

2004

# Michael Sutter v. Stan Benson : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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MICHAEL SUTTER,

Plaintiff/Appellant.

vs.

Case No. 20040483-CA

STAN BENSON, M.D.,

Defendant/Appellee.

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**BRIEF OF THE APPELLEE**

---

APPEAL FROM ORDER OF SUMMARY JUDGMENT BY THE  
HONORABLE G. RAND BEACHAM, FIFTH JUDICIAL DISTRICT COURT

---

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## **I. ORAL ARGUMENT REQUESTED**

Appellee Stan Benson, M.D. (hereinafter referred to as “Dr. Benson”) requests oral argument because of the important issues this appeal implicates.

## **II. LIST OF PARTIES**

All parties involved in this appeal are identified in the caption.

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## **V. STATEMENT OF JURISDICTION**

Jurisdiction in this Court is proper pursuant to Utah Code Annotated Section 78-2-2(4).

## **VI. STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW**

1. Did the district court properly determine that Sutter's first filed complaint was dismissed as of the date that the court was presented with and accepted a signed stipulation of voluntary dismissal, granted the dismissal, and entered a minute entry record of the dismissal?

2. Did the district court properly determine that when the statute of limitations on Sutter's claim had expired and Sutter relied on the savings statute to refile his claim, that the tolling provisions of the Utah Health Care Malpractice Act extending the "applicable statute of limitation" did not toll the time allowed by the savings statute for Sutter to refile his complaint?

Standard of review: Because both issues concern the lower court's summary judgment order, the standard of review is the same for both issues:

"Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." *Norman v. Arnold*, 2002 UT 81, ¶15, 57 P.3d 997; Utah R. Civ. P. 56(c).

This Court "give[s] a trial court's decision to grant summary judgment no deference and review[s] it for correctness." *Norman*, 2002 UT 81 at ¶15.

This Court “view[s] the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party.” *Id.* at ¶2.

“The proper interpretation of a statute is [] a question of law, which we review for correctness.” *Toone v. Weber County*, 2002 UT 103, 57 P.3d 1079.

## **VII. DETERMINATIVE RULES AND STATUTES**

The following rules and statutory provisions are of central importance to the outcome of this appeal and are attached in their entirety in the Addendum:

### **A. Utah Rules of Civil Procedure Rule 41(a)(2).**

*(a) Voluntary Dismissal; effect thereof; (a)(2) By order of court.* Unless the plaintiff timely files a notice of dismissal under paragraph (1) of this subdivision of this rule, an action may only be dismissed at the request of the plaintiff on order of the court based either on: (a)(2)(i) a stipulation of all of the parties who have appeared in the action; or (ii) upon such terms and conditions as the court deems proper.

### **B. Utah Rules of Civil Procedure Rule 7(f)(1).**

“An order includes every direction of the court including a minute order entered in writing, not included in a judgment.”

### **C. Utah Code Annotated Section 78-14-12(3)(a).**

The filing of a request for prelitigation panel review under this section tolls the applicable statute of limitation until the earlier of 60 days following the division’s issuance of an opinion by the prelitigation panel, or 60 days following the termination of jurisdiction by the division as provided in this subsection . . . .

**D. Utah Code Annotated Section 78-12-40.**

**Effect of failure of action not on merits.** If any action is commenced within due time and a judgment thereon for the plaintiff is reversed, or if the plaintiff fails in such action or upon a cause of action otherwise than upon the merits, and the time limited either by law or contract for commencing the same shall have expired, the plaintiff, or if he dies and the cause of action survives, his representatives, may commence a new action within one year after the reversal or failure.

**VIII. STATEMENT OF THE CASE**

**A. Nature of the Case and Proceedings Below.**

This is a medical malpractice action brought under the provisions of the Health Care Malpractice Act, Utah Code Annotated Section 78-14-1, *et. seq.* Appellant Michael Sutter (hereinafter referred to as “Sutter”) first filed his complaint on September 23, 1999. Sutter then filed a stipulation to voluntarily dismiss the complaint without prejudice on April 19, 2000. The district court granted dismissal on April 20, 2000. Sutter later refiled the complaint on April 23, 2001. On May 4, 2004, the Court entered an order granting Dr. Benson’s Motion for Summary Judgment, and dismissing the complaint as untimely. Sutter now appeals from the district court’s Order of Summary Judgment.

**B. Statement of Facts.**

1. On or about May 26, 1997, Sutter presented to the emergency department at Dixie Regional Medical Center (“Dixie”) for treatment of a large swollen mass in his right arm. R. 2.

2. Attempting to drain the apparent abscess, Dr. Benson made a small incision on its surface. The incision revealed a ruptured brachial artery. Consequently, later on May 26, 1997, Sutter underwent surgery to repair the artery. R. 2.

3. Sutter claims that as a result of Dr. Benson's incision and subsequent surgery on May 26, 1997, he suffered personal injury, incurred medical expenses, lost wages and other benefits of employment, suffered pain and anguish of mind and body, and sustained permanent disfigurement. R. 2.

4. On May 26, 1999, the last day in which to initiate an action against Dr. Benson prior to the running of the two-year statute of limitations for medical malpractice actions and pursuant to the Utah Health Care Malpractice Act ("Malpractice Act"), Utah Code Annotated Section 78-14-8, Sutter mailed a Notice of Intent to Commence Action to Dr. Benson. R. 44.

5. Because Sutter's Notice of Intent was served less than ninety days prior to the expiration of the statute of limitations, Sutter's time for commencing his malpractice action was extended 120 days from the date of service of the Notice of Intent. As a result, Sutter's statute of limitations in which to commence his malpractice action was extended to September 23, 1999. R. 92.

6. Thereafter, however, Sutter failed to file a request for prelitigation hearing with DOPL, as required by the Malpractice Act, Utah Code Annotated § 78-14-12.

7. On September 22, 1999, apparently believing that he had complied with the prelitigation requirements of the Malpractice Act, Sutter filed a complaint naming Dr. Benson. Dixie was served with a summons and the complaint. Dr. Benson was not served with a summons or complaint. R. 85.

8. Dixie moved to dismiss the complaint based upon Sutter's failure to comply with the prelitigation requirements of the Malpractice Act. Sutter thereafter apparently realized that he had failed to file a request for prelitigation hearing and that he did not have the required certificate of compliance from DOPL in order to proceed. R. 92.

9. On April 19, 2000, Sutter filed a "Stipulation of Dismissal (without prejudice)" signed by Sutter's attorney and Brinton Burbidge, counsel for Dixie Regional Medical Center. R 105.

10. On April 20, 2000, the district court held a hearing on Dixie's Motion to Dismiss and entered Sutter's stipulated dismissal of the complaint without prejudice, stating that "[t]here being no one present [at this hearing] and a Stipulation to Dismiss (Without Prejudice) being filed. Court orders this matter dismissed." R. 108.

11. On April 24, 2000, the district court's clerk made a computer entry containing the phrase "Case disposition is dismsd w/o prejudice." R. 108.

