

1992

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

Utah Court of Appeals

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DOCKET NO. 920403 IN THE UTAH COURT OF APPEALS

G. KEVIN JONES,
Plaintiff/ Appellant,

vs.

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

92-0403-21

NO: [REDACTED]

PRIORITY NO. 16

REPLY BRIEF OF APPELLANT

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

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MEDICAL CENTER AND JAMES M. BECKER, M.D.

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Donnan
Baker
Sullivan

IN THE UTAH COURT OF APPEALS

G. KEVIN JONES,)	
Plaintiff/ Appellant,)	
)	
vs.)	
)	NO: 920191
THE STATE OF UTAH; THE)	
UNIVERSITY OF UTAH; THE)	PRIORITY NO. 16
UNIVERSITY OF UTAH HOSPITAL AND)	
MEDICAL CENTER)	
and JAMES M. BECKER, M.D.)	
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ARGUMENT

Appellees' Brief raises five main issues, all of which are questions of law: (1) whether the Foil legal injury test requires only awareness of temporary symptoms; (2) whether the Foil legal injury test requires knowledge of the likely or probable cause of the injury; (3) whether the Foil test requires that a plaintiff know the possibility of negligence; (4) whether the continuing treatment doctrine adopted by the Utah Supreme Court in Peteler v. Robison, 17 P.2d 244 (Utah 1932) was abrogated by §78-14-4; and (5) whether the unique facts of this case require this Court to recognize the continuing treatment doctrine as an exception to §78-14-4. Issues 1, 2, and 4 and 5 have not been previously addressed by this Court or the Supreme Court.

A. THE TRIAL COURT ERRED IN ITS INTERPRETATION AND APPLICATION OF THE FOIL LEGAL INJURY TEST.

In Foil v. Ballinger, 601 P.2d 144, 148 (Utah 1979) the Utah Supreme Court reasoned that the term "injury" in §78-14-4 means "legal injury". The statutory period does not begin to run until discovery of "facts that would lead a reasonable person to conclude that he may have a cause of action against the health care provider." Hargett v. Limberg, 598 F. Supp. 152, 155 (D. Utah 1984). Knowledge of a cause of action, requires knowledge of "[1] the existence of an injury, [2] its cause, and [3] the possibility of negligence." Hargett, 598 F. Supp. at 155. The following will show the Trial Court improperly applied the Foil test, basing its decision entirely on the first prong, only incompletely on the second prong and failed to address the third prong at all.

1. The Foil Legal Injury Test Is Not Satisfied
By Mere Awareness Of A Temporary Injury.

Appellees suggest that the Trial Court properly found that knowledge of a temporary injury alone "is sufficient to start the statute of limitations in medical malpractice actions." Brief of Appellees, p. 39. Contrary to Appellees' claims, cases subsequent to Foil have never held that the legal injury test is satisfied by showing only a plaintiff's knowledge of temporary symptoms or dysfunctions. The cases have consistently recognized Foil's requirement that the action accrues only after knowledge of injury, whether temporary or permanent, "resulting from negligence". Duerden v. Utah Valley Hospital, 663 F. Supp. 781, 785 (D. Utah 1987)(although plaintiff believed the injury to be temporary, she knew the injury "resulted from negligent treatment") (emphasis added); Floyd v. Western Surgical Associates, 773 P.2d 401, 402 (Utah App. 1989) (plaintiff knew "that he had sustained an injury and that the injury was caused by negligent action.")(emphasis added); Deschamps v. Pulley, 784 P.2d 471, 475 (Utah App. 1989) (plaintiff "knew or should have known more than two years before she filed this action that her mother's death was the result of the health care providers' negligence")(emphasis added).

Therefore, as a matter of law, knowledge of legal injury, and not mere knowledge of physical injury, must still be established to trigger the statute of limitations under the case law subsequent to Foil. Foil, 601 P.2d at 148. Insofar as the

Trial Court based its decision solely on evidence that Jones was aware of a physical injury more than two years before the filing of his complaint, it erred and reversal is warranted.

Other courts have recognized the soundness of Foil's requirement that a plaintiff be aware of the full nature and extent of injury before the statute can accrue. See Foil, 601 P.2d at 147; Williams v. Borden, Inc., 637 F.2d 731, 735 (10th Cir. 1980); Massey v. Litton, 669 P.2d 248, 251 (Nev. 1983); Burns v. Hartford Hospital, 472 A.2d 1257, 1259 (Conn. 1984); Cleveland v. Wong, 701 P.2d 1301, 1306 (Kan. 1985) (statute of limitations did not run even though the plaintiff knew that he was both incontinent and impotent immediately after surgery but was advised by his physicians that these conditions were temporary). If, in fact, subsequent courts have deviated from Foil, as Appellees argue, by permitting the statute to accrue with mere knowledge of a physical injury, reversal of the trend to erode Foil is warranted.

