; Performing a medically unnecessary medical procedure with a device that was not FDA approved for this use; and

41. As a sole, proximate, and foreseeable result of Defendants' acts and omissions, Defendants caused Plaintiff to undergo unnecessary medical procedures, testing, and follow-up visits, incur unnecessary medical expenses, and experience physical injuries and emotional anguish.

42. As a sole, proximate, and foreseeable result of Defendants' acts and omissions, Plaintiff has suffered personal injuries, including by not limited to unnecessary medical procedures, testing, follow-up visits, medical expenses, and emotional anguish.

43. Plaintiff has therefore been injured and is entitled to recover general and special damages in an amount to be determined at trial.

SECOND CLAIM FOR RELIEF: NEGLIGENCE

44. Plaintiff refers to and incorporates the preceding paragraphs as if set forth fully herein.

45. At all relevant times, Defendants owed Plaintiff various duties of care, including but not limited to common law and statutory duties.

46. Defendants, individually and collectively, breached these duties of care.

47. As a sole, proximate, and foreseeable result of Defendants' acts and omission, Defendants caused personal and other injuries to Plaintiff.

48. Plaintiff has been injured and is entitled to recover general and special damages in amounts to be determined at trial.

THIRD CLAIM FOR RELIEF: NEGLIGENT MISREPRESENTATION

49. Plaintiff refers to and incorporates the preceding paragraphs as if set forth fully herein.

50. Defendants, individually and collectively, represented to Plaintiff that medical procedures, testing, and follow-up visits were medically necessary.

51. Defendants' representations that Plaintiff's medical procedures, testing, and follow-up visits were medically necessary was, in fact, not true.

52. Defendants failed to use reasonable care to determine whether the representations regarding the necessity of Plaintiff's medical care was true.

53. Defendants were in a better position than Plaintiff to know the true facts regarding Plaintiff's medical procedures, testing, and follow-up care.

54. Defendants had a financial interest in performing medically unnecessary procedures, testing, and follow-up care on Plaintiff.

55. Plaintiff relied on Defendants' representations, and it was reasonable for her to do so.

56. Plaintiff has therefore been injured as a result of relying on Defendants' representations and is entitled to recover general and special damages in an amount to be determined at trial.

FOURTH CLAIM FOR RELIEF: NEGLIGENT CREDENTIALING

57. Plaintiff refers to and incorporates the preceding paragraphs as if set forth fully herein.

58. Defendant St. Mark's owes a duty to patients to exercise reasonable care in the selection of its medical staff and in granting specialized privileges to them. It also has the duty to periodically monitor and review the qualifications and competency of its medical staff.

59. Defendant St. Mark's breached its duty to exercise reasonable care in its selection of its medical staff, and in granting specialized privileges to and periodically monitoring and reviewing the qualifications and competency of its medical staff.

60. As a sole, proximate, and foreseeable result of its breach, Defendant St. Mark's caused harm to Plaintiff.

61. Plaintiff has been injured and is entitled to recover general and special damages in an amount to be determined at trial.

FIFTH CLAIM FOR RELIEF: FRAUDULANT NON-DISCLOSURE/CONCEALMENT

62. Plaintiff refers to and incorporates the preceding paragraphs as if set forth fully herein.

63. Defendants owed a duty to Plaintiff to disclose important facts, such as the medical necessity of Plaintiff's medical care, to Plaintiff.

64. Defendants knew that the medical care Defendants provided to Plaintiff was not medically necessary, and failed to disclose this to Plaintiff.

65. Plaintiff did not know that the medical care provided by Defendants was not medically necessary.

66. Defendants' failure to disclose the fact that Plaintiff's medical care was not necessary was a substantial factor in causing Plaintiff's damages. Had Plaintiff known that her closure surgery was not necessary, Plaintiff would not have undergone the surgery.

67. Plaintiff has been injured and is entitled to recover general and special damages in an amount to be determined at trial.

SIXTH CLAIM FOR RELIEF: FRAUD

68. Plaintiff refers to and incorporates the preceding paragraphs as if set forth fully herein.

69. At all relevant times, Defendants had a duty and obligation to disclose to Plaintiff true facts concerning the medical care provided to Plaintiff by Defendants.

70. Defendants intentionally concealed material facts concerning Plaintiff's medical care from Plaintiff including, but not limited to the following:

a. Falsifying Plaintiff's medical records to indicate that she was an appropriate candidate for closure;

b. Performing medically unnecessary medical procedures with a device that was not FDA approved for this use; and

c. Concealing from Plaintiff that medical procedures, testing, and follow-up care was unnecessary.

71. Defendants made false statements and misrepresentations about important facts regarding Plaintiff's medical care.

72. Defendants made these false statements and misrepresentations described above knowing that the statements were false, or with reckless disregard for their truth.

73. Defendants made the false statements and misrepresentations to Plaintiff, with the intent that Plaintiff would rely on the statements.

74. Plaintiff did reasonably rely on the false statements and misrepresentations made by Defendants.

75. As a sole, proximate, and foreseeable result of Defendants' false statements and misrepresentations, Plaintiff has suffered personal injuries, including but not limited to unnecessary medical procedures, testing, follow-up visits, medical expenses, and emotional anguish.

SEVENTH CLAIM FOR RELIEF: CIVIL CONSPIRACY

76. Plaintiff refers to and incorporates the preceding paragraphs as if set forth fully herein.

77. Defendants were acting in a conspiracy to commit fraud, thereby increasing their profits through the performance of medically unnecessary procedures on patients, including Plaintiff.

78. There was an agreement and meeting of the minds among Defendant Sorensen, Defendant SCG, and Defendant St. Mark's to misrepresent the need for and induce patients, including Plaintiff, into undergoing medically unnecessary procedures, testing, and follow-up. Defendants agreed to act in concert in making these misrepresentations about the necessity of medical procedures to Plaintiff.