12. On May 9, 2000, Sutter mailed his Second Notice of Intent to Dr. Benson. R. 46.

13. On May 11, 2000, Sutter then filed a request for prelitigation panel review.  
R. 48.

14. On September 21, 2000, a prelitigation hearing was held. R. 51.

15. On November 15, 2000, the prelitigation panel issued its opinion. R. 51.

16. On November 16, 2000, DOPL issued a certificate of compliance to Sutter.  
R. 53.

17. April 20, 2001, according to Utah Code Ann. § 78-12-40, was the deadline  
for Sutter to refile his complaint. R. 79

18. On April 23, 2001, Sutter refiled his complaint against defendants. R. 3.

19. A time line summarizing the significant events of the case was presented to  
the district court. R. 91 .

20. On February 11, 2003, Dr. Benson filed his Motion for Summary Judgment  
on the basis that Sutter's claims were barred as out of time. The motion was fully briefed  
by the parties and the district court held a hearing on the matter on May 22, 2003. R. 114.

21. At the hearing, the district court granted Dr. Benson's motion and  
ultimately entered the Order Granting Stan Benson, M.D.'s Motion for Summary  
Judgment (the "Summary Judgment Order") that is at issue in this matter. In the  
Summary Judgment Order, the district court made, among others, the following findings:

Plaintiff claims that the date of dismissal of his first  
Complaint, Civil No. 990501775, was effective April 24,  
2000, the date on which a clerk's computer entry of the fact of  
dismissal was apparently made. Dismissal did not occur on

April 24, 2000, but occurred on April 20, 2000, according to the minute entry which documented the Court's order of dismissal rendered from the bench at the hearing on the same date at which no party or attorney appeared. The clerk's computer entry of the fact of dismissal may have been made on April 24, 2000, but that did not constitute the dismissal of Civil No. 990501775, the dismissal having already occurred on April 20, 2000.

R. 116.

### **IX. SUMMARY OF ARGUMENTS**

Sutter first filed his complaint before fulfilling all of the Malpractice Act prelitigation requirements and subsequently stipulated to the voluntary dismissal of the complaint. The district court granted the stipulated dismissal of the complaint and entered its order of dismissal and noted it on a minute entry record. These actions qualify as an order, under the definition provided in Utah R. Civ. P. 7(f)(1). According to Utah R. Civ. P. 41(a)(2), to grant a motion for voluntary dismissal a court need only order the case dismissed, nothing more. Thus, the Court's order on April 20, 2000, dismissing the complaint, was effective on that date. Because Sutter refiled his complaint more than a year after April 20, 2000, his claims are barred.

Sutter's cited cases are irrelevant, since they all focus on the sufficiency of a final judgment for purposes of appeal. The instant case differs from these cases in that the voluntary dismissal was non-appealable, and was memorialized in the parties' submitted stipulation.

Finally, the savings statute is not a statute of limitations, and cannot be tolled. Therefore, the deadline under the savings statute for Sutter to refile his complaint was April 20, 2001. Having missed that deadline, Sutter is barred from filing his complaint.

## **X. ARGUMENT**

### **A. The Court's Ruling and Minute Entry Dismissing Plaintiff's Lawsuit Based on Stipulation of the Parties Was an Order of Dismissal and Required No Further Action from the Court or Parties.**

Sutter's complaint was dismissed on April 20, 2000. On that date, the district court held a hearing to consider Dixie's Motion to Dismiss. The Court was presented with, and accepted, a stipulated order of dismissal signed by counsel for all the parties and agreeing to dismissal of Sutter's complaint without prejudice. The district court granted the motion, and entered its order. As detailed below, these acts were wholly sufficient to effect the dismissal of Sutter's complaint. There was no longer a case pending before the district court as of April 20, 2000. Sutter's citation to cases concerning the sufficiency of final judgments for purposes of appeal are irrelevant and are not helpful to the issues relevant in this case.

#### **1. A voluntary dismissal is granted when an order issues, not when a final, appealable judgment is entered.**

Rule 41(a)(2), Utah Rules of Civil Procedure sets forth the requirements for a plaintiff to dismiss his or her pending lawsuit: “. . .[A]n action may only be dismissed at the request of the plaintiff on order of the court based either on a (i) stipulation of all of



the parties who have appeared in the action, or (ii) upon such terms and conditions as the court deems proper . . .” Utah R. Civ. P. 41(a)(2). Here, Sutter presented to the district court a signed stipulation for dismissal signed by counsel for all the parties. The Court ordered the dismissal based on the stipulation and, thus, by operation of Rule 41, the case was dismissed.

Rule 41 does not require an entry of judgment, nor does it require any written document. For the purposes of a Rule 41 voluntary dismissal, when a stipulation of all of the parties is submitted to the court, a case will be dismissed “on order of the court.” All that remains, then, is to define what is meant by “order of the court.” Here, the district court’s ruling from the bench in open court, followed by an entry of the ruling in the court’s minutes, constitutes an “order” for purposes of Rule 41.

Utah R. Civ. P. 7(f)(1) provides the following: “An order includes *every direction of the court, including a minute order entered in writing*, not included in a judgment.” (emphasis added). Read together with Rule 41(a)(2), an order of the court dismissing the case occurred when the district court accepted the stipulation, declared at the hearing that Sutter’s complaint was dismissed, and entered that ruling in the docket. As these events took place on April 20, 2000, Sutter’s complaint was dismissed on that day. Because the dismissal was without prejudice, by operation of the savings statute, Sutter then had until April 20, 2001, one year later to refile his complaint. Instead, he waited until April 24, 2001. This delay is fatal to his claim and the district court’s order should be affirmed.

2. Sutter’s Case Citations Are Inapposite, as They Deal with “Judgment” for Purposes of Appeal.

Sutter cites numerous cases analyzing the requirements for entry of judgment and appeal. He fails to cite cases addressing what is required when a case is voluntarily dismissed. Cases that seek clarification on the necessary components of a final, appealable judgment are not helpful to the present case, because a judgment is not the same as an order based on a stipulation to voluntarily dismiss a case. Rule 54(a), Utah Rules of Civil Procedure, states that “[j]udgment’ as used in these rules includes a decree and any order from which an appeal lies.” Utah R. Civ. P. 54(a). Under this definition, an order of voluntary dismissal is not a judgment, as no appeal lies from a case that has been voluntarily dismissed. *See Bowers v. Utah Transit Auth.*, 872 P.2d 1036, 1039 (Utah 1994); *see also Dove v. Cude*, 710 P.2d 170 (Utah 1985) (“parties are bound by their stipulations . . .”).

Given the difference between a judgment and an order of dismissal based on the stipulation of the parties, Sutter’s voluminous case citations are not helpful. Without exception, each case cited by Sutter in support of his “no final judgment” argument deals with the sufficiency of a judgment for purposes of appeal. In each of these cases, a Utah court found that a district court’s unsigned minute entry or statement from the bench does not constitute a final judgment for purposes of appeal. *See Ron Shepherd Insurance v. Shields*, 882 P.2d 650, 653 (Utah 1994) (finding that court’s minute entry did not constitute a “final **judgment** for purposes of **appeal**.”); *Watson v. Odell*, 176 P. 619, 619

(Utah 1918) (“ . . . an order similar to the one [in the instant case] is not a final and **appealable judgment.**”); *Sather v. Gross*, 727 P.2d 212, 213 (Utah 1986) (“An **appeal** can be taken only from the entry of a final **judgment** that concludes the action.”) (emphasis added in all).

