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Michael Patrick Payne, By And Through His
Guardian Ad Litem, John Michael Payne, John
Michael Payne And Stephanie Payne v. Garth G.
Myers, M.D.; Joseph P. Kesler, M. D.; The State of
Utah And Handicapped Children's Service; and the
Division of Health of The State of Utah : Brief of
Appellants

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IN THE SUPREME COURT OF THE STATE OF UTAH

MICHAEL PATRICK PAYNE,)
by and through his)
Guardian ad Litem,)
JOHN MICHAEL PAYNE,)
JOHN MICHAEL PAYNE and)
STEPHANIE PAYNE,)
)
Plaintiffs-Appellants,)
)
vs.)
)
GARTH G. MYERS, M.D.;)
JOSEPH P. KESLER, M.D.;)
THE STATE OF UTAH AND)
HANDICAPPED CHILDREN'S)
SERVICE; and THE DIVISION)
OF HEALTH OF THE STATE OF)
UTAH,)
)
Defendants-Respondents.)

No. 19218

BRIEF OF APPELLANTS

APPEAL FROM A SUMMARY JUDGMENT OF THE THIRD JUDICIAL
DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH
JUDGE TIMOTHY R. HANSON

R. SCOTT WILLIAMS
STUART H. SCHULTZ
STRONG & HANNI
Sixth Floor Boston Building
Salt Lake City, Utah 84111
Attorneys for Plaintiffs-Appellants

STEWART M. HANSON, JR.
FRANCIS J. CARNEY
SUITTER, AXLAND & ARMSTRONG
175 South West Temple
Salt Lake City, Utah 84101
Attorneys for Respondent Kesler

GARY D. STOTT
NELSON L. HAYES
RICHARDS, BRANDT, MILLER & NELSON
50 South Main Street, Suite 700
Salt Lake City, Utah 84110
Attorneys for Respondent Myers

STEVEN J. SORENSON
ASSISTANT ATTORNEY GENERAL
Co-Counsel for Respondent Kesler

WILLIAM S. QUIGLEY
ASSISTANT ATTORNEY GENERAL
Co-Counsel for Respondent Myers

CRAIG L. BARLOW
ASSISTANT ATTORNEY GENERAL
236 State Capital Building
Salt Lake City, Utah 84114
Counsel for Respondents
State of Utah, et al.

ARTHUR H. NIELSON
1100 Beneficial Life Tower
Salt Lake City, Utah 84147
Co-Counsel for Respondent Myers

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GARTH G. MYERS, M.D.;)
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HANDICAPPED CHILDREN'S)
SERVICE; and THE DIVISION)
OF HEALTH OF THE STATE OF)
UTAH,)
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Defendants-Respondents.)

BRIEF OF APPELLANTS

STATEMENT OF THE NATURE OF THE CASE

This is an action by plaintiffs against defendants Myers, Kesler, the State of Utah Handicapped Children's Service and the Division of Health of the State of Utah, wherein plaintiffs claim that defendants Myers and Kesler, who are both physicians, provided negligent advice to plaintiffs John Michael Payne and Stephanie Payne, husband and wife, regarding their propensity to have a child suffering from a severe genetic disease. As a result of the negligent advice, plaintiffs John Michael

Payne and Stephanie Payne allege that they became the parents of a second child suffering from a severe genetic disease, the same genetic disease from which their first child also suffered. Plaintiffs John Michael Payne and Stephanie Payne seek damages for wrongful birth and plaintiff Michael Patrick Payne seeks damages for wrongful life.

DISPOSITION IN THE LOWER COURT

Motions for summary judgment by all defendants were considered by the district court, and summary judgments were entered in favor of the State of Utah and Handicapped Children's Service and the Division of Health of the State of Utah against plaintiffs John Michael Payne and Stephanie Payne on the grounds that they did not timely serve a notice of claim against the State of Utah defendants pursuant to Utah Code Annotated §63-30-12, and the motions for summary judgment by defendants Myers and Kesler were granted as to all claims by all plaintiffs. The motion for summary judgment by the State of Utah defendants as to the claims on behalf of Michael Patrick Payne was denied.

RELIEF SOUGHT ON APPEAL

Appellants seek reversal of the lower court's decision granting summary judgment in favor of defendants Myers and Kesler as to all claims of all named plaintiffs.

STATEMENT OF FACTS

On September 2, 1975, plaintiffs John Michael Payne and Stephanie Payne gave birth to their first child, Matthew Payne. Shortly after the child's birth, he showed signs of a serious neurological impairment and suffered numerous other physical problems. He was subsequently treated by defendants Kesler and Myers, both of whom failed to diagnose Matthew Payne's neurological and other physical problems as being related to genetic disease.

In 1977, Matthew was seen and treated by defendants Kesler and Myers at the Handicapped Children's Service of the State of Utah. In that period of time, plaintiffs John Payne and Stephanie Payne requested genetic counseling on several occasions from Kesler and/or Myers as well as counseling and advice regarding the possibility that Matthew's illnesses were related to a genetic disease. Both parents were anxious to have another child, but they did not want to run the risk of having a second child suffer in the same way as their first. The parents specifically requested that they be given genetic counseling by one qualified to perform the same, so as to minimize the risk. The parents specifically informed the defendants that they were anxious to have other children when they requested the genetic counseling.

An appointment to meet with a doctor trained in genetic counseling, Dr. Robert Fineman, was set up for plaintiffs by defendants for some time in the fall of 1977, but Dr. Fineman was

unable to keep the appointment, and plaintiffs were notified by telephone that the appointment was canceled. Subsequently, plaintiffs met with defendants Kesler and Myers, and John Payne and Stephanie Payne advised Kesler and Myers that the appointment for genetic counseling had been canceled. Mr. and Mrs. Payne again reiterated their concerns at this time regarding the need for genetic counseling, so that they would feel assured that it was safe to have another child. This last appointment with Kesler and Myers was probably held some time in the fall of 1977, or at least before March of 1978. During that visit, both Kesler and Myers advised Mr. and Mrs. Payne that, although another genetic counseling appointment could be set up, neither Dr. Kesler nor Dr. Myers felt that such counseling was necessary. Furthermore, the doctors advised Mr. and Mrs. Payne that it was safe to have another child, and that Mrs. Payne need not be concerned about any genetic problems related to having another child.

