SEAT:

MEMORANDUM

In re Estate of Harper (Plaintiff) v. Mountain Ridge Regional Hospital & Dr. S. Clark

FILE

Memorandum to Examinee

To: Examinee
From: Kayla Keller, Senior Partner
Date: November 4, 2025
Re: Opposition to Summary Judgment – *Estate of Harper v. Mountain View Regional Hospital*

Our firm represents Emma Harper, as Personal Representative for the Estate of David Harper. Mr. Harper was treated by Mountain Ridge Regional Hospital and Dr. Samuel Clark on October 15, 2021, for severe abdominal pain. He was discharged with a diagnosis of gastritis.

According to his affidavit, he sought treatment from a new physician on March 17, 2022, who discovered that Mr. Harper had a missed bowel perforation that led to sepsis (infection), permanent organ damage, and a cancer diagnosis allegedly accelerated by the infection. Mr. Harper died on November 8, 2023. The cause of death includes cancer as the primary cause, with complications from a bowel perforation that led to a severe infection (sepsis) accelerating the cancer and contributing to organ failure.

Emma opened David's estate on January 7, 2024 and hired us shortly after. We served our Notice of Intent to Commence Action on February 23, 2024 and the DOPL hearing was held on March 15, 2024. We received our Certificate of Compliance from DOPL on March 18, 2024, and filed this lawsuit on May 31, 2024. Defendants have moved for summary judgment, arguing the action is barred by the State of Utah's two-year statute of limitations for medical negligence because the treatment occurred on October 15, 2021.

You must draft the Argument section of our opposition brief. Do not draft a separate facts section. You should argue that the Defendants' motion for summary judgment must be denied and the legal justification for such a denial.

SEAT:

CASE FILE

This motion requires you to respond.
Please see the Notice to Responding Party.

Clark Dewey (1111)
Dewey Cheatem Howe, LLC
Telephone: (555) 555-5555
Clarkd@dchlaw.com

Attorney for Defendants

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IN THE DISTRICT COURT FOR THE SECOND JUDICIAL DISTRICT

DAVIS COUNTY, STATE OF UTAH

EMMA HARPER, as Personal Representative of the **ESTATE OF DAVID HARPER, Deceased**, Plaintiff, **MOUNTAIN RIDGE REGIONAL HOSPITAL**, and **SAMUEL CLARK, M.D.**, Defendants.	**DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** Case No. 123456789 Judge Oscar D. Grouch

Defendants Mountain Ridge Regional Hospital ("Hospital") and Samuel Clark, M.D. ("Dr. Clark") (collectively, "Defendants"), through counsel, hereby move the Court for summary judgment pursuant to Rule 56 of the Utah Rules of Civil Procedure on the ground that Plaintiff Emma Harper, as Personal Representative of the Estate of David Harper, Deceased's (the "Harper Estate") medical malpractice claims are barred by the applicable statute of limitations under Section 78B-3-404 of the Utah Code Annotated.

RELIEF REQUESTED AND GROUNDS THEREFOR

Hospital and Dr. Clark seek an order granting summary judgment in their favor and dismissing all claims with prejudice. The grounds for the relief requested are that the lawsuit was filed more than two years after Mr. Harper or the Harper Estate discovered, or in the exercise of

reasonable diligence should have discovered, Mr. Harper's alleged legal injury and its alleged negligent cause. *See* Utah Code Ann. § 78B-3-404(1). The Harper Estate's claims are therefore barred by the statute of limitations.

STATEMENT OF UNDISPUTED MATERIAL FACTS

For purposes of this Motion, Defendants identify the following material facts as undisputed or established by the Harper Estate's own evidence.

1. On or about October 15, 2021, David Harper presented to the Mountain Ridge Regional Hospital emergency department with severe abdominal pain, vomiting, and fever. Mountain Ridge medical records, pp. 138-140.

2. Dr. Clark evaluated Mr. Harper in the emergency department and discharged him the same day with a diagnosis of gastritis and instructions to use over-the-counter medication and return if symptoms worsened. Deposition of Samuel Clark, M.D. ("Clark Depo."), at 16:10-24.

3. Mr. Harper's abdominal pain and related symptoms continued unabated in the weeks following discharge. Deposition of Emma Harper ("Harper Depo."), at 14:3-15.

4. Despite persistent pain, Mr. Harper did not promptly follow up with his treating physician or seek additional diagnostic evaluation. Harper Depo. at 16:29-6:4.

5. Mr. Harper continued to experience worsening symptoms over the following six months. Harper Depo. 18:1-10.

6. The failure to follow up was a significant contributing factor of Mr. Harper's worsening condition. Clark Depo. at 25:10-18.

7. Dr. Clark could have treated Mr. Harper's condition and saved his life if he had followed up within a reasonable time frame. Clark Depo. at 27:2-27.

8. Mr. Harper waited six months to follow up and that is why he passed away. Clark

Depo. at 29:20-30:7.

9. On March 17, 2022, after finally seeking additional care, imaging revealed a bowel perforation. Deposition of Sally Morris, M.D. ("Morris Depo."), at 12:3-24.

10. The Harper Estate contends that the perforation existed at the time of the October 2021 emergency department visit and was negligently missed. Morris Depo. at 15:8-24.

11. Mr. Harper died on November 8, 2023. *See* Death Certificate.

12. The Notice of Intent to Commence Action ("NOIC") was served on February 23, 2024. *See* Docket.

13. The Division of Professional Licensing ("DOPL") hearing was held on March 15, 2024. *See* Docket.

14. The Certificate of Compliance was issued by DOPL on April 2, 2024. *See* Docket.

15. The Complaint was filed on May 31, 2024. *See* Docket.

ARGUMENT

I. SUMMARY JUDGMENT STANDARD

Summary judgment is 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). Where the facts establishing the accrual of a statute of limitations defense are undisputed, accrual may be resolved by the Court as a matter of law.

II. GOVERNING STATUTE OF LIMITATIONS

The Utah Health Care Malpractice Act, Utah Code Ann. § 78B-3-401, *et seq*. (the "Act"), provides a two-year limitations period, coupled with a four-year repose period, for medical malpractice claims against health care providers. The Act states, in relevant part: "A malpractice action against a health care provider shall be commenced within two years after the plaintiff or

patient discovers, or through the use of reasonable diligence should have discovered the injury, whichever first occurs, but not to exceed four years after the date of the alleged act, omission, neglect, or occurrence." Utah Code Ann. § 78B-3-404(1). Under Utah law, "injury" in this context means discovery of a "legal injury"—*i.e.*, discovery of the physical injury and that it resulted from negligence. *Foil v. Ballinger*, 601 P.2d 144, 148 (Utah 1979). Utah courts apply an objective standard: the limitations period begins when the plaintiff discovered, or through reasonable diligence should have discovered, facts sufficient to lead an ordinary person to conclude that a claim for negligence may exist. *Jensen v. IHC Health Servs*., 202 UT 57, ¶ 26.

III. MR. HARPER SHOULD HAVE DISCOVERED HIS LEGAL INJURY WITHIN WEEKS OF THE OCTOBER 2021 VISIT.

Mr. Harper was discharged on October 15, 2021 with explicit instructions to follow up if his symptoms persisted or worsened. His symptoms did exactly that. Severe abdominal pain continued for weeks, yet Mr. Harper failed to timely seek follow-up care. Under Utah's objective discovery rule, a patient cannot postpone accrual by ignoring persistent symptoms that directly contradict the original diagnosis.

Had Mr. Harper exercised reasonable diligence by following up with a physician within weeks of the October 15, 2021 visit—as instructed—the bowel perforation would have been discovered. At that point, he would have known that the condition had been missed during the emergency department visit and that his injury may have been caused by negligence.

A. <u>The Harper Estate Cannot Avoid Accrual by Characterizing Earlier Knowledge as "Trust" or Lack of Medical Sophistication</u>.

The Harper Estate may argue that Mr. Harper did not subjectively "know" the October 15, 2021 treatment was negligent until later. But the test is objective. Under Utah law, absolute certainty is not required. Rather, the question is when facts were sufficient to place an ordinary

person on notice that a malpractice claim may exist.

While Utah decisions recognize that symptoms alone may not always be enough, the Harper Estate's evidence goes well beyond symptoms. It includes a later diagnosis (bowel perforation) coupled with the asserted linkage to the October 2021 emergency visit. Once that linkage exists, a reasonable person is on notice to investigate and bring a claim within two years.

B. Ongoing Damages and Later Medical Developments Do Not Restart the Limitations Period.

The Harper Estate alleges severe downstream consequences as a result of the missed bowel perforation, including permanent organ damage and cancer progression allegedly accelerated by infection. Even if those allegations are assumed true, they do not restart the clock. Utah's statute is triggered by discovery (actual or constructive) of the legal injury—injury plus negligent cause—not by the realization of the full extent of damages. In other words, a plaintiff may later learn that damages are worse than initially understood, but the limitations period is not extended each time the medical picture evolves. The alleged later consequences are part of the damages, not a new accrual event.

C. Death and Probate Do Not Revive an Expired Malpractice Claim.

The Harper Estate also suggests that because Mr. Harper died on November 8, 2023 and the probate of his estate was opened in January 2024, the limitations period should be extended or restarted. That argument fails as a matter of law. The personal representative of a decedent's estate "stands in the shoes" of the decedent for purposes of defenses, including statutes of limitation. The appointment of a personal representative does not revive an already time-barred claim.

If the claim accrued no later than a few weeks after October 15, 2021, the two-year limitations period expired no later than a few weeks after October 15, 2023, right before Mr.

Harper's death. Once the limitations period expired, the claim was extinguished, and subsequent probate proceedings cannot resuscitate it.

CONCLUSION

For the reasons stated above, Defendants respectfully request that the Court grant summary judgment and dismiss the Harper Estate's claims with prejudice.

Dated January 4, 2026.

DEWEY, CHEATEM, HOWE

/s/Clark Dewey
Clark Dewey
Attorneys for Defendants

AFFIDAVIT OF DAVID HARPER

I, David Harper, being of lawful age and competent to testify, hereby declare as follows:

1. On October 15, 2021, I presented to the emergency department at Mountain Ridge Regional Hospital with severe abdominal pain, vomiting, and fever.

2. I was evaluated by Dr. Samuel Clark, who informed me that my condition was likely gastritis. I was discharged the same day with instructions to take over-the-counter medications and to return if symptoms worsened.

3. After my discharge, my condition did not improve. Over the following months, I experienced increasing abdominal pain, fatigue, and weakness. I believed these symptoms were part of the condition for which I had been treated but trusted that my doctors had properly diagnosed me.

4. On March 17, 2022, after my symptoms became intolerable, I sought treatment from another physician, Dr. Sally Morris. Imaging revealed that I had suffered a bowel perforation, which I believe had gone undetected during my October 2021 emergency room visit.

5. I was informed that the bowel perforation had resulted in sepsis, requiring prolonged hospitalization and aggressive treatment.

6. As a result of the sepsis, I sustained permanent organ damage that, according to Dr. Morris, would have occurred mere weeks after my visit to the ER in October 2021.

7. The sepsis damaged my kidneys and liver, which significantly affected my daily functioning and quality of life.

8. During my subsequent medical treatment, I was diagnosed with cancer. I was advised by my treating physicians that the severe infection and resulting systemic inflammation accelerated the progression of my cancer and materially worsened my prognosis.

9. Prior to being informed of the missed bowel perforation on March 17, 2022, I did not know my October 15, 2021 emergency room treatment was negligent or that my worsening condition was caused by a failure to diagnose my injury.

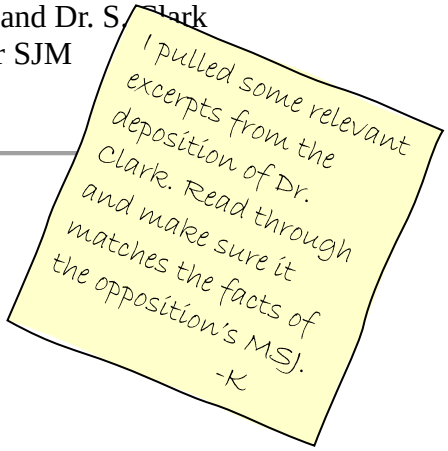
10. My health continued to deteriorate following my cancer diagnosis. By August 2022, I was frequently hospitalized and unable to manage my personal or legal affairs.

Pursuant to Utah Code Ann. § 78B-18a-106, I declare under criminal penalty of the law of the State of Utah that the foregoing is true and correct.

DATED September 1, 2023.

/s/David Harper
David Harper

In re Estate of Harper v. Mountain Ridge Regional Hospital and Dr. S. Clark
Excerpts from Deposition of Dr. Samuel Clark for SJM



EXAMINATION BY KAYLA KELLER

MS. KELLER: Please state your full name for the record.

DR. CLARK: My name is Dr. Samuel Clark.

MS. KELLER: What is your profession?

DR. CLARK. I am a board-certified internal medicine physician.

[deleted section regarding Dr. Clark's background and qualifications.]

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MS. KELLER: Were you the emergency room physician at Mountain Ridge Regional Hospital on October 15, 2021?

DR. CLARK. Yes, I was.

MS. KELLER: Do you recall evaluating Mr. Harper on that date?

DR. CLARK. Yes, generally.

MS. KELLER: What complaints did Mr. Harper present with at that time?

DR. CLARK. He reported severe abdominal pain, vomiting, and fever.

MS. KELLER: What was your diagnosis at that time?

DR. CLARK. I believed his symptoms were consistent with gastritis.

MS. KELLER: Did Mr. Harper ever indicate that he believed something more serious was going on?

DR. CLARK: No.

MS. KELLER: He believed you had properly diagnosed him?

MR. DEWEY: Objection, calls for speculation.

MS. KELLER: Did you give Mr. Harper any instructions when he was discharged?

DR. CLARK: I told him to use over-the-counter pain medication and to return if the symptoms got any worse.

MS. KELLER: Did you do any imaging at the time you saw Mr. Harper?

DR. CLARK: No. I did not.

MS. KELLER: Are you aware that Mr. Harper's symptoms did not improve?

DR. CLARK: Yes.

MS. KELLER: When did you first become aware that Mr. Harper passed away?

DR. CLARK: The hospital informed me when his attorneys contacted them.

MS. KELLER: Are you aware that Mr. Harper had a severe infection that accelerated the cancer?

DR. CLARK: I was told that his cause of death was cancer, but that he had other health complications leading up to his death.

MS. KELLER: What is your understanding of the other health complications?

DR. CLARK: I was told that he had an infection that affected his organs.

MS. KELLER: Are you aware that the infection was caused by a bowel perforation?

DR. CLARK: I know that is the conclusion made by another physician.

[deleted section regarding Dr. Clark's experience with infections/diagnosing bowel perforations.]

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MS. KELLER: Is it your belief that had Mr. Harper followed up with you, he would not have had the infection?

DR. CLARK: Yes. He did not follow up and it significantly contributed to his worsening condition.

[deleted section discussing the standard of care.]

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MS. KELLER: Doctor, do you agree that timely diagnosis is critical?

DR. CLARK: Yes.

MS. KELLER: And delays in diagnosis can affect patient outcomes?

DR. CLARK: Yes.

MS. KELLER: When should Mr. Harper have been diagnosed with a bowel perforation?

MR. DEWEY: Objection, calls for speculation

DR. CLARK: Within a reasonable time.

[deleted section discussing what Dr. Clark would have done on follow up]

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MS. KELLER: Is a reasonable time to follow up days or weeks or months?

DR. CLARK: Mr. Harper unfortunately waited six months, which is why he passed away.

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CROSS-EXAMINATION BY CLARK DEWEY

MR. DEWEY: Dr. Clark, at the time you treated Mr. Harper, were his symptoms specific to something other than gastritis?

DR. CLARK: No, they were relatively nonspecific.

MR. DEWEY: Is it true that many conditions can present similarly?

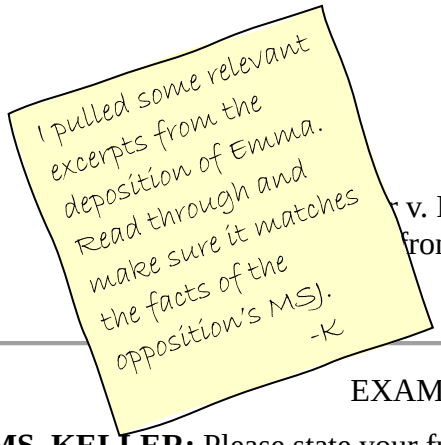
DR. CLARK: Yes.

MR. DEWEY. Did you act in accordance with your clinical judgment at the time?

DR. CLARK: Yes, I did.

MR. DEWEY. And were your decisions based on the information available to you during those visits?

DR. CLARK: Yes.



EXAMINATION BY KAYLA KELLER

MS. KELLER: Please state your full name for the record.

MS. HARPER: My name is Emma Harper

MS. KELLER: What is your relationship to David Harper?

MS. HARPER: He is…was my father.

MS. KELLER: Were you in regular contact with your father while he was dealing with the infection and cancer?

MS. HARPER: Yes. I lived with him for most of that time.

[deleted section regarding Ms. Harper's relationship with her father.]

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MS. KELLER: Did you take your father to the emergency room on October 15, 2021?

MS. HARPER: Yes, I did.

MS. KELLER: Why did you take him to the emergency room?

MS. HARPER: He was so sick. He was throwing up. He had a fever. His stomach hurt him all of the time.

MS. KELLER: Do you remember Dr. Samuel Clark?

MS. HARPER: Yes.

[deleted section about the emergency room]

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MS. KELLER: Did your father's condition get better in the weeks after his visit to the emergency room?

MS. HARPER: No. They didn't.

MS. KELLER: Explain what you saw your father experience.

MS. HARPER: We thought that over-the-counter pain medication would help because that's what the papers said that we got when we left the emergency room. So, we stopped at the drug

store and bought some on the way home. He took them but the stomach pain continued. He couldn't eat without throwing up. Nothing made his fever go away.

MS. KELLER: How long did that last?