The focus on a “final judgment for purposes of appeal” has no bearing on the instant case. Appeals courts insist on a final judgment in order to ground an appeal, because a final judgment “specifies with certainty a final determination of the rights of the parties and is susceptible of enforcement.” *Swenson Assoc. Architects, v. State*, 889 P.2d 415, 417 (Utah 1994) (citing *Cannon v. Keller*, 692 P.2d 740, 741 n.1 (Utah 1984)). This policy associated with requiring a final written judgment is inapplicable here for two reasons. First, in the instant case, there is a document specifying with certainty a final determination of the rights of the parties— that is, the stipulation submitted and signed by the parties, which clearly states that the case should be dismissed without prejudice. If any appeal from the voluntary dismissal were possible, an appellate court could easily rely on the signed stipulation as a record of the disposition of the case. *See* R. 105. Second, even if no such document existed, it could never be expected that a voluntary dismissal would be appealed, given that it was agreed to by all the parties. Further, such dismissals are never appealed because, under the savings statute, plaintiffs are enabled to refile their claims, if they will do so within the liberal one-year period following dismissal.

The non-appealability of the stipulated dismissal eliminates the need for a final entry of judgment. Given that all parties agreed to the dismissal, and they themselves drafted a document detailing and memorializing the agreement, no final entry of judgment was needed, and the district court's order sufficed to dismiss the complaint.

Many of Sutter's cited cases are inapposite for another reason. They focus on situations where a court has ruled on a motion, recorded the ruling in its minutes, and explicitly stated that a final written order was forthcoming. *See Swenson, supra*, 889 P.2d 415 (Utah 1994); *Watson, supra*, 176 P. 619 (Utah 1918); *State v. Jiminez*, 938 P.2d 264 (Utah 1997); *Wilson v. Manning*, 645 P.2 655 (Utah 1982). When the rulings in these cases were appealed, each was dismissed because the notice of appeal had been filed before the final order was entered. It makes sense that when a district court makes a ruling stating that a future order will be signed, no appeal can lie from the initial ruling. The present case does not fit into this category of cases, because the district court made no indication any further order would be issued or required. The district court, in fact, intended that the complaint be dismissed by stipulation and meant for its minute entry to be its dismissal order on the case. In its ruling on Dr. Benson's Motion for Summary Judgment, the district court stated that the case was dismissed on April 20, 2000—evidencing its own intention to dismiss that case with its minute entry order. R. 116. In the absence of some reason to expect some other word from the court on the voluntary

dismissal stipulation and motion, the district court's minute entry serves as a final order on the matter.

3. Even If a Final Judgment for Purposes of Appeal Were Required Here, the Court's Minute Entry Would Suffice.

Sutter cites a bevy of cases meant to convince the court that no decision can be honored if recorded only in a court's minutes. This is assuredly not the case. Several Utah cases exist in which courts have heard appeals from decisions rendered in minute entries alone. In *Dove v. Cude*, the Supreme Court took up the issue of whether it could hear an appeal from a district court's grant of a motion to withdraw a stipulation, which was recorded as a minute entry. 710 P.2d 170, 171 n. 1 (Utah 1985). The Court determined that the minute entry constituted a final order, reasoning that "[b]y permitting withdrawal of the stipulation, the district court determined the rights of the parties in this case." *Id.*

In *McNair v. Hayward*, the Supreme Court heard an appeal from a denial of a criminal defendant's petition for writ of habeas corpus. 666 P.2d 321, 325 n.1 (Utah 1984). In reviewing the history of the case, the Court noted multiple motions to dismiss, which had all been denied by minute entries. The Court held that each of these denials was a final order for purposes of appeal. *Id.*

The test for determining when a court's decision can be treated as a final order was elaborated in *Cannon v. Keller*, 692 P.2d 740 (Utah 1984). *See Dove*, 710 P.2d at 171

n.1; *Swenson*, 889 P.2d at 417. The *Cannon* Court was faced with whether to hear an appeal from a lower court's memorandum decision ordering a party to disclose the identity of a witness to a criminal transaction. The Court decided to treat the memorandum decision as a final order, because "the ruling specifies with certainty a final determination of the rights of the parties and is susceptible of enforcement." *Cannon*, 692 P.2d at 741 n.1.

This test weighs in favor of treating the district court's dismissal of Sutter's complaint as a final order. The order made a final determination of each party's rights, as stated more fully in the stipulation submitted by the parties. No question remained as to whether the case was still active, whether either party could appeal, or whether some future order would issue on the matter. Every question and claim remaining in the case was completely resolved and disposed of in the order. Thus, there is no reason not to treat the district court's dismissal as a final order.

4. Sutter Is Not Helped by His Citation to the Rules of Judicial Administration.

Sutter appears to rely on Rule 4-504 of the Rules of Judicial Administration for further support of his position that the district court's order of dismissal had no effect. *See* Appellant's Brief, at 8. And yet the Rules of Judicial Administration which governed the case at the time of the dismissal makes specific provisions for approval of stipulated dismissals. Rule 4-504.01 provides: "(1) in all rulings by the court, counsel for the party or parties obtaining a ruling shall within fifteen days, or within a shorter time as the court

may direct, file with the court a proposed order, judgment, or decree in conformity with the ruling.” Utah R. Judicial Admin. 4-504.01 (repealed). Sutter suggests that the district court should have required one of the parties to memorialize its order by submitting a proposed order to be signed by the district court. This suggestion is negated, however, by sections (3) and (7) of the same rule:

(3) Stipulated settlements and dismissals shall also be reduced to writing and presented to the court for signature within fifteen days of the settlement and dismissal. . . . (7) No orders, judgments, or decrees based upon stipulation shall be signed and entered unless the stipulation is in writing, signed by the attorneys of record for the respective parties and filed with the clerk or the stipulation was made on the record.

Utah R. Judicial Admin, 4-504.3,7 (repealed).

Rule 4-504 expressly outlines that stipulations for dismissal are to be handled differently than other kinds of orders. In the sections concerning stipulations, the sole requirement is that the stipulation be reduced to writing and submitted to the court soon after the agreement is reached.

The district court and the parties fulfilled the requirements of Rule 4-504 perfectly. After reaching an agreement, the parties submitted a signed stipulation to the court, which the court approved and granted, recording the order in its minutes. To require yet another writing from the parties, restating exactly what they had already recorded in their stipulation, would have been nonsensical and redundant— nothing had changed since they

submitted the stipulation, so nothing could be added to it. The stipulation was an accurate depiction of the agreement between the parties, and, once approved by the court, properly reflected the final disposition of the case.

Sutter has not provided this Court any reason to reject the district court's April 20, 2000 order of dismissal. For the reasons set forth *supra*, the Court should affirm the district court's finding that Sutter's complaint was dismissed as of April 20, 2000.

**B. The Savings Statute Cannot Be Tolloed by the Malpractice Act and Sutter's Claims Are Time-barred.**

**1. When the District Court Entered Dismissal of Sutter's First Filed Complaint on April 20, 2000, the Statute of Limitations Had Already Run.**

Sutter was allegedly injured on May 26, 1997. Under Utah Code Section 78-14-4(1), the statute allowed Sutter two years from the date of his injury to file his claim. On May 26, 1999, the last day Sutter could file his claim, he mailed to Dr. Benson a notice of intent to commence action. Because Sutter's notice of intent was served fewer than ninety days prior to the expiration of the statute of limitations, Sutter's time for commencing his malpractice action was extended 120 days from the date of service of the notice of intent. *See* U.C.A. § 78-14-8. As a result, Sutter's deadline for commencing his malpractice action was extended to September 23, 1999.