79. There were multiple unlawful, overt acts by Defendant Sorensen, Defendant SCG, and Defendant St. Mark's in furtherance of their scheme, including without limitation, Defendants' fraud.

80. As a result of this conspiracy, Defendant Sorensen, Defendant SCG, and Defendant St. Mark's, should be held jointly and severally liable for the conduct of the other co-conspirators and the damages that Plaintiff sustained as a proximate result thereof, including without limitation personal injuries and other injuries.

81. Plaintiff would further show that Defendant Sorensen and Defendant SCG were operating as alter egos for the purpose of perpetrating the above described conspiracy. There was such a unity of interest and ownership that the separate personalities of the company and the individual did not exist. Observing the corporate form will sanction this conspiracy, promote injustice, and allow an inequitable result.

EQUITABLE TOLLING/FRAUDULENT CONCEALMENT

82. Plaintiff refers to and incorporates the preceding paragraphs as if set forth fully herein.

83. Because of Defendants' concealment of material facts and misleading conduct, Plaintiff was not aware of her causes of action.

84. Defendants took affirmative steps to conceal Plaintiff's cause of action. Given Defendants' concealment and misleading conduct, a reasonable plaintiff would not have discovered the cause of action earlier.

85. Neither Sorenson, nor St. Mark's ever notified Plaintiff that she had received an unnecessary procedure, that she was never indicated for the surgery to begin with, that the device implanted into Plaintiff was never medically necessary, was retained in her body for no medical purpose, and that the informed consent contained fraudulent, misleading, and/or incomplete statements. Neither Sorenson, nor St. Mark's, ever compensated Plaintiff for the unnecessary medical surgery she underwent by reimbursing the costs of the procedure.

86. Neither Sorensen, nor St. Mark's, ever made a public statement, sent a letter, made a public announcement, or issued a press release to inform patients, such as Plaintiff, that they may have had medically unnecessary closures.

87. Defendants' misrepresentations and misleading conduct constitutes fraudulent concealment that tolls any proffered statute of limitation that may otherwise bar the recovery sought by Plaintiff.

88. Plaintiff did not know, nor should have known, of the causes of action against Defendants prior to being put on notice of Defendants' potential liability recently. She neither discovered, nor reasonably should have discovered, the facts underlying her causes of action before any proffered statute of limitations period expired.

89. As a result of Defendants' concealment of the true character, quality and nature of their conduct, they are estopped from relying on any statute of limitations defense. Defendants' affirmative acts and omissions, before, during, and/or after their actions causing Plaintiff's injury prevented Plaintiff from discovering the injury or cause thereof until recently. Such conduct tolls the limitations pursuant to the Utah Health Care Malpractice Act 78B-3-404(b).

90. Defendants' conduct, because it was purposely committed, was known or should have been known by them to be dangerous, heedless, reckless, and without regard to the consequences or the rights and safety of Plaintiff.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for a judgment (under URCP: Tier 3) against Defendants in an amount to be determined by the trier of fact for the following damages:

a. For special damages in an amount to be determined at trial;

b. For general damages in an amount to be determined at trial;

c. For pre and post judgment interest on all special damages pursuant to Utah law;

d. For costs and attorney fees to the extent allowed by law; and

e. For such other relief as the Court deems appropriate.

RESPECTFULLY SUBMITTED this 14th day of December 2017.

/s/ Rhome D. Zabriskie
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Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that that a true and exact copy of the foregoing has been served on the following via the Court's ECF filing system and/or Email on 14th day of December, 2017:

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Counsel for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT – SALT LAKE CITY

SALT LAKE COUNTY, STATE OF UTAH

LISA TAPP, Plaintiff, v. **SHERMAN SORENSEN, M.D.; SORENSEN CARDIOVASCULAR GROUP; AND IHC HEALTH SERVICES, INC.,** Defendants.	**FIRST AMENDED COMPLAINT** **(Tier 3 Filing)** **(Jury Demanded)** Case No. 170904956 **Judge Barry Lawrence**

COMES NOW Plaintiff, by and through counsel, and hereby complain for causes of action against the above-captioned Defendants, alleging as follows:

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff Lisa Tapp is, and at all relevant times has been, a resident of Salt Lake County, State of Utah.

2. Defendant SHERMAN SORENSEN, M.D. was, at all relevant times, a licensed physician providing health care services in Salt Lake County, State of Utah.

3. Defendant SORENSEN CARDIOVASCULAR GROUP (SCG), was at all material times, a Utah professional corporation in the business of providing health care services to residents of Utah. Defendant SCG's principal place of business is located at 5169 Cottonwood Street, No. 610, Murray, Utah. Defendant Sherman Sorensen owned and operated SCG as his primary medical practice.

4. Defendant IHC Health Services, Inc. (IHC) is a not-for-profit corporation based in Salt Lake City, Utah with its principal place of business and corporate office at 36 S. State Street Salt Lake City, UT 84111. IHC operates several healthcare facilities under d/b/a's, including Intermountain Medical Center, which has its principal place of business and corporate office at 5100 South State Street, Murray, Utah. IHC's Registered Agent for Service is Anne D. Armstrong, 36 South State St. Suite 2200, Salt Lake City, UT 84111.

5. Upon information and belief, at all material times, each of the Defendants were, or may have been, an agent, servant, employer, employee, joint venture, partner, and/or alter ego of one or more of each of the remaining Defendants, and were at all times acting within the purpose and scope of such agency, servitude, joint venture, alter ego, partnership, or employment, and with the authority, consent, approval, and/or ratification of each remaining Defendant.

