ARGUMENT

Summary judgment is only appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(a). "Generally, determining whether and when an injured patient discovered or should have discovered her legal injury is a fact-intensive question that requires a jury." *Arnold v. White*, 2012 UT 61, ¶ 13; 289 P.3d 449 (Utah 2012). Here, a jury is necessary to resolve the genuine questions of fact surrounding the accrual date of the statute of limitations. Thus, this court should deny this motion for summary judgment.

I. SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE THERE IS A GENUINE DISPUTE OF MATERIAL FACT IN DETERMINING THE ACCRUAL DATE OF THE STATUTE OF LIMITATIONS.

a. The Date of Accrual of David's Cause of Action Is March 17, 2022, Because That Is When He Discovered His "Legal Injury."

Utah Code § 75B-3-404 states that "[a] malpractice action against a healthcare provider shall be commenced within two years after the plaintiff or patient discovers, or through the use of reasonable diligence, should have discovered the injury, whichever first occurs." Utah Code § 75B-3-404. Utah case law has further interpreted the term "injury" to mean a "legal injury." *Arnold*, 2012 UT 61 at ¶ 15 A "legal injury" is defined in Utah case law as "both the fact of injury *and* that is resulted from negligence." *Id*. Actual or constructive knowledge of both prongs of a legal injury is required before the statute of limitations period begins to run. *Id.* Actual or constructive knowledge must be more than "mere suspicion" *Id*. at ¶ 17. Furthermore, the Utah Supreme Court has held that "the existence of symptoms alone is not a sufficient basis for a court to charge the plaintiff with knowledge that the symptoms were the result of negligence." *Id.* at ¶ 16. The Court gives weight to the "great disparity in the knowledge of those who provide health care services and those who receive the services with respect to expected and unexpected side

effects." *Id.* "Thus, while a patient 'may be aware of a disability or dysfunction' . . . it may be passed off as an unavoidable side effect or a side effect that will pass with time." *Id.*

Defendants assert that David should have discovered his legal injury within weeks of his October 2021 visit. *See Defendants' Motion*, p. 4. In support of this contention, they claim that the Dr. Clark's instructions to follow up if David's "symptoms worsened" were enough to give David actual or constructive knowledge of his legal injury. *Id.* at p. 4 ¶ 2. However, it is clear from both David's and Emma's sworn statements that—during the *five*-month period between David's ER discharge and appointment with a new physician on March 17, 2022—that David did not know the fact of injury nor that it resulted from Dr. Clark's negligence. David states that, after seeking emergency-room help for severe symptoms, he "was discharged the same day with instruction to take over-the-counter medications." *Affidavit of David Harper*, ¶¶ 1–3. Dr. Clark stated in his deposition that he didn't order any imaging. *See Deposition of Dr. Samuel Clark*, ¶ 21. Treatment in an emergency room consisting of a seemingly basic diagnosis—no testing apparently necessary—and a simple over-the-counter medication would not lead any ordinary person to "conclude that a claim for negligence may exist." *Jensen v. IHC Health Servs.*, 2020 UT 57, ¶ 26; 472 P.3d 935 (Utah 2020). In the following weeks, David states he "believed [his] symptoms were part of the condition for which I had been treated and trusted that my doctors had properly diagnosed me." *Affidavit*, ¶ 3. This indicates that—even if he could begin to comprehend the fact of his injury—he was completely unaware of the second prong of legal injury: "*and* that it resulted from negligence." This is further confirmed by Emma's deposition testimony that they "did not know" how long it would take for her father's condition to improve. *Deposition of Emma Harper*, ¶ 30.