At no time prior to September 23, 1999 did Sutter file a request for hearing which would have tolled the statute of limitations during the prelitigation process had he made the request. Sutter, however, apparently believing that he had complied with the



prelitigation requirements of the Malpractice Act, Sutter filed a complaint on September 22, 1999. Dixie Regional Medical Center, the only party served with that complaint, moved to dismiss it for failure to comply with the Malpractice Act's prelitigation requirements. The district court scheduled a hearing on the motion and the day before the hearing, Sutter filed a stipulation to dismiss the first filed complaint. Neither Sutter nor Dixie appeared at the hearing held by the district court and the court recognized and accepted the parties' stipulated dismissal and entered its order of dismissal by minute entry on April 20, 2000.

Because the statute of limitations on his malpractice claims had already expired on September 23, 1999, Sutter's claims, which he voluntarily dismissed on April 20, 2000, were no longer timely. In order to refile his claims, Sutter turned to the savings statute, which applies only to those cases where "the plaintiff fails in such action or upon a cause of action otherwise than upon the merits, and the time limited either by law or contract for commencing the same shall have expired . . . ." *See* U.C.A § 78-12-40. Thus, Sutter's ability to invoke the savings statute was conditioned on the fact that the applicable statute of limitations had already expired. Hence, there is no question that the statute of limitations for the filing of Sutter's malpractice action had expired before his case was dismissed on April 20, 2000.

2. The Savings Statute Is Not a Statute of Limitations and Cannot Be Tolloed.

Given that the statute of limitations had expired, Sutter's only remaining option for refileing his complaint was the savings statute. Sutter now seeks to apply the tolling provisions of the Malpractice Act to toll the savings statute to accommodate his tardiness in refileing his complaint. The savings statute cannot be treated as a statute of limitations for purposes of tolling under the Malpractice Act for two reasons: First, the savings statute only becomes applicable when the statute of limitations has already run; and second, there is no legal precedence, either statutory or judicial for applying the savings statute as a statute of limitations.

Under the Malpractice Act, the "applicable statute of limitations" governing the action is tolled during the prelitigation process when the claimant files a request for hearing. *See* U.C.A. § 78-14-12(3)(a). In order for Sutter to rely on the savings statute, the statute of limitations must already have run on his claims. Sutter may not now claim the right to refile his complaint under the savings statute and treat the savings statute as if it were a statute of limitation and seek to have the savings statute tolled by the Malpractice Act.

The "applicable statute of limitations" governing Sutter's claims is found in the Malpractice Act. *See* U.C.A. § 78-14-4 (two-year statute of limitations). As set forth *supra*, the two-year statute of limitations applicable to Sutter's claim expired on September 23, 1999.

Sutter attempts to extricate himself from this dead end by reading the phrase “applicable statute of limitations” to refer to the savings statute. This reading is not supported in law. Sutter’s disconnection from the law on this point is evidenced by his habit of referring to the savings statute throughout his brief as the “statute of limitations provided by Utah Code Section 78-12-40.” *See, e.g.,* Appellant’s Brief, pp. 5, 28. Nothing in the statute hints that it could be or should be labeled as a “statute of limitation.” Further, there is not a single Utah case that refers to the savings statute as a statute of limitation as Sutter does. On the contrary, Utah Courts are consistently careful to refer to the savings statute and statutes of limitations separately, even when dealing with both kinds of statutes in the same case. *See, e.g., McBride-Williams v. Huard*, 2004 UT 21, ¶14, 94 P.3d 175, 178 (holding that the savings statute and the Malpractice Act’s statute of limitations, ‘to the extent that they relate to one another . . . ,’ are motivated by different policy concerns); *Grynberg v. Questar Pipeline Co.*, 2003 UT 8, 70 P.3d 1 (writing that “savings statute suspends enforcement of statute of limitations . . . .”); *also Kittredge v. Shaddy*, 2001 UT 7, 20 P.3d 285. While it is clear that these two statutes regularly interact, it is also clear that they are different. Rather than becoming a new, provisional statute of limitations, when the savings statute is activated, it “suspends enforcement” of the statute of limitations. *Grynberg*, 2003 UT at ¶29, 70 P.3d at 29.

Had the Utah State Legislature intended the Malpractice Act’s tolling provisions to apply to the savings statute as well as to “applicable statutes of limitations,” it could

easily have used more expansive language. Broad references to legal time constraints are included in other statutes. Indeed, the savings statute itself applies to cases which were filed “in due time,” broadly including any action timely brought before the courts in its first instance, albeit under circumstances in which the relevant statute of limitations has been modified, extended, or abrogated. *See, e.g., Hebertson v. Bank One*, 995 P.2d 7 (Utah Ct. App. 1999)(savings statute allowed to run serially as long as first filed and intermediate complaints are “in due time.”). Thus, there is no question that the legislature is capable of drafting language as expansive as that desired by Mr. Sutter in his reading of the Malpractice Act. And yet, despite this capability, the drafters of the Malpractice Act decided to toll only the “the applicable statute of limitations.”

“In matters of statutory construction, the best evidence of the true intent and purpose of the Legislature in enacting [an] act is the plain language of the act.” *Platts v. Parents Helping Parents*, 947 P.2d 658, at 662 (Utah 1997). Given that the Legislature was capable of crafting the Malpractice Act’s tolling provisions to apply to the savings statute by using expansive language similar to that in the savings statute, but chose not to, the plain language of the Act must be heeded. The Court, therefore, should apply the Malpractice Act as expressly written and limit its tolling provision only to the “applicable statute of limitations.”

There is no case in which the Utah savings statute's one-year refiling period has ever been tolled or extended in any way.<sup>1</sup> Indeed, there is no authority for taking such a step. The statute plainly reads that “. . . the plaintiff . . . may commence a new action within *one year* after the reversal or failure.” See U.C.A. § 78-12-40 (emphasis added). Every Utah case that has taken up the issue of the savings statute has allowed exactly one year to refile dismissed cases—no more and no less. This fact also lends support to the idea that the savings statute has never been considered to be a statute of limitations—otherwise, cases might exist in which the savings statute had been tolled. Given the clarity of the statute and the lockstep approach of the Courts, Sutter's suggestion that the savings statute can somehow be tolled or expanded is without merit.

**C. Sutter's Failure to Refile His Malpractice Claim Within the One-Year Period Provided Under the Savings Statute Is Fatal to His Claims.**

The above arguments combine to emphasize an important conclusion in this case: the only way Sutter could have successfully refiled his claim against Dr. Benson was to file a notice of intent or complaint on or before April 20, 2000. He was barred by the applicable statute of limitations from filing any suit after September 23, 2000. This meant that his only remaining option after the dismissal was the savings statute, which offered exactly one year in which to refile the lawsuit. Given that Sutter's case was

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<sup>1</sup>Of course, the one-year period can be used multiple times in sequence, as stated in *Hebertson*, 995 P.2d 7. But this practice simply constitutes the serial invocation of the statute, rather than an interruption of its mandated time period.

dismissed on April 20, 2000 by the Court's acceptance of the stipulated dismissal and its minute entry, Sutter was required to refile his case by April 20, 2001. It is undisputed that he failed to do so. Thus, Sutter is now completely barred from re-commencing his lawsuit against Dr. Benson. For these reasons, the district court's ruling of summary judgment was appropriate and should be affirmed by this Court.