MS. HARPER: For weeks.

[deleted section about what they did to manage the symptoms]

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MS. KELLER: So, your father's symptoms were not improving.

MS. HARPER: That's correct.

MS. KELLER: What was your understanding of how long it would take for the conditions to improve?

MS. HARPER: I really did not know. I assumed that it was just taking a long time for his body to react to the medicine we bought.

MS. KELLER: Did your father develop any new symptoms?

MS. HARPER: He was so tired and weak, but we thought that was because he couldn't eat anything and the fever was affecting him.

MS. KELLER: At anytime in the weeks after the emergency room visit, did you or your father think that he needed to go back to the emergency room or be tested for something else?

MS. HARPER: Not really. Nothing really came of that visit except instructions to take pain medication and to follow up if things got worse.

[deleted section regarding the progression of Mr. Harper's condition.]

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MS. KELLER: Why did you make an appointment to have your father see Dr. Sally Morris?

MS. HARPER: Because he was in so much pain. He couldn't tolerate it anymore.

MS. KELLER: How many months passed between the emergency room visit and your father's appointment with Dr. Morris?

MS. HARPER: It was almost exactly five months.

[deleted section discussing the visit with Dr. Morris.]

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CROSS-EXAMINATION BY CLARK DEWEY

MR. DEWEY: Ms. Harper, at the time you took your father to the emergency room, was he experiencing anything besides vomiting, stomach pain, and a fever?

MS. HARPER: Not that I remember.

MR. DEWEY: Was there anything your father was experiencing that would tell you that your father had a more serious condition than gastritis?

MS. HARPER: I'm not a doctor, so I…

MR. DEWEY. So you trusted Dr. Clark's expert opinion about what was going on with your father?

MS. HARPER: Yes, I did. We both did. He is the doctor and we are supposed to be able to trust him.

SEAT:

LIBRARY

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

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

(2) Notwithstanding Subsection (1):

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

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

Amended by Chapter 384, 2012 General Session

Effective 5/4/2022

78B-3-412 Notice of intent to commence action.

(1) A malpractice action against a health care provider may not be initiated unless and until the plaintiff:
  (a) gives the prospective defendant or his executor or successor, at least 90 days' prior notice of intent to commence an action; and
  (b) except for an action against a dentist or a dental care provider, the plaintiff receives a certificate of compliance from the division in accordance with Section 78B-3-418.

(2) The notice shall include:
  (a) a general statement of the nature of the claim;
  (b) the persons involved;
  (c) the date, time, and place of the occurrence;
  (d) the circumstances surrounding the claim;
  (e) specific allegations of misconduct on the part of the prospective defendant; and
  (f) the nature of the alleged injuries and other damages sustained.

(3) Notice may be in letter or affidavit form executed by the plaintiff or his attorney. Service shall be accomplished by persons authorized and in the manner prescribed by the Utah Rules of Civil Procedure for the service of the summons and complaint in a civil action or by certified mail, return receipt requested, in which case notice shall be considered served on the date of mailing.

(4) Notice shall be served within the time allowed for commencing a malpractice action against a health care provider. If the notice 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.

(5) This section shall, for purposes of determining its retroactivity, not be construed as relating to the limitation on the time for commencing any action, and shall apply only to causes of action arising on or after April 1, 1976. This section shall not apply to third party actions, counterclaims or crossclaims against a health care provider.

Amended by Chapter 356, 2022 General Session

Arnold v. White

Supreme Court of Utah

September 25, 2012, Filed

No. 20100780

Reporter
2012 UT 61 *; 289 P.3d 449 **; 2012 Utah LEXIS 124 ***; 718 Utah Adv. Rep. 8

GINA M. ARNOLD and CHARLES S. ARNOLD, Plaintiffs and Respondents, v. GARY B. WHITE, M.D., UINTAH BASIN MEDICAL CENTER, and DAVID GRIGSBY, M.D., Defendants and Petitioner.

Subsequent History: Released for Publication December 13, 2012.

Decision reached on appeal by *Arnold v. Grigsby, 2018 UT 14, 2018 Utah LEXIS 40 (Apr. 11, 2018)*

Prior History: [*1]** Eighth District, Duchesne. The Honorable John R. Anderson. No. 020800066.

Arnold v. Grigsby, 2010 UT App 226, 239 P.3d 294, 2010 Utah App. LEXIS 237 (Aug. 26, 2010)

Core Terms

statute of limitations, trigger, course of treatment, patient, legal injury, two year, court of appeals, malpractice, injured patient, complicate, summary judgment, suspicion, ***malpractice*** action, ***medical*** procedure, medical treatment, result of negligence, injury resulted, diligence, prevail, symptom, discovery, constructive knowledge, cause of action, ordinary person, matter of law, relevant fact, side effect, medical complications

Case Summary

Procedural Posture
A trial court granted defendant physician's motion for summary judgment in plaintiff patient's ***medical malpractice*** action on the ground that it was barred by the two-year statute of limitations of the Utah Health Care Malpractice Act. The Court of Appeals of Utah reversed. The physician petitioned for a writ of certiorari.

Overview

On appeal, the court held that the appellate court correctly held that the physician failed to show, as a matter of law, that the patient filed her claim more than two years after she discovered her legal injury. However, that to prevail on his claim that the two-year statute of limitations had elapsed, the physician was not required to be more specific in his identification of the particular treatment that allegedly caused the patient's legal injury than she was in her initial complaint. The court held that when a plaintiff claimed that a course of treatment was negligent, a defendant could show that the claim was barred by the two-year statute of limitations of *Utah Code Ann. § 78B-3-404(1)* by demonstrating that more than two years elapsed between the date the plaintiff discovered or should have discovered that the course of treatment was negligent and the date she filed her claim. The physician failed to make this showing. Accordingly, the court agreed that material issues of fact rendered the district court's grant of summary judgment inappropriate.

Outcome
The judgment was affirmed and the case was remanded for further proceedings.

LexisNexis® Headnotes

Torts > ... > Statute of Limitations > Tolling > ***Discovery Rule***

Torts > Malpractice & Professional Liability > Healthcare Providers

HN1 **Tolling, *Discovery Rule***

When a plaintiff alleges a course of negligent treatment, a defendant may show that the claim is barred by the two-year statute of limitations without identifying the specific procedure within the course of treatment that caused the patient's injury. Rather, to prevail, a defendant need only show that the plaintiff filed her claim more than two years after she discovered that the course of treatment was negligent.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

HN2 **Entitlement as Matter of Law, Appropriateness**

When reviewing a case on certiorari, the Supreme Court of Utah reviews the court of appeals' decision for correctness. Additionally, 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. Thus, in considering whether the court of appeals properly reversed the district court's grant of summary judgment, the court considers the facts and inferences therefrom in the light most favorable to the nonmoving party.

Torts > ... > Statute of Limitations > Tolling > ***Discovery Rule***

Torts > Malpractice & Professional Liability > Healthcare Providers

Torts > Procedural Matters > Statute of Repose > Professional Malpractice

HN3 **Tolling, *Discovery Rule***

The Utah Health Care Malpractice Act provides both a two-year statute of limitations and a four-year statute of repose for the filing of ***medical malpractice*** actions. Specifically, it requires that a ***medical malpractice*** action be commenced within two years after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered the injury, whichever first occurs, but not to exceed four years after the date of the alleged act, neglect, or occurrence. *Utah Code Ann. § 78B-3-404(1)*. 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 to consider whether the actions taken in response to an injury and the efforts extended to discover its cause were adequate.

Torts > Procedural Matters > Statute of Limitations > General Overview

Torts > Procedural Matters > Statute of Repose > General Overview

HN4 **Procedural Matters, Statute of Limitations**

Statutes of limitations are essentially procedural in nature and establish a prescribed time within which an action must be filed after it accrues. Statutes of repose abolish a cause of action after a certain period, even if the action first accrues after the period has expired.

Torts > ... > Statute of Limitations > Tolling > ***Discovery Rule***

HN5 **Tolling, *Discovery Rule***

An injured patient has not discovered her legal injury when she merely suspects that her injuries resulted from negligence. A course of treatment can trigger the two-year statute of limitations, even if a particular procedure within the course of treatment has not been identified as causing the legal injury.

Torts > ... > Statute of Limitations > Tolling > ***Discovery Rule***

Torts > Malpractice & Professional Liability > Healthcare Providers

HN6 **Tolling, *Discovery Rule***

Under the Utah Health Care Malpractice Act, a patient has discovered her injury only when she has discovered her legal injury — that is, both the fact of injury and that it resulted from negligence. Indeed, the Supreme Court of Utah has long held that the two-year statute of limitations period commences to run only when the injured person knew or should have known of an injury and that the injury was caused by a negligent act. This occurs when a plaintiff first has actual or constructive knowledge of the relevant facts forming the basis of the cause of action. Accordingly, without more, neither (1) the existence of symptoms, (2) a suspicion that a doctor's negligence caused medical complications, nor (3) the commencement of an investigation is sufficient to trigger the statute of limitations.

Torts > ... > Statute of Limitations > Tolling > ***Discovery Rule***

Torts > Malpractice & Professional Liability > Healthcare Providers

HN7 **Tolling, *Discovery Rule***

A patient's knowledge that she has suffered complications from a medical treatment or procedure is insufficient to trigger the two-year statute of limitations. Indeed, the Supreme Court of Utah 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. This is because there often is a 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 of a given procedure, as well as the nature, degree, and extent of expected after effects. Thus, while a patient may be aware of a disability or dysfunction, there may be, to the untutored understanding of the average layman, no apparent connection between the treatment provided by a physician and the injury suffered. And even if there is, it may be passed off as an unavoidable side effect or a side effect that will pass with time.

Torts > ... > Statute of Limitations > Tolling > ***Discovery Rule***

Torts > Malpractice & Professional Liability > Healthcare Providers

HN8 **Tolling, *Discovery Rule***

A patient's mere suspicion that her doctor was negligent is insufficient to trigger the two-year statute of limitations. Nothing in *Utah Code Ann. § 78B-3-404(1)*'s language or the Supreme Court of Utah's interpretation of the statute limits the discovery of an injury to merely suspecting negligence without identifying its source. Indeed, virtually all patients who suffer unforseen complications resulting from a medical procedure may suspect that their health care providers did something incorrectly. But the court declines to interpret the Health Care Malpractice Act in a way that would encourage patients to file a lawsuit every time a medical procedure results in an unfavorable outcome.

Torts > ... > Statute of Limitations > Tolling > ***Discovery Rule***

Torts > Malpractice & Professional Liability > Healthcare Providers

HN9 **Tolling, *Discovery Rule***

Although suspicion is insufficient to trigger the two-year statute of limitations, actual knowledge of negligence is not required. A plaintiff need not have certain knowledge of negligence in order to have "discovered" it. All that is necessary is that the plaintiff be aware of facts that would lead an ordinary person, using reasonable diligence, to conclude that a claim for negligence may exist. Similarly, the Supreme Court of Utah has explained that a statutory ***discovery rule***, such as the one set forth in the Utah Health Care Malpractice Act, is triggered when a plaintiff first has actual or constructive knowledge of the relevant facts forming the basis of the cause of action.

Torts > ... > Statute of Limitations > Tolling > ***Discovery Rule***

Torts > Malpractice & Professional Liability > Healthcare Providers

HN10 **Tolling, *Discovery Rule***

When injuries are suffered that have been caused by an unknown act of negligence, the law ought not to be

construed to destroy a right of action before a person even becomes aware of the existence of that right. Thus, demonstrating that a plaintiff discovered or should have discovered her legal injury requires more than showing that the plaintiff merely suspected that her doctor had been negligent.

Torts > ... > Statute of Limitations > Tolling > ***Discovery Rule***

Torts > Malpractice & Professional Liability > Healthcare Providers

HN11 **Tolling, *Discovery Rule***

A plaintiff's initiation of an investigation to determine whether her injury was the result of negligence is insufficient to trigger the statute of limitations. Such an investigation, by its nature, indicates that the plaintiff has not yet discovered that her injury resulted from negligence, and has thus not yet discovered her legal injury. Indeed, the purpose of an investigation is typically to uncover facts that might lead an ordinary person to conclude that a claim for negligence may exist. In other words, a plaintiff cannot be charged with knowledge that her injury resulted from negligence on the date she begins her investigation to determine whether her injury resulted from negligence. Instead, an injured patient who investigates whether her injury is the result of negligence has discovered her legal injury only when her investigation reveals the relevant facts forming the basis of the cause of action.

Torts > ... > Statute of Limitations > Tolling > ***Discovery Rule***

Torts > Malpractice & Professional Liability > Healthcare Providers

HN12 **Tolling, *Discovery Rule***

Without more, neither symptoms, suspicion, nor the beginning of an investigation are sufficient to demonstrate that an injured patient has discovered that negligence caused her injury, because each falls short of actual or constructive knowledge that negligence caused the injury. Accordingly, the two-year statute of limitations of *Utah Code Ann. § 78B-3-404(1)* is triggered only when the plaintiff's investigation has revealed facts that would lead an ordinary person, using reasonable diligence, to conclude that a claim for negligence may exist.

Torts > ... > Statute of Limitations > Tolling > ***Discovery Rule***

Torts > Malpractice & Professional Liability > Healthcare Providers

HN13 **Tolling, *Discovery Rule***

Under the Utah Health Care Malpractice Act, the two-year statute of limitations is triggered only when the injured patient discovers which medical event allegedly caused her injury. Consequently, whether the two-year statute of limitations is triggered depends, in part, upon the type of treatment that the injured patient received.

Torts > ... > Statute of Limitations > Tolling > ***Discovery Rule***

Torts > Malpractice & Professional Liability > Healthcare Providers

HN14 **Tolling, *Discovery Rule***

A patient who suffers from complications after undergoing only one medical treatment or procedure has no trouble identifying the particular treatment that caused her injury. Indeed, she has discovered the particular treatment that caused her injury even if she has not identified the particular doctor who is responsible for it. Thus, once she discovers that her injuries resulted from negligence, the two-year statute of limitations is triggered. But a patient who suffers from complications after undergoing multiple medical treatments or numerous medical procedures has not necessarily discovered her legal injury, even if she knows that her injuries were caused by negligence. Although this patient is aware that she is injured and that her injury is the result of negligence, she has not identified the "causal event" that caused her injury because she has not yet sufficiently tied it to its source in a medical procedure. Thus, the two-year statute of limitations of *Utah Code Ann. § 78B-3-404(1)* is not triggered.

Torts > ... > Statute of Limitations > Tolling > ***Discovery Rule***

Torts > Malpractice & Professional Liability > Healthcare Providers

HN15 **Tolling, *Discovery Rule***

A plaintiff's discovery that a course of treatment was negligent can trigger the two-year statute of limitations. Accordingly, when a plaintiff alleges that a single course of treatment was negligent, a defendant can point to the date that the plaintiff discovered that the course of treatment was negligent to show that the malpractice action is barred by the two-year statute of limitations. A defendant need not show that the plaintiff ever discovered that a particular procedure within the course of treatment was negligent.

Torts > ... > Statute of Limitations > Tolling > ***Discovery Rule***

Torts > Malpractice & Professional Liability > Healthcare Providers

HN16 **Tolling, *Discovery Rule***

The two-year statute of limitations of *Utah Code Ann. § 78B-3-404(1)* is triggered only when the plaintiff's investigation has revealed, or should have revealed, both the fact of injury and that the injury resulted from negligence.

Counsel: Roger P. Christensen, Karra J. Porter, Robert S. Gurney for respondents.

Larry R. White, Paul D. Van Komen, Daniel R. Harper for petitioner.

Judges: CHIEF JUSTICE DURRANT authored the opinion of the Court, in which ASSOCIATE CHIEF JUSTICE NEHRING, JUSTICE DURHAM, JUSTICE PARRISH, and JUSTICE LEE joined.

Opinion by: DURRANT

Opinion

[451]** On Certiorari to the Utah Court of Appeals

CHIEF JUSTICE DURRANT, opinion of the Court:

INTRODUCTION

[*P1] In this case, we consider whether the Utah Health Care Malpractice Act's two-year statute of limitations is triggered when a patient merely suspects that she has received negligent medical treatment. We also consider what a defendant must demonstrate, in a case where a plaintiff has alleged a course of negligent treatment, to show that the claim is barred by the two-year statute of limitations.

[*P2] In the summer of 1999, Gina Arnold underwent several medical procedures performed by Dr. David Grigsby and Dr. Gary White.[1] Two years and three months after the treatment ended, Ms. Arnold filed a ***medical malpractice*** claim, alleging that these doctors were negligent in the course of their treatment. Dr. Grigsby moved for summary **[***2]** judgment, arguing that Ms. Arnold's claim was barred by the two-year statute of limitations set forth in the Utah Health Care Malpractice Act. The district court granted his motion and dismissed Ms. Arnold's claim.[2] But the court of appeals reversed, holding that Dr. Grigsby had failed to show that Ms. Arnold's claim was barred by the statute of limitations because he had failed to show that, more than two years before Ms. Arnold filed her complaint, she "knew or should have known *which procedure*" caused her injuries.[3] We granted Dr. Grigsby's petition for a writ of certiorari to review the court of appeals' decision.

[*P3] We conclude that the court of appeals correctly reversed summary judgment. First, we hold that the court of appeals correctly found that, as a matter of law, Dr. Grigsby failed to show that Ms. Arnold filed her claim more than two years after she discovered or should have discovered her legal injury. But second, we hold that ***HN1*** when a plaintiff alleges a course of negligent treatment, **[***3]** a defendant may show that the claim is barred by the two-year statute of limitations without identifying the specific procedure within the course of treatment that caused the patient's injury. Rather, to prevail, a defendant need only show that the plaintiff filed her claim more than two years after she discovered that the course of treatment was negligent. Thus, although we conclude that the court of appeals was correct in its decision to remand this case, we disagree, in part, with its reasoning.

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[1] Although Dr. White remains a defendant in Ms. Arnold's malpractice action, he is not a party to this appeal.