In reliance on the assurances given by Drs. Kesler and Myers, Mr. and Mrs. Payne began a course of conduct which would ultimately result in the birth of their second child, plaintiff Michael Patrick Payne, on January 27, 1979. The course of conduct taken by the Paynes in reliance on Drs. Myers' and Kesler's advice included a visit by Mrs. Payne on February 14, 1978, to her obstetrician/gynecologist, Dr. R. Kent Gibbs. At that office visit, Dr. Gibbs removed the intrauterine birth control device (IUD) from Mrs. Payne. [Gibbs Depo. p. 20] Mrs. Payne con-

Dr. Gibbs again on March 13, 1978. [Gibbs Depo., p. 21] The IUD was removed so that the Paynes could conceive another child. As indicated above, the second child, plaintiff Michael Patrick Payne, was born on January 27, 1979. The Paynes were charged for the services provided by Dr. Gibbs as part of their overall bill for services relating to obstetrical care and delivery of the baby in the amount of \$345. [Gibbs Depo. Exhibit A] Shortly after his birth, Michael developed the same neurological impairments and defects from which his brother suffers.

A few months after Michael's birth, both children were seen by a geneticist who upon examining them almost immediately diagnosed Pelizaeus-Merzbacher disease as the probable genetic impairment from which the boys suffer.

Pelizaeus-Merzbacher in its classical form is an hereditary genetic, slowly progressive brain disorder with no known treatment or cure. Early symptoms include rotating eye movements and jerking and rolling head movements or tremor. In the first few years of life, there is a slow progression of the neurological signs and a decline of the intellectual or mental level. Ultimately, the symptoms of the disease include severe spasticity, loss of sight, severe involvement of speech and finally vegetation and death in the second or third decade. Renier, et al., "Connatal Pelizaeus-Merzbacher Disease with Congenital Stridor in Two Maternal Cousins", Acta Neuropathologica (1982); Swaiman & Wright, The Practice of Pediatric Neurology, p. 729 (1975).

As part of their complaint in this action, plaintiffs John Michael Payne and Stephanie Payne seek as damages, among other things, the "[c]osts incident to the pregnancy and delivery of plaintiff Michael Patrick Payne in excess of \$1,000;" [Tr. #

The lower court's decision to grant summary judgment in favor of defendants Myers and Kesler was based on its interpretation of Utah Code Annotated §63-30-4, as amended in 1978, to absolutely preclude personal liability of a governmental employee for said employee's negligent conduct. As set forth more fully below, plaintiffs take the position that said statute is inapplicable to this case because plaintiffs' cause of action arose prior to the effective date of the statute, and/or because the lower court's interpretation of the statute as applied to the facts of this case was wrong and violates sound public policy, and/or the statute is unconstitutional.

ARGUMENT

POINT I.

UTAH CODE ANNOTATED §63-30-4, AS AMENDED, CANNOT BE APPLIED RETROACTIVELY TO BAR PLAINTIFFS' CLAIMS AGAINST DEFENDANTS MYERS AND KESLER BECAUSE SAID DEFENDANTS' NEGLIGENCE OCCURRED AND PLAINTIFFS' RIGHTS AROSE PRIOR TO THE EFFECTIVE DATE OF THE STATUTE.

A. U.C.A. §63-30-4 As Amended, Is To Be Given Prospective Effect Only.

Utah Code Annotated §63-30-4 was amended in 1978. The legislature expressed its intent when it amended said statute by stating that it was applicable only after the effective date of

ne amendment. Said section states, in part:

The remedy against a governmental entity or its employee for an injury caused by an act or omission which occurs during the performance of such employee's duties, within the scope of employment, or under color of authority is, after the effective date of this Act, exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or the estate of the employee whose act or omission gave rise to the claim, unless the employee acted or failed to act through gross negligence, fraud or malice.
[emphasis added]

Section 63-30-4, as amended, became effective on March 30, 1978. Laws of Utah 1978 at 91. It cannot be applied retroactively to events, occurrences or transactions occurring before March 30, 1978.

In addition to the specific language in §63-30-4 precluding its retroactive application, the general rule of statutory construction is that statutes are to be applied prospectively only unless the statute specifically states that it is to have retroactive application. Utah has codified this general rule in U.C.A. §68-3-3 which states: "No part of these revised statutes is retroactive, unless expressly so declared." §63-30-4 cannot be applied retroactively because it does not expressly declare itself to be retroactive.

B. A Statute Cannot Be Applied Retroactively If Existing Substantive Rights Are Terminated By the Statute.

Courts have applied an exception to the rule that statutes are to be applied prospectively only, in cases where the statute involved procedural rights only, or where the statute dealt only with a clarification or the interpretation of a prior statute. See 82 C.J.S. Statutes §416. In a case involving a constitutional challenge of certain "children's rights" statutes, but which did not turn on the issue of retroactivity, the Utah Supreme Court, in the case of In Re J. P., 648 P.2d 1364 (Utah 1982), explained the general rule and the exception as noted above regarding retroactivity in Footnote 4 to the main opinion as follows:

The well-established general rule is that statutes not expressly retroactive should only be applied prospectively. . . . Exceptions to this general rule have been found where an amendment's effect was 'procedural' or 'remedial.' Foil v. Ballinger, Utah, 601 P.2d 144 (1979) (clarified statutory notice provision and changed 'commenced' to 'initiated'); Petty v. Clark, 113 Utah 205, 192 P.2d 589 (1948) (added new categories of suits where jury is advisory); Boucofski v. Jacobsen, 36 Utah 165, 104 P. 117 (1909) (empowered courts to make additional findings after entry of judgment). In Foil v. Ballinger, 601 P.2d at 151 we quoted with approval a passage from Okland Constr. Co. v. Industrial Comm., . . . which stated that a statute or amendment may be retroactively applied where it 'deals only with clarification or amplification as to how the law should have been understood prior to its enactment.'

The 1981 Amendment to §78-3(a)-48(1)(a) did not make a merely procedural change

or clarify how the 1980 statute should have been understood originally. Although the amendment does not alter the subsection's controlling principle . . . it deletes one of the two criteria for determining the child's best interests, clarifies the other, and adds seven new criteria. The additions are extensive, more than doubling the subsection's length. Changes of this magnitude do not fit within the relatively narrow exception illustrated above. [emphasis added] [648 P.2d at 1369-1370]

In the instant case, the 1978 change to §63-30-4 was extensive and did not affect only procedural rights. Nor did the amendment clarify or interpret prior law. The amendment to §63-30-4, effectively destroys plaintiffs' common law right to file suit and pursue an action against Drs. Kesler and Myers for simple negligence, which is clearly a substantive right not within the exceptions set forth in In Re J. P., supra. The amendment not only affects substantive rights, it purports to totally extinguish basic, substantive, common law rights to hold treating physicians personally liable for their medical malpractice.