## **X. CONCLUSION**

Sutter has consistently made filings in this matter at the very limits of the time allotted him. Having skirted the edge numerous times, Sutter made his final filing three days too late. As a result, the district court appropriately granted summary judgment in favor of Dr. Benson. In so ruling, the district court determined that its dismissal of Sutter's first-filed complaint occurred on April 20, 2000 and that Sutter's second-filed complaint was untimely under both a statute of limitations analysis and savings statute analysis. Finally, the district court correctly held that Sutter could not extend the savings statute beyond one year by reliance on the Malpractice Act's tolling provisions that specifically apply only to the "applicable statute of limitation." For these reasons and those set forth herein, Dr. Benson respectfully requests the Court affirm summary judgment in his favor.

DATED this 21<sup>st</sup> day of March, 2005.

SNOW, CHRISTENSEN & MARTINEAU

By 

Brian P. Miller  
Kenneth L. Reich  
Ryan B. Bell  
Attorneys for Appellee  
Stan Benson, M.D.

## **XI. ADDENDUM**

- A. Utah Rules of Civil Procedure 41(a)(2).**
- B. Utah Rules of Civil Procedure 7(f)(1).**
- C. Utah Code Annotated Section 78-14-12(3)(a).**
- D. Utah Code Annotated Section 78-12-40.**

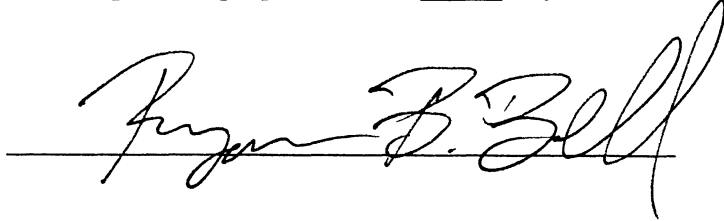


CERTIFICATE OF SERVICE

I certify that I am employed by the law offices of Snow, Christensen & Martineau, attorneys for Appellee Stan Benson, M.D.; that I served the attached **BRIEF OF THE APPELLEE** upon the parties listed below by placing a true and correct copy thereof in an envelope addressed to:

Richard M. Hutchins  
Michele P. Chambers  
192 East 200 North, #102  
St. George, Utah 84770  
Attorneys for Plaintiffs

and causing the same to be mailed first class, postage prepaid, on the 21<sup>st</sup> day of March, 2005.

A handwritten signature in black ink, reading "Ryan B. Bell", is written over a horizontal line.

Tab A

failure of party to attend at own deposition or serve answers or objections to interrogatories submitted by or an officer, director, or managing agent of a party upon whom a subpoena is served, or a party designated under Rule 30(b)(6) or 31(a) to testify if a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, (2) to serve answers or objections to interrogatories submitted by or an officer, director, or managing agent of a party upon whom a subpoena is served, or a party designated under Rule 30(b)(6) or 31(a) to testify if a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, (3) to serve a written response to a request for inspection under Rule 34, after proper service of the request, (4) to file a motion in which the action is pending on motion may make orders in regard to the failure as are just, and among others, may take any action authorized under Paragraphs (b) and (C) of Subdivision (b)(2) of this rule. In lieu of any other action taken in addition thereto, the court shall require the party to act or the party's attorney or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantiated or that other circumstances make an award of expenses unjust.

Failure to act described in this subdivision may not be on the ground that the discovery sought is objectionable or that the party failing to act has applied for a protective order provided by Rule 26(c).

*Failure to participate in the framing of a discovery plan.* If a party or attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by Rule 26(f), the court may, after opportunity for hearing, require each party or attorney to pay to any other party the reasonable expenses, including attorney fees, caused by the failure.

*Failure to disclose.* If a party fails to disclose a witness, or other material as required by Rule 26(a) or Rules 26(b)(1) and (2), or to amend a prior response to discovery as required by Rule 26(e)(2), that party shall not be permitted to use the document or other material at any hearing unless the court finds that the failure to disclose is harmless or the party shows good cause for the failure to disclose. In addition to or in lieu of this the court may order any other sanction, including the payment of reasonable costs and attorney fees, any order under subpart (b)(2)(A), (B) or (C) and informing the party of the failure to disclose.

## PART VI. TRIALS

### Jury trial of right.

*Right preserved.* The right of trial by jury as declared by the Constitution and as given by statute shall be preserved to the parties.

*Demand.* Any party may demand a trial by jury of any issue of right by a jury by paying the statutory jury fee and giving upon the other parties a demand therefor in writing any time after the commencement of the action and within 10 days after the service of the last pleading which raises such issue. Such demand may be endorsed upon a pleading.

*Specification of issues.* In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so he has demanded trial by jury for only some of the issues of the other party, within 10 days after service of the demand, or such lesser time as the court may order, may serve or trial by jury of any other or all of the issues of the action.

*Waiver.* The failure of a party to pay the statutory fee, to demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury and for trial by jury made as herein provided may be taken without the consent of the parties.

### Rule 39. Trial by jury or by the court.

(a) *By jury.* When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the register of actions as a jury action. The trial of all issues so demanded shall be by jury, unless

(1) The parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury, or

(2) The court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist, or

(3) Either party to the issue fails to appear at the trial.

(b) *By the court.* Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

(c) *Advisory jury and trial by consent.* In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

### Rule 40. Assignment of cases for trial; continuance.

(a) *Order and precedence.* The district courts shall provide by rule for the placing of actions upon the trial calendar (1) without request of the parties or (2) upon request of a party and notice to the other parties or (3) in such other manner as the courts may deem expedient. Precedence shall be given to actions entitled thereto by statute.

(b) *Postponement of the trial.* Upon motion of a party, the court may in its discretion, and upon such terms as may be just, including the payment of costs occasioned by such postponement, postpone a trial or proceeding upon good cause shown. If the motion is made upon the ground of the absence of evidence, such motion shall also set forth the materiality of the evidence expected to be obtained and shall show that due diligence has been used to procure it. The court may also require the party seeking the continuance to state, upon affidavit or under oath, the evidence he expects to obtain, and if the adverse party thereupon admits that such evidence would be given, and that it may be considered as actually given on the trial, or offered and excluded as improper, the trial shall not be postponed upon that ground.

(c) *Taking testimony of witnesses present.* If required by the adverse party, the court shall, as a condition to such postponement, proceed to have the testimony of any witness present taken, in the same manner as if at the trial; and the testimony so taken may be read on the trial with the same effect, and subject to the same objections that may be made with respect to a deposition under the provisions of Rule 32(c)(3)(A) and (B).

### Rule 41. Dismissal of actions.

(a) *Voluntary dismissal; effect thereof.*

(1) *By plaintiff.* Subject to the provisions of Rule 23(e), of Rule 66(i), and of any applicable statute, an action may be dismissed by the plaintiff without order of court by filing a notice of dismissal at any time before service by the adverse party of an answer or other response to the complaint permitted under these rules. Unless otherwise stated in the notice of dismissal, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any

court of the United States or of any state an action based on or including the same claim.

(a)(2) *By order of court.* Unless the plaintiff timely files a notice of dismissal under paragraph (1) of this subdivision of this rule, an action may only be dismissed at the request of the plaintiff on order of the court based either on:

(a)(2)(i) a stipulation of all of the parties who have appeared in the action; or

(a)(2)(ii) upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) *Involuntary dismissal; effect thereof.* For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits.