[2] *Arnold v. Grigsby, 2010 UT App 226, ¶ 9, 239 P.3d 294*.

[3] *Id. ¶ 23* (emphasis added).

BACKGROUND

[*P4] On July 22, 1999, Dr. White performed a colonoscopy on Ms. Arnold. The following day, she experienced pain in her lower abdomen and sought treatment at the emergency room at the Uintah Basin Medical Center (UBMC). Dr. White diagnosed her as having a perforated colon and admitted her to UBMC, where he treated her with antibiotics. **[**452]** Over the next few weeks, Dr. White and Dr. Grigsby performed four laparoscopic procedures to treat her and to eliminate the infection that the perforation had caused.[4]

[*P5] Their efforts were unsuccessful, and Ms. Arnold's condition worsened. Concerned that his wife's condition was not improving, Ms. Arnold's husband requested that she be transferred out of the care of Dr. White and Dr. Grigsby. Ultimately, on August 16, 1999, Ms. Arnold was transferred from UBMC to St. Mark's Hospital in Salt Lake City.

[*P6] The following month, Ms. Arnold consulted an attorney because she thought "something had gone wrong" with her treatment at UBMC and that she might "have a malpractice action." And on November 16, 1999, Ms. Arnold's attorney sent a letter to UBMC requesting Ms. Arnold's medical records. The letter stated that his office represented Ms. Arnold "relative to treatment she received following complications arising from an initial diagnosis and treatment of her for an intestinal condition" and that "complications following the initial treatment . . . rendered her totally incapacitated and prohibited her from maintaining her gainful employment." The letter also explained that they were "still in the investigatory stage" of their representation.[5]

[*P7] Ms. Arnold ultimately filed her malpractice action against Dr. White and Dr. Grigsby on December 4, 2001. In her complaint, she alleged that she was a patient at UBMC "[c]ommencing on July 23, 1999, and continuing thereafter," and that "[t]he procedure and other care" she received "were performed in a negligent manner, causing . . . severe injuries and damages which have resulted in permanent disabilities."

[*P8] Dr. Grigsby moved for summary judgment, arguing that Ms. Arnold's claim was barred by the two-year statute of limitations under the Utah Health Care Malpractice Act. He argued that Ms. Arnold had discovered her injury by the time she was transferred to St. Mark's Hospital on August 16, 1999, which would mean that the statute of limitations period expired on August 17, 2001—more than three months before Ms. Arnold filed her complaint. The district court agreed and granted summary judgment in favor of Dr. Grigsby. Ms. Arnold appealed.

[*P9] The court of appeals reversed, noting that "[t]o take the determination away from **[***6]** the jury, Dr. Grigsby had the burden of demonstrating as a matter of law that [Ms. Arnold's] complaint against him was time-barred when it was filed on December 4, 2001."[6] And relying on our decision in *Daniels v. Gamma West Brachytherapy, LLC*,[7] the court of appeals held that Dr. Grigsby "failed to make this showing because he has not demonstrated that [Ms. Arnold] knew or should have known which procedure was the causal event of [her] injuries more than two years prior to filing [her] complaint."[8]

[*P10] Dr. Grigsby filed a petition for a writ of certiorari with this court, seeking review of the court of appeals' decision. We granted his petition to resolve only one issue: whether the court of appeals erred in reversing the district court's order dismissing Ms. Arnold's complaint for failure to file within the period allowed by the statute of limitations. We have jurisdiction under section 78A-3-102(3)(a) of the Utah Code.

STANDARD OF REVIEW

[*P11] ***HN2*** "When reviewing a case on certiorari, we review the court of appeals' decision for correctness."[9]

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[4] Dr. White performed the first laparoscopic surgery on August 3, 1999, with assistance from Dr. Grigsby. Dr. White performed the second surgery on August 5, 1999. Dr. Grigsby performed the **[***4]** third surgery on August 11, 1999.

[5] Although it is unclear when Ms. Arnold's attorney actually received her medical records, **[***5]** the court of appeals concluded that the records by themselves do not indicate that any particular procedure was performed negligently. *Arnold, 239 P.3d 294, 2010 UT App 226, ¶ 21 & n.6*.

[6] *Id. ¶ 23*.

[7] *2009 UT 66, 221 P.3d 256*.

[8] *Arnold, 239 P.3d 294, 2010 UT App 226, ¶ 23*; *see also Daniels, 2009 UT 66, ¶¶ 1, 30, 221 P.3d 256*.

[9] *Massey v. Griffiths, 2007 UT 10, ¶ 8, 152 P.3d 312* (internal

Additionally, **[**453]** summary judgment is appropriate **[***7]** 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."[10] Thus, in considering whether the court of appeals properly reversed the district court's grant of summary judgment, we consider the facts and inferences therefrom in the light most favorable to the nonmoving party.[11]

ANALYSIS

[*P12] Because it concluded that disputed issues of material fact precluded summary judgment, the court of appeals reversed the district court's grant of summary judgment in this case.[12] Specifically, the court of appeals concluded that Dr. Grigsby failed to demonstrate, as a matter of law, that Ms. Arnold filed her claim more than two years after she discovered or should have discovered her legal injury.[13] We agree. But we disagree with the court of appeals' conclusion that Dr. Grigsby could not have prevailed on his motion without identifying the specific procedure within the course of treatment that allegedly caused Ms. Arnold's injury. Ultimately, although we disagree, in part, with the court of **[***8]** appeals' reasoning, we agree that this case should be remanded so that a jury may resolve the disputed factual issues and determine whether Ms. Arnold filed her claim more than two years after she discovered, or should have discovered, her legal injury. We first discuss the legal standard for determining whether a defendant has shown that a plaintiff's claim is barred by the ***Medical Malpractice*** Act's statute of limitations. We then apply this standard to the question of whether Dr. Grigsby showed that Ms. Arnold's claim was barred.

*A. To Show That a **Medical Malpractice** Claim Is Barred by the Two-Year Statute of Limitations, a Defendant Must Show That the Plaintiff Filed Her Claim More than Two Years After She Discovered, or Should Have Discovered, Her Legal Injury*

[*P13] Dr. Grigsby argues that Ms. Arnold discovered her injury more than two years before she filed her claim, and that as a result, her claim is barred by the two-year statute of limitations. ***HN3*** The Utah Health Care Malpractice Act provides both a two-year statute of limitations and a four-year statute of repose for the filing of ***medical malpractice*** actions.[14] **[***9]** Specifically, it requires that a ***medical malpractice*** action "be commenced within two years after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered the injury, whichever first occurs, but not to exceed four years after the date of the alleged act, . . . neglect, or occurrence."[15] 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 to consider "whether the actions taken in response to an injury and the efforts extended to discover its cause were adequate."[16]

[*P14] **[***10]** As discussed below, we hold that ***HN5*** an injured patient has not discovered her legal injury when she merely suspects that her injuries resulted from negligence. Further, we clarify our holding in *Daniels v. Gamma West Brachytherapy, LLC*[17] and explain that a course of treatment can trigger the two-year statute of limitations, even if a particular procedure within the course of treatment **[**454]** has not been identified as causing the legal injury.

1. The Two-Year Statute of Limitations Is Not Triggered When a Patient Merely Suspects That Her Injury Was Caused by Negligence

[*P15] Dr. Grigsby argues that the two-year statute of

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quotation marks omitted).

[10] *UTAH R. CIV. P. 56(c)*.

[11] *Massey, 2007 UT 10, ¶ 8, 152 P.3d 312*.

[12] *Arnold v. Grigsby, 2010 UT App 226, ¶¶ 23, 25, 239 P.3d 294*.

[13] *Id. ¶ 23*.

[14] *See Lee v. Gaufin, 867 P.2d 572, 575-76 (Utah 1993)* (***HN4*** "Statutes of limitations are essentially procedural in nature and establish a prescribed time within which an action must be filed after it accrues. . . . [S]tatutes of repose abolish a cause of action after a certain period, even if the action first accrues after the period has expired.").

[15] *Utah Code § 78B-3-404(1)*. Although this statute has been renumbered since the underlying facts of this case occurred, because the relevant language was not changed, we cite to the current version of the code for convenience.

[16] *Daniels v. Gamma West Brachytherapy, LLC, 2009 UT 66, ¶ 31, 221 P.3d 256*.

[17] *2009 UT 66, 221 P.3d 256*.

limitations was triggered on the date that Ms. Arnold suspected that the medical complications she suffered were the result of negligence. We disagree. ***HN6*** Under the Utah Health Care Malpractice Act, a patient has discovered her injury only when she has discovered her "legal injury — that is, both the fact of injury *and* that it resulted from negligence."[18] Indeed, "[w]e have long held that the two-year statute of limitations period commences to run only when the injured person knew or should have known of an injury and that the injury was caused by a negligent act."[19] This **[***11]** occurs "when a plaintiff first has actual or constructive knowledge of the relevant facts forming the basis of the cause of action."[20] Accordingly, as discussed in the following paragraphs, without more, neither (1) the existence of symptoms, (2) a suspicion that a doctor's negligence caused medical complications, nor (3) the commencement of an investigation is sufficient to trigger the statute of limitations.

[*P16] First, ***HN7*** a patient's knowledge that she has suffered complications from a medical treatment or procedure is insufficient to trigger the two-year statute of limitations. Indeed, we have 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.[21] This is because "there often is a 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 of a given procedure, as well as the nature, degree, and extent of expected after effects."[22] Thus, while a patient "may be aware of a disability or dysfunction, there may be, to the untutored understanding of the average layman, no apparent connection between the treatment provided by a physician **[***13]** and the injury suffered."[23] And "[e]ven if there is, it may be passed off as an unavoidable side effect or a side effect that will pass with time."[24]

[*P17] Second, ***HN8*** a patient's mere suspicion that her doctor was negligent is insufficient to trigger the two-year statute of limitations. As we explained in *Daniels*, "[n]othing in the statute's language or our interpretation of the statute limits the discovery of an injury to merely suspecting negligence without identifying its source."[25] Indeed, virtually all patients who suffer unforseen complications resulting from a medical procedure may suspect that their health care providers did something incorrectly. But we decline to interpret the Health Care Malpractice Act in a way that would encourage patients to file a lawsuit every time a medical procedure results in an unfavorable outcome.[26]

[*P18] **[**455]** ***HN9*** Although suspicion is insufficient to trigger the two-year statute of limitations, actual knowledge of negligence is not required. "A plaintiff need not have certain knowledge of negligence in order to have 'discovered' it. All that is necessary is that the plaintiff be aware of **[***14]** facts that would lead an ordinary person, using reasonable diligence, to conclude that a claim for negligence may exist."[27] Similarly, we have explained that a statutory ***discovery***

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[18] *Id. ¶ 1* (emphasis added).

[19] ***Collins v. Wilson, 1999 UT 56, ¶ 19, 984 P.2d 960***; *see also Seale v. Gowans, 923 P.2d 1361, 1363 (Utah 1996)* (noting that "the two-year limitations period does not commence to run until the injured person knew or should have known that he had sustained an injury and that the injury was caused by negligent action" (internal quotation marks omitted)); *Brower v. Brown, 744 P.2d 1337, 1338-40 (Utah 1987)* (explaining that a plaintiff has discovered her legal injury when she knew or should have known both of her injury and that it resulted from negligence); *Foil v. Ballinger, 601 P.2d 144, 148 (Utah 1979)* ("[W]e hold that the term discovery of 'injury' . . . means discovery of injury and the negligence which resulted in the injury.").

[20] *Russell Packard Dev., Inc. v. Carson, 2005 UT 14, ¶ 22, 108 P.3d 741* **[***12]** ("Once the triggering event identified by the statutory ***discovery rule*** occurs — i.e., when a plaintiff first has actual or constructive knowledge of the relevant facts forming the basis of the cause of action—the statutory limitations period begins to run and a plaintiff who desires to file a claim must do so within the time specified in the statute.").

[21] *Foil, 601 P.2d at 147*.

[22] *Id*.

[23] *Id*.

[24] *Id*.

[25] *Daniels, 2009 UT 66, ¶ 27, 221 P.3d 256*.

[26] *See id. ¶ 30*.

[27] *Jensen v. IHC Hosps., Inc., 2003 UT 51, ¶ 61, 82 P.3d 1076* (alterations omitted) (internal quotation marks omitted); *see also* ***Collins, 1999 UT 56, ¶ 19, 984 P.2d 960*** ("[D]iscovery of legal injury . . . encompasses both awareness of physical injury and knowledge that the injury is or may be attributable to negligence." (emphasis omitted) (internal quotation marks omitted)).

rule, such as the one set forth in the Utah Health Care Malpractice Act, is triggered "when a plaintiff first has actual or constructive knowledge of the relevant facts forming the basis of the cause of action."[28]

[*P19] Further, we have noted that "[o]ne of the chief purposes of the Utah Health Care Malpractice Act was to prevent the filing of unjustified lawsuits."[29] Interpreting the statute to require injured patients to file complaints against health care providers based on suspicion alone is inconsistent with the "unarguably sound proposition that unfounded claims should be strongly discouraged."[30] Indeed, **[***15]** if mere suspicion were enough to trigger the two-year statute of limitations under the Act, then the period for filing a malpractice action could expire well before an injured patient is able to file a complaint that complies with *rule 11*.[31] But as we have already noted, ***HN10*** "when injuries are suffered that have been caused by an unknown act of negligence . . . [,] the law ought not to be construed to destroy a right of action before a person even becomes aware of the existence of that right."[32] Thus, demonstrating that a plaintiff discovered or should have discovered her legal injury requires more than showing that the plaintiff merely suspected that her doctor had been negligent.

[*P20] Third, we conclude that ***HN11*** a plaintiff's initiation of an investigation to determine whether her injury was the result of negligence is insufficient to trigger the statute of limitations. Such an investigation, by its nature, indicates that the plaintiff has not yet discovered that her "injury . . . resulted from negligence," and has thus not yet discovered her legal injury.[33] Indeed, the purpose of an investigation is typically to uncover facts that might "lead an ordinary person . . . to conclude that a claim for negligence may exist."[34] In other words, a plaintiff cannot be charged with *knowledge* that her injury resulted from negligence on the date she begins her investigation to determine *whether* her injury resulted from negligence. Instead, an injured patient who investigates whether her injury is the result of negli gence has discovered her legal injury only when her investigation reveals "the relevant facts forming the basis of the cause of action."[35]

[*P21] Thus, ***HN12*** without more, **[***17]** neither symptoms, suspicion, nor the beginning of an investigation are sufficient to demonstrate that an injured patient has discovered that negligence caused her injury, because each falls short of actual or constructive knowledge **[**456]** that negligence caused the injury. Accordingly, the two-year statute of limitations is triggered only when the plaintiff's investigation has revealed "facts that would lead an ordinary person, using reasonable diligence, to conclude that a claim for negligence may exist."[36]

2. A Plaintiff's Discovery That a Course of Treatment Was Negligent Triggers the Two-Year Statute of Limitations Under the Utah Health Care Malpractice Act

[*P22] The court of appeals held that, to show that Ms. Arnold's claim was barred by the two-year statute of limitations, Dr. Grigsby was required to point to "which treatment in particular was negligent and culminated in [Ms. Arnold's] legal **[***18]** injury."[37] On appeal, Dr. Grigsby argues that, because Ms. Arnold's complaint alleges that his course of treatment was negligent, he should not be required to show which specific procedure within the course of treatment caused her alleged

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[28] *Russell Packard Dev., Inc., 2005 UT 14, ¶ 22, 108 P.3d 741*.

[29] *Foil, 601 P.2d at 148*; *see also Daniels, 2009 UT 66, ¶ 30, 221 P.3d 256* (requiring that "a patient must not only suspect negligence in a medical treatment, but must also suspect which treatment in particular implicates negligent care to avoid pursuing unfounded litigation").

[30] *See Foil, 601 P.2d at 148*.

[31] *See Utah R. Civ. P. 11(b)(3)* (requiring that "the allegations and other factual contentions" in a complaint "have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable **[***16]** opportunity for further investigation or discovery").

[32] *Foil, 601 P.2d at 147*.

[33] *See Daniels, 2009 UT 66, ¶ 1, 221 P.3d 256*.

[34] *See Jensen, 2003 UT 51, ¶ 61, 82 P.3d 1076*(internal quotation marks omitted).

[35] *Russell Packard, 2005 UT 14, ¶ 22, 108 P.3d 741*.

[36] *Jensen, 2003 UT 51, ¶ 61, 82 P.3d 1076* (internal quotation marks omitted); *see also* ***Collins, 1999 UT 56, ¶ 19, 984 P.2d 960*** ("[D]iscovery of legal injury . . . encompasses both awareness of physical injury and knowledge that the injury is or may be attributable to negligence." (emphasis omitted) (internal quotation marks omitted)).

[37] *Arnold, 239 P.3d 294, 2010 UT App 226, ¶ 19* (internal quotation marks omitted).

injury.[38] He contends that such a requirement would impliedly force him to admit that he was negligent in order to prevail on his argument that Ms. Arnold's claim is barred by the statute of limitations. We agree. ***HN13*** Under the Utah Health Care Malpractice Act, the two-year statute of limitations is triggered only when the injured patient "discovers which medical event allegedly caused [her] injury."[39] Consequently, whether the two-year statute of limitations is triggered depends, in part, upon the type of treatment that the injured patient received.

[*P23] ***HN14*** A patient who suffers from complications after undergoing only one medical treatment or procedure has no trouble identifying the particular treatment that caused her injury.[40] Indeed, she has discovered the particular treatment that caused her injury even if she has not identified the particular doctor who is responsible for it.[41] Thus, once she discovers that her injuries resulted from negligence, the two-year statute of limitations is triggered. But a patient who suffers from complications after undergoing "multiple medical treatments or . . . numerous medical **[***20]** procedures" has not necessarily discovered her legal injury, even if she knows that her injuries were caused by negligence.[42] Although this patient is aware that she is injured and that her injury is the result of negligence, she has not identified the "causal event" that caused her injury because she has not yet "sufficiently tied it to **[**457]** its source in a medical procedure."[43] Thus, the two-year statute of limitations is not triggered.