2. The Foil Legal Injury Test Requires That A Plaintiff Know The True Cause Or The Likely Cause Of The Injury.

The Trial Court found that the statute in this case began to run when Jones knew that the second surgery was "a" possible cause of his injuries. Pleadings (hereinafter "PL."), at 1085 (Findings of Fact ¶16); PL. at 1087 (Conclusions of Law ¶3); PL. at 1048 (Court's Decision). However, the second prong of the Foil legal injury test has been interpreted to require existence of an injury and knowledge of "its cause". Hargett, 598 F. Supp. at 155. See also Hamilton v. Smith, 773 F.2d 461, 465 (2d Cir. 1985). To

have knowledge of "its" cause, a plaintiff must have knowledge of the true cause of the injury; this refers to the act of the defendant which gave rise to the injury. Christiansen v. Rees, 436 P.2d 435, 436 (Utah 1969); Foil, 601 P.2d at 147. Applying the similar inquiry of knowledge of causation under the Federal Tort Claims Act (FTCA), Judge Richard Posner has stated: "When there are two causes of an injury, and only one is the government, the knowledge that is required to set the statute of limitations running is knowledge of the government cause, not just the other cause." Drazan v. United States, 762 F.2d 56, 59 (7th Cir. 1985); See also Arvayo v. United States, 766 F.2d 1416, 1420 (10th Cir. 1985). The United States Supreme Court holds that a plaintiff be "in possession of the critical facts that he has been hurt and who has inflicted the injury" for a claim to accrue under the FTCA. United States v. Kubrick, 444 U.S. 111, 122 (1979) (emphasis added). See also Imes v. Tourma, 784 F.2d 756, 758 (6th Cir. 1986); Williams, 637 F.2d at 735.

In cases of multiple possible causes, it has been recognized that knowledge of causation requires that a plaintiff know the "likely or probable" cause of the injury, not just a possible cause. Rosales v. United States, 824 F.2d 779, 805 (9th Cir. 1987); Chapman v. Primary Children's Hospital, 784 P.2d 1181, 1183 (Utah 1989)(plaintiff knew that her injuries "were most likely caused" by oxygen deprivation); Maughan v. S. W. Servicing, Inc., 758 F.2d 1381, 1387 (10th Cir. 1985) (in cases involving multiple causes, the statute must be tolled until the plaintiff knows or

should know that one particular source was likely the cause of the injury); Mendez by Martinez v. United States, 655 F. Supp. 701, 706 (S.D.N.Y. 1987) (plaintiff's knowledge that the medical cause of newborn's injury was "possibly lack of oxygen to the brain" did not cause claim to accrue); Lee v. United States, 485 F. Supp. 883, 886 (E.D.N.Y. 1980); Hance v. United States, 773 F. Supp. 531 (W.D.N.Y. 1991).

The only finding by the Trial Court on this issue was that Jones knew that the surgery had not been ruled out as a possible cause of the injury. PL. 1048-49. However, there is no evidence that Jones' knew that surgery was "the (cause) or (the) likely cause" of his sexual dysfunctions. TR. at 1235 lines 4-15 (testimony of Dr. Becker).¹

¹ Dr. Becker had not been able to diagnose the cause or the likely cause of Jones' sexual disabilities. TR. 1189 lines 9-25, at 1190 lines 1-2 (testimony of Dr. Becker). In response to what the cause of Jones' sexual dysfunction is Dr. Becker replied: "I'm not sure. Based on all the tests and what has happened and so forth, and the number of people who have seen him and consulted on the problem, I think it's still very unclear." TR. at 1235 lines 23-25, at 1236 lines 1-3. Dr. Becker's letter of May 29, 1984, to Dr. Richard Middleton, stated: "I explained [to Jones] that no true case of impotence had been reported with the mucosal proctectomy and ileoanal pull-through procedure. In fact, the operation is performed anatomically such that it is almost impossible to damage the parasympathetic nerves to the penis or to totally destroy the sympathetic innervation." Plaintiff's exhibit no. 4. Dr. Becker told Jones that the cause of his sexual dysfunctions was "unlikely related" to the surgery. TR. at 1196 lines 19-25, at 1197 lines 1-2, at 1234 lines 7-12 (testimony of Dr. Becker). Jones was also informed by University Hospital and other physicians that it was "highly unlikely" that surgery was the cause of his sexual dysfunctions. TR. at 1653 lines 1-25, at 1654 lines 1-17, at 1657 lines 1-2, at 1659 lines 17-20 (testimony of Dr. Middleton); TR. at 1373 lines 11-21, at 1383 lines 5-15 (testimony of Dr. Mangelson). The District Court also found that Jones' sexual dysfunctions were "unlikely to be the result of surgery." PL. at 1050-51 (Court's Decision).

