IN THE SUPREME COURT OF THE STATE OF UTAH

LISA TAPP, Plaintiff-Appellee, vs. SHERMAN SORENSEN, M.D.; SORENSEN CARDIOVASCULAR GROUP; and IHC HEALTH SERVICES, INC., Defendant-Appellants.	**BRIEF OF APPELLANT IHC HEALTH SERVICES, INC.** Appeal No. 20180690-SC Appeal from the Third District Court Case No. 170904956 Judge Barry Lawrence
JOHANNA BRIGHT, Plaintiff-Appellee vs. SHERMAN SORENSEN, M.D.; SORENSEN CARDIOVASCULAR GROUP; and ST. MARK'S HOSPITAL, Defendant-Appellants.	Appeal No. 20180528-SC

PIA MERLO-SCHMUCKER, Plaintiff-Appellee vs. SHERMAN SORENSEN, M.D.; SORENSEN CARDIOVASCULAR GROUP; and ST. MARK'S HOSPITAL, Defendant-Appellants.	Appeal No. 20180554-SC

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Defendants: Sherman Sorensen, M.D.
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INTRODUCTION

Plaintiff Lisa Tapp's ("Plaintiff") Complaint arises from a medical procedure in 2008, and was filed long after the Utah Health Care Malpractice Act's ("UHMA") four-year repose period expired. *See* Utah Code § 78B-3-404(1) ("A malpractice action … shall be commenced within two years after [discovery of the injury,] but not to exceed four years after the date of the alleged act."). She alleges that Dr. Sherman Sorensen, an independent cardiologist,[1] performed an unnecessary surgical closure of a small hole in her heart known as a "PFO" (patent foramen ovale). For Plaintiff's claims to survive, she must demonstrate that her claims were affirmatively fraudulently concealed from her by each of the defendants she has sued. *See* Utah Code Ann. § 78B-3-404(2)(b).

Plaintiff initially filed her Complaint against Intermountain and the Sorensen defendants in August 2017, alleging various fraud-based and negligence claims against all defendants.[2] Plaintiff expressly alleged that her PFO closure occurred in September 2008, almost nine years before she filed suit. She recognized her claims were untimely and included a section in her Complaint titled "Equitable Tolling/Fraudulent Concealment." However, because the date of Plaintiff's tolling allegations failed to include facts satisfying the UHMA repose period's *affirmative* fraudulent concealment

[1] While Dr. Sorensen had privileges to practice at both Intermountain and St. Mark's facilities, he was not an employee or agent of Intermountain or St. Mark's, the other hospital entity involved in the two other cases on appeal.

[2] Plaintiff also alleged a federal RICO claim, which she later voluntarily withdrew. *See* R.00118 n.4.

exception,[3] Intermountain moved to dismiss her claims as untimely under Rule 12(b)(6). In response, the district court allowed Plaintiff to file a First Amended Complaint ("FAC"). However, the FAC suffered from the same deficiency, and Intermountain again moved to dismiss, leading to the ruling at issue on appeal in Plaintiff's case.

Unfortunately, while the district court recognized the FAC still failed to make any allegations of affirmative fraudulent concealment, it incorrectly concluded that it was procedurally barred from "rul[ing] on the statute of limitation/repose defense" at the pleading stage because it believed "Plaintiff [wa]s not obligated to plead with particularity in her complaint facts in response to the statute of limitation/repose defense." R.00734. The district court then ruled Plaintiff could proceed with bifurcated discovery regarding Intermountain's possible (but unpled) "affirmative fraudulent concealment" of Plaintiff's claims, despite Plaintiff's failure to plead such allegations, let alone with Rule 9(c)'s required particularity. R.00753–56, R.00759–62.[4]

Contrary to the district court's finding, because Plaintiff's FAC is facially untimely, Rule 12(b)(6) obligates her to plead an exception to the UHMA's repose period for her claims to survive. And in her case, the potentially applicable exception to the UHMA's repose period requires her to plead facts demonstrating that Intermountain affirmatively fraudulently concealed her claims from her, allegations that must satisfy Rule 9(c)'s particularity requirements. Plaintiff has not, and cannot do this, as is

[3] *See* Utah Code § 78B-3-404(2)(b).

[4] The district court also welcomed guidance from the appellate courts, recommending the Court grant the currently pending interlocutory appeal. *Id.*

highlighted by the district court's own correct application of Rule 9(c) to Plaintiff's affirmative claims of fraud (rather than her tolling allegations), claims the district court recognized were subject to Rule 12. In dismissing these claims, the district court held that the FAC contains no factual allegation of an "act of fraud by [Intermountain]."

If the district court's procedural error is left uncorrected, particularly in light of its recognition Plaintiff completely failed to allege that Intermountain affirmatively fraudulently concealed anything, Intermountain will be forced to submit to full fraud discovery of yet-to-be-pled fraud allegations. Such a result runs counter to Utah's established case law on Rule 12's application, Rule 9's plain language, and the underlying policy of Rule 9, which serves to prevent parties from using the broad powers of discovery to find facts they are required to have pled at the outset. Accordingly, Intermountain asks this Court to correct the district court's erroneous application of Rules 12(b)(6) and 9(c) and dismiss Plaintiff's remaining stale claims against Intermountain with prejudice.