[*P24] We articulated this rule in Daniels.[44] The plaintiff in Daniels **[***21]** suffered complications following multiple radiation treatments from different providers at two different facilities.[45] In other words, the plaintiff underwent two different courses of treatment.[46] At issue was whether the jury should have been instructed that the two-year statute of limitations was triggered when the plaintiff first discovered that he might have been treated negligently at some point during either of the courses of treatment he underwent, or whether the statute of limitations was instead triggered only when he discovered that the "specific treatment" he received from a particular doctor at a particular facility was negligent.[47] We held that the statute of limitations was tolled until the plaintiff discovered which particular procedure was performed negligently.[48] But we required such specificity in *Daniels* only because the defendant had received more than one course of treatment that could have caused his injury.[49]

[*P25] We take this opportunity to clarify that ***HN15*** a plaintiff's discovery that a course of treatment was negligent can trigger the two-year statute of limitations. Accordingly, when a plaintiff **[***22]** alleges that a single course of treatment was negligent, a defendant

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[38] Reasoning that Dr. Grigsby had the burden of identifying the event that triggered the statute of limitations, the court of appeals also concluded that Dr. Grigsby failed to meet his burden because the causal event of Ms. Arnold's injuries had not been identified. *Id*. ¶ 23. On appeal, Dr. Grigsby argues that, in alleging a continuous course **[***19]** of negligent treatment, Ms. Arnold identified the causal event of her injuries in her initial complaint. But Dr. Grigsby conflates the identification of a course of treatment with the identification of a cause of action. We reject his argument. Nonetheless, as discussed below, we conclude that Dr. Grigsby was not required to show a more specific causal event than the course of treatment Ms. Arnold identified in her complaint.

[39] *Daniels, 2009 UT 66, ¶ 30, 221 P.3d 256*; *see also id. ¶ 25* (holding that an injured patient has discovered her legal injury when she "discovered or should have discovered *which* event might have caused [her] injury").

[40] As we explained in *Daniels*, when there has been a single medical event — even if the treatment was provided by multiple doctors — "a patient who is injured and suspects negligence may investigate this suspicion with adequate time to bring a claim based on the facts of that medical treatment," and "[i]n such cases, the patient has discovered [her] legal injury, including the medical injury and its source." *Id. ¶ 29*.

[41] *Id*. ("[W]hile a patient may not be required to discover the specific individual responsible for [her] injury, [she] must discover the causal event before the statute of limitations begins to run."). She may add unknown defendants as the case progresses. *Id*.

[42] *Id*.

[43] *Id. ¶¶ 25, 29*.

[44] *2009 UT 66, 221 P.3d 256*.

[45] *Id. ¶¶ 1, 6-9*.

[46] *See id*.

[47] *Id. ¶ 1*.

[48] *Id. ¶¶ 1, 30*.

[49] *Id. ¶ 29*.

can point to the date that the plaintiff discovered that the course of treatment was negligent to show that the malpractice action is barred by the two-year statute of limitations.[50] A defendant need not show that the plaintiff ever discovered that a particular procedure within the course of treatment was negligent.

[*P26] For example, a patient may suffer complications after receiving several related medical treatments over a period of time. If she later visits a new doctor who suggests that the treatments were performed negligently and that the first doctor's negligence caused the complications, then the two-year statute of limitations is triggered. Although the patient might not have discovered the specific date or dates upon which she received negligent treatment, she has discovered that negligence occurred at some point during the course of treatment. Thus, she has "sufficiently tied [her injury] to its **[***23]** source in a medical procedure," and triggered the two-year statute of limitations.[51]

[*P27] In this case, although we conclude that the court of appeals was correct in its reversal of summary judgment, we hold that it was mistaken in its analysis on this issue. Specifically, the court of appeals incorrectly concluded that Dr. Grigsby was required to identify "which treatment in particular," within the course of treatment, caused Ms. Arnold's injury.[52]

[*P28] Ms. Arnold alleged that the series of procedures Dr. Grigsby performed to treat her perforated colon were performed negligently.[53] In other words, Ms. Arnold alleged **[**458]** that a single course of treatment was negligent. Thus, her complaint identified "which medical event caused [her] injury," even though she did not identify the particular procedure that she alleges **[***24]** was negligent. In this context, Dr. Grigsby had no burden to show which particular procedure within the course of treatment caused Ms. Arnold's alleged injury. Instead, he could have prevailed by showing that Ms. Arnold filed her claim more than two years after she discovered, or should have discovered, that the course of treatment was negligent. Accordingly, because Ms. Arnold alleged that the entire course of treatment was negligent, the court of appeals was incorrect in stating that Dr. Grigsby was required to point to a specific procedure within that course of treatment to show that Ms. Arnold's claim was barred by the statute of limitations.

B. Dr. Grigsby Failed to Show That Ms. Arnold Filed Her Action More Than Two Years After She Discovered, or Should Have Discovered, That Her Injuries Resulted from Negligence

[*P29] Having discussed the legal principles at issue in this case, we turn to the question of whether Dr. Grigsby demonstrated that Ms. Arnold's claim was barred by the two-year statute of limitations. Ms. Arnold alleged in her complaint that she received negligent medical treatment beginning July 22, 1999 "and continuing thereafter." Specifically, during her time at UBMC, Ms. Arnold underwent four procedures, the last of which Dr. Grigsby performed on August 11, 1999. She was then transferred out of Dr. Grigsby's care on August 16, 1999. It is therefore undisputed that any negligent treatment occurred, if at all, no later than August 16, 1999. Ms. Arnold ultimately filed her complaint on December 3, 2001, approximately two years and three months after the treatment ended. She was therefore safely within the Act's four-year statute of repose when she filed her complaint.

[*P30] Thus, for Dr. Grigsby to prevail on his argument that Ms. Arnold's claim was barred, he must **[***26]** show that her claim is barred by the two-year statute of limitations. And to prevail on summary judgment, he must show that there is no genuine issue

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[50] Alternatively, a defendant may show that the plaintiff's claim is barred by the four-year statute of repose by showing that the plaintiff filed her claim more than four years after the course of treatment concluded.

[51] *See* id.

[52] *See* Arnold, 239 P.3d 294, 2010 UT App 226, ¶ 19 (internal quotation marks omitted); *see also* id. ¶ 23 ("Dr. Grigsby has failed to [show that Ms. Arnold's complaint was time-barred] because he has not demonstrated that [Ms. Arnold] knew or should have known which procedure was the causal event of [her] injuries more than two years prior to filing [her] complaint, as required by *Daniels*.").

[53] The parties dispute whether Ms. Arnold pled a continuous course of negligent treatment. We note that although the phrase "continuous course of negligent treatment" does not appear in Ms. Arnold's complaint, her factual allegations support a claim of ***medical malpractice*** based on a continuous course of negligent treatment. Accordingly, we consider her complaint to allege a continuous course of negligent treatment. *See* ***Collins, 1999 UT 56, ¶ 11 n.9, 984 P.2d 960*** (suggesting that whether a plaintiff has alleged a continuous course of negligent treatment can **[***25]** be determined from the facts alleged in the complaint).

of material fact as to whether Ms. Arnold had discovered or should have discovered her legal injury before December 3, 1999.[54] We agree with the court of appeals that he failed to make this showing. Because he has not demonstrated that Ms. Arnold discovered or should have discovered, before December 3, 1999, that her medical complications resulted from negligence, Dr. Grigsby has not shown that Ms. Arnold discovered her legal injury before that date.

[*P31] As we have explained in this opinion, ***HN16*** the two-year statute of limitations is triggered only when the plaintiff's investigation has revealed, or should have revealed, both the fact of injury *and* that the injury resulted from negligence. But in attempting to demonstrate that Ms. Arnold's claim was barred by the two-year statute of limitations, Dr. Grigsby points only to the following facts. First, on August 16, 1999, after Dr. Grigsby's efforts to treat Ms. Arnold's infection had failed, Ms. Arnold's husband expressed concern that she was **[***27]** not improving and requested that she be transferred to another hospital. Second, Ms. Arnold stated that in September of 1999, she consulted with an attorney because she "knew that something had happened that shouldn't have happened." And third, in a November 16, 1999 letter, Ms. Arnold's attorney stated that he represented Ms. Arnold regarding "treatment she received following complications arising from an initial diagnosis and treatment of her for an intestinal condition."

[*P32] From these facts, Dr. Grigsby has shown, at most, that Ms. Arnold suspected that her injury may have been caused by negligence. But indications that Ms. Arnold suspected that her health problems were caused by negligence are not sufficient to demonstrate that her claim is barred by the **[**459]** two-year statute of limitations.[55] Instead, to demonstrate that Ms. Arnold's claim is barred by the two-year statute of limitations, Dr. Grigsby was required to establish that Ms. Arnold discovered, or that she should have discovered, that her medical complications were caused by negligence more than two years before she filed her claim. Accordingly, we agree with the court of appeals that this case should be remanded so that a jury **[***28]** can determine whether Ms. Arnold filed her claim more than two years after she discovered, or should have discovered, her legal injury.

CONCLUSION

[*P33] The court of appeals correctly held that Dr. Grigsby failed to show, as a matter of law, that Ms. Arnold filed her claim more than two years after she discovered her legal injury. We note, however, that to prevail on his claim that the two-year statute of limitations had elapsed, Dr. Grigsby was not required to be more specific in his identification of the particular treatment that allegedly caused Ms. Arnold's legal injury than she was in her initial complaint. We hold that when a plaintiff claims that a course of treatment was negligent, a defendant can show that the claim is barred by the two-year statute of limitations by demonstrating that more than two years elapsed between the date the plaintiff discovered or should have discovered that the course of treatment was negligent and the date she filed her claim. Dr. Grigsby failed to make this showing. Accordingly, we agree that material issues of fact in this case render the district court's grant of summary judgment inappropriate. We affirm the court of appeals' reversal **[***29]** of summary judgment in favor of Dr. Grigsby and we remand for the jury to determine whether Ms. Arnold filed her claim more than two years after she discovered or should have discovered her legal injury.

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[54] *See* Utah Code § 78B-3-404(1); Utah R. Civ. P. 56(c).

[55] *See supra* ¶¶ 17-19.

Jensen v. IHC Health Servs.

Supreme Court of Utah

March 9, 2020, Heard; August 17, 2020, Filed

No. 20190026

Reporter
2020 UT 57 *; 472 P.3d 935 **; 2020 Utah LEXIS 152 ***; 2020 WL 4782775

ERIK JENSEN, Appellant, v. IHC HEALTH SERVICES, INC. dba LDS HOSPITAL, Appellee.

Subsequent History: Released for Publication October 6, 2020.

Prior History: [*1]** On Direct Appeal. Third District, Salt Lake. The Honorable Barry G. Lawrence. No. 150900735.

Jensen v. Intermountain Healthcare, Inc., 2018 UT 27, 424 P.3d 885, 2018 Utah LEXIS 78 (June 26, 2018)

Core Terms

legal injury, discovery, patient, malpractice, reasonable diligence, trial court, statute of limitations, negligent act, two year, medical provider, ***discovery rule***, suspicion, instruction of a jury, jury instructions, instruct a jury, trigger, ***medical malpractice*** action, ordinary person, injured person

Case Summary

Overview

ISSUE: Whether the trial court erred in its jury instruction defining the "discovery of legal injury," in regard to the commencement of the running of the statute of limitations in a ***medical malpractice*** action under *Utah Code Ann. § 78B-3-404(1)*. HOLDINGS: [1]-Taken as a whole, the trial court's instructions accurately described the relevant law as to when a plaintiff discovered negligence for purposes of triggering the statute of limitations—specifically that a plaintiff had discovered negligence for purposes of the discovery of legal injury when the plaintiff first discovered or in the exercise of reasonable diligence should have discovered facts sufficient to lead an ordinary person to conclude that the injury was or may have been caused by negligence. Accordingly, the trial court did not err in its jury instruction.

Outcome
Judgment affirmed.

LexisNexis® Headnotes

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

HN1 **Relief From Judgments, Motions for New Trials**

An appellate court reviews a trial court's ruling concerning a jury instruction for correctness, without deference to its interpretation of the law. A new trial will not be granted unless any error of the trial court was prejudicial, meaning that it misadvised or misled the jury on the law.

Governments > Legislation > Statute of Limitations > Time Limitations

Healthcare Law > ... > Actions Against Facilities > Defenses > Statute of Limitations

HN2 **Statute of Limitations, Time Limitations**

In a ***medical malpractice*** action, the discovery commences the running of the statute of limitations.

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > ... > Statute of Limitations > Tolling > ***Discovery Rule***

Healthcare Law > ... > Actions Against Facilities > Defenses > Statute of Limitations

HN3 **Statute of Limitations, Time Limitations**

Under the Utah Health Care Malpractice Act, a malpractice action must be commenced within two years after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered the injury. *Utah Code Ann. § 78B-3-404(1)*. The word "injury" is interpreted to encompass both discovery of injury and the negligence which resulted in the injury. This is referred to as a plaintiff's legal injury, and the statute of limitations begins to run when an injured person knows or should know that he has suffered a legal injury.

Healthcare Law > ... > Actions Against Facilities > Defenses > Statute of Limitations

HN4 **Defenses, Statute of Limitations**

Absolute or certain knowledge of negligence is not required. But without more, neither (1) the existence of symptoms; (2) a suspicion that a doctor's negligence caused medical complications; nor (3) the commencement of an investigation is sufficient to trigger the statute of limitations.

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > ... > Negligence > Breach of Duty > Deviation in the Standard of Care

Torts > ... > Statute of Limitations > Tolling > ***Discovery Rule***

HN5 **Statute of Limitations, Time Limitations**

The ***discovery rule*** in the Utah Health Care Malpractice Act has been compared with statutory ***discovery rules*** in general, explaining that under a statutory ***discovery rule***, the limitations period begins to run when a plaintiff first has actual or constructive knowledge of the relevant facts forming the basis of the cause of action. In a ***medical malpractice*** action, this refers to the moment when a patient first has knowledge or constructive knowledge of the facts underlying their malpractice claim—in other words, their legal injury: (1) the physical injury; (2) the causal event of the injury; and (3) that negligence (a breach in the standard of care) caused the injury.

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > ... > Statute of Limitations > Tolling > ***Discovery Rule***

HN6 **Statute of Limitations, Time Limitations**

With regard to the third element under the ***discovery rule*** in the Utah Health Care Malpractice Act—negligence—the level of knowledge sufficient to trigger the limitations period is objective, not subjective. A defendant must establish the moment when the plaintiff discovered or should have discovered through reasonable diligence facts that would lead an ordinary person to conclude that a claim for negligence may exist.

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Jury Instructions

HN7 **Province of Court & Jury, Jury Instructions**

An appellate court looks at the jury instructions in their entirety and will affirm when the instructions taken as a whole fairly instruct the jury on the law applicable to a case.

Torts > ... > Statute of Limitations > Tolling > ***Discovery Rule***

HN8 **Tolling, *Discovery Rule***

A patient's subjective suspicion of negligence is not legally sufficient to show discovery of a legal injury.

Torts > ... > Statute of Limitations > Tolling > ***Discovery Rule***

HN9 **Tolling, *Discovery Rule***

So long as a set of instructions correctly explains the substantive law applicable to the discovery of a legal injury, the instructions would be legally correct.

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > ... > Statute of Limitations > Tolling > ***Discovery Rule***

HN10 **Statute of Limitations, Time Limitations**

Utah Code § 78B-3-404(1) provides that an action shall be commenced within two years after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered the injury.

Counsel: Charles H. Thronson, Salt Lake City, for appellant.

Nathan W. Burbidge, Paul D. Van Komen, Patrick L. Tanner, Salt Lake City, for appellee.

Judges: JUSTICE PETERSEN authored the opinion of the Court, in which CHIEF JUSTICE DURRANT, ASSOCIATE CHIEF JUSTICE LEE, JUSTICE HIMONAS, and JUSTICE PEARCE joined.

Opinion by: PETERSEN

Opinion

[936]** JUSTICE PETERSEN, opinion of the Court:

INTRODUCTION

[*P1] Erik Jensen suffered a cardiac arrest after undergoing abdominal surgery at LDS Hospital. His heart did not beat for over fifteen minutes, and he suffered brain damage **[**937]** as a result. Just under five years later, he filed this ***medical malpractice*** claim against LDS Hospital.

[*P2] LDS Hospital requested a bifurcated trial to first determine if Jensen had missed the applicable two-year statute of limitations. The jury found that he had. And the trial court entered judgment against Jensen.

[*P3] Jensen appeals the judgment, arguing that the trial court erred in its jury instruction defining the "discovery of legal injury," which starts the running of the statute of limitations in ***medical malpractice*** actions.

[*P4] We conclude the instructions as a whole were correct. We **[***2]** affirm.

BACKGROUND

[*P5] On March 26, 2010, Erik Jensen went to the emergency room at LDS Hospital, an IHC Health Services facility, "with complaints of abdominal pain that had been going on for a few hours." After undergoing a computed tomography,[1] Jensen was prepared for and sent to "the operating room for a diagnostic laparoscopy, which [was] subsequently converted to an open laparotomy because he had an unusual inflammatory reaction in his abdomen." After the surgery, Jensen remained in the hospital to recover. He did "fairly well" for the first few days. But then he experienced complications and was transferred to the intensive care unit.

[*P6] The hospital staff conducted a second surgery to ensure there was nothing wrong with Jensen's abdomen, after which he returned to the intensive care unit. On the morning of April 1, 2010, Jensen experienced cardiac arrest and for "15 to 17 minutes" his heart did not beat. As a result, Jensen suffered brain damage. He was then transferred to a different IHC Health Services facility.

[*P7] On April 26, 2010, Jensen signed a power of attorney authorizing his mother to act on his behalf. Jensen and his mother met with Colin King, a ***medical malpractice*** attorney, **[***3]** to discuss a potential malpractice action. As part of his investigation into the potential claim, King requested Jensen's medical records from LDS Hospital and sent them to two different experts. After more than a year of investigation, King declined to represent Jensen. King advised Jensen's mother that while LDS Hospital may have provided substandard care in some respects, it would be difficult to prove that this made any difference to Jensen's outcome.