Jones was referred to numerous other doctors about his condition based on numerous other possible causes of his dysfunction. Finally, in September of 1987, Dr. Dayton told Jones that the "most likely cause" of his sexual dysfunctions was that "something went wrong during the surgeries". TR. at 1449 lines 18-25, at 1450 lines 12-14 (testimony of G. Kevin Jones). This is the only evidence offered which indicates that anyone told Jones that the surgery was the likely or probable cause of his injuries. Finding knowledge of causation because Jones made a connection between the surgery and his injury improperly bases knowledge on mere layman's speculation. Foil explained, "common experience teaches that one often suffers pain and other physical difficulties without suspecting the true cause, and may, as often happens, ascribe a totally erroneous cause to the manifestations. Foil, 601 P.2d at 144; See Chamness v. United States, 835 F.2d 1350, 1353 (11th Cir. 1988); Reis v. Cox, 660 P.2d 46, 50 (Idaho 1982). Therefore, Jones actually had no facts upon which to base a knowledge that the surgery was the likely cause of his injuries.

Appellees argue that Jones knew the cause of his injuries because he allegedly threatened to sue the University Hospital. Appellees Brief at p. 29-30, Findings of Fact ¶20, Transcript (hereinafter "TR.") at 1086. This assertion is contrary to the great weight of the evidence. Jones not only strongly denied this assertion, TR. at 1319 lines 3-5, at 1320 lines 5-7, but explained that any threats, if they existed, were directed toward the impersonal way he was treated as an individual at the Hospital.

TR. at 1314a lines 21-23 (testimony of G. Kevin Jones). Dr. Harmon also testified Jones was angry because the Appellees failed to return his phone calls and failed to respond to his questions. TR. at 1634 lines 11-21, at 1642 lines 8-15 (testimony of Dr. Harmon). Even Terri Stoker, the person upon whose testimony Appellees rely for this assertion, testified that Jones' litigation threats were related to "his dissatisfaction with how he's being treated by the secretary/receptionist and others." TR. at 1581 lines 4-8. When the Stoker testimony is read in context, it is clear that Jones' complaints were directed to the bedside manner of the University and the red tape he confronted.² See TR. at pages 1579-1584 (testimony of Terri Stoker). A patient's complaints about a doctor's bedside manner is insufficient to start the statute of limitations in a claim of malpractice. Rispoli v. United States, 576 F. Supp. 1401, 1402 (E.D.N.Y. 1983).

Finally it is axiomatic that a patient cannot be expected to discover the medical cause of his injuries "before the doctors themselves are able to do so." Rosales v. United States, 824 F.2d 799, 805 (9th Cir. 1987); Chamness v. United States, 835 F.2d 1350, 1353 (11th Cir. 1988). Further complicating matters, in this case, the Trial Court found, as a matter of fact, that Jones had suffered no injury as a result of the surgeries. In its decision the Trial Court wrote: "[I]n the instant case there still appears to be a

²The Memo to which Appellees refer is an unsigned, undated memo that was not included in Appellees' production of documents in response to Jones' Motion to Compel hospital files. The memo appeared shortly before trial. TR. at 1556, lines 23-25.

real fact question about the nature and existence of any sexual dysfunction and the cause." PL. at 1048 (Court's Decision) (emphasis added); See also PL. at 1085 (Findings of Fact ¶15); PL. at 1084 (Findings of Fact ¶11); PL. at 1085 (Findings of Fact ¶17), at 1086 (Findings of Fact ¶¶18, 19, 20 and 26); See also PL. at 1048 (Court's Decision).

The discovery rule tolls the statute of limitations when a plaintiff, despite the exercise of due diligence, is unable to know of "the existence of an injury and its cause." Hargett, 598 F. Supp. at 155; Christiansen, 436 P.2d at 436; Foil, 601 P.2d at 148. In this case the discovery rule should toll the limitations period because, under a proper interpretation of Foil, there was no evidence that Jones knew that the surgery was the likely or probable cause of his injury until September of 1987.

3. The Foil Legal Injury Test Requires That A Plaintiff Know Or Should Know The Possibility of Negligence.

The Trial Court found that Jones "knew or should have known that he had sustained an injury and the causation of the same, on or about May of 1984." PL. at 1046 (Court's Decision). The Trial Court erroneously found based on this knowledge, Jones "had two years from May of 1984, the point of discovery, in which to file an Intent to Commence Legal Action." PL. at 1047 (Court's Decision).

Jones, contrary to Appellees' assertions, has never argued a legal determination of negligence or expert medical opinion of negligence is necessary to start the statute. Deschamps,

at 474. On the other hand, a plaintiff must be aware of facts from which he reasonably should suspect "a possibility of negligence". Hargett, at 155; Foil, 601 P.2d at 148; Hove v. McMaster, 621 P.2d 694, 696-97 (Utah 1980); Deschamps, at 474; See also Pope v. Gray, 760 P.2d 763, 764 (Nev. 1988); Massey, 669 P.2d at 249; Cleveland, 701 P.2d at 1306; Wehrman v. United States, 830 F.2d 1480, 1484 (8th Cir. 1987). In other words, a plaintiff must be aware of facts which reasonably indicate that something may have gone wrong in the performance of the medical care; that is, some fact indicating malpractice by the health care provider. Foil, 601 P.2d at 148; Hove, 621 P.2d at 696; Brower v. Brown, 744 P.2d 1337 (Utah 1987); See also Jones v. Salem Hospital, 762 P.2d 303, 313 (Or. App. 1988); Jordan v. United States, 503 F.2d 620, 621, 623-24 (6th Cir. 1974); Bridgford v. United States, 550 F.2d 978, 982 (4th Cir. 1977); Rispoli v. United States, 576 F. Supp. 1398, 1402 (E.D.N.Y. 1983); Exnicious v. United States, 563 F.2d 418, 424-25 (10th Cir. 1977); Hamilton, 773 F.2d at 466.