(c) *Dismissal of counterclaim, cross-claim, or third-party claim.* The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to Paragraph (1) of subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) *Costs of previously-dismissed action.* If a plaintiff who as once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may seem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

(e) *Bond or undertaking to be delivered to adverse party.* Should a party dismiss his complaint, counterclaim, cross-claim, or third-party claim, pursuant to Subdivision (a)(1)(i) above, after a provisional remedy has been allowed such party, the bond or undertaking filed in support of such provisional remedy must thereupon be delivered by the court to the adverse party against whom such provisional remedy was obtained.

#### Rule 42. Consolidation; separate trials.

(a) *Consolidation.* When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

a)(1) A motion to consolidate cases shall be heard by the judge assigned to the first case filed. Notice of a motion to consolidate cases shall be given to all parties in each case. The

order denying or granting the motion shall be filed in each case.

(a)(2) If a motion to consolidate is granted, the case number of the first case filed shall be used for all subsequent papers, and the case shall be heard by the judge assigned to the first case. The presiding judge may assign the case to another judge for good cause.

(b) *Separate trials.* The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.

#### Rule 43. Evidence.

(a) *Form.* In all trials, the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules, the Utah Rules of Evidence, or a statute of this state. All evidence shall be admitted which is admissible under the Utah Rules of Evidence or other rules adopted by the Supreme Court.

(b) *Evidence on motions.* When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

#### Rule 44. Proof of official record.

(a) *Authentication of copy.* An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and in the absence of judicial knowledge or competent evidence, accompanied with a certificate that such officer has the custody. If the office in which the record is kept is within the United States or within a territory or insular possession subject to the dominion of the United States, the certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of his office.

(b) *Proof of lack of record.* A written statement signed by an officer having the custody of an official record or by his deputy that after diligent search no record or entry of a specified tenor is found to exist in the records of his office, accompanied by a certificate as above provided, is admissible as evidence that the records of his office contain no such record or entry.

(c) *Other proof.* This rule does not prevent the proof of official records or of entry or lack of entry therein by any method authorized by any applicable statute or by the rules of evidence at common law.

(d) *Certified copy of record read in evidence.* A copy of an official record, or entry therein, in the custody of a public officer of this state, or of the United States, certified by an officer having custody thereof, to be a full, true and correct copy of the original in his custody, may be read in evidence in an action or proceeding in the courts of this state, in the same manner and with like effect as the original could be produced.

Tab B

without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect, but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d) and (e), and (b), except to the extent and under the conditions stated in this rule.

*c) Unaffected by expiration of term* The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The continued existence or expiration of a term of court in no way affects the power of the court to do any act or take any proceeding in any civil action that has been pending before it.

*d) Notice of hearings* Notice of a hearing shall be served later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of court. Such an order may for cause shown be made on ex parte application.

*e) Additional time after service by mail* Whenever a party is required to do some act or take some proceedings within a prescribed period after the service of a writ or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the end of the prescribed period as calculated under subsection (a). Saturdays, Sundays and legal holidays shall be included in the computation of any 3-day period under this subsection, except that if the last day of the 3-day period is a Saturday, a Sunday, or a legal holiday, the period shall run until the end of the next day that is not a Saturday, Sunday, or a legal holiday.

### PART III. PLEADINGS, MOTIONS, AND ORDERS

#### 7. Pleadings allowed; motions, memoranda, hearings, orders, objection to commissioner's order.

*Pleadings* There shall be a complaint and an answer, a counterclaim, an answer to a cross-claim, if the counterclaim contains a cross-claim, a third-party complaint, if a party who was not an original party is summoned under the provisions of Rule 14, and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

*Motions* An application to the court for an order shall be made in writing, unless made during a hearing or trial or in proceedings before a court commissioner, shall be made in accordance with this rule. A motion shall be in writing and shall state distinctly and with particularity the relief sought and the grounds for the relief sought.

#### *Memoranda*

*Memoranda required, exceptions, filing times* All motions, except uncontested or ex parte motions, shall be accompanied by a supporting memorandum. Within ten days after the motion and supporting memorandum, a party opposing the motion shall file a memorandum in opposition. Within five days after service of the memorandum in opposition, the moving party may file a reply memorandum, which is limited to rebuttal of matters raised in the memorandum in opposition. No other memoranda will be considered except by leave of court. A party may attach a proposed order to the memorandum.

*Length* Initial memoranda shall not exceed 10 pages, except by leave of the court. Reply memoranda shall not exceed 5 pages of argument without leave of the court.

The court may permit a party to file an over-length memorandum upon ex parte application and a showing of good

#### *(c)(3) Content*

*(c)(3)(A)* A memorandum supporting a motion for summary judgment shall contain a statement of material facts as to which the moving party contends no genuine issue exists. Each fact shall be separately stated and numbered and supported by citation to relevant materials, such as affidavits or discovery materials. Each fact set forth in the moving party's memorandum is deemed admitted for the purpose of summary judgment unless controverted by the responding party.

*(c)(3)(B)* A memorandum opposing a motion for summary judgment shall contain a verbatim restatement of each of the moving party's facts that is controverted, and may contain a separate statement of additional facts in dispute. For each of the moving party's facts that is controverted, the opposing party shall provide an explanation of the grounds for any dispute, supported by citation to relevant materials, such as affidavits or discovery materials. For any additional facts set forth in the opposing memorandum, each fact shall be separately stated and numbered and supported by citation to supporting materials, such as affidavits or discovery materials.

*(c)(3)(C)* A memorandum with more than 10 pages of argument shall contain a table of contents and a table of authorities with page references.

*(c)(3)(D)* A party may attach as exhibits to a memorandum relevant portions of documents cited in the memorandum, such as affidavits or discovery materials.

*(d) Request to submit for decision* When briefing is complete, either party may file a "Request to Submit for Decision." The request to submit for decision shall state the date on which the motion was served, the date the opposing memorandum, if any, was served, the date the reply memorandum, if any, was served, and whether a hearing has been requested. If no party files a request, the motion will not be submitted for decision.

*(e) Hearings* The court may hold a hearing on any motion. A party may request a hearing in the motion, in a memorandum or in the request to submit for decision. A request for a hearing shall be separately identified in the caption of the document containing the request. The court shall grant a request for a hearing on a motion under Rule 56 or a motion that would dispose of the action or any claim or defense in the action unless the court finds that the motion or opposition to the motion is frivolous or the issue has been authoritatively decided.

#### *(f) Orders*

*(f)(1)* An order includes every direction of the court, including a minute order entered in writing, not included in a judgment. An order for the payment of money may be enforced in the same manner as if it were a judgment. Except as otherwise provided by these rules, any order made without notice to the adverse party may be vacated or modified by the judge who made it with or without notice. Orders shall state whether they are entered upon trial, stipulation, motion or the court's initiative.

*(f)(2)* Unless the court approves the proposed order submitted with an initial memorandum, or unless otherwise directed by the court, the prevailing party shall, within fifteen days after the court's decision, serve upon the other parties a proposed order in conformity with the court's decision. Objections to the proposed order shall be filed within five days after service. The party preparing the order shall file the proposed order upon being served with an objection or upon expiration of the time to object.