Despite what Defendants now claim, Dr. Clark's instructions were not to return if his symptoms *persisted or* got worse. *See Defendants' Motion* at p. 4, ¶ 2. According to both Dr. Clark's deposition and David's affidavit, the instruction was to return only if he worsened. *Clark's Deposition* at ¶¶ 18–19; *Affidavit* at ¶ 2. The Harpers believed that David's so-called "worsening symptoms" were not actually worse. *Defendants' Motion*, p. 2, ¶ 5. Rather, his symptoms were the same as his original ER complaints, just exacerbated by the "long time" his body was taking "to react to the medicine." *Emma's Deposition*, ¶¶ 30–31. David's continued vomiting had not allowed him to properly fuel his body, and the prolonged fever was also taking its toll. *Id.* at ¶¶ 33–34. This is a scenario clearly contemplated by the Utah Supreme Court in *Arnold*: "Thus, while a patient 'may be aware of a disability or dysfunction' . . . it may be passed off as an unavoidable side effect or a side effect that will pass with time." *Arnold*, 2012 UT 61 at ¶ 17. With such beliefs—an ordinary person still would not suspect a claim for negligence. Finally, when David's condition became "intolerable," he sought help from a new physician. *Affidavit* at ¶ 4. It was on March 17, 2022, that Dr. Sally Morris performed imaging revealing a bowel perforation. *Id.* at ¶¶ 4–5. Dr. Morris informed David that the permanent organ damage from his untreated bowel perforation would have occurred shortly after his October ER Visit. *Id.* at ¶ 6. At this time, David had actual or constructive knowledge of his injury in fact—a potentially missed diagnosis, and delayed treatment resulting in permanent organ damage—as well as the conclusion that a claim for Dr. Clark's negligence existed. *Id.* at ¶ 4. In fact, this same scenario is exactly contemplated by the Utah Supreme Court as marking the correct date of accrual, as discussed in *Arnold*. The Court gives the following example: "If [a patient] later visits a new doctor who suggests that the first doctor's negligence caused the [injury], then the two-year statute of limitations is triggered." *Arnold*, 2012 UT 61 at ¶ 26. Thus, it is our contention

that the date of accrual is March 17, 2022—not a few weeks after David's ER visit. Therefore, Personal Representative has demonstrated that a genuine dispute of material fact is present and the date of accrual cannot be decided as a matter of law in this case. Therefore, Defendants' Motion for Summary Judgement should be denied.

b. Defendants' Assertion that David Ignored Persistent Symptoms or Did Not Exercise Reasonable Diligence

Defendants assert that David should have discovered his legal injury within weeks of his October 2021 visit. *See Defendants' Motion*, p. 4. In support of this contention, they claim that if he had exercised reasonable diligence and followed up with a doctor sooner, his condition would have been discovered sooner, starting the timing of the statute of limitations. However, this contention is founded on speculation.

It is speculative at best to assume the next provider would have discovered what Dr. Clark didn't. After all, one doctor already did not perform any imaging on David; one doctor already missed the diagnosis. *Clark's Deposition* at ¶ 21. Dr. Clark testified that David's symptoms were "relatively nonspecific" and agreed that "many conditions can present similarly." *Id.* at 33, ¶¶ 8–9. Thus, it cannot be said that, even if David had sought help earlier, that a follow-up visit would have given him the facts to serve as the basis for his legal injury. Furthermore, according to Dr. Morris, the damage to his organs would have occurred "weeks after [his] visit to the ER." *Affidavit* at ¶ 6. Thus, if David had followed-up with a doctor before that damage had occurred, again, there still is a possibility that he would not have discovered the facts to serve as the basis for his legal injury. As such, Defendants' contention that the statute of limitations should have started running a few weeks after David's ER visit is too speculative to be decided as a matter of law. Finally, a decision in favor of Defendants would raise the standard of "reasonable diligence" beyond what the Utah Supreme Court has already articulated. The

Utah Supreme Court has given considerable weight to the "great disparity in the knowledge of those who provide health care services and those who receive the services with respect to expected and unexpected side effects." *Arnold* at ¶ 16. Holding that reasonable diligence would ask every patient to correctly identify what their expected and unexpected side effects are in less than a five-month period would disregard the great disparity in knowledge that is at the heart of the Utah Health Care Malpractice Act.

II. SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE FILING WAS TIMELY UNDER UTAH CODE §§ 75B-3-412(4) AND 78B-2-108.