The case of Allen v. Fisher, 118 Ariz. 95, 574 P.2d 1314 (1977), helps define the distinction between substantive and procedural rights. The court stated:

While there is no precise definition of either term, it is generally agreed that a substantive law creates, defines and regulates rights while a procedural one prescribes the method of enforcing such rights or obtaining redress. [574 P.2d at 1315]

The case of Kolodejchuk v. Lucier, 52 Or.App. 81, 630

P.2d 889 (1981), provides an insightful explanation of the retroactivity question, distinguishing between procedural and substantive rights:

The general rule in this state is that, unless the legislature indicates otherwise, 'procedural' or 'remedial' statutes are applied retroactively and 'substantive' statutes are not. . . . These labels are commonly applied, however, only after a determination as to which effect should be given. . . . The focal question is whether the new statute affects legal rights and obligations arising out of past transactions. If it does, then the statute is substantive and normally will not be applied retroactively. [emphasis added] [630 P.2d at 891]

In the case of Silver King Coalition Mines Co. v. Industrial Comm., 2 Utah 2d 1, 268 P.2d 689 (1954), the Utah Supreme Court made a similar statement:

A statute is not made retroactive merely because it draws on antecedent facts for its operation. . . . A law is retrospective, in its legal sense, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already passed. [emphasis added] [268 P.2d at 692]

In addition, the Utah Supreme Court has held that a cause of action is a property right which the legislature cannot take away retroactively. In Spanish Fork West Field Irrigation Co. v. Dist. Court of Salt Lake County, 99 Utah 527, 104 P.2d 3 (1940), the court stated:

With reference to a right of action it is stated in 6 RCL under Title, 'Constitutional Law', . . . as follows: 'A

vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference, and whether it springs from contract or the principles of the common law, it is not competent for the legislature to take it away.'

And this Court has approved and affirmed this doctrine in the case Halling v. Industrial Comm. of Utah, et al., 71 Utah 112, 263 P. 78, citing 2d Cooley's Const. Law 8th Ed., [104 P.2d at 360]

The recent case of State of Utah v. Higgs, 656 P.2d 998 (Utah 1982), contains language indicating that the statute in effect at the time the complaint is filed controls the litigation. However, the issue in Higgs was concerned entirely with the question of which statute applied for purposes of determining the procedural rights of the parties for employee grievances. No substantive rights were involved, and even though the court referred, in dicta, to a general rule that the statute in effect at the time the complaint is filed applies to both procedural and substantive rights, it is clear that the court was applying a procedural statute retroactively, and did not intend to expand the general rule of law that a statute cannot be applied retroactively to cut off substantive rights. This is evidenced by the court's statement in the second to the last paragraph of the opinion:

On remand of this case, the Personnel Management Act will control the administrative proceeding since it does not affect any common law or vested rights, and since jurisdiction of the district court had not yet attached at the time the Employees' Grievance Procedure Act was repealed. [emphasis added] [656 P.2d at 1002]

Furthermore, "a statute should be given the least retroactive effect that its language reasonably permits." Aircraft Co. v. Cranston, 24 Cal.Rptr. 851, 374 P.2d 814 (1962). And, "[i]n the case of doubt, the doubt must be resolved against retrospective effect." Wilson v. State Ex Rel. Okla. Tax Comm., 594 P.2d 1210 (Okla. 1979). It is further a well-stated principle that the substantive law to be applied in a case is the law that was in effect as of the date of the critical event, occurrence or transaction. This principle was stated by the Utah Supreme Court in Okland Constr. Co. v. Industrial Comm., 520 P.2d 208 (Utah 1974), wherein the court stated:

It is true as the employee Okland contends: That it is entitled to have its rights determined on the basis of the law as it existed at the time of the occurrence; and that a later statute or amendment should not be applied in a retroactive manner to deprive a party of his rights or impose greater liability upon him. [520 P.2d at 210]

This same principle was cited approvingly in Foil v. Ballinger, 601 P.2d 144 (Utah 1979).

Thus, it is clear that a statute which terminates an existing substantive right cannot be applied retroactively.

There should be no question that with the passage of Amendment to §63-30-4 that a substantive right has been extinguished. A clear indication that the amendment affected a substantive right is shown from the holding in Allen v. Fitch, supra, an Arizona case involving a medical malpractice statute. The court was required to determine whether an amendment

malpractice statute in Arizona which became effective after the date plaintiff filed his action could be applied to plaintiff's action. The court needed to decide whether the amendment to the statute was procedural only, or if it affected substantive rights. Part of the amended statute abolished the general source rule and allowed the defendant medical care provider to put into evidence any benefits the plaintiff was receiving for his injuries from collateral sources. The court held that this part of the medical malpractice statute changed the measure of damages available to a plaintiff in a malpractice action and that such a change was a substantive one and as a result, the amended statute could not be applied retroactively. The court stated:

A rule affecting the measure of damages is a substantive right, Frank Bricoe Co., Inc. v. Rutgers State Univ. & College of Medicine and Denistry of N.J., et al., 130 N.J. Super. 493, 327 A.2d 687 (1974), and a change in the law affecting the measure of an injured person's right of recovery cannot be applied retroactively. [574 P.2d at 1316]

Just as in Allen, so in the instant case, the amendment in 1974 effectively changes the measure of damages available to a plaintiff in a claim against a government employee for his negligence. If the plaintiffs' right to sue and recover from the employee in his personal capacity is abolished, then the amount of damages is controlled by the Governmental Immunity Act which limits the amount to be recovered to \$100,000 per person depending on the facts of this case. See G.S.A. §63-30-29.

This is another basis for holding that the amendment to the statute affects a substantive right and cannot be applied retroactively.

The only question then is what are the critical occurrences in the instant case which determine whether plaintiffs held a substantive right before the amendment took effect. This issue will be discussed under the next subheading.

C. Plaintiffs Acquired Substantive Rights Prior To The Effective Date of §63-30-4, As Amended, Because The Physicians' Negligent Advice Was Given, And Plaintiffs Relied Thereon And Incurred Medical Expense Obligations As A Result Of Said Negligent Advice, Prior To The Effective Date of §63-30-4, As Amended.

It is clear from the facts of this case that the amended statute did not become effective until after the date of the alleged negligent acts committed by defendants Myers and Kesler. Although neither John Payne nor Stephanie Payne could place a specific date on the visit when Dr. Kesler and Dr. Myers advised them that Matthew Payne's disease was not genetically related and that the Paynes could have another child without concern for genetic problems, both Mr. and Mrs. Payne stated that it was in the fall of 1977 that the visit occurred. Furthermore, the last entry or medical visit found in the Handicapped Children's Service Record before the birth of the second child is October 5, 1977. Consequently, the alleged negligence of the doctors occurred prior to March 30, 1978, the effective date of §63-30-4 as amended.