[*P8] After being turned away by King, Jensen's mother met with another law firm, Siegfried and Jensen, to discuss potential representation. Three days later, Siegfried and Jensen also declined to represent Jensen. After her meetings with King and Siegfried and Jensen,

[1] Also known as a CT or CAT scan.

Jensen's mother concluded that her son's injury "was not due to medical mistake or negligence." She instructed Siegfried and Jensen to destroy the medical records.

[*P9] Jensen's father met Charles Thronson, a ***medical malpractice*** attorney, at a social event in March 2014. Jensen's father and Thronson discussed Jensen's injury and Thronson offered "to look at [Jensen's] case but needed to get medical records as soon as possible to avoid the running of the four-year statute [of repose]." **[***4]** Thronson shared Jensen's medical records with an expert who concluded that the cardiac arrest was caused by several breaches of the standard of care. Thronson called Jensen to inform him of the reported breaches and offered to represent him.

[*P10] Jensen retained Thronson. And on March 21, 2014, Jensen served the defendants with notice of his intent to commence an action pursuant to Utah Code section 78B-3-412(1)(a). Jensen received a certificate of compliance from the Division of Occupational and Professional Licensing (DOPL), as was required at the time under section 78B-3-412(1)(b),[2] and he filed suit on February 2, 2015.

[*P11] In the trial court, LDS Hospital moved for summary judgment, arguing that the **[**938]** four-year statute of repose had expired before Jensen filed his complaint. Jensen responded that both the statute of repose and the two-year statute of limitations should have been tolled during the period of prelitigation review. The trial court agreed and denied the motion.

[*P12] LDS Hospital then moved for a bifurcated trial to first determine only whether Jensen's lawsuit was barred by the applicable two-year statute of limitations. The trial court granted the motion.

[*P13] At trial, the parties advocated for different jury instructions on the meaning **[***5]** of a plaintiff's "discovery of legal injury," which triggers the running of the statute of limitations. Ultimately, the trial court instructed the jury that

> [d]iscovery of a "legal injury" in this context occurs when a patient knows, or through reasonable diligence should know, each of the following: (1) that he sustained an injury; (2) the cause of the injury; and (3) that the injury may have been caused by a negligent act of a medical provider.

[*P14] After a three-day trial, the jury found that Jensen discovered or should have discovered his legal injury more than two years before he commenced the action. Thus, the action was barred by the statute of limitations, and the trial court entered judgment against Jensen.

[*P15] Jensen timely appealed. He challenges the correctness of the trial court's jury instruction on "discovery of legal injury."

STANDARD OF REVIEW

[*P16] ***HN1*** We review "'[a] trial court's ruling concerning a jury instruction . . . for correctness,' without deference to its interpretation of the law." Arnold v. Grigsby (Arnold V), 2018 UT 14, ¶ 11, 417 P.3d 606 (citation omitted). "A new trial will not be granted unless any error of the trial court was prejudicial, meaning that it misadvised or misled the jury on the law." *Id.* (citation omitted).

ANALYSIS [***6]

[*P17] Jensen argues that during the bifurcated trial, the trial court erred in its instruction defining a plaintiff's "discovery of legal injury." ***HN2*** In a ***medical malpractice*** action, this discovery commences the running of the statute of limitations.

[*P18] ***HN3*** Under the Utah Health Care Malpractice Act (Malpractice Act), a malpractice action must be "commenced within two years after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered the injury." Utah Code § 78B-3-404(1). In *Foil v. Ballinger*, we interpreted the word "injury" to encompass both "discovery of injury and the negligence which resulted in the injury." 601 P.2d 144, 148 (Utah 1979). We referred to this as a plaintiff's "legal injury," and we held that "the statute begins to run when an injured person knows or should know that he has suffered a *legal injury*." Id. at 147 (emphasis added).

[*P19] Jensen argues that the trial court's instruction was erroneous for two reasons. First, with regard to the patient's discovery of negligence, Jensen argues that it was erroneous to instruct the jury that a patient's

[2] We have since held unconstitutional the requirement that a plaintiff obtain a certificate of compliance from DOPL in order to initiate a malpractice action against a health care provider. *See* Vega v. Jordan Valley Med. Ctr., LP, 2019 UT 35, ¶ 24, 449 P.3d 31.

discovery occurs when the patient knows "that the injury *may have been caused* by a negligent act of a medical provider," rather than "that the injury *was caused* ***[***7]*** by a negligent act" of a medical provider. (Emphases added.)

[*P20] Second, he argues that the trial court erroneously instructed the jury that discovery of a legal injury occurs when a patient "*knows*, or through reasonable diligence *should know*" each of the elements of his legal injury, rather than "when a patient *discovers*, or through reasonable diligence *should discover*" each element.[3] (Emphases added.)

[939]** *"May Have Been Caused" Versus "Was Caused"*

[*P21] Jensen's first argument pertains to the third element of the disputed instruction. He argues it was error to instruct the jury that he had discovered the negligence element of his legal injury when he knew "that the injury *may have been caused* by a negligent act of a medical provider," rather than when he knew that the injury "*was caused*" by a negligent act of a medical provider. (Emphases added.) Fundamentally, this argument relates to how certain Jensen must have been that negligence caused his injury before he is considered to have "discovered" that component of his "legal injury." Jensen argues that a plaintiff's knowledge that an injury "may have been caused" by negligence is synonymous with a mere suspicion of negligence, which we have said **[***8]** is legally insufficient. *See* Arnold v. White (Arnold IV), 2012 UT 61, ¶ 17, 289 P.3d 449. Conversely, LDS Hospital argues that this verbiage is an accurate reflection of our case law. And it contends this is so even if the language is substantively equivalent to a suspicion of negligence.

[*P22] As Jensen correctly observes, we have used both formulations in our case law. In *Foil*, we held that legal injury "means discovery of injury and the negligence *which resulted* in the injury." 601 P.2d at 148 (emphasis added). We have used similar language repeatedly. *See, e.g.,* Arnold IV, 2012 UT 61, ¶ 15, 289 P.3d 449 ("[A] patient has discovered her injury only when she has discovered her 'legal injury—that is, both the fact of injury *and that it resulted* from negligence.'" (emphasis added) (citation omitted)); *Collins v. Wilson, 1999 UT 56, ¶ 19, 984 P.2d 960* ("[T]he two-year statute of limitations period commences to run only when the injured person knew or should have known of an injury and that the injury *was caused* by a negligent act." (emphasis added)).

[*P23] But we have also used more equivocal language, sometimes in the same case. *See, e.g.,* Arnold IV, 2012 UT 61, ¶ 18, 289 P.3d 449 ("All that is necessary is that the plaintiff be aware of facts that would lead an ordinary person, using reasonable diligence, to conclude that a claim for negligence *may exist*." (emphasis added)); Daniels v. Gamma W. Brachytherapy, LLC, 2009 UT 66, ¶ 31, 221 P.3d 256 ("[T]he statute of **[***9]** limitations did not begin to run until [the plaintiff] discovered that the Defendants' treatment and care *might have been* negligent and thus *might have caused* his injuries." (emphases added)); *Collins, 1999 UT 56, ¶ 19, 984 P.2d 960* ("[D]iscovery of legal injury, therefore, encompasses both awareness of physical injury and knowledge that the injury is *or may be attributable to negligence*." (quoting Chapman v. Primary Children's Hosp., 784 P.2d 1181, 1184 (Utah 1989) *abrogated on other grounds by* Bright v. Sorensen, 2020 UT 18, 463 P.3d 626)).

[*P24] Accordingly, our analysis of the requisite level of certainty in this context has not hinged on the specific words Jensen identifies. However, we have addressed the substance of this question a number of times. ***HN4*** We have explained that absolute or "certain knowledge" of negligence is not required. Arnold IV, 2012 UT 61, ¶ 18, 289 P.3d 449. But we have also clarified that "without more, neither (1) the existence of symptoms, (2) a suspicion that a doctor's negligence caused medical complications, nor (3) the commencement of an investigation is sufficient to trigger the statute of limitations." *Id.* ¶ 15.

[*P25] ***HN5*** We have compared the ***discovery rule*** in the Malpractice Act with statutory ***discovery rules*** in general, explaining that under a statutory ***discovery rule***, the limitations period begins to run "when a plaintiff first has actual or constructive **[***10]** knowledge of the relevant facts forming the basis of the cause of action."

[3] Jensen makes two additional arguments that we do not resolve. First, he argues that the knowledge of his mother and his various attorneys should not be imputed to him. But LDS Hospital asserts that he did not preserve this argument at trial, and in fact stipulated to jury instructions explaining that the knowledge of those individuals would be imputed to him. Jensen does not dispute LDS Hospital's representations. Second, Jensen proposes what he views as an optimal jury instruction. But this is not the instruction he proposed at trial, so this argument also is not preserved. Accordingly, we do not further address either argument.

Id. ¶ 18 (citation omitted). In a ***medical malpractice*** action, this refers to the moment when a patient first has knowledge or constructive knowledge of the facts underlying their malpractice claim—in other words, their legal injury: (1) the physical injury, (2) the causal event of the injury, and (3) that negligence (a breach in the standard of care) caused the injury. *See Daniels, 2009 UT 66, ¶¶ 27, 29, 221 P.3d 256*.

[*P26] [940]** ***HN6*** With regard to the third element—negligence—we have explained that the level of knowledge sufficient to trigger the limitations period is objective, not subjective. A defendant must establish the moment when the plaintiff discovered or should have discovered through reasonable diligence "facts that would lead an ordinary person . . . to conclude that a claim for negligence may exist." *Arnold IV, 2012 UT 61, ¶¶ 18, 21, 289 P.3d 449* (citation omitted).

[*P27] We conclude that the trial court's jury instructions as a whole correctly conveyed the law regarding when a plaintiff discovers negligence for purposes of triggering the statute of limitations. ***HN7*** "[W]e look at the jury instructions in their entirety and will affirm when the instructions taken as a whole fairly instruct the jury on the law **[***11]** applicable to the case." *Arnold V, 2018 UT 14, ¶ 40, 417 P.3d 606* (citation omitted).

[*P28] While we have made clear that ***HN8*** a patient's subjective suspicion of negligence is not legally sufficient to show discovery of a legal injury, we conclude that the trial court's jury instructions did not give such an impression even though they employed the "may have been caused" formulation. The instructions here stated,

> Discovery of Legal Injury Defined
>
> [Jensen] was required to have filed a ***medical malpractice*** claim within two years from the date that he discovered or should have discovered his "legal injury."
> Discovery of a "legal injury" in this context occurs when a patient knows, or through reasonable diligence should know, each of the following: (1) that he sustained an injury; (2) the cause of the injury; and (3) that the injury may have been caused by a negligent act of a medical provider.
> . . .
> Negligence Element
>
> In evaluating the third element of legal injury, you must weigh all of the facts and circumstances to determine whether the facts here were sufficient to place (*sic*) an ordinary person, exercising reasonable diligence, to conclude that medical negligence may have occurred.
>
> In making this determination you should note that, without **[***12]** more, neither the existence of symptoms, a patient's suspicions of negligence, nor the commencement of an investigation, is sufficient to inform a patient that a claim for negligence may exist. However, the law does not require a patient to have actual or certain knowledge of negligence.[4]

Jensen takes issue with a particular phrase within a specific jury instruction. But we conclude that, taken as a whole, the trial court's instructions accurately described the relevant law—specifically that a plaintiff has discovered negligence for purposes of the "discovery of legal injury" when the plaintiff first discovers or in the exercise of reasonable diligence should have discovered facts sufficient to lead an ordinary person to conclude that the injury was or may have been caused by negligence.[5] *See Arnold IV, 2012 UT 61, ¶¶ 15, 18, 289 P.3d 449*; *Collins, 1999 UT 56, ¶ 19, 984 P.2d 960*.

"Knows" Versus "Discovers"

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[4] At oral argument, LDS Hospital argued that it would be improper for a trial court to define "negligence" for the jury in a bifurcated trial focusing only on the statute of limitations, because it could lead the jury to assess the merits of the case. While Jensen has not raised this as a failing of the instructions here, we briefly address LDS Hospital's argument. We do not see why a definition of negligence would lead to a trial on the merits, assuming the instructions adequately explained that the question before the jury was only whether the plaintiff filed suit within the two-year statute of limitations. The instruction on discovery of a legal injury asks the jury to determine whether the plaintiff discovered facts that would lead an ordinary person to conclude that the injury was (or may have been) due to negligence. Negligence is a legal term. We disagree with LDS Hospital's assertion that the jury should be expected to apply this instruction without being informed of the meaning of negligence.

[5] This does not mean that it would have been erroneous if the court had used the "was caused" terminology. We have used that formulation throughout our case law. ***HN9*** And so long as a set of instructions correctly explain the substantive law applicable to the discovery of a legal injury, the instructions would be legally correct.

[*P29] Jensen's second argument is that the trial court erred in instructing the jury that **[**941]** discovery of a legal injury occurs when a patient "*knows*, or through reasonable diligence should *know* . . . (1) that he sustained an injury; (2) the cause of the injury; and (3) that the injury may have been caused by a negligent act of a medical provider." (Emphases added.) He argues **[***13]** that the instruction should have used the word "discover" in place of "know."

[*P30] As with Jensen's first argument, we have used both "knows" and "discovers" in our case law, and we have used them interchangeably. For example, in *Foil*, we held that the term "discovery of injury" in the Malpractice Act means "*discovery* of injury and the negligence which resulted in the injury." *601 P.2d at 148* (emphasis added). But we also said that the statute begins to run "when an injured person *knows or should know* that he has suffered a legal injury." *Id. at 147* (emphasis added); *see also Arnold IV, 2012 UT 61, ¶ 33, 289 P.3d 449* ("[A] defendant can show that the claim is barred . . . by demonstrating that more than two years elapsed between the date the plaintiff *discovered or should have discovered* that the course of treatment was negligent and the date she filed her claim." (emphasis added)); *Daniels, 2009 UT 66, ¶ 25, 221 P.3d 256* ("[T]he determination of when a plaintiff is aware of the causal fact turns on a jury's determination of when a plaintiff acting with reasonable diligence *discovered or should have discovered which* event might have caused his injury." (emphasis added)); *Collins, 1999 UT 56, ¶ 19, 984 P.2d 960* ("[T]he two-year statute of limitations period commences to run only when the injured person *knew or should have known* **[***14]** of an injury and that the injury was caused by a negligent act." (emphasis added)); *Brower v. Brown, 744 P.2d 1337, 1338-39 (Utah 1987)* ("This Court has defined discovery of the injury as *knowledge* of a legal injury; that is, the plaintiff must *know* of the injury and of the negligence which caused the injury." (emphases added)); *Deschamps v. Pulley, 784 P.2d 471, 475 (Utah Ct. App. 1989)* (holding that the plaintiff *knew or should have known* her mother's injury was a result of medical negligence more than two years before filing an action). Beyond these two words, we have also employed synonymous terms such as "reveals," *Arnold IV, 2012 UT 61, ¶ 20, 289 P.3d 449* and becomes "aware," *Daniels, 2009 UT 66, ¶ 30, 221 P.3d 256*; *Foil, 601 P.2d at 147*.

[*P31] Importantly, Jensen has not explained how the use of "knows" instead of "discovers" renders the trial court's instructions erroneous. He argues only that "discovers" is preferable because it is the word used in the Malpractice Act. *See Utah Code § 78B-3-404(1)*. And he asserts it is more precise than "knows" in this context.

[*P32] We acknowledge that there are some benefits to using "discover" in place of "know" in this context. As Jensen notes, it is the language used in the statute. *Id.* (***HN10*** providing that an action "shall be commenced within two years after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered the injury").

[*P33] And it does more precisely communicate that the jury must determine the moment in time "when a plaintiff first has actual or constructive knowledge of the relevant facts forming the basis of the cause of action." *Arnold IV, 2012 UT 61, ¶ 18, 289 P.3d 449* (citation omitted). "Know" means "to have understanding of" or "to be aware of the truth or factuality of." *Know*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/know (last visited July **[***15]** 27, 2020). Whereas "discover" is defined as "to make known" or "to obtain sight or knowledge of for the first time." *Discover*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/discover (last visited July 27, 2020). We agree that "discover" connotes learning new information for the first time more precisely than does "know."

[*P34] However, while we appreciate Jensen's point, he fails to explain why the trial court's use of "know" caused the disputed jury instruction to be legally incorrect. And in light of our use of both words interchangeably and their similar meanings, we see no reason to conclude that it was.

CONCLUSION

[*P35] When viewed as a whole, the trial court's jury instructions correctly stated the **[**942]** law relevant to discovery of a legal injury. We affirm.

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Robertson v. IHC Health Servs.

United States Court of Appeals for the Tenth Circuit

July 19, 2023, Filed

No. 22-4046

Reporter
2023 U.S. App. LEXIS 18290 *; 2023 WL 4618346

JEFFREY ROBERTSON and WANPHEN ROBERTSON, Plaintiffs - Appellants, v. IHC HEALTH SERVICES, d/b/a Utah Valley Regional Medical Center; CRAIG S. COOK, MD PC; CRAIG S. COOK, M.D.; UTAH VALLEY SPECIALTY HOSPITAL, Defendants - Appellees.

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: **[*1]** (D.C. No. 2:19-CV-00053-JNP). (D. Utah).