However, "[a] surgical procedure is not malpractice simply because it does 'not turn out as it was supposed to have.'" DeWitt v. United States, 593 F.2d 276, 280 (7th Cir. 1979). Therefore, even if Jones experienced a dysfunction following surgery, this does not ipso facto mean that he had reason to believe it may have been caused by malpractice. Discovery of legal injury encompasses both knowledge of injury and knowledge of the possibility of negligence. Foil, 601 P.2d at 144.

Appellees and the Trial Court discount and omit any reference to the specific requirement that plaintiff have some knowledge that the injury was possibly caused by negligence. In this case, no evidence was presented by Appellees, nor did the Trial Court find that Jones had reason to know the injury he sustained was possibly attributable to negligence on the part of Appellees. In fact, just the opposite was found by the Trial Court. In its factual findings, the Trial Court stated that Jones was aware and was told by Dr. Becker that sexual dysfunction was one of the foreseeable and possible results of the surgery. PL. at 1048. This means that Jones was found to be aware that even a properly performed surgery may have resulted in dysfunction. There was no evidence presented that Jones was ever told or should have known that the surgery may have been performed improperly. Therefore, Jones' awareness of injury and knowledge that it may have been caused by the surgery are not tantamount to knowledge of negligence as required by Foil. See Hove, 621 P.2d at 696-97; Hargett, 598 F. Supp. at 154-155; Deschamps, at 474; Brower, 744 P.2d at 1339; See also Cleveland, 701 P.2d at 1306; Wehrman, 830 F.2d at 1484; Prenderville v. United States, 651 F. Supp. 867, 868 (S.D.N.Y. 1986); Jordan, 503 F.2d at 623.

The only evidence regarding knowledge of the possibility of negligence was Jones' testimony that Dr. Dayton reported to him that the "most likely cause" of his sexual dysfunctions was that "something went wrong during the surgeries". TR. at 1449 lines 18-25, at 1450 lines 12-14 (testimony of G. Kevin Jones). This

singular piece of information was the only evidence offered which could be deemed sufficient to start the running of the statute since it alerted Jones to the possibility that his injuries might be attributable to negligence. Cf. Chapman, 784 P.2d at 1184. Even the Trial Court indirectly acknowledged that Dr. Dayton provided Jones with new information concerning causation and negligence. See Proposed Findings of Fact ¶20; TR. at 1086. Appellees' claim that Jones learned nothing new from his treatment by Dr. Dayton is without a basis in the evidence. See Appellees Brief at 43.

At best, the record shows that Jones knew he was suffering from injuries which resulted from the surgery, but not from a negligent act. "[W]hen injuries are suffered that have been caused by an unknown act of negligence by an expert, the law ought not to be construed to destroy a right of action before a person even becomes aware of the existence of that right." Foil, 601 P.2d at 147. The Trial Court improperly applied Foil and its progeny, mandating reversal of the judgment for a proper inquiry regarding Jones' knowledge of the possibility of negligence.

**B. THE TRIAL COURT ERRED, AS A MATTER OF LAW,
IN CONCLUDING THAT THE CONTINUING TREATMENT
DOCTRINE DOES NOT APPLY TO THIS CASE.**

The Trial Court ruled as a matter of law that the continuing treatment doctrine: (1) was not applicable since the legislature passed § 78-14-4, UCA (1953 as amended), PL. at 1052 (Court's Decision), PL. at 1088 (Conclusions of Law ¶6); and (2)

that the doctrine would not apply to the facts of this case because of Jones' knowledge of his injury and possible causes, and the absence of any misleading conduct preventing Jones from obtaining medical information as a result of the continuing treatment. PL. at 1088 (Conclusions of Law, ¶7).³

In cases involving the application of a statute, the primary objective is to determine the intent and purpose for which it was enacted. Young v. Barney, 433 P.2d 846, 847 (Utah, 1967). Section 78-14-4 was enacted for the purpose of codifying the discovery rule adopted in Christiansen. Christiansen, 436 P.2d at 436-37. The statute was designed to provide greater protection of the public in cases of medical malpractice by extending or tolling the statute of limitations according to the unique facts in each case.