Furthermore, services provided by Mrs. Payne's obstetrician, Dr. R. Kent Gibbs, in removing the IUD from Mrs. Payne allowing her to become pregnant, were provided on February 14, 1978, approximately one and a half months before the effective date of the amended statute. At such time as those services were rendered, the Paynes incurred an obligation to pay for the services of Dr. Gibbs, which services would never have been provided nor the obligation incurred, had defendants Myers and Kesler not negligently advised Paynes that it was safe to have another child without concern for genetic ramifications.

Plaintiffs contend, therefore, that since the negligence occurred prior to the effective date of the amendment to §63-30-4, and since the Paynes incurred obligations for medical services as a result of said negligence, also prior to the effective date of §63-30-4, that their substantive rights arose prior to the effective date of the statute. The amendment is therefore not applicable because applying it to this case would constitute a retroactive application of the statute which is expressly prohibited as discussed above.

The critical occurrences in the instant case, which give rise to plaintiffs' substantive rights prior to the effective date of §63-30-4, are the negligent advice of defendants Myers and Kesler and the subsequent reliance by plaintiffs John Michael Payne and Stephanie Payne on said negligent advice in obligating themselves for medical services provided in removing the IUD so as to allow Mrs. Payne to become pregnant. Both of these criti-

cal occurrences took place prior to the effective date of the amendment to §63-30-4. The substantive law in effect as of the date of those critical occurrences is the law that must be applied to this case because those occurrences created a substantive right in favor of Paynes which cannot be retroactively taken away from them by an amendment to §63-30-4.

Defendants will undoubtedly argue that plaintiffs' rights or cause of action did not accrue until either the date the baby was conceived or the date the baby was born. This court should reject that argument for the following two reasons, which will be enumerated in more detail below. First, it is clear that the law applicable to a cause of action is that law in effect at the time of the occurrence or transaction that gives rise to the rights and liabilities of the parties. The "occurrence" giving rise to the liability of the defendant doctors was the negligent advice which was given prior to the effective date of the amendment to §63-30-4. Second, once the plaintiffs incurred any detriment or obligation, regardless of how small it may have been, which obligation was a direct result of the defendants' negligence, plaintiffs' cause of action arose and any consequences subsequent to the date that cause of action arose are a part of the original cause of action and relate back to that same cause of action.

The general rule has previously been stated that a statute will not be applied retroactively if it affects the substantive rights of the parties. In most cases, it will generally be the case that the substantive rights are determined

when the cause of action accrues. It has further generally been stated that a cause of action accrues when a party could first maintain a successful suit.

Medical malpractice actions, however, are somewhat different than the average negligence case. In most negligence actions, the injury occurs at the same time, or very closely in time, to the act of negligence. This is not necessarily the case in a medical malpractice action, especially one involving negligent medical advice. As in the instant case, the negligent advice may be given before any concrete actions are taken in reliance upon that advice. But the negligent advice is the conduct that gives rise to liability on the part of the doctor. The rights and liabilities of the parties, therefore, must be measured by the law in effect at the time of the actions of the doctors which give rise to later liability.

Even the Utah Medical Malpractice Act recognizes that the treatment by the physician should be given some operative effect. Section 78-14-4, Utah Code Annotated, states, in pertinent part:

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

This section recognizes that medical malpractice cases

are often different than the average tort case. It can be some time between the time of the negligence and the time of discovery, and the Medical Malpractice Act therefore provides for codification of the "discovery rule". But even though the discovery rule is applied, allowing two years from the time that the patient discovers or should have discovered an injury within which to bring suit, the legislature also recognized the operative effect of the doctors' negligence and provides for an outside limit on the time for bringing a cause of action, that being four years after the alleged act, omission, neglect or occurrence.

In the instant case, the negligence occurred some time in the fall of 1977, clearly prior to the date of the amendment to §63-30-4. Thus, the substantive rights of the parties arose prior to the effective date of the amendment, which right cannot be extinguished at a later date by an amendment to §63-30-4.

It is further interesting to note that the Utah Legislature in 1983 amended the notice provision of the Governmental Immunity Act, §63-30-11(1) in 1983 to read: "A claim is deemed to arise when the statute of limitations that would apply if the claim were against a private person commences to run." Utah Code Annotated §63-30-11(1) (Inter. Supp. 1983). Since the four-year medical malpractice statute of limitations begins to run as of the date of negligence, the Legislature has here recognized the potential for a right of some type (claim) to arise as of the date of the negligence.

Furthermore, as indicated above, plaintiffs incurred an obligation for medical services to Dr. Gibbs for removal of the IUD and for other services provided prior to the effective date of the amendment to §63-30-4. These services were clearly related to the Paynes' desire to have another child, and would not have been incurred if defendants Kesler and Myers had not assured plaintiffs that they could conceive and have another child without fear of any genetic problems. Although the actual bill for services rendered may not have been received by Mr. and Mrs. Payne until after their second child was delivered, that bill includes the costs of all obstetrical care provided by Dr. Gibbs dating back to the time the IUD was removed. The obligation to pay for the services rendered in removing the IUD was incurred at the time those services were rendered. If the Paynes had learned prior to the date of conception of the genetic disease, and had terminated any attempts at having another child, they clearly would have been responsible for the services provided by Dr. Gibbs up to that point in time. Their obligation to pay for those services would have given them a right of action back against Drs. Myers and Kesler because the obligation was incurred as a direct result of the negligent advice provided by Kesler and Myers.

That a patient becomes obligated to pay for services rendered by a physician as the services are rendered is clearly set forth in the case of In Re Shoptaw's Estate, 343 P.2d 740 (Wash. 1959). This case involved the issue of whether a

doctor's bill for services rendered during the last 11 months of a person's life took priority over a claim of the United States for back taxes where both were made claims against the deceased person's estate. The Washington Supreme Court discussed the issue of whether the doctor's bills were in fact debts due from the deceased and stated:

The test is whether, if the decedent had recovered from her illness, she would have been personally liable for the payment of those obligations. The general rule is that the patient is liable, either under express or implied contract, for the medical services rendered to him. The patient's liability arises as the physician's services are rendered on his behalf during his lifetime. After the patient's death, his physician's claim for such services relates to a debt due from the decedent [emphasis added] [343 P.2d at 742]

This same general rule was referred to in Fugitt v. Myers, 9 Wash.App. 523, 513 P.2d 297 (1973), wherein the court stated:

[T]he general rule is that a patient is liable, under either an express or implied contract, for the medical services rendered to him, and after the patient's death the attending physician's claim for such services is a debt due from the decedent's estate. [513 P.2d at 299]

Cleveland Anesthesia Group v. Krulak, 135 N.E. 685 (Ohio 1956), was a case where the Anesthesia Group brought suit to recover the cost of providing anesthetic services to the defendant's wife while she was in the hospital. The trial court entered judgment for the plaintiff and the defendant appealed. The appellate court affirmed. Regarding the obligation for the anesthetic services provided, the court stated:

It is well established in this state that a husband is bound to pay for medical services rendered to his wife as necessities, and that the services of a surgeon, in conjunction with the services of one specializing in anesthesiology in the performance of an operation, are indeed necessities.