6. At all material times, Defendants were health care providers within the meaning of the Utah Health Care Malpractice Act, Utah Code Ann. § 78B-3-401 et seq., and each Defendant provided health care services to Lisa Tapp.

7. This Court has jurisdiction over this action pursuant to Utah Code Ann. § 78A-5-102.

8. Venue is proper in this Court pursuant to Utah Code Ann. § 78B-3-307.

9. In bringing this action, Plaintiff complied with all statutory requirements regarding pre-litigation review of this matter as set forth in the Utah Health Care Malpractice Act, Utah Code Ann. § 78B-3-416.

BACKGROUND

10. This case is one of more than a thousand cases that are presently working their way through the prelitigation process, which involve the medically unnecessary heart surgery by Dr. Sherman Sorensen related to two kinds of holes in the heart. One is called an atrial septal defect (ASD), and the other is a patent foramen ovale (PFO). Both are holes in the wall of tissue (septum) between the left and right upper chambers of the heart (atria). An ASD is considered a birth defect and is a failure of the septal tissue to form between the atria, PFO's can only occur after birth when the foramen ovale fails to close.[1]

11. Life threatening ASD's are generally discovered at birth and corrected immediately. However, there are billions of adults who have small openings between the left and right atriums of their hearts.[2] The foramen ovale is an opening located in the wall separating the two upper chambers of the heart, the atrial septum, which is used during fetal circulation to redirect blood through the heart. In 75% of the population, the foramen ovale closes at birth when increased blood pressure on the left side of the heart forces the opening to close. In those cases, where the foramen ovale does not close at birth, a patent foramen ovale (PFO) results.

[1] Dr. Sorensen at times earlier in his career referred to these two conditions interchangeably, but for insurance reimbursement purposes decided that all PFO's were ASD's later in his practice. Either way, and no matter what he called them, he closed holes indiscriminately and without medical justification on thousands of people including the Plaintiff.

12. Approximately 25% of the healthy population have a PFO and will never require any treatment or evaluation. Apart from extremely rare cases, patients with a PFO remain completely unaware of the presence of the PFO because it's almost never associated with symptoms. Persistent patency of the foramen ovale is considered a normal anatomic variation.

13. Only if a patient has a recurrence of cryptogenic (originating from unexplained causes) stroke or transient ischemic attack (TIA), likely due to paradoxical embolization through a PFO, and despite optimal medical therapy, may it be appropriate to close the PFO. Generally, this closure is performed through a percutaneous surgical procedure. In the percutaneous procedure, a patient undergoes a cardiac catheterization to determine the size and location of the PFO.

14. There has long been general agreement in the medical community—as far back as 2003—that PFO closure is not medically necessary, except in the limited circumstances where there is a confirmed diagnosis of a recurrent cryptogenic stroke or TIA, despite optimum medical management. At all material times, no widely accepted medical group specializing in cardiology in the United States has ever recommended, advised, or suggested that closure is appropriate for stroke or migraine prevention to patients that have not had recurrent crypotogenic strokes.

15. In 2011, Defendant IHC adopted internal Guidelines for Percutaneous Closure of Septal Defects of the Atrium that mirrored those promulgated by the American Heart Association/American Stroke Association (AHA/ASA). The Guidelines state that "PFO closure may be considered for patients with recurrent cryptogenic stroke (CS) despite optimal medical therapy." The IHC Guidelines note that PFO closure is only appropriate for "recurrent, confirmed, clinical cryptogenic TIA or stroke."

16. PFO could also, under Defendant IHC's Guidelines, be considered for "patients with a single well-documented significant stroke or systemic emboli in a high-risk patient who has been comprehensively evaluated for alternative cause of embolic stroke." Under either circumstance, the Guidelines require that the cardiologists ensure that the diagnosis of PFO and cryptogenic stroke or embolism is confirmed by an independent neurology consult or a brain CT or MRI, a MRA of the head and neck, an ambulatory telemetry monitor for atrial fibrillation, and a TTE with bubbles to confirm the diagnosis. Defendant IHC's Guidelines make clear that PFO closure is never indicated for migraine headaches.

17. Defendant IHC's Guidelines are clear that PFO closure for migraine can only be performed in the clinical trial setting and that there is currently "no RCT [randomized clinical trials] to support use of PFO closure in the treatment of migraine headaches or asymptomatic white-matter lesions." These latter two categories of symptoms are precisely what Defendant Sorensen treated Plaintiff for with a PFO closure.

18. Defendant Sorensen frequently touted his excessive volume, touting that he has more than a "10 year/3000 device history" of utilizing various devices (*i.e.* Amplatzer and Gore) to perform PFO and ASD closures. Defendant Sorensen often referred patients to his "research" and "data" for PFO and ASD closures at www.sorensenmd.com.

GENERAL ALLEGATIONS

19. The following general allegations are common to all claims alleged herein:

20. As noted, Defendant Dr. Sorensen is a cardiologist and was practicing interventional cardiology. He had privileges at Defendant IHC and at other hospitals. From roughly 2002 to 2012, Defendant Sorensen performed more than 4,000 PFO and ASD closures, the majority of those at IHC. The administration at IHC was on notice because of the sheer volume

of the procedures performed by Defendant Sorensen and because of complaints from other practitioners and employees that Defendant Sorensen was engaged in a practice of regularly performing unnecessary, invasive cardiac procedures on his patients. Defendants enriched themselves by submitting false and fraudulent medical billing to insurance companies, including Plaintiff's, for medically unnecessary procedures.

21. During the hiring and credentialing process at IHC, Sorensen advised IHC representatives of the medical treatment he was qualified to perform, and specifically informed IHC how he would perform PFO closures. These procedures would include performing PFO and ASD closures on patients that did not have recurrent cryptogenic strokes. Despite this, Defendant IHC gave Sorensen hospital privileges, hired and paid him, and allowed him to utilize their catheterization laboratory to perform these PFO procedures.