Robertson v. IHC Health Servs., 2022 U.S. Dist. LEXIS 82664, 2022 WL 1443069 (D. Utah, May 6, 2022)

Core Terms

district court, statute of limitations, prelitigation, tolling, Providers, certificate of compliance, surgery, legal injury, summary judgment, two-year, waive, genuine issue of material fact, retroactively, statute of limitations defense, malpractice action, conversations, correctly, material fact, accrued, expired, mentally incompetent, genuine dispute, malpractice, nonmoving, declarations, depositions, proceedings, claimant, lawsuit, Notice

Case Summary

Overview

HOLDINGS: [1]-Where plaintiffs filed a lawsuit against the providers under the Utah Health Care Malpractice Act, five years after the patient was treated, the trial court properly granted summary judgment because the two-year statute of limitations set forth in *Utah Code Ann. § 78B-3-404(1)* (2010) barred plaintiffs' claims; [2]-Plaintiffs' sham declarations did not show a genuine issue of material fact about when they discovered their legal injury, because the declarations only swore that plaintiffs discovered their legal claim—not the facts underlying their legal claim—on August 18, 2016; [3]-The declarations were disregarded them as sham affidavits, submitted solely for the purpose of attempting to establish genuine issues of material fact.

Outcome
Judgment affirmed.

LexisNexis® Headnotes

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > Malpractice & Professional Liability > Healthcare Providers

HN1 **Statute of Limitations, Time Limitations**

The Utah Health Care Malpractice Act requires claimants to give prospective defendants ninety days' notice of their intent to commence a malpractice action. *Utah Code Ann. § 78B-3-412(1)(a)*.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > Judgments > Summary Judgment > Entitlement as Matter of Law

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN2 Entitlement as Matter of Law, Appropriateness

The appellate court reviews an order granting summary judgment de novo, giving no deference to the district court's decision and applying the same standards as the district court. Summary judgment is appropriate if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). At the summary judgment stage, a district court must view the evidence and make all reasonable inferences in the light most favorable to the nonmoving party.

Civil Procedure > Judgments > Summary Judgment > Burdens of Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN3 Summary Judgment, Burdens of Proof

A party moving for summary judgment bears the initial burden of demonstrating the absence of a genuine dispute of material fact. Of course, a party seeking summary judgment always bears the initial responsibility of identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file which it believes demonstrate the absence of a genuine issue of material fact. If a movant satisfies this burden, the nonmoving party must set forth specific facts showing that there is a genuine issue for trial. A fact is material if, under the governing law, it could have an effect on the outcome of the lawsuit. A dispute over a material fact is genuine if a rational jury could find in favor of the nonmoving party on the evidence presented.

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > ... > Negligence > Breach of Duty > Deviation in the Standard of Care

Torts > ... > Statute of Limitations > Tolling > Discovery Rule

HN4 Statute of Limitations, Time Limitations

Under the Utah Health Care Malpractice Act (UHCMA), a malpractice action must be commenced within two years after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered the injury. Utah Code Ann. § 78B-3-404(1) (2010). According to the Utah Supreme Court, legal injury for purposes of the UHCMA refers to (1) the physical injury, (2) the causal event of the injury, and (3) that negligence (a breach in the standard of care) caused the injury. In other words, legal injury for UHCMA claims means both discovery of injury and the negligence which resulted in the injury.

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > ... > Healthcare Providers > Types of Liability > Negligence

HN5 Statute of Limitations, Time Limitations

When it comes to what it means to become aware of a legal injury under the Utah Health Care Malpractice Act, the Utah Supreme Court has set forth a kind of continuum, where actual knowledge of negligence is not required, but mere suspicion of having received negligent medical treatment is not enough, Establishing a middle ground, the Utah Supreme Court has explained: All that is necessary for the statute of limitations to accrue is that the plaintiff be aware of facts that would lead an ordinary person, using reasonable diligence, to conclude that a claim for negligence may exist.

Governments > Legislation > Statute of Limitations > Time Limitations

Healthcare Law > ... > Actions Against Facilities > Defenses > Statute of Limitations

Governments > Legislation > Statute of Limitations > Tolling

HN6 **Statute of Limitations, Time Limitations**

The Utah Health Care Malpractice Act's two-year statute of limitations is subject to statutory tolling.

Civil Procedure > Judgments > Summary Judgment > Entitlement as Matter of Law

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN7 **Summary Judgment, Entitlement as Matter of Law**

A dispute over a material fact is genuine if a rational jury could find in favor of the nonmoving party on the evidence presented.

Civil Procedure > ... > Summary Judgment > Opposing Materials > Accompanying Documentation

Civil Procedure > Judgments > Summary Judgment > Burdens of Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > ... > Methods of Discovery > Depositions > Oral Depositions

HN8 **Opposing Materials, Accompanying Documentation**

Naked contradictions of unchallenged deposition testimony will not carry the non-movant's burden on summary judgment. The nonmovant, however, cannot defeat summary judgment by relying on ignorance of the facts, on speculation, or on suspicion.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN9 **Entitlement as Matter of Law, Materiality of Facts**

An issue of fact is material if under the substantive law it is essential to the proper disposition of the claim.

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > ... > Statute of Limitations > Tolling > Discovery Rule

Torts > Malpractice & Professional Liability > Healthcare Providers

HN10 **Statute of Limitations, Time Limitations**

The Utah Health Care Malpractice Act's statutory discovery rule is triggered when a plaintiff first has actual or constructive knowledge of the relevant facts supporting their cause of action.

Civil Procedure > Appeals > Standards of Review > Plain Error

Evidence > Burdens of Proof > Allocation

HN11 **Standards of Review, Plain Error**

To show plain error, the appellant must establish the presence of (1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings. The burden of establishing plain error lies with the appellant.

Civil Procedure > ... > Standards of Review > Plain Error > Obvious Errors

Governments > Legislation > Statute of Limitations > Time Limitations

HN12 **Plain Error, Obvious Errors**

An error is plain when it is clear or obvious under well-settled law. Under Utah law, an individual may not bring a cause of action while the individual is: (a) under 18 years old; or (b) mentally incompetent without a legal guardian. Utah Code Ann. § 78B-2-108(1) (West 2023). During the time that an individual is underage or mentally incompetent, the statute of limitations for a cause of action may not run. § 78B-2-108(2). 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 of an overall inability to function in society. Demonstrating mental incompetence under § 78B-2-108 requires establishing the individual could not manage their business affairs or estate, or comprehend their legal rights or liabilities.

Governments > Legislation > Statute of Limitations > Tolling

HN13 **Statute of Limitations, Tolling**

Nothing in Utah Code Ann. § 78B-2-108 says a district court has an obligation to invoke mental incapacity tolling sua sponte.

Civil Procedure > Judgments > Summary Judgment > Burdens of Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > Judgments > Summary Judgment > Entitlement as Matter of Law

HN14 **Summary Judgment, Burdens of Proof**

The nonmovant must set forth specific facts showing that there is a genuine issue for trial to survive summary judgment.

Governments > Legislation > Statute of Limitations > Time Limitations

Healthcare Law > ... > Actions Against Facilities > Defenses > Statute of Limitations

Governments > Legislation > Statute of Limitations > Tolling

HN15 **Statute of Limitations, Time Limitations**

As a general matter, a request for prelitigation panel review qualifies as an event which tolls the running of the Utah Health Care Malpractice Act's two-year statute of limitations.

Torts > Malpractice & Professional Liability > Attorneys

HN16 **Malpractice & Professional Liability, Attorneys**

The prelitigation process before the Utah Division of Occupational and Professional Licensing focuses only on the substance of a prospective plaintiff's malpractice claims to determine whether they have merit and caused harm to the claimant. Utah Admin Code r. 156-78B-14(1).

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Estoppel

HN17 **Affirmative Defenses, Estoppel**

Equitable estoppel prevents a party from taking a legal position inconsistent with an earlier statement or action that places his adversary at a disadvantage.

Governments > Legislation > Statute of Limitations > Tolling

Torts > Malpractice & Professional Liability > Healthcare Providers

HN18 **Statute of Limitations, Tolling**

To be sure, the Utah Health Care Malpractice Act provides for statutory tolling after a party has filed a request for prelitigation panel review.

Civil Procedure > Appeals > Reviewability of Lower

Court Decisions > Preservation for Review

HN19 **Reviewability of Lower Court Decisions, Preservation for Review**

Arguments intentionally relinquished or abandoned in the district court are deemed waived on appeal. Waiver is accomplished by intent, but forfeiture comes about through neglect.

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For UTAH VALLEY SPECIALTY HOSPITAL, Defendant - Appellee: Aaron Thomas Cunningham, Cortney Kochevar, Christian W. Nelson, Nelson Naegle, Salt Lake City, UT.

Judges: Before TYMKOVICH, MORITZ, and ROSSMAN, Circuit Judges.

Opinion by: Veronica S. Rossman

Opinion

ORDER AND JUDGMENT[*]

This appeal arises from a federal lawsuit filed in 2019 by Plaintiffs-Appellants Jeffrey and Wanphen Robertson under the Utah Health Care Malpractice Act (UHCMA). The Robertsons alleged Defendants-Appellees IHC Health Services, Inc. d/b/a Utah Valley Regional Medical Center; Craig S. Cook, M.D., P.C.; Craig S. Cook, M.D.; and Utah Valley **[*2]** Specialty Hospital, Inc. (collectively Providers) committed medical malpractice when treating Mr. Robertson in 2014 and 2015.[1] Providers moved for summary judgment, contending the UHCMA's two-year statute of limitations barred the Robertsons' claims. The district court agreed and granted the motions.

The Robertsons now appeal, raising several subsidiary arguments supporting two primary claims of reversible error. First, the Robertsons maintain the district court erroneously determined their UHCMA claims accrued on March 9, 2015. Second, the Robertsons insist that even if the accrual date is March 9, 2015, the district court erroneously concluded the statute of limitations expired no later than December 20, 2017. Exercising jurisdiction under *28 U.S.C. § 1291*, we discern no error and affirm.

BACKGROUND

I. Factual History

On September 4, 2014, Mr. Robertson experienced severe abdominal pain and sought treatment at the Utah Valley Regional Medical Center's (UVRMC) emergency department. A CT scan revealed acute pancreatitis and gallstones. Mr. Robertson was admitted to the Intensive Care Unit (ICU). He remained at UVRMC for two months. Between September and October 2014, Dr. Craig Cook—a general surgeon—operated **[*3]** on Mr. Robertson multiple times to remove necrotic material and abscesses, and to place abdominal drains.

In late October 2014, UVRMC discharged Mr. Robertson to Appellee Utah Valley Specialty Hospital, Inc. He remained there for about five months. Dr. Cook and his team from UVRMC followed up with Mr. Robertson during his stay.

In early March 2015, Utah Valley Specialty Hospital discharged Mr. Robertson to Salt Lake Regional Medical Center (SLRMC) for inpatient rehabilitation. Soon after Mr. Robertson arrived at SLRMC, a nurse accidentally displaced his gastronomy tube, and a physician later observed discharge coming from the

[*] This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with ***Fed. R. App. P. 32.1*** and ***10th Cir. R. 32.1***.

[1] The Robertsons' complaint also named Samer A. Saleh, M.D.; Matthew B. Sperry, M.D.; Kurt O. Bodily, M.D.; Thomas A. Dickinson, M.D.; and Tala'at Al-Shuqairat, M.D. as defendants, but these defendants were voluntarily dismissed in the district court and are not parties to this appeal.

associated area. This prompted a CT scan, which revealed significant abscesses in Mr. Robertson's abdomen. Mr. Robertson was then admitted to the ICU at SLRMC.

On March 9, 2015—a key date at issue in this appeal—Dr. Legrand Belnap performed surgery on Mr. Robertson to remove the necrotic portion of Mr. Robertson's pancreas and to drain the abscesses. In their depositions, the Robertsons described their March 9 conversations with Dr. Belnap. *See* App. at 102, 112-13. According to Mrs. Robertson, on March 9, Dr. Belnap said her husband needed another surgery and would **[*4]** likely die without it. According to Mr. Robertson, after the operation that same day, Dr. Belnap said the previous physicians had performed the wrong surgery on Mr. Robertson—they should have removed his entire pancreas, not just ten percent of it.

II. Procedural History

At all times relevant to the Robertsons' federal action, the UHCMA required plaintiffs to satisfy several conditions precedent to filing a malpractice claim against a health care provider. *See* Utah Code §§ 78B-3-401 to - 426 (West 2010). Because those procedural steps, and the Robertsons' efforts to satisfy them, relate to the issues on appeal, we discuss the prerequisites in some detail at the outset.

HN1 The UHCMA requires claimants to give prospective defendants ninety days' notice of their intent to commence a malpractice action. *Id.* § 78B-3-412(1)(a). When the Robertsons filed this case, the UHCMA also required claimants to obtain a "certificate of compliance" from the Utah Division of Occupational and Professional Licensing (DOPL) before suing a health care provider under the statute. *Id.* § 78B-3-412(1)(b). A certificate of compliance served as "proof that the claimant has complied with all conditions precedent" of the UHCMA. *See id.* § 78B-3-418(1)(b). To obtain a certificate of compliance, a claimant **[*5]** had to present their case to a DOPL prelitigation panel, which decided if their claims had "merit" or "no merit." *Id.* §§ 78B-3-416(2)(a), 418(2)(a)(i). The DOPL would issue a certificate of compliance if the prelitigation panel determined a claim had "merit" and the "conduct complained of resulted in harm to the claimant." *See id.* § 78B-3-418(2)(a), (3). But if the panel determined a claim had "no merit," a claimant needed to present an additional "affidavit of merit" from their attorney and a health care provider stating there is a reasonable and meritorious cause for filing a malpractice action. *Id.* § 78B-3-423(1)-(2). As we later discuss, Utah law no longer requires a certificate of compliance before a plaintiff can pursue medical malpractice claims under the UHCMA. *See infra* Section III.B.3 (discussing Vega v. Jordan Valley Med. Ctr., LP, 2019 UT 35, 449 P.3d 31, 35 (Utah 2019)).

The Robertsons twice attempted to obtain a certificate of compliance from DOPL. On August 18, 2016, the Robertsons, through prior counsel, filed a Notice of Intent to Commence Legal Action and a request for prelitigation panel review. App. at 82, 226. The DOPL issued an opinion of "no merit" on January 18, 2017 and notified the Robertsons' counsel to file affidavits of merit by March 30. *See id.* at 236. That same lawyer requested, and the DOPL **[*6]** granted, a 60-day extension. *See id.* at 237. The Robertsons did not meet that deadline and never filed the requisite affidavits. The DOPL closed the matter on May 31, 2017, without issuing a certificate of compliance. *Id.* at 251.

On July 18, 2018, the Robertsons, represented by new counsel, sought to reopen the first prelitigation matter. *See id.* at 256-57. The DOPL refused but explained Mr. Robertson could restart the process. *See id.* at 248. On August 8, 2018, the Robertsons' counsel filed a second Notice of Intent to Commence Legal Action—this time with affidavits of merit. *Id.* at 258-80. About a week later, on August 16, counsel submitted a second request for a prelitigation review panel. *Id.* at 281-83. The DOPL then opened a new prelitigation matter. On November 28, the parties agreed to waive a prelitigation panel review hearing before the DOPL. *Id.* at 318-23. The DOPL issued a certificate of compliance on December 17, 2018.

On January 24, 2019, the Robertsons, invoking the diversity jurisdiction of the United States District Court for the District of Utah, sued Providers for medical malpractice under the UHCMA. The parties engaged in discovery for several years.

On January 19, **[*7]** 2022, Providers moved for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, arguing the UHCMA's two-year statute of limitations barred the Robertsons' medical malpractice action. App. at 80-92, 132-45. On May 6, after a hearing, the district court granted summary judgment to Providers on all claims. *Id.* at 389-408 (the Order). This timely appeal followed.

DISCUSSION

The district court made two rulings particularly relevant to this appeal. First, the court found there was no genuine issue of material fact that the Robertsons' claims accrued (starting the two-year statute of limitations) on March 9, 2015. App. at 403. Second, after considering applicable tolling principles, the court concluded the two-year statute of limitations expired no later than December 20, 2017, making the Robertsons' federal action, filed on January 24, 2019, untimely. *See id.* at 407. The Robertsons challenge both rulings, contending their claims did not accrue on March 9, 2015, but even if they did, reversal is required because their federal lawsuit was timely filed. As we explain, the Robertsons' appellate arguments are unavailing.

I. Legal Standards

A. Standard of Review

HN2 "We review an order granting summary judgment de novo, giving no **[*8]** deference to the district court's decision and applying the same standards as the district court." *Carlile v. Reliance Standard Life Ins. Co., 988 F.3d 1217, 1221 (10th Cir. 2021)*. Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. At the summary judgment stage, a district court must "view the evidence and make all reasonable inferences in the light most favorable to the nonmoving party." *N. Nat. Gas Co. v. Nash Oil & Gas, Inc., 526 F.3d 626, 629 (10th Cir. 2008)*.

HN3 A party moving for summary judgment—here, Providers—bears the initial burden of demonstrating the absence of a genuine dispute of material fact. *See Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* ("Of course, a party seeking summary judgment always bears the initial responsibility of . . . identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file . . . which it believes demonstrate the absence of a genuine issue of material fact.") (quotation marks omitted). If a movant satisfies this burden, the nonmoving party—here, the Robertsons—"must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* (internal quotation marks and citation omitted). "A fact is material if, under the governing law, it could have an effect on the outcome of **[*9]** the lawsuit. A dispute over a material fact is genuine if a rational jury could find in favor of the nonmoving party on the evidence presented." *Schneider v. City of Grand Junction Police Dep't, 717 F.3d 760, 767 (10th Cir. 2013)* (citation omitted).

B. The Utah Health Care Malpractice Act

The parties do not dispute the UHCMA is the state substantive law governing the Robertsons' malpractice claims. *See Elm Ridge Expl. Co. v. Engle, 721 F.3d 1199, 1210 (10th Cir. 2013)* ("A federal court sitting in diversity applies the substantive law of the state where it is located, including the state's statutes of limitations."). Two aspects of the UHCMA are at issue here—the statute of limitations and the statutory tolling provisions.