. . . .

Under the facts shown here to exist, the husband may be held liable. At common law, when one secures services to be rendered, whether to himself or to another, there arises an implied contract to pay for such services. [135 N.E.2d at 687]

The above-referenced cases clearly establish that once the Paynes received the services from Dr. Gibbs in February of 1978, which services were only obtained by Paynes because of the advice given them by defendants Myers and Kesler, the Paynes immediately incurred an obligation to pay Dr. Gibbs for those services. As was subsequently shown, the advice given by Drs. Myers and Kesler was negligent because it was not genetically safe for Mrs. Payne to become pregnant again, and the obligation incurred by Paynes to Dr. Gibbs constituted a cause of action as of the date that obligation was incurred (February 14, 1978). This obligation is a damage incurred by Mr. and Mrs. Payne caused by the negligent advice of Drs. Myers and Kesler. This cause of action for damages arose prior to the effective date of the amendment to §63-30-4. Therefore, the plaintiffs had a cause of action prior to the amendment to §63-30-4.

Once the cause of action arose when Paynes incurred the obligation to Dr. Gibbs, then any additional damages incurred by

Paynes, which are foreseeable and which are the natural result of defendants' negligent advice, are recoverable by Paynes as part of the basic cause of action. It is a well-settled principle of law that a cause of action cannot be split and that all damages relating to a cause of action, whether present or future, must be joined in the same lawsuit. 22 Am.Jur.2d, Damages, §26 states:

The law does not permit the owner of a single or entire cause of action or an entire or indivisible demand, without the consent of the person against whom the cause or demand exists, to divide or split that cause or demand so as to make it the subject of several actions. The entire cause must be determined in one action, and if suit is brought for a part of the claim, the judgment obtained precludes a second action for any remaining portion of the claim, even though the form of the second action is not identical with the first or different grounds of relief are set forth in the second suit. Hence, in estimating the pecuniary loss which a plaintiff has sustained as a result of the defendant's tort or breach of contract, all the consequences of the injury, future as well as past, are to be taken into consideration; the recovery, if any, must be for all the injuries and all damages resulting therefrom, whether past, present, or prospective, once and for all. In cases coming within this rule, a recovery may be had for prospective damages which are reasonably certain to accrue. [22 Am.Jur.2d at 46-47]

Moreover, the Utah Supreme Court quoted approvingly from a Minnesota case in Masich v. United States Smelting, Refining & Mining Co., 13 Utah 108, 191 P.2d 612 (1948), and stated:

A personal injury received at the hands of a wrongdoer constitutes but one right of action. It cannot be divided into several parts to accord with the elements of dama-

ges recoverable therefor. It presents a single controversy to be settled in a single action. [191 P.2d at 619]

The Masich case also made a statement relevant to the retroactivity issue. It stated:

Obviously when an act excludes causes of action arising before the act is passed, no valid reason exists for denying the employee his right of action for the injuries sustained before passage of the act. [Id. at 623]

Masich involved the interpretation of Utah's Occupational Disease Disability Law and whether that Act was the exclusive remedy for an employee partially disabled by silicosis where the Act only provided compensation for employees totally disabled by the disease. In light of the court's statement, quoted above, that a personal injury is one right of action and cannot be divided, the court's statement regarding causes of action arising before passage of the Act is directly applicable to the instant case. A cause of action arose when Paynes' incurred the medical expense obligation. That constituted an injury, and since the cause of action for personal injury cannot be divided up, all subsequent damages flowing naturally from the original cause of action relate back to that date prior to passage of the amendment to §63-30-4.

Clearly, when Drs. Myers and Kesler gave plaintiffs the advice that they could conceive and have another child without fear of genetic problems, they could foresee that plaintiffs would take the steps necessary to conceive and have a child. It

was also clearly foreseeable that if the advice was not proper, that another genetically diseased child could be born and that plaintiffs would incur expenses and damages as a result thereof.

Therefore, any and all damages that occurred following the initial date that a cause of action was formed are a part of that cause of action and are recoverable by plaintiffs against defendants. Since medical expense obligations were incurred prior to the effective date of the amendment, all future damages to plaintiffs relate back to that date at the very least.

In addition, the determination of the time when the plaintiffs suffered appreciable and measurable damages, which would give rise to a cause of action, is a question of fact which would preclude summary judgment. Haslund v. City of Seattle, 547 P.2d 1221 (Wash. 1976).

In summary, plaintiffs' position is that their substantive rights were in existence prior to the effective date of §63-30-4, as amended, because defendants' negligence occurred before and plaintiffs incurred obligations before the statute became effective. If the court were to apply §63-30-4, as amended, to this case and eliminate any potential liability of Drs. Kesler and Myers as individuals, then the court would be giving §63-30-4 an impermissible retroactive application.

D. The Law In Effect As Of The Date Of Negligence
And/Or Date Paynes First Incurred Medical Expenses
Applies To This Case.

It has been shown above, that plaintiffs held substantive rights prior to the date §63-30-4, as amended, became effective. Therefore, §63-30-4 as it existed prior to being amended is the statute applicable to the facts of this case. Prior to the 1978 amendment, the statute stated:

Nothing contained in this Act, unless specifically provided, is to be construed as an admission or denial of liability or responsibility insofar as governmental entities are concerned. Wherein immunity from suit is waived by this Act, consent to be sued is granted and liability of the entity shall be determined as if the entity were a private person.

Obviously, the statute prior to the 1978 amendment does not bar an action against an employee of a governmental entity in his personal capacity, and in fact, makes no reference whatsoever to the status of governmental employees.

Further, the Utah Supreme Court held in Frank v. State, 613 P.2d 517 (Utah 1980), that the Governmental Immunity Act had no application to individuals, and that a psychologist working with the University of Utah Medical Center alleged to have been negligent in his treatment of a patient was not afforded immunity under the discretionary/ministerial analysis applied to agents of the government.

Thus, under the law applicable to the facts of the instant case, Drs. Kesler and Myers can be held personally liable for their negligent conduct to plaintiffs. This law should be

applied and the court should reverse the lower court's summary judgment in favor of said defendants.

POINT II.

PLAINTIFFS' CLAIMS AGAINST DEFENDANTS MYERS
AND KESLER ARE NOT BARRED BY THE
GOVERNMENTAL IMMUNITY ACT.