22. Sorensen's cardiac privileges at IHC were suspended on or about June 27, 2011, following an internal investigation concluded that Sorensen had performed multiple, medically unnecessary PFO closures and that Sorensen represented a threat to the health and safety of the patients treated at IHC.

23. The letter from IHC to Defendant Sorensen informing him in writing of his suspension (effective June 27, 2011 through July 11, 2011), stated that the suspension was "taken in good faith to prevent a threat to the health or safety of patients" at IHC and to "provide the Medical Executive Committee the opportunity to further evaluate the patient care you have provided, your professional conduct within the hospital and [to] determine if additional action regarding your membership and privileges should be taken beyond the 14 day suspension."

24. Dr. Sorensen's suspension was the direct result of the IHC's acknowledgement of what it had known for years, that Sorensen had performed thousands of medically unnecessary

PFO closures at IHC. The suspension was a reversal of sorts for IHC because it had long encouraged, profited, and provided a haven for Defendant Sorensen's practice.

25. Further, Defendant Sorensen and IHC created false statements and documents to conceal the fact that Sorensen was performing medically unnecessary closures. These statements include documenting migraine or stroke history where none existed, such as Plaintiff's case.

26. Defendant IHC supplied Sorensen with its catheterization lab facilities, hospital staff such as nurses, administrative, and other support staff, and privileges to perform these procedures whenever he saw fit, including for Plaintiff Lisa Tapp's PFO procedure in October 2008. For example, the Patient Information pamphlet passed on to Plaintiff (and many other patients) touts "a dedicated, specialized team of echo, nursing, catheterization laboratory, and physician members" as "Why Our Program May Be Right For You" (Slide 30).

27. Sorensen would routinely mislead his patients, who had no previous strokes or TIAs, into believing that they were at extreme risk of debilitating stroke because of their PFO or ASD. He would further mislead them that a closure procedure would be effective and was medically necessary in order to prevent strokes. These misrepresentations were made to the vast majority of his patients, including Plaintiff.

28. Despite his representations to his patients, Sorensen often created medical charts that falsely reflected that the patients had suffered from, or were at risk of suffering from, recurrent cryptogenic stroke in order to get insurance to pay for the procedure. The effort to disguise the true diagnosis and reason for the closures shows that Sorensen was always aware of and understood the true standard of care for these procedures. IHC knew or should have known through a cursory review of the patients' files that they did not meet the closure indications in the standard of care.

IHC, SCG, and Sorensen engaged in a conspiracy and/or concert of action, with each other to profit from the perpetuation of Sorensen's medically unnecessary closures.

29. In a report released to the entire Department of Cardiology at IHC, it reported that the study showed that "compliance with the guidelines for performing PFO closures" at IHC was "less than ideal." The review showed that the Guidelines had been violated in many of the cases reviewed.

30. Even though it did not issue these Guidelines until 2011, at all times relevant to this case, IHC knew that septal closures were rarely indicated. For years IHC ignored the loud objections from its own medical staff and leadership, including the Director of the Catheterization Laboratory, Dr. Revenaugh, and the Medical Director for Cardiovascular Services at Intermountain Healthcare, Dr. Donald L. Lappe, as well as written warnings and complaints from Professor Andrew Michaels of the University of Utah. Further, IHC was informed by Dr. Nancy Futrell, a neurologist who was a co-investigator with Defendant Sorensen on a trial performed at IHC for the closure devices used by Defendant Sorensen, that Defendant Sorensen was performing unnecessary closures outside of the criteria set by the trials. She spoke with several individuals associated with IHC regarding Dr. Sorensen, including Dr. Lappe, chief of cardiology; William Hamilton, medical director; Jeffrey Anderson, associate chief of cardiology; and Liz Hammond.

31. After Sorensen's 14-day suspension, he returned to work at IHC on or about July 12, 2011. It immediately became apparent that Sorensen had no intention of complying with the IHC Guidelines for PFO closures, and that he would continue to perform medically unnecessary procedures on patients not suffering from recurrent cryptogenic stroke despite optimal medical therapy. Because Sorensen refused to comply with the Guidelines and represented an immediate threat of harm to his patients, IHC moved to suspend Sorensen from practice in September 2011.

Sorensen and IHC entered a Settlement Agreement, which was designed to prevent his permanent suspension. However, within days of entering the Agreement, Sorensen was notified by IHC that he was in violation of the Agreement. IHC threatened to take immediate action to suspend him, and to report his misconduct to the National Practitioner Database. Sorensen promptly resigned to avoid these adverse consequences.

32. In Fall 2011/Winter 2012, Dr. James L. Orford, listed in the Cardiology Department at Intermountain Health Center, authored an article "Understanding the Heart Defect – Patent Foramen Ovale" in The Classroom on Intermountain's website. This publication lists "Intermountain Medical Group" with a link at the bottom.

33. Speaking on behalf of Intermountain, Dr. Orford states the following:

- "Because PFO is very common and never causes any problems in most patients, undergoing surgery to possibly prevent migraines and/or stroke usually isn't worth the risk."
- "It has been noted that PFO is more common in patients who experience migraine with aura, but may patients with a PFO do not have migraine headaches and many migraine patients do not have a PFO."
- "Furthermore, there is no conclusive evidence that fixing a PFO will benefit migraines."
- "In a few cases, where patients have already suffered a confirmed cryptogenic stroke without any possible cause, closing a PFO may be a viable option to prevent future strokes."
- "However, it is important to consult with a neurologist and a cardiologist to determine all of your options and whether surgical closure is recommended."