HN4 Under the UHCMA, a malpractice action must be "commenced within two years after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered the injury." *Utah Code § 78B-3-404(1)* (West 2010). According to the Utah Supreme Court, legal injury for purposes of the UHCMA refers to "(1) the physical injury, (2) the causal event of the injury, and (3) that negligence (a breach in the standard of care) caused the injury." *Jensen v. IHC Health Servs., Inc., 2020 UT 57, 472 P.3d 935, 939 (Utah 2020)*. In other words, "legal injury" for UHCMA claims means "both 'discovery of injury and the negligence which resulted in the injury.'" *Id. at 938* (quoting *Foil v. Ballinger, 601 P.2d 144, 148 (Utah 1979)*).

HN5 When it comes to what it means to become **[*10]** aware of a legal injury under the UHCMA, the Utah Supreme Court has set forth a kind of continuum, where "actual knowledge of negligence is not required," *Arnold v. Grigsby, 2012 UT 61, 289 P.3d 449, 455 (Utah 2012)*, but "mere suspicion" of having received negligent medical treatment is not enough, *id. at 454*. Establishing a middle ground, the Utah Supreme Court has explained, "All that is necessary [for the statute of limitations to accrue] is that the plaintiff be aware of facts that would lead an ordinary person, using reasonable diligence, to conclude that a claim for negligence *may* exist." *Id. at 455* (emphasis added); *see also Jensen, 472 P.3d at 939* (explaining the UHCMA's statute of limitations begins to run "the moment when a patient first has knowledge or constructive knowledge of the facts underlying their malpractice claim—in other words, their legal injury").

HN6 The UHCMA's two-year statute of limitations is subject to statutory tolling. Recall, when the Robertsons were pursuing their malpractice action, the UHCMA still had a "certificate of compliance" requirement. *See* §§ 78B-3-412(1)(b), 416(2)(a). Under that procedure, filing a request for prelitigation panel review—the first step in obtaining a certification of compliance—tolled the two-year statute of limitations for filing a lawsuit until the later **[*11]** of:

- 60 days following the issuance of a certificate of compliance,
- 60 days following an opinion by the prelitigation panel, or
- 180 days after the filing of the request for prelitigation panel review.

See id. § 78B-3-416(3).

II. The District Court Correctly Determined the Robertsons' UHCMA Action Accrued on March 9, 2015.

The Robertsons make two arguments challenging the district court's conclusion that their UHCMA claims accrued on March 9, 2015. First, they insist a genuine dispute of material fact exists about when they discovered their legal injury. Second, they claim for the first time on appeal that, even if March 9 is the correct accrual date, the two-year limitations period should have been tolled under Utah's mental incapacity statute, Utah Code § 78B-2-108 (West 2010). We discern no error.

A. There is no genuine dispute of material fact about when the Robertsons' cause of action accrued; it was March 9, 2015.

The district court concluded Providers "marshal[ed] significant evidence that [the Robertsons] became aware of their legal injury . . . during their conversation with Dr. Belnap on March 9, 2015." App. at 397. Explaining its reasoning, the court pointed to deposition testimony in the summary judgment record **[*12]** from Mr. Robertson, Mrs. Robertson, and Steven Clarke, a witness designated by the Robertsons. *See id.* at 397-99. The district court concluded,

> First, the Robertsons knew of Mr. Robertson's physical injury because Dr. Belnap informed him that he faced likely death if Dr. Belnap hadn't repaired the injury. Second, the Robertsons knew that Mr. Robertson's care at Utah Valley Regional Medical Center and Utah Valley Specialty Hospital caused the injury because Dr. Belnap inquired as to who had performed the prior surgeries on Mr. Robertson and indicated that Mr. Robertson's prior improper care caused the injury. Third, the Robertsons knew that negligence may have caused the injury based on Dr. Belnap's statement that the doctors at Utah Valley Specialty Hospital performed the wrong surgery.

Id. at 398-99. The court then considered, and rejected, the Robertsons' arguments that: (1) Providers mischaracterized deposition testimony about when the Robertsons discovered their legal injury, and (2) the Robertsons' sworn declarations created a genuine dispute of material fact about whether they discovered their legal injury on March 9. *See id.* at 399-403.

On appeal, the Robertsons insist the district court erred because "there are a significant **[*13]** number of genuine issues of material fact which remain unknown and undetermined, all of which are critical for any determination that Plaintiffs' legal malpractice claim accrued such that the statute of limitations expired prior to [January 24, 2019]." Aplt. Br. at 25. To that end, the Robertsons assert seven alleged factual disputes:

> 1. When the Robertsons learned of their legal injury (separate and distinct from Mr. Robertson's need for additional surgery);
>
> 2. When Dr. Belnap formed his opinion that Mr. Robertson's prior surgeon performed the wrong surgery;
>
> 3. When Dr. Belnap told Mr. Robertson that his prior physicians performed the wrong surgery;
>
> 4. When Mr. Robertson was sent home from the hospital;
>
> 5. When Mr. Robertson resumed conversations with Mr. Clarke;
>
> 6. When Mr. Clarke learned that Mr. Robertson's original physician failed to follow the standard operating procedure; and
>
> 7. When Mr. Robertson "was looking into filing a case."

Id.

The Robertsons' appellate arguments focus on two categories of evidence—deposition testimony and their declarations—which they claim show summary judgment was granted to Providers in error. *See id.* at 24-33.[2] We are not persuaded. On the evidence presented, **[*14]** Providers carried their burden on summary judgment to show there is no genuine dispute of material fact that March 9, 2015, was the accrual date for the Robertsons' UHCMA claim.

1. The evidence presented at summary judgment fails to show a genuine issue of material fact about when the Robertsons discovered their legal injury.

On de novo review, we are convinced the district court correctly determined—primarily based on the Robertsons' own deposition testimony—the Robertsons discovered their legal injury on March 9, 2015—the day Dr. Belnap performed emergency surgery on Mr. Robertson. In their depositions, the Robertsons described conversations with Dr. Belnap on that date. Mrs. Robertson testified she spoke with Dr. Belnap before Mr. Robertson's surgery, and he "explained to me that we need to give him another surgery because, if we don't, he will die within one week, because they did not get rid of his pancreas, and the pancreas is eating itself right now." App. at 112. Mrs. Robertson further testified she and Mr. Robertson then discussed Dr. Belnap's comments "for almost an hour" while Dr. Belnap prepared the surgery room and "then we agreed to have [the] surgery." *Id.*

In his deposition, **[*15]** Mr. Robertson testified that on March 9—after the surgery—Dr. Belnap told him that his prior surgeon "performed the wrong surgery and he said that[] '[i]f this surgery didn't happen today, you would have been deceased today.'" *Id.* at 102. According to Mr. Robertson, Dr. Belnap told him that his prior providers "should have removed the entire pancreas, not [only] ten percent." *Id.* at 103. Mr. Robertson recalled that on March 9, when he told Dr. Belnap the name of the surgeon who had operated on him the first time, "[Dr. Belnap] shook his head and was disgusted and left the room." *Id.* at 102. Mrs. Robertson likewise testified she understood from conversations with Dr. Belnap on March 9 that he "was critical or unhappy with the prior care that [Mr. Robertson] had received." *Id.* at 112-13. Mr. Robertson testified, "You can't take those things out of my mind." *Id.* at 102.

Based on the Robertsons' deposition testimony, the district court correctly determined Providers demonstrated there was no genuine dispute that, on March 9, 2015, the Robertsons discovered their legal injury—that is, they had been made "aware of facts that would lead an ordinary person, using reasonable diligence, to conclude **[*16]** that a claim for negligence *may* exist." *Arnold, 289 P.3d at 455* (emphasis added). The summary judgment burden then shifted to the Robertsons, as nonmovants, to "set forth specific facts showing that there is a genuine issue for trial." *Anderson, 477 U.S. at 248*. The Robertsons failed to meet this burden.

HN7 "A dispute over a material fact is genuine if a rational jury could find in favor of the nonmoving party on the evidence presented." *Schneider, 717 F.3d at 767* (citation omitted). On this score, the Robertsons fail to "identify specific facts that show the existence of a genuine issue of material fact"—in other words, evidence in the record to support a finding they did not discover their legal injury on March 9. *GeoMetWatch Corp. v. Behunin, 38 F.4th 1183, 1220 (10th Cir. 2022)* (emphasis omitted) (quoting *Clinger v. N.M. Highlands Univ., Bd. of Regents, 215 F.3d 1162, 1165 (10th Cir. 2000)*). The Robertsons argue "on March 9, 2015, Mrs. Robertson did not learn of any legal injury from Dr. Belnap" and "[t]here is no evidence in the record that Dr. Belnap addressed any of Mr. Robertson's prior care or surgery on March 9." Aplt. Br. at 28, 29. But their own depositions show otherwise. The Robertsons' deposition testimony confirms Dr. Belnap told the Robertsons on March 9 that Mr. Robertson needed potentially lifesaving surgery because of mistakes allegedly made by his previous medical provider. *See* App. at **[*17]** 102, 112. ***HN8*** Naked contradictions of unchallenged deposition testimony—what the Robertsons advance here—will not carry the non-movant's burden on summary judgment. *See Genzer v. James River Ins. Co., 934 F.3d 1156, 1160 (10th Cir. 2019)* ("The nonmovant, however, cannot defeat summary judgment by relying on 'ignorance of the facts, on speculation, or on suspicion.'" (quoting *Conaway v. Smith, 853 F.2d 789, 794 (10th Cir. 1988)*)).

[2] We note the Robertsons do not contend on appeal that the district court employed an erroneous understanding of what constitutes legal injury under Utah law. Nor would such an argument be successful. The district court correctly concluded the two-year statute of limitations for a medical malpractice claim under the UHCMA begins once a plaintiff has discovered their "legal injury," meaning when they become "aware of facts that would lead an ordinary person, using reasonable diligence, to conclude that a claim for negligence may exist." App. at 396-97 (quoting *Jensen, 472 P.3d at 939*, and *Arnold, 289 P.3d at 455*).

Contrary to the Robertsons' assertions, Mr. Clarke's deposition testimony does not create a genuine issue of material fact about the accrual date. *See* Aplt. Br. at 25, 33. Mr. Clarke testified he conversed with Mr. Robertson about the medical care provided to him. The record confirms Mr. Clarke spoke with Mr. Robertson sometime after the surgery on March 9. According to the Robertsons, however, the record fails to establish exactly *when* those conversations occurred. Those factual issues—even if disputed—are not material. ***HN9*** "An issue of fact is 'material' if under the substantive law it is essential to the proper disposition of the claim." *Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 670 (10th Cir. 1998)* (citing *Anderson, 477 U.S. at 248*). Here, Mr. Clarke's testimony does not call into question that the Robertsons *already discovered* their legal injury on March 9.

2. The Robertsons' declarations do not show a genuine issue of material fact about when they discovered their **[*18]** legal injury.

The Robertsons each submitted a declaration stating they were unaware of any legal claim for medical malpractice under Utah law until August 18, 2016. *See* App. at 178, 182. The district court explained it did not view the Robertsons' declarations as creating a genuine issue of material fact about when they discovered their legal injury. *See id. at 401-02*. The district court reasoned "[t]he declarations only swear that the Robertsons discovered their legal claim—not the facts underlying their legal claim—[on August 18, 2016]." *Id. at 402*. The district court also found the declarations "fail under the sham affidavit doctrine" and disregarded them "as sham affidavits, submitted solely for the purpose of attempting to establish genuine issues of material fact as to when Plaintiffs discovered their legal injury." *Id. at 401, 403*. We agree with the district court's conclusion the Robertsons' declarations do not create a genuine issue of material fact about the date they discovered their legal injury.[3]

HN10 The UHCMA's statutory discovery rule is triggered when a plaintiff first has actual or constructive knowledge of the relevant facts supporting their cause of action. *See Arnold, 289 P.3d at 455*. The summary judgment record does not support a conclusion—or justify a reasonable inference—that the Robertsons discovered the relevant facts underlying their medical malpractice action on August 18, 2016, the date their counsel filed and served a Notice of Intent to Commence a legal malpractice action and a request for prelitigation panel review to the DOPL. On this record, the date of filing cannot also be the date of discovery. As the district court correctly pointed out, "Plaintiffs' counsel offered no affidavits or other evidence indicating when the Robertsons became aware of the facts underlying their legal claim, if not during the conversation with Dr. Belnap." App. at 399 n.5.

B. The Robertsons have not shown reversible error based on alleged mental incompetence.

Even if March 9, 2015 is the correct date of accrual, the Robertsons maintain "the statute of limitations had to be tolled until Mr. Robertson was mentally **[*20]** competent to actually comprehend his legal rights and act on them." Aplt. Br. at 33-34. The Robertsons claim the district court erred by "finding Mr. Robertson was actually capable of comprehending and acting on his legal rights on March 9, 2015." *Id.* at 34. They insist tolling was required under *Utah Code § 78B-2-108*, which says a statute of limitations "may not run" while an individual is mentally incompetent. We are not persuaded.

Providers contend the Robertsons' *§ 78B-2-108* tolling argument is subject to plain error review. We agree. Nowhere in their Opening Brief do the Robertsons "cite the precise references in the record where" an argument for mental incompetency tolling under *§ 78B-2-108* "was raised and ruled on." *See 10th Cir. R. 28.1(A)*. Nor could we locate anything in the record to suggest the Robertsons advanced an argument for tolling under *§*

[3] As a general matter, "[w]e review the district court's decision to exclude affidavits at the summary judgment stage for abuse of discretion." *Law Co. v. Mohawk Constr. & Supply Co., 577 F.3d 1164, 1169 (10th Cir. 2009)*. To determine whether an affidavit or declaration creates a sham issue of fact, courts must consider whether

(1) the affiant was cross-examined during his earlier testimony; (2) the affiant had access to the pertinent evidence at the time of his earlier testimony or whether the affidavit was based on newly discovered evidence; **[*19]** and (3) the earlier testimony reflects confusion which the affidavit attempts to explain.

Id. (quoting *Ralston v. Smith & Nephew Richards, Inc., 275 F.3d 965, 973 (10th Cir. 2001)*). Because we conclude the Robertsons' declarations, even if legitimate, fail to establish a genuine issue of material fact, we need not also determine if the district court abused its discretion by excluding them under the sham affidavit doctrine.

78B-2-108 in the district court. This argument is therefore forfeited. *See* Richison v. Ernest Grp., Inc., 634 F.3d 1123, 1128 (10th Cir. 2011) (explaining where a "theory simply wasn't raised before the district court, we usually hold it forfeited" and while we will entertain forfeited theories on appeal, we will only reverse on that basis if the party seeking review can show plain error).

HN11 To show plain error, the Robertsons "must establish the presence of (1) error, (2) **[*21]** that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings." Hayes v. SkyWest Airlines, Inc., 12 F.4th 1186, 1201 (10th Cir. 2021) (citation omitted). "The burden of establishing plain error lies with the appellant." Somerlott v. Cherokee Nation Distribs., Inc., 686 F.3d 1144, 1151 (10th Cir. 2012).

HN12 An error is plain when it is "clear or obvious" under "well-settled law." United States v. Trujillo-Terrazas, 405 F.3d 814, 818 (10th Cir. 2005) (quoting United States v. Whitney, 229 F.3d 1296, 1309 (10th Cir. 2000)). Under Utah law, "[a]n individual may not bring a cause of action while the individual is: (a) under 18 years old; or (b) mentally incompetent without a legal guardian." Utah Code § 78B-2-108(1) (West 2023). "During the time that an individual is underage or mentally incompetent, the statute of limitations for a cause of action . . . may not run." *Id.* § 78B-2-108(2). 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 of an *overall* inability to function in society.'" Martinez v. Dale, 2020 UT App 134, 476 P.3d 136, 143 (Utah Ct. App. 2020) (quoting O'Neal v. Div. of Family Servs., 821 P.2d 1139, 1142 (Utah 1991)). Demonstrating mental incompetence under § 78B-2-108 requires establishing the individual could not manage their business affairs or estate, or comprehend their legal rights or liabilities. *See id.*

HN13 Nothing in § 78B-2-108 says a district court has an obligation to invoke mental incapacity tolling *sua sponte*. And the Robertsons have pointed **[*22]** us to no authority imposing such a duty. The case the Robertsons primarily rely on, Martinez, suggests the burden is on the party seeking tolling to offer some evidence demonstrating mental incompetence. *See id.* (finding plaintiff's affidavit filed in support of her mental incompetence-based tolling argument was "sufficient to establish a genuine issue of material fact" about whether § 78B-2-108 tolling applied to plaintiff's limitations period) (citation omitted). Under the circumstances, we discern no error—let alone a plain error—in the district court's failure to invoke § 78B-2-108. Trujillo-Terrazas, 405 F.3d at 818; *see* United States v. Gantt, 679 F.3d 1240, 1246 (10th Cir. 2012) ("Because all four requirements [of plain error] must be met, the failure of any one will foreclose relief and the others need not be addressed.").

To the extent the Robertsons preserved an argument for reversal based on Mr. Robertson's alleged mental incompetence on March 9, 2015, we reject it. In its Order, the district court observed, "[a]lthough not included in their briefing," the Robertsons' counsel raised arguments at the summary judgment hearing about their clients' ability to comprehend Dr. Belnap on March 9, 2015. *See* App. at 399 n.5. According to the district court, counsel had "pointed out that the conversations **[*23]** with Dr. Belnap happened during a highly stressful moment, just before and after Mr. Robertson's surgery. . . . [and] argued that both Mr. and Ms. Robertson were unlikely to be in a clear state of mind at the time." *Id.* The district court was unpersuaded, however, because "Plaintiffs offered no evidence that the Robertsons were unable to comprehend the views expressed by Dr. Belnap during their conversations with him." *Id.* We agree.