STATEMENT OF THE ISSUE

Issue No. 1: Did the district court err by holding that, under Rule 12(b)(6) and 9(c), Plaintiff's FAC should not be dismissed and fraud discovery should proceed with respect to Intermountain, despite the FAC's facial untimeliness and its failure to include any factual allegation that Intermountain "affirmatively acted to fraudulently conceal [its] alleged misconduct"?

Standard of Review: Denial of a Rule 12(b)(6) motion is reviewed for correctness. *Jacobsen Const. Co., Inc. v. Teton Builders*, 2005 UT 4, ¶ 10, 106 P.3d 719.

The interpretation of rules of procedure (Rules 12(b)(6) and 9(c)) and their application is a question of law reviewed for correctness. *Drew v. Lee*, 2011 UT 15, ¶ 7, 250 P.3d 48.

Preservation of Issue: Intermountain preserved this issue below on multiple occasions. *See* R.00349–61, R.00358–71; R.00054–57, R.00063–71.

STATEMENT OF THE CASE

Statement of Facts and Course of Proceedings

Plaintiff filed her Complaint against Intermountain and Dr. Sorensen in August 2017, based on her PFO closure which occurred in September 2008. R.00001. Intermountain moved to dismiss Plaintiff's initial Complaint as facially untimely under the UHMA's four-year statute of repose. Mot. to Dismiss, R.00050. Thereafter, Plaintiff requested and was granted permission to file her FAC. R.00149; R. 00317; R. 00122.

In her FAC, Plaintiff again pled that she received negligent medical care in 2008, nearly nine years before commencing legal proceedings in 2017. R.00132–37 at ¶¶ 37, 39–42, 45, 48. Plaintiff alleges Dr. Sorensen fraudulently induced her to undergo a PFO closure in 2008 at an Intermountain facility. R.00134 at ¶ 43. Plaintiff further alleges Dr. Sorensen's medical records at that time contain "fraudulent misrepresentations, falsehoods, and other misleading statements." R.00135 at ¶ 44. The FAC contains no factual allegation of affirmative fraud by Intermountain, but instead contains several allegations that Intermountain *disclosed* information to patients regarding when PFO closure is medically necessary. *See generally* R.00122–146; R.00736; R.00753–56; R.00311–13; R.00130–32 at ¶¶ 32–34 (alleging publication of Intermountain "Fact Sheets" and web pages stating that "PFO Closure has not been found to reliably reduce

migraines" and "there is no conclusive evidence that fixing a PFO will benefit migraines").

Despite the absence of any allegation of affirmative fraudulent concealment against Intermountain, Plaintiff alleged the legal conclusion that her claims against Intermountain are saved from untimeliness under the affirmative fraudulent concealment provision in Utah Code § 78B-3-404(2)(b). R.00146 at ¶ 108 ("Defendants' affirmative acts and omissions, before, during, and/or after their actions causing Plaintiff's injury prevented Plaintiff from discovering the injury or cause thereof until recently in 2017. Such conduct tolls the limitations pursuant to the Utah Health Care Malpractice Act 78B-3-404(b) [sic].").

Intermountain again moved to dismiss the FAC's facially untimely claims, which still failed to allege Intermountain "affirmative[ly]" acted to fraudulently prevent Plaintiff from timely pursuing her claims within the four-year repose period.[5] *See* R.00347.

Disposition Below

On August 9, 2018, the district court resolved Intermountain's motion, agreeing with Intermountain's substantive arguments regarding the application of the UHMA's statute of repose and its exception in section 78B-3-404(2)(b). R.00736–37; R.00747–56. The district court further acknowledged the FAC contains *no* allegation of an "affirmative act of fraud by [Intermountain]," R.00754, and dismissed Plaintiff's affirmative fraud-based

[5] The district court expressly permitted Defendants to file motions to dismiss the FAC, but also ordered that Defendants file answers to the FAC "so that the case may proceed," R.00316, which Intermountain did on April 16, 2018 shortly after filing its Motion to Dismiss the FAC, R.00499.

claims against Intermountain. R.00736–37. The district court also dismissed Plaintiff's affirmative claim of conspiracy against all defendants "[h]aving dismissed the underlying predicate for the conspiracy claim (i.e., the fraud claim)," leaving only her negligence claims against Intermountain. R.00737. The district court reasoned:

> The allegations of [Intermountain's] fraud in inducing Ms. Tapp to have surgery are non-existent. There is nothing but conclusory statements where the plaintiff lumps the "defendants" in together and there is not one fact in the complaint that would support that [Intermountain] was somehow involved in a fraud in 2008. There is no fact stated in the complaint that even alleges, let alone with any degree of particularity, as required under Rule 9, U.R.C.P., that [Intermountain] was involved in a fraud on Plaintiff in 2008.