- "Patients are also encouraged to enroll in a clinical trial so their response to treatments can be studied, allowing scientists to learn more about this condition."
- "As leaders in cardiology, Intermountain Healthcare is always very conscientious regarding how new technology is applied. For this reason, the Intermountain Medical Group instituted specific "Guidelines for Percutaneous Closure of Septal Defects" throughout all our hospitals and clinics."
- "We believe it is important to have clear, positive evidence for both the short-term and long-term consequences of any procedure."

Despite this publication and clear recognition, IHC did nothing to alert patients, including Lisa Tapp, that no "clear, positive" evidence existed that PFO closure was effective for stroke prevention in absence of a history of cryptogenic strokes or for migraine headache prevention.

34. Defendant IHC also published "Fact Sheet for Patients and Families – PFO and ASD Closure in the Cath Lab" with a publication range of 2011-2016. Among the recognized risks of a PFO or ASD Closure include: temporary leg numbness or weakness in the first few hours, bruising, bleeding, infection, or blood vessel damage whether cathether(s) were inserted, damage to the heart muscle that may require open heart surgery, abnormal heart rhythm, blood clots, heart attack or stroke, negative reaction to anesthetic or dye, and unforeseen complications. While these risks are "uncommon" they are present for PFO and ASD Closures. The Fact Sheet for Patients and Families also states the following:

- **"Why Might I need a PFO or ASD Closure?** You might need a PFO closure if you've had a stroke that is related to PFO."

- "What are the benefits of a PFO or ASD closure procedure? PFO Closure has not been found to reliably reduce migraines. Also, it is not indicated unless you've had a previous TIA or stroke."

35. Despite the results of this audit, patient literature representations, stated opinion of IHC cardiologists, and ample evidence that Defendant Sorensen had performed thousands of PFO closures, Defendant IHC deliberately and consciously chose not to expand its audit to other PFO closure patients from past years, including Plaintiff Lisa Tapp Defendant IHC never released information to the public that Sorensen had performed medically unnecessary PFO procedures, as this information was kept internal.

36. IHC made a deliberate and conscious decision not to inform patients that they may have had a medically unnecessary surgery, and chose not to reimburse Plaintiff Lisa Tapp, her insurance company, (or any patients) who had procedures performed unnecessarily. Instead, IHC kept the profits for itself.

PLAINTIFF LISA TAPP'S PFO CLOSURE AND INJURIES

37. Plaintiff Lisa Tapp was 43 years old when she underwent the percutaneous closure of a patent foramen oval at Intermountain Medical Center in Salt Lake County on September 18, 2008. The procedure was performed by Defendant Sherman Sorensen, M.D. using an 18 millimeter Amplatzer septal occlude device—a device not approved by the FDA for use in this manner. The safety and efficacy for using the Amplatzer device in a PFO closure to prevent strokes on patients without recurrent cryptogenic stroke has never been established, even to this day.

38. In fact, at all material times the Amplatzer septal occcluder has been indicated for patients with "echocardiographic evidence of ostium secundum atrial septal defect." The

Amplatzer instructions for use unequivocally state, "The use of this device has not been studied in patients with patent foreman ovale."

39. Prior to Lisa's percutaneous closure, she underwent a neurological history and physical by Walter Reichert M.D. on August 15, 2008. The patient described a two-month history of continuous paresthesias in the back of the neck and head. She also described "mild numbness in her right thumb and hand while she is seated." Importantly, a detailed neurological exam did not show any abnormalities; specifically, there were no motor/strength deficits and no sensory deficits.

40. On August 20, 2008, a brain MRI, MRA of the intracranial arteries and an MRI of the cervical spine were performed at Western Neurological Associates, where Dr. Reichert practiced. The brain MRI was interpreted to show about fifteen bilateral non-specific white matter lesions. A differential diagnosis is given for this finding: "includes demyelinating disease, migraine headaches, vasculitis/inflammatory disease, chronic microvascular ischemic disease, hypertension and post-traumatic sequela." The differential diagnosis did not include embolic strokes or events.

41. On September 2, 2008, Lisa received a transthoracic echocardiogram and transcranial doppler study in Defendant Sorensen's office, SCG. The transthoracic echo is interpreted to show an abnormal bubble study consistent with a right to left shunt across the atrial septum and the transcranial doppler study is interpreted to show 5/5 conductance with a valsalva maneuver. The 5/5 conductance is used to place the patient at "high risk stratification for stroke."

42. On this same day, Defendant Sorensen performed a history and physical on Lisa. Among Defendant Sorensen's findings, he concluded that Lisa did not have hyper coagulability (despite a lack of testing for this), that she developed "well-defined symptoms of hemisensory"

(despite no evidence of this in Lisa's neurological exam), and that she had a history of migraines (despite Lisa's own claims to the contrary). Defendant Sorensen went on to state that Lisa had "a change in her level of consciousness" and that her "right-sided weakness has been persistent." None of these findings were reflected in Lisa's neurological exam. Defendant Sorensen claims the non-specific white matter lesions seen on Lisa's brain MRI "are, therefore, most likely embolic." Defendant Sorensen made this diagnosis with virtually no medical support.

43. To persuade Plaintiff to undergo a PFO closure, Defendant Sorensen represented to Plaintiff that she was at high risk of a debilitating stroke due to the presence of her PFO/ASD. In truth, the mere presence of the defect, without more, including a history of cryptogenic stroke, is not a significant risk factor for stroke. Further, Sorensen passed out a Patient Information Patent Foreman Ovale (PFO) handout to Plaintiff. Sorensen's patient literature contained fraudulent misrepresentations, unsupported data and statistics, outright falsehoods, and other misleading statements, such as the following:

- "Until recently, 40% of all strokes were unknown cause. We now know that most of these unexplained strokes may be caused by a PFO (Patent Foramen Ovale)" (Stroke and PFO Slide 2).
- "Strokes resulting from septal defects have a 50% mortality rate."
- "PFO is diagnosed in 50-70% of patients with stroke of unknown cause" (What is Known About PFO and Stroke Slide 12).
- "Continued lifelong risk of stroke ranging from 2-9% each year." (PFO Treatment Options Aspirin/Plavix/Coumadin Slide 17).
- "Stroke reduction to less than 1%" (PFO Treatment Options Catheter Closure of PFO).
- "Septal Defect Closure Safety and Efficacy" (Slide 28).