Assuming, arguendo, that Utah Code Annotated §63-30-4, as amended in 1978, does apply to the facts of the instant case, plaintiffs contend that said statute was never intended to bar their claims against Drs. Kesler and Myers as individuals.

A. Madsen v. Borthick, 658 P.2d 627 (Utah 1983) Does Not Apply To The Facts Of This Case.

Plaintiffs acknowledge this court's recent decision in Madsen v. Borthick, 658 P.2d 627 (Utah 1983), which case contains statements to the effect that the Governmental Immunity Act amendments have extinguished any personal liability of employees of governmental entities for simple negligence. In spite of these statements, plaintiffs suggest that Madsen does not bar their claims against Myers and Kesler. Footnote 5 in Madsen, states, in part:

[W]e express no opinion on the question of whether a claim against an employee of a government entity would be barred if the notice of claim had not been filed but the entity had a statutory duty to indemnify the employee. [658 P.2d at 630]

Prior to a 1983 amendment, the governmental entity's statutory duty to indemnify its employees arose pursuant to Utah Code Annotated §63-48-1, et. seq., and was applicable only in

situations where simple negligence of an employee was involved. If the employee acted with gross negligence, malice or fraud, the governmental entity was relieved of the statutory duty to indemnify. At all times relevant to the instant case, §63-48-3(4) stated:

No public entity is obligated to pay any judgment based on a claim against an officer or employee if it is established that the officer or employee acted or failed to act due to gross negligence, fraud, or malice.

If Madsen stands for the proposition that there can be no cause of action for simple negligence against a government employee, there would be no need for the statement made by the court in Footnote 5, and there would also be no way to reconcile the 1978 amendment to §63-30-4 of the Governmental Immunity Act with the indemnity statute. This court clearly recognized in Madsen the statutory duty to indemnify, and made no statement to the effect that the amendment to §63-30-4 of the Governmental Immunity Act impliedly repealed the indemnity statute. However, if §63-30-4 abolishes any personal liability for simple negligence of a government employee, there could be no situation in which the statutory duty to indemnify would arise. This would violate the general principal of statutory construction that requires construing related statutes in such a way as to give reasonable and operable effect to both. Madsen further recognized the existence of the duty to indemnify and also the potential for a claim against an employee in Footnote 11, which states:

The intent to adopt a new rule for official immunity is further evident in the 1978 amendment to the notice provision, §63-30-11, which added a provision to the effect that the service of a notice of claim upon an employee of a government entity is not a condition precedent to the commencement of an action against the employee, and a further provision that the entity need not receive a notice of claim where only the employee was sued, unless the entity had a statutory duty to indemnify the employee. [658 P.2d at 633]

Both Footnote 5 and Footnote 11 of Madsen describe a situation which is present in the instant case. This case deals with claims against employees of the state in their individual capacity. The claims are for simple negligence only, which gives rise to the statutory duty to indemnify. This court stated in Madsen that it was expressing no opinion on the question of whether a claim against an employee would be barred if the notice of claim had not been filed where the entity had a statutory duty to indemnify. If there is no basis for a claim or for personal liability against an employee for simple negligence, there could be no situation where the statutory duty to indemnify arises. Thus, plaintiffs suggest that the court has not yet decided the full extent of the meaning of the amendment to §63-30-4.

Furthermore, any reference in Madsen to the effect of §63-30-4, as amended, on actions against employees, should be considered no more than dicta because the defendant in Madsen was not simply a government employee, but rather a government official, the Commissioner of the Utah Department of Financial Institutions. The defendants in the instant case are medical

ctors who happened to be working for the State of Utah while performing services for plaintiffs.

B. U.C.A. §63-30-4, As Amended, Must Be Given A Reasonable Interpretation.

In Nelson v. Stoker, et al., ___ P.2d ___ (Utah 1983), No. 18244, filed August 1, 1983, the Supreme Court stated: "This Court has previously stated that we will not interpret a statute in such a way that results in an absurdity." If the 1978 amendment to §63-30-4 is interpreted to mean that there is no personal liability of employees of the State for simple negligence, then we are left with the absurd result that an employer (the State) can be held liable for the negligent acts of its employees while the employees themselves cannot be held liable. The general, common law rule for holding an employer liable for the negligent acts of its employee has been that of agency or respondeat superior. If an employee is not liable, then there is no basis in common law for holding the employer liable. Yet, §63-30-4 appears to require that an employer can still be held liable even though the employee cannot. Furthermore, such a result is absurd because it cannot be reconciled with the indemnity statute which provides that a governmental employer can be required to indemnify its employees for liabilities created by the employees' simple negligence.

The Utah Supreme Court has previously noted that it would be absurd to grant immunity to an employee physician while holding the employer liable for that employee's negligence. In

Frank v. State, 613 P.2d 517 (Utah 1980), an action was brought against the State of Utah claiming negligence of the University of Utah Medical Center, a staff psychiatrist and a psychologist with the Salt Lake County Mental Health Department who was working with the University of Utah Medical Center under a contractual arrangement. The trial court granted the defendants' motion for summary judgment on the ground that all defendants were protected by the Governmental Immunity Act. On appeal, the Utah Supreme Court held that, although the operation of a health care facility is protected under the Governmental Immunity Act, such immunity was waived by the government because the injury was caused by the negligent act or omission of an employee, and that the injury did not arise out of the exercise or performance or the failure to exercise or perform a discretionary function.

The Supreme Court further held that the Governmental Immunity Act does not apply to individuals but only to governmental entities. The court stated that physician-employees of governmental entities should not be given absolute immunity from their medical malpractice. Finally, the court made the following significant statement:

Other reasons for the above holding are manifest. For one, it is contrary to reason to deny governmental immunity to a public employer and then grant it to the very employee allegedly causing the injury. Moreover, a grant of immunity in the present case, would of necessity, shield all practitioners employed, even under temporary contract from another source, by a governmental health care facility from any liability for malpractice. [emphasis added] [613 P.2d at 520]

Although the amendment to §63-30-4 was not applicable to the facts of Frank v. State, because the claim arose prior to the effective date of the amended statute, it is nonetheless clear that the Utah Supreme Court, in 1980, believed it to be unreasonable to grant immunity to a doctor employee of the state whose negligence caused the injuries complained of. Additionally, the court obviously considered it unacceptable to immunize state-employed physicians from any liability for malpractice. These statements were made after the effective date of the amendment to §63-30-4.

Thus, it is clear that the interpretation given by the lower court to §63-30-4 is both unreasonable and unfair. This court should interpret said statute to preserve the common law claims of plaintiffs against the doctors in their individual capacities.