Legislative bodies are presumed to legislate with knowledge of judicial precedent. Lorillard v. Pons, 434 U.S. 575, 580-81 (1978). Where, as here, the legislature adopts a statute of limitations against a background of existing law, a court should not infer an intent to depart from that precedent absent some clear legislative intent. Sea-Land Service, Inc. v. United States, 874 F.2d 169, 172-73 (3rd Cir. 1989). Therefore, "failure to make changes in a given statute in a particular respect when the subject

³ Appellees' erroneously state that Jones did not cite Utah authority in support of the continuing treatment doctrine and did not argue the physician-patient relationship doctrine at trial. Appellees Brief at 43, 45. Both of these issues were raised before the trial court and are part of the record upon which the court based its decision. TR. at 1723 line 25, at 1724 lines 1-10.

is before the Legislature, and (when) changes are made in other respects, (it) is indicative of an intention to leave the law unchanged in that respect." Alter v. Michael, 413 P.2d 153, 155 (Cal. 1966). Here, Appellees and the Trial Court refer to no legislative history or case law suggesting that the Utah Legislature rejected Peteler or the continuing treatment doctrine when adopting §78-14-4. Appellees instead argue that recognition of the continuing treatment rule as an exception to §78-14-4 is for the legislature and not for this Court. The same argument was presented to the Utah Supreme Court in Christiansen. Christiansen, 436 P.2d at 437. The Court, rejected that argument noting that doctrines tolling statutes of limitation are judicial in origin, to wit: "[T]his court, without benefit of legislative edict, previously has seen fit to make exceptions to the limitations statute in malpractice actions, namely, where there is a continuing treatment after the negligent act. . . ." Christiansen, 436 P.2d at 436, 437 (citing Peteler); Myers v. McDonald, 635 P.2d 84, 87-88 (Utah 1981) (Howe, J., concurring); See also Mayer v. Good Samaritan Hospital, 482 P.2d 497, 501 (Ariz. App. 1971).

Absent evidence of intent to abrogate the precedent of Peteler, the enactment of §78-14-4 should be read as being consistent. If the legislature concludes that the continued recognition of the continuing treatment doctrine is incorrect, it is free to do so. Until that time, this Court should not deny a plaintiff access to Utah's courts. Myers, 635 P.2d at 87 (Howe,

Jr., concurring); Mayer, 482 P.2d at 501-02; Yoshizaki v. Hilo Hospital, 433 P.2d 220, 224 (Hawaii 1967).

1. The Discovery Rule And The Continuing Treatment Doctrine Are Consistent.

Courts considering the issue, have held that under the discovery rule, statutes of limitation properly run from the end of a period of continuous medical treatment. Metzger v. Kalke, 709 P.2d 414, 417 (Wyo. 1985)(and cases cited therein). In states where the legislature has incorporated the discovery rule into a statute of limitations for medical malpractice, their Supreme Courts recognize the continuing treatment doctrine as an exception to the limitations period.⁶ Federal courts interpreting the

⁶ See e.g., (1) California, Cal. Code Civ. Proc. §340.5; Hundley v. St. Francis Hospital, 327 P.2d 131, 135 (Cal. 1958); Myers v. Stevenson, 270 P.2d 885, 886-87 (Cal. 1954); (2) Missouri, V.A.M.S. Civ. Proc. & Limit. §516.105; Thatcher v. DeTar, 173 S.W.2d 760, 762 (1943); Shaw v. Clough, 597 S.W.2d 212, 214-15 (Mo. App. 1980); Green v. Washington University Medical Center, 761 S.W.2d 688, 689-90 (Mo. App. 1988); (3) Nebraska, Neb. Rev. Stat. Comm. & Limit. of Actions §25-222 (Reissue 1989); Williams v. Elias, 1 N.W.2d 121, 124 (Neb. 1941); Smith v. Dewey, 335 N.W.2d 530, 533 (Neb. 1983); and (4) Wyoming, W.S. Limit. of Actions §1-3-107(a); Metzger, 709 P.2d at 414; Sharsmith v. Hill, 764 P.2d 667, 669 (Wyo. 1988).

Appellees cite Bixler v. Bowman, 614 P.2d 1290 (Wash. 1980) for the proposition that the continuing treatment doctrine is inconsistent with the discovery rule. The continuing treatment rule in Washington was "affected only slightly" in Bixler, which holds only that the doctor-patient relationship ends with the patients' last visit with the doctor. The rule that the statute is tolled during a continuing course of treatment endures. Note, Medical Malpractice Statute of Limitations in Washington, 57 Wash. L. Rev. 317, 329 (1982).

Federal Tort Claims Act⁷ (FTCA) statute of limitations (a discovery rule), have consistently held that the doctrine is applicable to medical malpractice actions arising under the FTCA.⁸

The Trial Court in this case refused to apply the continuing treatment doctrine for the further reason that it was not applicable to the facts because Jones possessed all of the knowledge concerning his injury and possible causes during his treatment by Becker and Hospital which he possessed at the time the suit was filed. PL. at 1088 (Conclusions of Law ¶7). This conclusion misapplies the continuing treatment doctrine and its rationale.