- "Our rigorous Program requirements assure that you are informed and receive the safest and most effective treatment" (Why Our Program Might Be Right For You Slide 30).

These statements induced and persuaded Plaintiff to undergo a PFO closure at IHC by inducing fear of an imminent and debilitating stroke, downplaying safer and accepted treatment options, misrepresenting the indication for PFO in the medical community, and downplaying the risks of PFO closure.

44. Further, Plaintiff's medical records authorized by Defendant Sorensen are replete with fraudulent misrepresentations, falsehoods, and other misleading statements containing information presented to Plaintiff to induce her to have the closure procedure. These statements include:

- "Our approach is a preventative strategy. It is scientifically based, but it is an aggressive strategy." In fact, Dr. Sorenson's method has never been accepted in any scientific journal, organization, been approved for a randomized clinical trial, and/or the peer review process for his data and proposed indication for PFO closure. "We, therefore follow a preventative strategy and risk stratify patients based on the studies…proposed by the American Academy of Neurology." That is false; the AAN did not recommend closure outside of clinical trials and encouraged patients to participate in research protocols.
- "8 studies demonstrate that very high flow is the main feature of stroke risk." In fact, the AAN Practice Parameter did not find an association, much less causation, of shunting and risk of stroke recurrence.

- "Randomized trials are not available currently." In reality, the Closure I trial was opened in Salt Lake City, Utah. It was halted due to Defendant Sorensen's medically unnecessary off-label PFO procedures of patients outside the trial.
- "Coumadin is considered to be unsafe and ineffective…based on studies." In fact, the SPIRIT, WASID and WARRS studies showed no such thing.
- Within Plaintiff's medical records, Sorenson noted that Ms. Tapp had a history of migraine. That too was false, misleading, and inaccurate. Dr. Sorenson made this notation without any objective evidence.
- Defendant Sorenson certified that his echocardiography lab was certified by ICAEL (Intersocietal Commission for Accreditation Laboratories) using the ICAEL logo on his echochardiogram. In fact, his lab was never accredited by ICAEL and this was false.

Plaintiff was unaware of the misrepresentations and falsehoods in her medical records and instead trusted what the Defendants had told her during her of treatment. Further, and even if she had been aware of some the factual mischaracterizations, as non-expert she could not have understood their implications as it relates the appropriateness of her medical treatment.

45. Ultimately, Defendant Sorensen performed the percutaneous closure on September 18, 2008, at Defendant IHC's Cardiac Catheterization Laboratory. The following day, a transthoracic echocardiogram was performed at Defendant IHC on Lisa prior to discharge. A color-flow doppler test was not performed to evaluate the atrial septum for a residual shunt, which was ostensibly one of the reasons for closing Lisa's PFO.

46. In a patient with strong or definitive evidence for embolic stroke, the standard of care requires a comprehensive evaluation for all of the causes of embolic stroke. This was not

performed by Dr. Sorensen in his care of Plaintiff. A comprehensive evaluation for causes of "cryptogenic" stroke includes an MRI of the brain (which was done in this case), imaging of the extra cranial and intracranial cerebral arteries, 3-4 week rhythm monitoring to look for paroxysmal atrial fibrillation, imaging of the aorta to look for atherosclerotic disease, lower extremity venous doppler/ultrasound, MRV of the abdominal and pelvic veins, and a hyper coagulability workup. Sorensen did not conduct this evaluation on Plaintiff.

47. Defendant IHC was aware that this type of off-label medically unnecessary PFO closure was being performed on hundreds of patients, including Plaintiff, during this time of October 2008 as Defendant Sorensen had informed Defendant IHC he would perform the procedure in this manner.

48. On October 15, 2008, Lisa Tapp was seen by Defendant Sorensen for a follow-up visit. Lisa complained of palpitations and a rapid heart rate. Defendant Sorensen did not screen Lisa for atrial fibrillation, which carries with it the risk of stroke.

49. Because of Defendants' conduct, Lisa suffered damages, including undergoing an unnecessary surgical procedure and hospital stay, as well as medical expenses, physical pain, and emotional anguish.

50. Despite IHC's awareness of Sorensen's fraudulent and/or negligent practices, it did nothing to notify Plaintiff. Instead, IHC actively allowed Sorensen's practice to continue in order to profit from the thousands of unnecessary procedures performed on patients like Plaintiff. In fact, IHC has to this day actively concealed its knowledge about Sorensen's rogue and fraudulent practices at its facility from patients, third party payers, and the public, and has retained the money earned off of Sorensen's medically unnecessary surgeries.

51. The FDA issued a warning about serious erosion events with Amplatzer Septal Occluder devices in October 2013. Although erosion events are not currently an issue for Lisa Tapp, the Amplatzer Septal Occluder device is permanently implanted and carries this risk.

52. IHC sent a letter to patients around February 2014 alerting patients who had an Amplatzer Septal Occluder device implanted about the FDA's findings with a link to the FDA announcement and St. Jude patient advisory. The letter sent to patients did not mention anything about Dr. Sorensen, the PFO closure procedure itself, or that medical malpractice may have occurred. Nor did the letter inform patients, including Lisa Tapp, that the PFO closure was medically unnecessary to begin with, that the use of this device for PFO closure had not been studied, accepted, and/or approved in the medical community, and that Defendant Sorensen had asserted misrepresentations, falsehoods, half-truths, and engaged in other deceptive acts.