C. The Trial Court's Interpretation of U.C.A. §63-30-4 Violates Public Policy.

The ramifications of immunizing state-employed physicians from any personal liability for medical malpractice are staggering. If §63-30-4, as amended, is interpreted to mean that no state employee can be held personally liable for his or her simple negligence, then every employee at a state-operated medical facility, such as the University of Utah Medical Center, is absolutely immune from personal liability for malpractice. The only redress available to an injured person is an action against the state. In the case of serious injuries, such as in the

instant case, a suit against the state for a maximum recovery of \$250,000, based on the 1983 amendment to the Governmental Immunity Act, is simply not an adequate remedy. In the case of plaintiffs' claim, the total possible recovery against the state is possibly only \$100,000 per person, which is well below the costs necessary to provide care and treatment to plaintiff Michael Payne. (See U.C.A. §63-30-29)

The amount of the potential recovery is not the only reason why §63-30-4 should not be interpreted to eliminate personal liability of physician-employees of the state. In addition, a patient's right to bring a malpractice action against a negligent physician has the meritorious effect of promoting better health care from physicians. If §63-30-4 eliminates personal liability of state employees, then physicians employed by the state will no longer be concerned about the potential for a malpractice claim. Such a result will certainly not promote the desirable result of better health care in state-operated facilities in Utah.

Finally, as an alternative, if the Court were to interpret §63-30-4 to mean that personal liability of a state employee is only preserved if the plaintiffs meet the notice requirements of the Governmental Immunity Act, plaintiffs suggest that the claims of the minor plaintiff Michael Patrick Payne against Drs. Meyers and Kesler have been properly preserved. The lower court refused to grant summary judgment in favor of the State as to the minor plaintiff's claims, thus ruling that his

claims had been timely filed. The main purpose for the amendment to §63-30-4 was to close the loophole in the immunity and indemnity statutory scheme whereby the State could be protected against liability if the plaintiff failed to meet the Immunity Act's notice requirements, but could still be liable under the Indemnity Act if its employee was still personally liable. See Cornwall v. Larsen, 571 P.2d 925 (Utah 1977), (Wilkins' concurring opinion); Developments in Utah Law, 1978 Utah L.Rev. 741, 776.

Since, in the instant case, the claims of the minor plaintiff against the State have been properly noticed and the State can be held liable, there is no reason to preclude personal liability of the physicians because plaintiffs are not using the claims against said physicians as a back-door method of getting at the State.

In summary, plaintiffs contend that even if §63-30-4, as amended, is deemed to apply to the facts of this case, it cannot be construed to deny plaintiffs their common law right of action against the individual defendant physicians for their personal negligence. On that basis, the lower court's granting of summary judgment pursuant to §63-30-4 was improper and should be reversed by this court.

POINT III.

UTAH CODE ANNOTATED §63-30-4, AS AMENDED,
IS UNCONSTITUTIONAL.

As indicated in Point I, supra, if Utah Code Annotated §63-30-4, as amended, is applied to the facts of the instant case, such application would give retroactive effect to the statute because plaintiffs' claims against the defendant doctors arose prior to the effective date of the amended statute.

ART. I, §7 of the Utah Constitution states:

No person shall be deprived of life,
liberty or property, without due process of
law.

In Spanish Fork West Field Irrigation Co. v. District Court of Salt Lake County, 99 Utah 527, 104 P.2d 353 (1940), the defendants argued that an amendment to a portion of the state's water statutes, if applied retroactively, would deprive defendants of a vested right, and therefore violate the Constitution. Although the court determined that the amendment to the statute affected procedure only, and therefore retroactive application would not deprive defendants of any vested rights, the court made the following significant statement regarding vested rights of action:

A vested right in procedure of a court is quite different from a vested right of action. With reference to a right of action it is stated 6 RCL under Title, 'Constitutional Law', . . . as follows: 'A vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference, and whether it springs from contract or the principles of

the common law, it is not competent for the legislature to take it away.'

And this Court has approved and affirmed this doctrine in the case of Halling v. Industrial Comm. of Utah, et al., 71 Utah 112, 263 P. 78 [104 P.2d at 360]

In addition, applying a statute retroactively to deny a party of substantive rights of action against governmental employees has been found to be a denial of due process under the United States Constitution. See Barrick v. Dist. of Columbia, 173 A.2d 372 (D.C. 1961). Thus, retroactive application of §63-30-4, as amended, to the facts of the plaintiffs' claims, would constitute a violation of ART I, §7, of the Utah Constitution, and also of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Furthermore, ART. I, §11, of the Utah Constitution states:

All courts shall be open, and every person, for an injury done to him and his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

Plaintiffs contend that if §63-30-4 is interpreted to totally abolish the common law right of action against a state employee for his simple negligence, then the statute violates §11 of ART. I because it denies plaintiffs' access to the courts for remedy by due course of law. It will undoubtedly be argued by defendants that plaintiffs have not been denied access to the

courts by this statute because there is still a remedy available against the state. However, plaintiffs suggest that the qualitative change in their rights is so extensive under §63-30-4, that it is in violation of ART I, §11.

For example, if the common law right of action against the employees in their individual capacities is totally abolished, the only possibility plaintiffs have to recover is against the state and then only if they meet all the rigid requirements of the Governmental Immunity Act, such as the one-year notice provision. Furthermore, there is a significant substantive difference between the claim against the state and the claim against the individual doctors. Plaintiffs are possibly limited in their amount of damages to a maximum of \$100,000 per person under the terms of the Governmental Immunity Act (U.C.A. §63-30-29), whereas in an action against an individual doctor, no such limitation is present. With such restrictions placed on plaintiffs, they have been effectively denied their "remedy by due course of law" which is guaranteed them by ART. I, §11.

Plaintiffs acknowledge this court's prior decision of Masich v. United States Smelting, Ref. & Mining Co., 13 Utah 108, 191 P.2d 612 (1948), which may be construed to hold contrary to plaintiffs' position on this issue. In response, however, plaintiffs cite to the court the case of Barrick v. Dist. of Columbia supra, wherein the court explained that the United States Code affecting governmental liability of the District of Columbia was

changed following the date of an accident involving plaintiff and the driver of an ambulance employed by the District of Columbia. Prior to the amendment to the statute, the District of Columbia had complete immunity from liability, but actions could be filed against its employees in their individual capacity for simple negligence. The amendment to this statute abolished the liability of the individual employees, but allowed liability against the District of Columbia where an emergency vehicle was involved if the plaintiff could prove gross negligence against the District of Columbia. The statute was expressly made to be retroactive, and on the basis of the application of that statute to plaintiff's case, a directed verdict was entered in favor of the District of Columbia because plaintiff could not prove gross negligence. Plaintiff appealed, and the District of Columbia court held that the statute was unconstitutional as applied retroactively. One of the arguments raised by the District of Columbia was that the retroactive application of the amended statute did not destroy a vested right because it replaced plaintiff's original right to sue the employee with a right to sue the District of Columbia. The court refused to agree with that reasoning. The court stated:

There might be some merit to the government's argument if the Act merely affected remedies or procedure. . . . But the Act does more than that. As was said by the court in Weil v. Taxi Cabs of Cincinnati, 139 Ohio St. 198, 39 N.E. 148, 151, 'If the statute created a right to compensation which did not theretofore exist, it was dealing with a new substan-

tive right, and the fact that the legislation has the effect of extinguishing one type of right and creating another in lieu thereof, does not make it remedial legislation as to the rights involved.' . . .