*(g) Objection to court commissioner's recommendation* A recommendation of a court commissioner is the order of the court until modified by the court. A party may object to the recommendation by filing an objection in the same manner as

Tab C

**78-14-9. Professional liability insurance coverage for providers — Insurance commissioner may require joint underwriting authority.**

If the commissioner finds after a hearing that in any part of this state any professional liability insurance coverage for health care providers is not readily available in the voluntary market, and that the public interest requires, he may by regulation promulgate and implement plans to provide insurance coverage through all insurers issuing professional liability policies and individual and group accident and sickness policies providing medical, surgical or hospital expense coverage on either a prepaid or an expense incurred basis, including personal injury protection and medical expense coverage issued incidental to liability insurance policies.

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**78-14-9.5. Periodic payment of future damages in malpractice actions.**

(1) As used in this section:

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

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

(2) In any malpractice action against a health care provider, as defined in Section 78-14-3, the court shall, at the request of any party, order that future damages which equal or exceed \$100,000, less amounts payable for attorney's fees and other costs which are due at the time of judgment, shall be paid by periodic payments rather than by a lump sum payment.

(3) In rendering a judgment which orders the payment of future damages by periodic payments, the court shall order periodic payments to provide a fair correlation between the sustaining of losses and the payment of damages. Lost future earnings shall be paid over the judgment creditor's work life expectancy. The court shall also order, when appropriate, that periodic payments increase at a fixed rate, equal to the rate of inflation which the finder of fact used to determine the amount of future damages, or as measured by the most recent Consumer Price Index applicable to Utah for all goods and services. The present cash value of all periodic payments shall equal the fact finder's award of future damages, less any amount paid for attorney's fees and costs. The present cash value of periodic payments shall be determined by discounting the total amount of periodic payments projected over the judgment creditor's life expectancy, by the rate of interest which the finder of fact used to reduce the amount of future damages to present value, or the rate of interest available at the time of trial on one year U.S. Government Treasury Bills. Before periodic payments of future damages may be ordered, the court shall require a judgment debtor to post security which assures full payment of those damages. Security for payment of a judgment of periodic payments may be in one or more of the following forms:

- (a) a bond executed by a qualified insurer;
- (b) an annuity contract executed by a qualified insurer;
- (c) evidence of applicable and collectable liability insurance with one or more qualified insurers;
- (d) an agreement by one or more qualified insurers to guarantee payment of the judgment; or
- (e) any other form of security approved by the court.

Security which complies with this section may also serve as a supersedeas bond, where one is required.

(4) A judgment which orders payment of future damages by periodic payments shall specify the recipient or recipients of the payments, the dollar amount of the payments, the interval between payments, and the number of payments or the period of time over which payments shall be made. Those payments

may only be modified in the event of the death of the judgment creditor.

(5) If the court finds that the judgment debtor, or the assignee of his obligation to make periodic payments, has failed to make periodic payments as ordered by the court, it shall, in addition to the required periodic payments, order the judgment debtor or his assignee to pay the judgment creditor all damages caused by the failure to make payments, including court costs and attorney's fees.

(6) The obligation to make periodic payments for all future damages, other than damages for loss of future earnings, shall cease upon the death of the judgment creditor. Damages awarded for loss of future earnings shall not be reduced or payments terminated by reason of the death of the judgment creditor, but shall be paid to persons to whom the judgment creditor owed a duty of support, as provided by law, immediately prior to his death. In that case the court which rendered the original judgment may, upon petition of any party in interest, modify the judgment to award and apportion the unpaid future damages in accordance with this section.

(7) If security is posted in accordance with Subsection (3) and approved by a final judgment entered under this section, the judgment is considered to be satisfied, and the judgment debtor on whose behalf the security is posted shall be discharged.

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**78-14-10. Actions under Utah Governmental Immunity Act.**

The provisions of this act shall apply to malpractice actions against health care providers which are brought under the Utah Governmental Immunity Act insofar as they are applicable; provided, however, that this act shall in no way affect the requirements for filing notices of claims, times for commencing actions and limitations on amounts recoverable under the Utah Governmental Immunity Act.

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**78-14-11. Act not retroactive — Exception.**

The provisions of this act, with the exception of the provisions relating to the limitation on the time for commencing action, shall not apply to injuries, death or services rendered which occurred prior to the effective date of this act.

**78-14-12. Division to provide panel — Exemption Procedures — Statute of limitations tolling — Composition of panel — Expenses — Division authorized to set license fees.**

(1) (a) The division shall provide a hearing panel in all medical liability cases against health care providers defined in Section 78-14-3, except dentists.

(b) (i) The division shall establish procedures for litigation consideration of medical liability claims damages arising out of the provision of or a failure to provide health care.

(ii) The division may establish rules necessary to administer the process and procedures relating to prelitigation hearings and the conduct of prelitigation hearings in accordance with Sections 78-14-15 through 78-14-16.

(c) The proceedings are informal, nonbinding, and not subject to Title 63, Chapter 46b, Administrative Procedures Act, but are compulsory as a condition precedent to commencing litigation.

(d) Proceedings conducted under authority of this section are confidential, privileged, and immune from discovery process.

(2) (a) The party initiating a medical liability action shall file a request for prelitigation panel review with the division within 60 days after the service of notice of intent to commence action under Section



b) The request shall include a copy of the notice of intent to commence action. The request shall be mailed to health care providers named in the notice and request.

a) The filing of a request for prelitigation panel review under this section tolls the applicable statute of limitations until the earlier of 60 days following the division's issuance of an opinion by the prelitigation panel, or 60 days following the termination of jurisdiction by the division as provided in this subsection. The division shall send any opinion issued by the panel to all parties by regular mail.

b) (i) The division shall complete a prelitigation hearing under this section within 180 days after the filing of the request for prelitigation panel review, or within any longer period as agreed upon in writing by all parties to the review.

(ii) If the prelitigation hearing has not been completed within the time limits established in Subsection (3)(b)(i), the division has no further jurisdiction over the matter subject to review and the claimant is considered to have complied with all conditions precedent required under this section prior to the commencement of litigation.

c) (i) The claimant and any respondent may agree by written stipulation that no useful purpose would be served by convening a prelitigation panel under this section.

(ii) When the stipulation is filed with the division, the division shall within ten days after receipt enter an order divesting itself of jurisdiction over the claim, as it concerns the stipulating respondent, and stating that the claimant has complied with all conditions precedent to the commencement of litigation regarding the claim.

The division shall provide for and appoint an appropriate panel or panels to hear complaints of medical liability and claims, made by or on behalf of any patient who is a victim of medical liability. The panels are composed of:

(i) one member who is a resident lawyer currently licensed and in good standing to practice law in this state who shall serve as chairman of the panel, who is appointed by the division from among qualified individuals who have registered with the division indicating a willingness to serve as panel members, and a willingness to comply with the rules of professional conduct governing lawyers in the state of Utah, and who has completed division training regarding conduct of panel hearings;

(ii) one member who is a licensed health care provider listed under Section 78-14-3, who is practicing and knowledgeable in the same specialty as the proposed defendant, and who is appointed by the division in accordance with Subsection (5); or

(iii) in claims against only hospitals or their employees, one member who is an individual currently serving in a hospital administration position directly related to hospital operations or conduct that includes responsibility for the area of practice that is the subject of the liability claim, and who is appointed by the division; and

(iv) a lay panelist who is not a lawyer, doctor, hospital employee, or other health care provider, and who is a resident citizen of the state, selected and appointed by the division from among individuals who have completed division training with respect to panel hearings.

Each person listed as a health care provider in Section 78-14-3 and practicing under a license issued by the state, is obligated as a condition of holding that license to participate as a member of a medical liability prelitigation panel at reasonable times, places, and inter-

vals, upon issuance, with advance notice given in a reasonable time frame, by the division of an Order to Participate as a Medical Liability Prelitigation Panel Member.