FIRST CLAIM FOR RELIEF: NEGLIGENCE (HEALTH CARE MALPRACTICE)

53. Plaintiff refers to and incorporates the preceding paragraphs as if set forth fully herein.

54. Defendants, individually, collectively, and through the acts and omissions of their agents, servants, employees, physicians, nurses, therapists, and technologists (hereinafter collectively "Defendants") accepted Plaintiff as a patient, and thereby assumed various duties of care.

55. At all relevant times, Defendants held themselves out as being able to provide full care and treatment for patients requiring medical care of the type that Plaintiff required, including, but not limited to, paresthesias in the back of the neck and head and non-specific white matter lesions, among other things.

56. The degree of care and treatment provided to Plaintiff fell below the acceptable standards of care for the types of medical care and treatment required by Plaintiff and provided by Defendants.

57. Specifically, Defendants breached the applicable standards of care in multiple ways including, but not limited to:

a. Falsifying Plaintiff's medical records to indicate that Plaintiff was an appropriate candidate for closure;

b. Misleading Plaintiff regarding the risks and benefits associated with closure and regarding the necessity of treatment;

c. Failing to obtain an adequate history which resulted in an improper medical diagnosis that Plaintiff was an appropriate candidate for closure;

d. Failing to conduct an adequate physical and to obtain appropriate diagnostic testing, which resulted in an improper medical diagnosis that Plaintiff was an appropriate candidate for PFO closure; Performing a medically unnecessary medical procedure with a device that was not FDA approved for this use;

e. Failing to test for residual shunting after performing the PFO closure; and

f. Failing to screen Plaintiff for atrial fibrillation when she presented with palpitations and a rapid heart rate.

58. As a sole, proximate, and foreseeable result of Defendants' acts and omissions, Defendants caused Plaintiff to undergo unnecessary medical procedures, testing, and follow-up visits, incur unnecessary medical expenses, and experience physical injuries and emotional anguish.

59. As a sole, proximate, and foreseeable result of Defendants' acts and omissions, Plaintiff has suffered personal injuries, including by not limited to unnecessary medical procedures, testing, follow-up visits, medical expenses, and emotional anguish.

60. Plaintiff has therefore been injured and is entitled to recover general and special damages in an amount to be determined at trial.

SECOND CLAIM FOR RELIEF: NEGLIGENCE

61. Plaintiff refers to and incorporates the preceding paragraphs as if set forth fully herein.

62. At all relevant times, Defendants owed Plaintiff various duties of care, including but not limited to common law and statutory duties.

63. Defendants, individually and collectively, breached these duties of care.

64. As a sole, proximate, and foreseeable result of Defendants' acts and omission, Defendants caused personal and other injuries to Plaintiff.

65. Plaintiff has been injured and is entitled to recover general and special damages in amounts to be determined at trial.

THIRD CLAIM FOR RELIEF: NEGLIGENT MISREPRESENTATION

66. Plaintiff refers to and incorporates the preceding paragraphs as if set forth fully herein.

67. Defendants, individually and collectively, represented to Plaintiff that medical procedures, testing, and follow-up visits were medically necessary.

68. Defendants' representations that Plaintiff's medical procedures, testing, and follow-up visits were medically necessary was, in fact, not true.

69. Defendants failed to use reasonable care to determine whether the representations regarding the necessity of Plaintiff's medical care was true.

70. Defendants were in a better position than Plaintiff to know the true facts regarding Plaintiff's medical procedures, testing, and follow-up care.

71. Defendants had a financial interest in performing medically unnecessary procedures, testing, and follow-up care on Plaintiff.

72. Plaintiff relied on Defendants' representations, and it was reasonable for her to do so.

73. Plaintiff has therefore been injured as a result of relying on Defendants' representations and is entitled to recover general and special damages in an amount to be determined at trial.

FOURTH CLAIM FOR RELIEF: NEGLIGENT CREDENTIALING

74. Plaintiff refers to and incorporates the preceding paragraphs as if set forth fully herein.

75. Defendant IHC owes a duty to patients to exercise reasonable care in the selection of its medical staff and in granting specialized privileges to them. It also has the duty to periodically monitor and review the qualifications and competency of its medical staff.

76. Defendant IHC breached its duty to exercise reasonable care in its selection of its medical staff, and in granting specialized privileges to and periodically monitoring and reviewing the qualifications and competency of its medical staff.

77. As a sole, proximate, and foreseeable result of its breach, Defendant IHC caused harm to Plaintiff.

78. Plaintiff has been injured and is entitled to recover general and special damages in an amount to be determined at trial.

FIFTH CLAIM FOR RELIEF: FRAUDULANT NON-DISCLOSURE/CONCEALMENT

79. Plaintiff refers to and incorporates the preceding paragraphs as if set forth fully herein.

80. Defendants owed a duty to Plaintiff to disclose important facts, such as the medical necessity of Plaintiff's medical care, to Plaintiff.

81. Defendants knew that the medical care Defendants provided to Plaintiff was not medically necessary, and failed to disclose this to Plaintiff.

82. Plaintiff did not know that the medical care provided by Defendants was not medically necessary.

83. Defendants' failure to disclose the fact that Plaintiff's medical care was not necessary was a substantial factor in causing Plaintiff's damages. Had Plaintiff known that her closure surgery was not necessary, Plaintiff would not have undergone the surgery.

84. Plaintiff has been injured and is entitled to recover general and special damages in an amount to be determined at trial.

SIXTH CLAIM FOR RELIEF: FRAUD

85. Plaintiff refers to and incorporates the preceding paragraphs as if set forth fully herein.

86. At all relevant times, Defendants had a duty and obligation to disclose to Plaintiff true facts concerning the medical care provided to Plaintiff by Defendants.