The continuing treatment doctrine requires the satisfaction of only two elements: (1) a course of continuous medical treatment, (2) for the same or related injury or complaint out of which the claim for malpractice arose. Peteler, 17 P.2d at

⁷Under the FTCA, a tort claim against the United States is barred "unless it is presented to the appropriate Federal agency within two years after such claim accrues." 28 U.S.C. §2401(b). Federal courts follow the discovery rule to determine when a claim accrues under the FTCA. Perkins v. United States, 76 F.R.D. 591, 592 (1976).

⁸See, e.g., Page v. United States, 729 F.2d 818, 823n.36 (D.C. Cir. 1984); Holdridge v. Heyer-Schulte Corp. of Santa Barbara, 440 F. Supp. 1088, 1098 (N.D.N.Y. 1977); Accardi v. United States, 356 F. Supp. 218, 221 (S.D.N.Y. 1973); Kossick v. United States, 330 F.2d 933, 936 (2d Cir. 1964); Kelly v. United States, 554 F. Supp. 1001, 1003-04 (E.D.N.Y. 1983); Miller v. United States, 458 F. Supp. 363, 365-66 (D. Puerto Rico 1978); Otto v. National Institute of Health, 815 F.2d 985, 988-89 (4th Cir. 1987); and Wehrman v. United States, 830 F.2d 1480, 1483 (8th Cir. 1987).

250; Comment, The Continuous Treatment Doctrine: A Toll on the Statute of Limitations for Medical Malpractice in New York, 49 Albany L. Rev. 64, 68-69 (1984) (hereinafter "Comment"); Metzger, 709 P.2d at 417; Otto, 815 F.2d at 988. Contrary to the Appellate Court's conclusion, the doctrine applies to patients who have full knowledge of the physician's negligent acts. Kelly v. United States, 554 F. Supp. 1001, 1004 (E.D.N.Y. 1983); Wehrman, 830 F.2d at 1483; LaBay v. White Plains Hospital, 467 N.Y.S.2d 400, 401 (1983) ("The fact that [plaintiff] may have been aware of the alleged tort and its results on the day of the fall did not deprive [plaintiff] of the tolling protection of the continuous treatment doctrine.")

The rationale for the continuous treatment doctrine rests on a number of sound policy factors not completely addressed by §78-14-4. First, equity dictates that a remedy be available where the negligent acts of the health care provider caused the lengthened treatment. Borgia v. City of New York, 187 N.E.2d 777, 779 (N.Y. 1962); Comment at p. 68-69. Additionally, a patient has the right to place trust and confidence in his physician during the period of treatment. Peteler, 17 P.2d at 250; Williams, 1 N.W.2d at 124; Otto, 815 F.2d at 988; Mortensen v. United States, 509 F. Supp. 23, 29 (S.D.N.Y. 1980); Comment, at p. 69-70. The physician also has superior medical knowledge; therefore, the patient may rely on his physician's expertise and training and accepts in good

faith the medical services provided. Foil, 601 P.2d at 147; Comment, at p. 70-71; Massey, 669 P.2d at 252.

The doctrine also addresses the concern that the treating physician, knowing of his actionable mistake, might be able to conceal it from his patient or to lull the patient into failing to institute suit until the statute of limitations runs. Peteler, 17 P.2d at 250; Foil, 601 P.2d at 148; Miller, 458 F. Supp. at 366. Failure to recognize the doctrine "would penalize the conscientious doctor, who would advise his patient of a mistake, and protect a practitioner, who would not reveal his mistake until the statute of limitations became a shield." Christiansen, 436 P.2d at 436. "The law should foster a fulfillment of the duty to disclose so that proper remedial measures can be taken and damage ameliorated." Foil, 601 P.2d at 148.

The continuing treatment doctrine also allows the patient to seek corrective treatment without losing his legal remedy. Whitmore v. Fabi, 399 N.W.2d 520, 524 (Mich. App. 1986); Comment, at p. 69. It permits causes of action which otherwise would be time barred because of the latent nature of the injury. Watkins v. Fromm, 488 N.Y.S.2d 768, 772 (N.Y. 1985). The doctrine provides further flexibility when there is difficulty in determining when, during a course of treatment, the negligent act or omission took place. Watkins, 488 N.Y.S.2d at 772; Comment, at p.71 n.29. Courts also reason that the medical treatment and employment should be considered as a whole, and if malpractice occurred during its

course, the statute of limitations begins to run when the treatment terminates. Williams, 1 N.W.2d at 124; Metzger, 709 P.2d at 417.

Perhaps the most compelling reason for continued recognition of the doctrine in this case is that it gives the patient the right to rely upon the doctor's professional skill without the necessity of interrupting a continuing course of treatment by instituting suit. Peteler, 17 P.2d at 250; Borgia, 187 N.E.2d at 779; Holdridge, 440 F. Supp. at 1098; Perkins, 76 F.R.D. at 592; Kelly, 554 F. Supp. at 1004; Grubbs v. Rawls, 369 S.E.2d 683, 686 (Va. 1988). This allows the patient the opportunity to seek corrective treatment as well as giving the physician a reasonable chance to identify and correct any errors. Williams, 1 N.W.2d at 124; Otto, 815 F.2d at 988; Grubbs, 369 S.E.2d at 686; Whitmore v. Fabi, 399 N.W.2d 520, 523-24 (Mich. App. 1986).