As the effect of the D.C. Employee Non-Liability Act is to retroactively divest appellants of their common-law right of action to recover against the ambulance driver on proof of ordinary negligence and allows recovery against the District of Columbia only on proof of gross negligence, we are forced to declare that the Act in its application to the facts of this case results in an unconstitutional deprivation of appellants' property right. [173 A.2d at 376]

The reasoning of the District of Columbia court is analogous to plaintiffs' claim that the change in the Governmental Immunity Act in Utah precludes them adequate access to the courts. Substituting a more restrictive right for one that was more liberal, does not preclude the constitutional defective nature of the statute in denying adequate access to the courts.

The Fourteenth Amendment to the United States Constitution, states in part, that "no STATE . . . shall . . . deprive any person of life, liberty or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

Spanish Fork West Field Irrigation Co., supra, sets forth the general principle in Utah that a vested right of action is property protected by the due process clause of the Constitution. Plaintiffs have a vested right in their claims against the individual doctors, said right arising out of the

negligent conduct of the doctors and the obligations incurred by plaintiffs as a result thereof for medical services. Section 31-30-4, as amended, takes that right away from plaintiffs. The statute is unconstitutional to the extent that it attempts to take that right away from the plaintiffs because it denies them property without due process of law.

In Buttrey v. Guaranteed Securities Co., 78 Utah 39, 300 P. 1040 (1931), the plaintiff brought suit for a violation of Utah's Blue Sky Law. However, the statute which gave rise to plaintiff's claim had been repealed prior to the date plaintiff filed her lawsuit. The statute was in effect at the time of the transaction which gave rise to the claim. The repeal of the statute did away with plaintiff's claim under the Blue Sky Laws. The defendants argued that since the action was commenced after repeal of the statute, plaintiff had no cause of action. The Utah Supreme Court disagreed. The court stated:

[H]er right of action was nevertheless within the protection of the Constitution and could not be destroyed by legislation. . . . It is a vested right, in the nature of a property right, and ought to be regarded as property in the sense that tangible things are property and equally protected by the Constitution against arbitrary interference by the Legislature. [300 P. at 1045]

Finally, plaintiffs contend that the statute is unconstitutional because it denies them equal protection under the laws. The statute makes a classification which has no rational basis. The classification is composed, in the instant

case, of claimants of employees of state-operated health care facilities. Plaintiffs are denied their common law right of action against physician-defendants simply because those physician-defendants happened to be working for a governmental entity at the time they committed malpractice. Other than the fact that these physicians worked for a governmental entity, there is absolutely no difference between them and private physicians. Each of the individual physicians in the instant case carries medical malpractice insurance with a private insurance carrier, just the same as any private physician practicing in the state of Utah. There is no rational basis for allowing these defendants to avoid personal liability for their malpractice simply because they were working for a governmental entity. The classification made by the statute is discriminatory against persons who choose, or who may be required, due to the availability of facilities, or their own financial ability, to obtain their medical services from physicians employed by governmental entities.

CONCLUSION

The lower court's summary judgment dismissing plaintiffs' claims against the individual defendants Myers and Kesler should be reversed and the case remanded for trial on the issue of those defendants' negligence and liability to plaintiffs for the following reasons:

1. The lower court's application of Utah Code Annotated:

§63-30-4, as amended, to the facts of this case to abolish all personal liability of governmental employees, is improper because the plaintiffs' substantive rights vested and causes of action arose prior to the effective date of the amended statute, and the statute cannot be applied retroactively to abolish plaintiffs' claims against the individual physician-defendants.

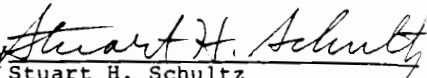
2. Even if §63-30-4 is applicable to the facts of this case, it cannot be interpreted to abolish common law causes of action for medical malpractice against individual defendant physicians such as those involved in this case. It is contrary to proper and reasonable statutory interpretation, and is also contrary to policy to interpret that statute to mean that individual employees of the state are totally immune from liability for their own negligence.

3. Application of §63-30-4 to abolish the claims of plaintiffs against the individual defendant physicians is unconstitutional under ART. I, §§7 and 11 of the Utah Constitution and also under the Fourteenth Amendment of the United States Constitution because it denies the plaintiffs adequate remedies for the wrongs committed against them and also because it denies them their property without due process of law and also denies them equal protection under the laws.

Respectfully submitted this 19th day of September,
1983.

STRONG & HANNI

By 
R. Scott Williams

By 
Stuart H. Schultz
Attorneys for Plaintiffs-
Appellants

CERTIFICATE OF HAND DELIVERY

I hereby certify that on this 19th day of September,
1983, two true and correct copies of the foregoing Brief of
Appellants were hand delivered to the following:

Stewart M. Hanson, Jr.
Francis J. Carney, Esq.
SUITTER, AXLAND & ARMSTRONG
Attorneys for Defendant Kesler
175 South West Temple
Salt Lake City, Utah 84101

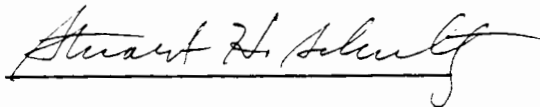
Craig L. Barlow
Assistant Attorney General
Counsel for State Defendants
236 State Capitol Building
Salt Lake City, Utah 84114

Gary D. Stott, Esq.
Nelson L. Hayes
RICHARDS, BRANDT, MILLER & NELSON
50 South Main Street, Suite 700
Salt Lake City, Utah 84110

William S. Quigley, Esq.
Assistant Attorney General
Co-Counsel for Defendant Myers
236 State Capitol Building
Salt Lake City, Utah 84114

Arthur H. Nielson, Esq.
Co-Counsel for Defendant Myers
1100 Beneficial Life Tower
Salt Lake City, Utah 84147

Steven J. Sorenson, Esq.
Assistant Attorney General
Co-Counsel for Defendant Kesler
115 State Capitol Building
Salt Lake City, Utah 84114

A handwritten signature in cursive script, reading "Stewart H. Schultz", is written over a solid horizontal line.