87. Defendants intentionally concealed material facts concerning Plaintiff's medical care from Plaintiff including, but not limited to the following:

a. Falsifying Plaintiff's medical records to indicate that she was an appropriate candidate for closure;

b. Performing medically unnecessary medical procedures with a device that was not FDA approved for this use; and

c. Concealing from Plaintiff that medical procedures, testing, and follow-up care was unnecessary.

88. Defendants made false statements and misrepresentations about important facts regarding Plaintiff's medical care.

89. Defendants made these false statements and misrepresentations described above knowing that the statements were false, or with reckless disregard for their truth.

90. Defendants made the false statements and misrepresentations to Plaintiff, with the intent that Plaintiff would rely on the statements.

91. Plaintiff did reasonably rely on the false statements and misrepresentations made by Defendants.

92. As a sole, proximate, and foreseeable result of Defendants' false statements and misrepresentations, Plaintiff has suffered personal injuries, including but not limited to unnecessary medical procedures, testing, follow-up visits, medical expenses, and emotional anguish.

SEVENTH CLAIM FOR RELIEF: CIVIL CONSPIRACY

93. Plaintiff refers to and incorporates the preceding paragraphs as if set forth fully herein.

94. Defendants were acting in a conspiracy to commit fraud, thereby increasing their profits through the performance of medically unnecessary procedures on patients, including Plaintiff.

95. There was an agreement and meeting of the minds among Defendant Sorensen, Defendant SCG, and Defendant IHC to misrepresent the need for and induce patients, including Plaintiff, into undergoing medically unnecessary procedures, testing, and follow-up. Defendants agreed to act in concert in making these misrepresentations about the necessity of medical procedures to Plaintiff.

96. There were multiple unlawful, overt acts by Defendant Sorensen, Defendant SCG, and Defendant IHC in furtherance of their scheme, including without limitation, Defendants' fraud.

97. As a result of this conspiracy, Defendant Sorensen, Defendant SCG, and Defendant IHC, should be held jointly and severally liable for the conduct of the other co-conspirators and the damages that Plaintiff sustained as a proximate result thereof, including without limitation personal injuries and other injuries.

98. Plaintiff would further show that Defendant Sorensen and Defendant SCG were operating as alter egos for the purpose of perpetrating the above described conspiracy. There was such a unity of interest and ownership that the separate personalities of the company and the individual did not exist. Observing the corporate form will sanction this conspiracy, promote injustice, and allow an inequitable result.

EQUITABLE TOLLING/FRAUDULENT CONCEALMENT

99. Plaintiff refers to and incorporates the preceding paragraphs as if set forth fully herein.

100. Because of Defendants' concealment of material facts and misleading conduct, Plaintiff was not aware of her causes of action.

101. Plaintiff found out about her cause of action only after learning of Defendants' conduct through lawyer advertising in 2017.

102. Defendants took affirmative steps to conceal Plaintiff's cause of action. Given Defendants' concealment and misleading conduct, a reasonable plaintiff would not have discovered the cause of action earlier.

103. IHC, through its employees, physicians, internal audit, and Sorensen's own representations was well aware that Sorensen had performed medically unnecessary PFO and ASD closures on patients such as Plaintiff, but chose not to conduct a more expansive audit and/or inform patients that had an unnecessary surgery.

104. Neither Sorenson, nor IHC ever notified Plaintiff that she had received an unnecessary procedure, that she was never indicated for the surgery to begin with, that the device implanted into Plaintiff was never medically necessary, was retained in her body for no medical purpose, and that the informed consent contained fraudulent, misleading, and/or incomplete statements. Neither Sorenson, nor IHC, ever compensated Plaintiff for the unnecessary medical surgery she underwent by reimbursing the costs of the procedure.

105. Neither Sorensen, nor IHC, ever made a public statement, sent a letter, made a public announcement, or issued a press release to inform patients, such as Plaintiff Lisa Tapp, may have had a medically unnecessary PFO closure at IHC at any time.

106. Defendants' misrepresentations and misleading conduct constitutes fraudulent concealment that equitably tolls any proffered statute of limitation that may otherwise bar the recovery sought by Plaintiff.

107. Plaintiff did not know, nor should have known, of the causes of action against Defendants prior to being put on notice of Defendants' potential liability in 2017. She neither discovered, nor reasonably should have discovered, the facts underlying her causes of action before any proffered statute of limitations period expired.

108. As a result of Defendants' concealment of the true character, quality and nature of their conduct, they are estopped from relying on any statute of limitations defense. Defendants' affirmative acts and omissions, before, during, and/or after their actions causing Plaintiff's injury prevented Plaintiff from discovering the injury or cause thereof until recently in 2017. Such conduct tolls the limitations pursuant to the Utah Health Care Malpractice Act 78B-3-404(b).

109. Defendants' conduct, because it was purposely committed, was known or should have been known by them to be dangerous, heedless, reckless, and without regard to the consequences or the rights and safety of Plaintiff.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for a judgment (under URCP: Tier 3) against Defendants in an amount to be determined by the trier of fact for the following damages:

a. For special damages in an amount to be determined at trial;

b. For general damages in an amount to be determined at trial;

c. For pre and post judgment interest on all special damages pursuant to Utah law;

d. For costs and attorney fees to the extent allowed by law; and

e. For such other relief as the Court deems appropriate.

RESPECTFULLY SUBMITTED this 21st day of November 2017.

/s/ Rhome D. Zabriskie
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CERTIFICATE OF SERVICE

I hereby certify that that a true and exact copy of the foregoing has been served on the following via the Court's ECF filing system and/or Email on 21ST day of November, 2017:

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