Based on these sound principles, this Court should recognize the continuing treatment doctrine as a valuable and viable exception to §78-14-4. Further, the evidence in the record illustrates the necessity of continued recognition of the doctrine. There is abundant testimony that Jones engaged in a lengthy and continuing program of care and treatment for his disease by Appellees from December, 1983 through January, 1987. TR. at 1557 lines 18-21, at 1590 line 25, at 1591 line 1 (testimony of Terri Stoker); TR. at 1167 lines 23-25, at 1168 lines 1-25, at 1169 lines 1-10 (testimony of Dr. Dayton); TR. at 1410 lines 2-7, at

1430 lines 12-25, at 1431 lines 1-25, at 1432 lines 1-25, at 1433 lines 1-15, at 1444 lines 18-25, at 1446 lines 20-24 (testimony of G. Kevin Jones); TR. at 1180 lines 10-15, 20-25, at 1181 line 1, at 1258 lines 23-25, at 1259 lines 1-17, at 1263 lines 24-25, at 1264 lines 1-21 (testimony of Dr. Becker). It was stipulated that the physician-patient relationship between Jones and Dr. Becker directly related to the operations and follow-up care, extending until January, 1987, when Dr. Becker left the University Hospital. TR. at 1440 lines 23-25, at 1441 line 1 (statement of Mr. Williams).

Jones' continued care by Dr. Becker was necessary because of Dr. Becker's unique medical expertise in performing the ileoanal procedure. Statement of Facts No. 4; TR. at 1181 lines 18-22, at 1182 lines 1-5, 20-25, at 1183 lines 1-16 (testimony of Dr. Becker); TR. at 1179 lines 20-21 (testimony of Dr. Becker). Dr. Becker was the only physician in the intermountain area performing the ileoanal surgical procedure on adults when Jones was operated on in 1984. Statement of Facts No. 4. If Jones needed someone other than Dr. Becker to perform the procedure or provide treatment and care, he would have had to travel out of the intermountain region. TR. 1256 lines 2-5 (testimony of Dr. Becker). Dr. Becker opined that Jones' surgery and follow-up care required the expertise of someone such as himself, because of the complexity and rarity of the disease. TR. at 1257 lines 14-17, at 1258 lines 1-4 (testimony of Dr. Becker); TR. at 1256 lines 14-20, at 1258 lines

8-13 (testimony of Dr. Becker); TR. at 1256 lines 17-23 (testimony of Dr. Becker). In fact, Dr. Becker testified that it would have been unreasonable for Jones to seek post-surgical follow up care somewhere else. TR. at 1259 lines 23-25, at 1260 lines 1-19 (testimony of Dr. Becker).

Based on these facts, even assuming Jones knew of the possibility of negligence in 1984, he had virtually no alternative but to continue treatment and care with Appellees until the treatment was concluded in 1987. According to Appellees' interpretation of the statute, the limitations period in this case would have run over a year before Jones stopped seeing Dr. Becker. Under such circumstances, "[i]t would be absurd to require a wronged patient to interrupt corrective efforts by serving a summons on the physician. . . ." Borgia, 187 N.E.2d at 779. See also Otto, 815 F.2d at 988-89. Obvious injustice would result from requiring Jones to disrupt his exclusive and complex medical treatment that would, and in fact did result from initiating suit. TR. 1451 lines 22-25, at 1452 lines 1-19 (testimony of G. Kevin Jones).

According to the stipulated facts, Dr. Becker's last act as Jones' physician occurred in January, 1987. Accordingly, Jones had until January, 1989, to file his action. It is undisputed that Notice of Intent to Commence Action was filed on December 4, 1987, well within the statutory period.

The changing field of medical practice in the United States requires recognition of the continuing treatment doctrine. The application of the discovery rule without the continuing treatment exception is unrealistic and inconsistent with modern medicine.⁴ Jones' complex course of treatment is an example of the many patients who are dependent upon one "sub-specialist" for their entire course of treatment. It would be absurd to require a patient to sue that physician before that specialized, necessary treatment had ended. Such a requirement would ironically preserve the cause of action but, at the same instant, would foreclose the patient's only available means of medical recovery. Accordingly, this Court should uphold the continuing treatment doctrine as a consistent exception to §78-14-4. See, e.g., Brigance v. Velvet Dove Restaurant, Inc., 725 P.2d 300, 303-04 (Okla. 1986); Ontiveros v. Borak, 667 P.2d 200, 208-09 (Ariz. 1983).