(b) A licensee may be excused from appearance and participation as a panel member upon the division finding participation by the licensee will create an unreasonable burden or hardship upon the licensee.

(c) A licensee whom the division finds failed to appear and participate as a panel member when so ordered, without adequate explanation or justification and without being excused for cause by the division, may be assessed an administrative fine not to exceed \$5,000.

(d) A licensee whom the division finds intentionally or repeatedly failed to appear and participate as a panel member when so ordered, without adequate explanation or justification and without being excused for cause by the division, may be assessed an administrative fine not to exceed \$5,000, and is guilty of unprofessional conduct.

(e) All fines collected under Subsections (5)(c) and (d) shall be deposited in the Physicians Education Fund created in Section 58-67a-1.

(6) Each person selected as a panel member shall certify, under oath, that he has no bias or conflict of interest with respect to any matter under consideration.

(7) Members of the prelitigation hearing panels shall receive per diem compensation and travel expenses for attending panel hearings as established by rules of the division.

(8) (a) In addition to the actual cost of administering the licensure of health care providers, the division may set license fees of health care providers within the limits established by law equal to their proportionate costs of administering prelitigation panels.

(b) The claimant bears none of the costs of administering the prelitigation panel except under Section 78-14-16.

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#### **78-14-13. Proceedings — Authority of panel — Rights of parties to proceedings.**

(1) No record of the proceedings is required and all evidence, documents, and exhibits are returned to the parties or witnesses who provided the evidence, documents, and exhibits at the end of the proceedings upon the request of the parties or witnesses who provided the evidence.

(2) The division may issue subpoenas for medical records directly related to the claim of medical liability in accordance with division rule and in compliance with the following:

(a) the subpoena shall be prepared by the requesting party in proper form for issuance by the division; and

(b) the subpoena shall be accompanied by:

(i) an affidavit prepared by the person requesting the subpoena attesting to the fact the medical record subject to subpoena is believed to be directly related to the medical liability claim to which the subpoena is related; or

(ii) by a written release for the medical records to be provided to the person requesting the subpoena, signed by the individual who is the subject of the medical record or by that individual's guardian or conservator.

(3) Per diem reimbursement to panel members and expenses incurred by the panel in the conduct of prelitigation panel hearings shall be paid by the division. Expenses related to subpoenas are paid by the requesting party, including witness fees and mileage.

(4) The proceedings are informal and formal rules of evidence are not applicable. There is no discovery or perpetuation of testimony in the proceedings, except upon special order of the panel, and for good cause shown demonstrating extraordinary circumstances.

Tab D

**78-12-39. Effect of war.**

When a person is an alien subject or a citizen of a country at war with the United States, the time of the continuance of the war is not a part of the period limited for the commencement of the action. 1953

**78-12-40. Effect of failure of action not on merits.**

If any action is commenced within due time and a judgment thereon for the plaintiff is reversed, or if the plaintiff fails in such action or upon a cause of action otherwise than upon the merits, and the time limited either by law or contract for commencing the same shall have expired, the plaintiff, or if he dies and the cause of action survives, his representatives, may commence a new action within one year after the reversal or failure. 1953

**78-12-41. Effect of injunction or prohibition.**

When the commencement of an action is stayed by injunction or a statutory prohibition the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action. 1953

**78-12-42. Disability must exist when right of action accrues.**

No person can avail himself of a disability, unless it existed when his right of action accrued. 1953

**78-12-43. All disabilities must be removed.**

When two or more disabilities coexist at the time the right of action accrues, the limitation does not attach until all are removed. 1953

**78-12-44. Effect of payment, acknowledgment, or promise to pay.**

In any case founded on contract, when any part of the principal or interest shall have been paid, or an acknowledgment of an existing liability, debt or claim, or any promise to pay the same, shall have been made, an action may be brought within the period prescribed for the same after such payment, acknowledgment or promise; but such acknowledgment or promise must be in writing, signed by the party to be charged thereby. When a right of action is barred by the provisions of any statute, it shall be unavailable either as a cause of action or ground of defense. 1953

**78-12-45. Action barred in another state barred here.**

When a cause of action has arisen in another state or territory, or in a foreign country, and by the laws thereof an action thereon cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state, except in favor of one who has been a citizen of this state and who has held the cause of action from the time it accrued. 1953

**78-12-46. "Action" includes special proceeding.**

The word "action," as used in this chapter, is to be construed, whenever it is necessary to do so, as including a special proceeding of a civil nature. 1953

**78-12-47. Separate trial of statute of limitations issue in malpractice actions.**

In any action against a physician and surgeon, dentist, osteopathic physician, chiropractor, physical therapist, registered nurse, clinical laboratory bioanalyst, clinical laboratory technologist, or a licensed hospital, person, firm or corporation as the employer of any such person for professional negligence or for rendering professional services without consent, if the responsive pleading of the defendant pleads that the action is barred by the statute of limitations, and if either party so moves the court, the issue raised thereby may be tried separately and before any other issues in the case are tried. If the issue raised by the defense of the statute of limitations is

finally determined in favor of the plaintiff, the remaining issues shall then be tried.

This act shall not be construed to be retroactive.

**78-12-48. Statute of limitations — Asbestos damages.**

(1) (a) Notwithstanding any other provision of law, a statute of limitation or repose may bar an action to recover damages from any manufacturer of any construction materials containing asbestos and arising out of a manufacturer's providing of the materials, directly through other persons, for use in construction of a building within the state until July 1, 1991, or until ten years after the person or entity bringing the action discovers or with reasonable diligence could have discovered the injury or damages, whichever is later.

(b) Subsection (a) provides a statute of limitation for the specified actions, and also acts retroactively to persons bringing actions within time limits, the commencement of actions in this section that are otherwise barred.

(2) As used in this section, "asbestos" means asbestos in any of the following varieties of:

- (a) chrysotile (serpentine);
- (b) crocidolite (riebeckite);
- (c) amosite (cummingtonite-grunerite);
- (d) anthophyllite;
- (e) tremolite; or
- (f) actinolite.

**CHAPTER 12a****PROCESS SERVER ACT****Section**

- 78-12a-1. Short title.
- 78-12a-2. Process servers.
- 78-12a-3. Recoverable rates.
- 78-12a-4. Violations of service of process authority.

**78-12a-1. Short title.**

This chapter is known as the "Process Server Act."

**78-12a-2. Process servers.**

(1) Persons who are not peace officers, constables, or lawfully appointed deputies of such officers, or state investigators may not serve any forms of civil or process other than complaints, summonses, and subpoenas.

(2) The following persons may serve all process in the courts of this state except as otherwise limited by this act (1):

- (a) a peace officer employed by any political subdivision of the state acting within the scope and jurisdiction of his employment;
- (b) a sheriff or appointed deputy sheriff employed by any county of the state;
- (c) a constable serving in compliance with the law;
- (d) an investigator employed by the state and authorized by law to serve civil process.

(3) Private investigators licensed in accordance with 53, Chapter 9, Private Investigator Regulation Act, may serve the following forms of process:

- (a) petitions;
- (b) complaints;
- (c) summonses;
- (d) supplemental orders;
- (e) orders to show cause;
- (f) notices;
- (g) small claims affidavits;
- (h) small claims orders;
- (i) writs of garnishment;