There are two parts to Utah's statute of limitations for medical malpractice actions: a two-year statute of limitations and a four-year statute of repose. It is undisputed that David began receiving medical treatment on October 15, 2021, when he presented to the ER with severe abdominal pain, vomiting, and fever. *See Defendants' Motion for Summary Judgment,* filed January 4, 2026, p. 2, ¶ 1. It is also undisputed that the next time David was evaluated by a medical professional was on March 17, 2022. *Id*. at p. 3, ¶ 9. Therefore, it is also undisputed that any negligent treatment occurred no later than March 17, 2022. Personal Representative ultimately filed her complaint on May 31, 2024, approximately two years and one and a half months after treatment ended. *See* Docket. Therefore, Personal Representative was within the four-year statute of repose of the Utah Health Care Malpractice Act (the "Act") when she filed her complaint. *See Arnold*, 2012 UT 61 at ¶ 29 (holding that a complaint filed two years and three months after treatment ended was safely within the statute of repose.) Thus, for the Defendants to prevail on their argument that this claim is barred, they must show that Personal Representative's claim is undisputedly barred by the two-year statute of limitations.

a. If the Date of Accrual Is March 17, 2022, the Filing on May 31, 2022, Is Still Timely Under Utah Code § 75B-3-412(4).

It is vital to note that the time allowed for commencing a malpractice action against a health care provider can be extended by Utah Code § 75B-3-412. “If the notice [of intent] is served less than 90 days prior to the expiration of the applicable time period, the time for commencing the malpractice action against the health care provider shall be extended to 120 days from the date of service of notice.” Utah Code § 75B-3-412(4). In this case, the notice of intent was served on February 23, 2024. The expiration of the “applicable time period,” was March 18, 2022. Thus, the notice of intent was filed less than one month from the expiration of the applicable timer period. As such, the 120-day extension applies, making the date for commencing the malpractice action against a health care provider be approximately June 23, 2024. Therefore, Personal Representative’s filing on May 31, 2024, was still timely under the two-year statute of limitations.

b. If the Date of Accrual Is March 17, 2022, the Filing on May 31, 2022, Is Still Timely Under Utah Code § 78B-2-108.

A recent 10th Circuit decision has discussed the requirements for showing mental incompetence and its effects on a statute of limitations. *See Robertson v. IHC Health Servs.*, 2023 U.S. App. LEXIS 18290; 2023 WL 4618346 (10th Cir. 2023). A statute of limitations ‘“may not run’ while an individual is mentally incompetent.” *Id.* at 20 (citing Utah Code. § 75B-2-108). “The Utah Supreme Court has held that section 78B-2-108 is intended to relieve from the strict time restrictions people who are unable to protect their legal rights because an *overall* inability to function in society.” *Id*. at 21 (internal quotations and citations simplified). “Demonstrating mental incompetence under [the rule] requires establishing the individual could not manage their business affairs or estate, or comprehend their legal rights or liabilities.” *Id.* In David’s affidavit, he testified that “[m]y health continued to deteriorate following my cancer diagnosis. By August 2022, I was frequently hospitalized and unable to manage my personal or

legal affairs." *Affidavit* at ¶ 10. His daughter—Personal Representative—lived with him during that time, in order to care for him. *See Deposition of Emma Harper*, ¶ 7. These facts demonstrate David, from August 2022 to his death in November 2023, was unable to manage his affairs—fitting the requirements for mental incompetence. As Defendants' have stated, only after David's death was Emma able to "stand in" his shoes as Personal Representative. *See Defendants' Motion*, p. 5, ¶ 3. Thus, the statute of limitations should have paused during that period. From March 17, 2022, to August 2022 is a period of approximately 4.5–5.5 months. Then, the period from November 8, 2023, to May 31, 2024, is 5 months and 23 days. Combined, the time that ran under the statute of limitations before filing was a maximum of a year. Thus, the May 31, 2024, filing is timely, due to David's mental incompetence near the end of his life.

CONCLUSION

In conclusion, Defendants have failed to show that there are no genuine disputes of material facts concerning both the accrual date of the statute of limitations and that Personal Representative's claim was extinguished by the expiration of the applicable time period. A jury is necessary to answer the fact-intensive questions of whether and when David discovered or should have discovered his legal injury. *Arnold* at ¶ 13. Consequently, this court should deny Defendants' Motion for Summary Judgment.