C. EXCEPTIONAL CIRCUMSTANCES WARRANT EXCEPTION
TO THE LIMITATIONS PERIOD.

In Myers the Utah Supreme Court recognized that in "exceptional circumstances or causes of action" the statute of limitations should be tolled where its application would be "irrational or unjust." Myers, 635 P.2d at 86. When injustice

⁴ A recent report by The Journal of the American Medical Association concludes that "The environment of medical practice is changing more rapidly than ever before. Growth of medical knowledge and changes in the way medicine is practiced are producing an explosion of new sub-specialties. . . ." The Journal of the American Medical Association, Vol. 268, No. 9 (Sept. 2, 1992) at p. 1105.

would occur, courts may properly fashion an equitable exception to the statutory period. Klamm Shell v. Berg, 441 P.2d 10, 13 (Colo. 1968); Peteler, 17 P.2d at 250; Myers, 635 P.2d at 87-88; Christiansen, 436 P.2d at 436-37; Foil, 601 P.2d at 147-48; Burnett v. New York Central Railroad Co., 380 U.S. 424, 428 (1965)(The policy underlying the statute of limitations may be outweighed "where the interests of justice require vindication of the plaintiff's rights."). It is the basic and fundamental duty of this Court "to aid the furtherance of justice and (ensure) that every litigant shall be permitted to enjoy his day in court." Sewell v. Beatrice Foods Co., 400 P.2d 892, 894 (Mont. 1965); Myers, 635 P.2d at 88 (Howe, Jr., concurring).

To determine whether equity should toll the limitations period, the Court in Myers utilized a balancing test stating, "[t]he hardship the statute of limitations would impose on the plaintiff [was to be balanced against] any prejudice to the defendant from difficulties of proof caused by the passage of time." Myers, 635 P.2d at 87. The Court in Myers found "exceptional circumstances" to be present where the guardians did not discover the wrongful death of their ward until after the statute of limitations had run. The Court also noted that the problems of proof caused by the delay were not significantly

different for the defendant than for the plaintiffs. Myers, 635 P.2d at 87.⁵

In this case, the policy against stale claims is outweighed by the unique circumstances of Jones' hardship and medical condition. Appellees cannot establish that they would be prejudiced by having to defend Jones' claim since their problems of proof occasioned by the delay are no greater than Jones'. Cf. Myers, 635 P.2d at 87.

In contrast, Jones would be irreparably prejudiced if he were expected to file an action while still undergoing continued medical treatment from the only physician in the intermountain area trained to treat him. Equity demands Jones be allowed to bring his action after treatment by Dr. Becker concluded.

After applying the balancing test, Jones would be left without a legal remedy after completion of his course of treatment. If Jones is "denied the opportunity of proceeding with [his] action, the law would be in the untenable position of having created a remedy for [Jones] and then barring [him] from exercising it before [he] had any practical opportunity to do so." Myers, 635 P.2d at 87. See also Hanebuth v. Bell Helicopter International,

⁵The governing policy in the area of the statute of limitations, as declared by the Utah Supreme Court, "is that statutes of limitations 'are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'" Myers, 635 P.2d at 86 quoting Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-49 (1944).

694 P.2d 143, 147 (Alaska 1984) (citing Myers); Foil, 601 P.2d at 147. Even assuming Jones knew of a legal injury, equity should permit the statutory period to be tolled until conclusion of treatment by Dr. Becker. Jones' actions should not be barred by the technical application of §78-14-4 when such obvious injustice would result.

CONCLUSION

Jones has shown that even assuming the Trial Court's Findings of Fact are grounded in evidence, there was no evidence offered that Jones knew or had reason to know of the possibility of negligence prior to September of 1987. The Trial Court failed to properly apply the requirements of knowledge of "legal injury" as required by Foil and its progeny, mandating reversal of the judgment.

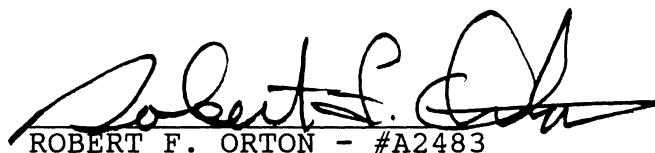
This Court should also continue recognition of Peteler and the continuing treatment doctrine as an exception to the statute. Under the unique facts of this case, rigid application of the statute of limitations in this case would unreasonably require Jones to choose between continued, life-saving medical treatment and his legal remedy. The continuing treatment doctrine offers an equitable solution to the conflict by permitting essential medical treatment to continue and by preserving legal rights.

Finally, compelling circumstances exist to warrant an exception to the inflexible interpretation of §78-14-4 proposed by Appellees. There is no greater prejudice to Appellees than to

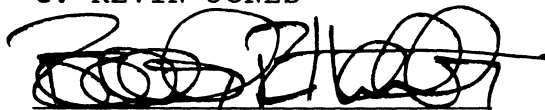
Jones in permitting equitable tolling of the statute pending completion of medical treatment by Dr. Becker. This Court may properly vacate the judgment and remand this matter to the Trial Court for retrial of the merits of this case under Foil and Peteler.

Respectfully submitted this 28~~th~~ day of OCTOBER, 1992.

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