Like the district court, we "recognize[] the difficult situation faced by the Robertsons" on March 9. *Id.* But, under the circumstances, the district court correctly concluded there is "no genuine dispute of material fact as to whether the Robertsons understood Dr. Belnap" on March 9, so as to toll the statute of limitations. *Id.* **HN14** The nonmovant must "set forth specific facts showing that there is a genuine issue for trial" to survive summary judgment. Anderson, 477 U.S. at 248. Here, the Robertsons did not carry their burden. The summary judgment record contains no evidence that, on March 9, Mr. Robertson could not comprehend Dr. Belnap or otherwise understand his legal rights.[4]

[4] We observe the Robertsons' opening brief frames their argument for mental incompetence tolling only with regard to Mr. Robertson. *See* Aplt. Br. at 33 (arguing the statute of limitations was "Tolled Until Mr. Robertson was Mentally Competent to Comprehend his Legal Rights"). In the reply brief, the Robertsons also suggest Mrs. Robertson had "limited ability to understand and communicate with Dr. Belnap" because Mrs. Robertson is a native Thai speaker. *See* Reply Br. at 14. We decline to consider any argument for tolling based on *Mrs. Robertson's* mental competence because it was not raised in the opening brief. *See, e.g.*, Tran v. Trs. of State Colls. in Colo., 355 F.3d 1263, 1266 (10th Cir. 2004)

Accordingly, as the district court correctly concluded, there is no genuine **[*24]** issue of material fact that the Robertsons' UHCMA claims accrued on March 9, 2015—the date they discovered their legal injury.

III. The District Court Correctly Determined the Two-Year Statute of Limitations Expired Before The Robertsons Filed Their Federal Complaint on January 24, 2019.

The Robertsons next contend, even if the two-year statute of limitations began to run on March 9, 2015, it did not expire before they filed their federal complaint on January 24, 2019. We begin by describing the district court's decision, which considered the effect of the UHCMA's statutory tolling provisions on calculating the Robertsons' two-year limitations period. We then discuss, and reject, the Robertsons' arguments for reversal.

A. Additional Factual Background

Using the March 9, 2015 date of accrual, the district court considered the Robertsons' arguments that "the proper application of various tolling statutes renders their January 24, 2019 complaint timely." *See* App. at 403-04. The district court began by observing that, absent any tolling, the Robertsons' two-year statute of limitations would have run on March 9, 2017-731 days after the date of discovery.[5] *Id.* at 404. On August 18, 2016, the Robertsons **[*25]** filed for prelitigation review to the DOPL, and the district court determined this request tolled the running of their two-year statute of limitations under *Utah Code § 78B-3-416(3)(a)*. *See id.* According to the district court, when statutory tolling kicked in on this date, 528 days of the Robertsons' 731-day limitations period had already run. *Id.* This meant the Robertsons had 203 days remaining in which to commence their medical malpractice action under the UHCMA—unless they took some other action to further toll the statute of limitations.

The district court then considered the three tolling scenarios outlined in the UHCMA relating to prelitigation procedures.[6] The court determined the latest date on which the statutory tolling period could end—thus triggering the running of the Robertsons' remaining 203 days—was March 19, 2017. *Id.* at 405. However, the court also considered an even later date—when DOPL closed the case—to assess the timeliness of the Robertsons' federal complaint. The court explained, "even if the court construes the facts generously for the Plaintiffs and extends the tolling until May 31, 2017—the date on which DOPL declined to issue a certificate of compliance and closed the case—Plaintiffs' claims **[*26]** still fail."[7] *Id.* The Robertsons needed to have filed their lawsuit or have taken some action to further toll the statute of limitations by December 20, 2017 (203 days after May 31, 2017). *See id.* The Robertsons took no such action. Accordingly, the district court determined the UHCMA's two-year statute of limitations barred the Robertsons' lawsuit, which was not filed until January 24, 2019. *See id.* at 407.

The district court observed that after the two-year statute of limitations expired, the Robertsons "retained new counsel[who] made a valiant effort to revive the Robertsons' claims." *Id.* at 406. The Robertsons' new counsel filed a second Notice of Intent to Commence Action on August 8, 2018, and a new request for prelitigation panel review to the DOPL on August 16, 2018. *Id.* ***HN15*** As a general matter, a request for prelitigation panel review qualifies as an event which tolls the running of the UHCMA's two-year statute of limitations. But in this case, as the district court explained, it was too little, too late. By the time new counsel filed their second prelitigation panel request in August 2018, the applicable limitations period had already expired.

B. Analysis

("Issues not raised in the opening brief are deemed abandoned or waived.") (citation omitted).

[5] The district court noted that, in this case, "two years is equivalent to 731 days because 2016 was a leap year." App. at 404 n.8.

[6] Recall, *§ 78B-3-416(3)(a)* outlines three tolling scenarios, depending on how prelitigation proceedings unfold before the DOPL. Under *§ 78B-3-416(3)(a)* in effect at the time relevant to this action, filing a request for prelitigation panel review tolled the UHCMA's two-year limitations period until the later of either: 60 days following the issuance of a certificate of compliance, 60 days following an opinion by the prelitigation panel, or 180 days after the filing of the request for prelitigation panel review. *See Utah Code § 78B-3-416(3)(a)(i)-(ii)* (West 2010).

[7] For purposes of our review, we consider statutory tolling to have ended on May 31, 2017 (rather than March 19, 2017) because that date is more favorable to the Robertsons.

The Robertsons advance several arguments **[*27]** challenging the district court's application of the UHCMA's two-year statute of limitations and tolling provisions. First, Providers waived their statute of limitations defense. Second, certain prelitigation proceedings before the DOPL either restarted or further tolled their applicable limitations period. Third, the Utah Supreme Court's decision in *Vega v. Jordan Valley Medical Center, 2019 UT 35, 449 P.3d 31 (Utah 2019)*—which found unconstitutional the UHCMA's certificate of compliance requirement—applies retroactively to save their claims. We address, and reject, each argument.

1. The district court correctly concluded Providers did not waive their statute of limitations defense.

The Robertsons argue Providers waived their statute of limitations defense because they a) failed to assert it during the prelitigation process; b) stipulated to dismissing a prelitigation panel review hearing; and c) litigated in the district court for three years before claiming the statute of limitations had run.

a. Providers did not waive their statute of limitations defense by failing to assert it before the DOPL.

On appeal, the Robertsons contend a party may waive their right to pursue a statute of limitations defense by failing to assert it during prelitigation proceedings **[*28]** before the DOPL. Aplt. Br. at 46-47 (citing *Gygi v. St. George Surgical & Med. Ctr., No. 2:05CV505DAK, 2005 U.S. Dist. LEXIS 38290, 2005 WL 3536275, at *10 (D. Utah Dec. 22, 2005)*). The district court rejected this argument, and so do we.

The Robertsons fail to identify, nor have we found, any authority to suggest a party waives a statute of limitations defense in federal litigation unless it is advanced in the prelitigation process before the DOPL. ***HN16*** As the district court correctly explained, the prelitigation process before the DOPL focuses only on the *substance* of a prospective plaintiff's malpractice claims to determine whether they have merit and caused harm to the claimant. *See* App. at 396 n.4 (citing *Utah Admin Code r. 156-78B-14(1)*). The DOPL is not tasked with determining the potential applicability of any statute of limitations.

The Robertsons' reliance on *Gygi*, an unpublished case from the District of Utah, is inapposite. *Gygi* simply stands for the proposition—irrelevant here—that a party's participation in prelitigation proceedings with the DOPL demonstrates an intent by that party to waive their contractual right to arbitrate a dispute. *See, e.g., Gygi, 2005 U.S. Dist. LEXIS 38290, 2005 WL 3536275, at *4* (holding that a party "waived his right to invoke the [arbitration clause in an agreement] by fully participating in the pre-litigation hearing before moving to compel arbitration").

The Robertsons also argue **[*29]** an affirmative defense may be waived even when a defendant has properly pleaded the defense in their answer.[8] Aplt. Br. at 47 (citing *Cortez v. Wal-Mart Stores, Inc., 460 F.3d 1268, 1276 (10th Cir. 2006)*). In support, the Robertsons rely on *Cortez*, where a panel of this court held a defense preserved in a litigant's answer may yet still be waived in later litigation under the final pretrial order rule reflected in *Federal Rule of Civil Procedure 16(e)*. *Cortez, 460 F.3d at 1276-77* (explaining "issues not contained in the resulting pretrial order were not part of the case before the district court," even where a party raised the issue in their earlier answer to a complaint). There was never a final pretrial conference or pretrial order in the district court, so *Cortez* has no relevance here.

b. Providers did not intentionally relinquish their statute of limitations defense.

After the Robertsons filed their second request for prelitigation panel review in August 2018, the parties agreed by written stipulation to waive a pre-litigation hearing panel before the DOPL, as permitted by Utah law and administrative rules.[9] *See* App. at 318-23. According to the Robertsons, this waiver means Providers gave up their right to later pursue their statute of limitations defense in federal court. *See* Aplt. Br. at 47-48. There is no merit to the Robertsons' **[*30]** position.[10]

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[8] The Robertsons did not advance this contention in the district court. Providers do not argue forfeiture on appeal and respond on the merits, so we exercise our discretion to consider the argument.

[9] *See § 78B-3-416(3)(e)(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."); *Utah Admin. Code r. 156-78B-13(1)* (2023) ("A full prelitigation panel hearing is not required if the parties enter into a stipulation that no useful purpose would be served by convening a panel hearing as to any or all respondents . . . .").

[10] Again, we do not see where the Robertsons made this

The Robertsons acknowledge "[a] waiver is an 'intentional relinquishment or abandonment of a known right,'" yet they fail to identify where the referenced stipulations state or even suggest Providers intended to waive their statute of limitations defense by foregoing a pre-litigation hearing panel before the DOPL. *See* Aplt. Br. at 46 (citing *State v. Williams, 2020 UT App 67, 462 P.3d 832, 840 (Utah Ct. App. 2020)*). Nor do we see any language in the stipulations that might support the Robertsons' waiver argument. *See* App. at 318-23.

c. Providers did not waive their limitations defense through their litigation conduct.

Finally, the Robertsons insist Providers should be estopped from prevailing on a statute of limitations defense because Providers "prejudiced Plaintiffs" by "engag[ing] in active litigation for over three years" before ever contending the malpractice action was time barred. *See* Aplt. Br. at 48. We are not persuaded.

HN17 Equitable estoppel "prevent[s] a party from taking a legal position inconsistent with an earlier statement or action that places his adversary at a disadvantage." *Spaulding v. United Transp. Union, 279 F.3d 901, 909 (10th Cir. 2002)* (alteration in original) (quoting *Penny v. Giuffrida, 897 F.2d 1543, 1545 (10th Cir. 1990)*). We perceive no basis to apply this principle here. Providers' answers to the Robertsons' underlying complaint asserted **[*31]** affirmative defenses based on the UHCMA's statute of limitations, as required by *Federal Rule of Civil Procedure 8(c)(1)*.[11] None of the cases cited by the Robertsons suggest anything more was required for Providers to move for summary judgment on statute of limitations grounds.[12]

2. The district court correctly concluded the Robertsons' second effort in August 2018 to obtain a certificate of compliance from the DOPL did not trigger a new two-year statute of limitations period.

The Robertsons urge reversal "for the simple reason that DOPL made the determination in 2018 that the Plaintiffs' second Notice of Intent was timely filed." Aplt. Br. at 43. The Robertsons point to a letter dated August 20, 2018, from the DOPL that approved Mr. Robertson's second request for prelitigation panel review. *Id.* at 45 (citing App. at 285). In the referenced letter, DOPL informed Mr. Robertson his request for prelitigation panel review had been accepted, and the request operated to toll applicable statutes of limitations under the UHCMA. *See* App. at 285 ("The Request tolls the applicable statute of limitations until 60 days **[*32]** after the [DOPL] issues the opinion of the pre-litigation panel."). The Robertsons contend they relied on the DOPL's representation about tolling, and the district court should have assessed the timeliness of their complaint accordingly. *See* Aplt. Br. at 43-46. Like the district court, we reject the Robertsons' arguments.

HN18 To be sure, the UHCMA provides for statutory tolling after a party has filed a request for prelitigation panel review. But the Robertsons advance no legal support for the argument that their already-expired statute of limitations was revived because they initiated a second round of prelitigation proceedings in the DOPL. As the district court explained:

> Consider the implications. Plaintiffs' position would allow a lawyer to refile a closed medical malpractice case any time after DOPL closed the prelitigation proceedings without issuing a certificate of compliance (even if several years had passed), obtain a certificate of compliance, and claim that the statute of limitations did not restart until sixty days following that certificate of compliance. Such a position runs entirely counter to the purposes of the Utah Health Care Malpractice Law, which include "provid[ing] **[*33]** a reasonable time in which actions may be commenced against health care providers while limiting that time to a specific period for which professional liability insurance premiums can be reasonably and accurately calculated." *Utah Code § 78B-3-402(3)*.

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argument in the district court. Providers do not argue forfeiture and, instead, respond on the merits. Even if the Robertsons had preserved the argument, it is unavailing, as we explain.

[11] *See* App. at 37 (reflecting Appellee UVRMC including a limitations affirmative defense in its answer); *see also id.* at 51 (same with respect to Appellee Utah Valley Specialty Hospital); *id.* at 75 (same with respect to Appellees Craig S. Cook, M.D., P.C. and Craig S. Cook M.D.).

[12] The Robertsons cite *Kimball Glassco Residential Center, Inc. v. Shanks*, where the Mississippi Supreme Court rejected a plaintiff's attempt to equitably estop defendants from relying on a statute of limitations defense where the defendants gave plaintiff notice of the defense and acted reasonably to pursue it. *64 So. 3d 941, 947-48 (Miss. 2011)*. The Robertsons also cite *Central Florida Investments, Inc. v. Parkwest Associates*, where the Utah Supreme Court addressed when a party's substantial participation in litigation may waive that party's contractual right to compel arbitration. *2002 UT 3, 40 P.3d 599 (Utah 2002)*. Neither authority supports reversible error here.

App. at 406-07. We endorse the district court's sound analysis. By the time the Robertsons filed their second request for prelitigation panel review on August 16, 2018, the statute of limitations on their claim had already expired, and any new efforts before the DOPL did not revive the already-expired statute of limitations.

3. The Robertsons waived their argument that the district court should have applied the *Vega* decision retroactively to their UHCMA claims.

The Robertsons contend the district court erred by not giving retroactive effect to the Utah Supreme Court's decision in *Vega, 449 P.3d 31*. According to the Robertsons, this error led to the court's mistaken conclusion that the statute of limitations on their claims expired no later than December 20, 2017. Providers urge affirmance, contending *Vega* has no application to the Robertsons' claims and does not apply retroactively.

In *Vega*, the Utah Supreme Court found the UHCMA's certificate of compliance requirement unconstitutional **[*34]** because it required the DOPL to exercise a core judicial function. *See id. at 35, 39* (concluding *§§ 78B-3-412(1)(b)* and *78B-3-423* are facially unconstitutional). The Utah Supreme Court struck down the UHCMA sections requiring a plaintiff to obtain a certificate of compliance before filing a medical malpractice action. *See id. at 39*. In adjudicating Providers' motions for summary judgment, the district court observed that, when the Robertsons filed their federal complaint, the UHCMA still required plaintiffs to obtain a certificate of compliance from the DOPL, but after *Vega*, plaintiffs were no longer required to do so. *See* App. at 392 & n.2.

In deciding Providers' motions for summary judgment, the district court rejected the Robertsons' argument that *Vega* rendered their UHCMA claims timely. The district court explained "[a]t oral argument, Plaintiffs' counsel suggested that the fact that the Utah Supreme Court later struck down the certificate of compliance requirement rendered it unfair for the court to apply the statute of limitations to the Robertsons." *Id.* at n.2. Rejecting the Robertsons' argument, the district court found "*Vega* does not control the outcome here" for two reasons. *See id.* First, the court reasoned it "cannot ignore **[*35]** the statute of limitations based on a holding—which the Utah Supreme Court did not apply retroactively—made after the statute of limitations had run." *Id.* Second, the court explained "the Robertsons had the opportunity to obtain a certificate of compliance within the statute of limitations by submitting the required affidavits of merit. The Robertsons simply failed to do so." *Id.*

On appeal, the Robertsons ask this court to apply the *Vega* ruling retroactively and to find they commenced their federal action on November 16, 2016, for statute of limitations purposes. Aplt. Br. at 52. The Robertsons argue:

> Applying the *Vega* ruling retroactively to where a Certificate of Compliance was not required, Plaintiffs could have commenced a lawsuit on November 16, 2016, 90 days following the Plaintiffs' First Notice of Intent to Commence Legal Action that was filed and served on August 1[8], 201[6]. Accordingly, this Court should find that Plaintiffs "commenced" the action on November 16, 2016, for determining when an action "commenced" for statute of limitations purposes.

Id. We decline the invitation.

HN19 Arguments "intentionally relinquished or abandoned in the district court" are deemed waived on appeal. **[*36]** *Richison, 634 F.3d at 1127*; *cf. United States v. Carrasco-Salazar, 494 F.3d 1270, 1272 (10th Cir. 2007)* ("[W]aiver is accomplished by intent, [but] forfeiture comes about through neglect." (second alteration in original) (quoting *United States v. Staples, 202 F.3d 992, 995 (7th Cir. 2000)*)). Here, the Robertsons' brief opposing summary judgment alerted the district court to the *Vega* decision. But the Robertsons never argued, as they do for the first time on appeal, that *Vega* applied retroactively to their claims. *See* App. at 146-168. Just the opposite. At the summary judgment hearing, the Robertsons' counsel suggested she was *not* asking the court to apply *Vega* retroactively:

> **COURT**: Well, I think what you're asking me to do is to make the *Vega* ruling retroactive when the Utah Supreme Court didn't do that.
>
> **COUNSEL**: No. I'm actually asking the Court to conclude that the statute of limitations was tolled in between, because Mr. and Mrs. Robertson did ultimately receive a certificate of compliance from DOPL.
>
> . . .
>
> So I'm asking the Court for a broad reading of the tolling to include all of the DOPL proceedings in light of the fact that DOPL allowed for the Robertsons to reopen their file.

Id. at 465-66. Based on the Robertsons' representations to the district court, we conclude the Robertsons have waived any appellate argument that the *Vega* decision should **[*37]** have been applied retroactively to their claims.

CONCLUSION

We **AFFIRM** the district court's grant of summary judgment to Providers.

ENTERED FOR THE COURT

Veronica S. Rossman

Circuit Judge

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