R.00736 (emphasis in original).[6]

The district court also correctly held that the narrow exception to the four-year repose period within § 78B-3-404(2)(b) requires not just allegations of "'fraudulent concealment' (which, in normal parlance, might encompass silence in the face of a duty to disclose) but a much narrower '*affirmative act* to fraudulently conceal.'" R.00754. This is because "the legislature intended that only the 'affirmative act' branch of fraudulent concealment – and not concealment by silence – would apply as an *exception* under the statute." R.00755.[7] After finding that Plaintiff had adequately alleged a

[6] The district court also recognized that the *singular* fraud properly alleged in Plaintiff's complaints concerns alleged misrepresentations by Dr. Sorensen in 2008 that induced Plaintiff to have the PFO procedure and thereafter Dr. Sorensen "perpetuat[ed] that falsehood by his silence." R.00751–52; R.00312 (citing R.00134–35 at ¶¶ 43–44). These allegations, however, involve only Dr. Sorensen. *See id.*

[7] In making this finding, the district court noted the legislature's codification of its "Legislative Findings and Declarations" regarding the UHMA. R.00748. The court stated the UHMA "was borne out of the legislatures' concern that increasing malpractice claims had resulted in 'substantial increases' in medical malpractice insurance, and the

scheme of affirmative fraudulent concealment on the part of Dr. Sorensen,[8] the court acknowledged that with regard to Intermountain "Plaintiff has a much steeper hill to climb to avail [herself] of the statutory exception at issue," having pled "no [fraud] facts … let alone facts with a level of particularity[] to support a claim against [Intermountain]." R.00753–54.

The district court also held that to toll the repose period through affirmative concealment fraud, a particular defendant's conduct must "*cause* … a plaintiff's inability to have discover[ed] the alleged misconduct by [that] provider." R.00756.[9]

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resulting 'increased health care costs' which are then passed through to the patient." R.00749. The court also recognized the legislature "intended to curtail individual malpractice cases in the 'public interest by enacting measures designed to encourage private insurance companies to continue to provide health-related malpractice insurance'" and that the periods for timely pursuing claims are statutorily recognized "to provide 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*." *Id.* (quoting § 78B-2-402(2)) (emphasis in original).

[8] In finding fraud allegations against Dr. Sorensen sufficient, the district court rejected the argument that section 78B-3-404(2)(b) "implicitly requires some *later affirmative act* of fraud that kept Plaintiff from discovering the wrongfulness of his actions," which Plaintiff had not alleged as to either Defendant. *See* R.00752 (emphasis in original) ("[Dr. Sorensen's] fraudulent misrepresentation at the outset, followed by years of perpetuating that falsehood by his silence, meets the standard for fraudulent concealment under the statute.").

[9] The district court held that under § 78B-3-404(2)(b), a plaintiff who asserts a claim after the four-year repose period must prove the following:

1. That the provider "*affirmatively acted* to fraudulently conceal the alleged misconduct";
2. That, as a result, the plaintiff was prevented from discovering the provider's misconduct during the repose period; and
3. That plaintiff filed her claim within one year of (actually or constructively) discovering concealment.

However, rather than dismiss the FAC, given this factual void and the exacting requirements of the UHMA's repose exception, the district court accepted as sufficient Plaintiff's conclusory allegation that "Defendants' … conduct tolls the limitations pursuant to the Utah Health Care Malpractice Act 78B-3-404(b) [sic]." R.00146 at ¶ 108; R.00734. The district court did so based on its holding that Plaintiff was not obligated, under Rule 12, to plead an exception to the UHMA's repose period to maintain her facially untimely claims. R.00734. The court then ordered bifurcated discovery on the limited issue of the currently unpled affirmative fraudulent concealment of Plaintiff's claims. R.00747.

SUMMARY OF THE ARGUMENT

Despite finding that Plaintiff's FAC contains *no allegation* of an "affirmative act of fraud by [Intermountain]," R.00754, the district court refused to dismiss Plaintiff's negligence claims against Intermountain based on its misapplication of Rules 12(b)(6) and 9(c). The district court's erroneous interpretation of these rules should be corrected and made consistent with settled Utah law, which holds that a facially untimely complaint is subject to dismissal under Rule 12(b)(6) unless the plaintiff affirmatively pleads an exception to the applicable statute of limitations or repose. And when that exception involves a fraudulent act on the part of the defendant, like Utah Code § 78B-3-404(2)(b), such fraudulent acts—as with all allegations of fraud—must be pled with particularity under Rule 9(c). Intermountain accordingly requests that this Court reverse the district

R.00751 (emphasis in original).

court's procedural error in interpreting Rule 12(b)(6) and Rule 9(c) and, given the lack of any allegations sufficient to save her facially untimely claims, dismiss Plaintiff's claims against Intermountain with prejudice.

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT IT WAS PROCEDURALLY BARRED FROM DISMISSING PLAINTIFF'S FAC AS UNTIMELY UNDER RULE 12(b)(6).

The district court's holding that it could not dismiss Plaintiff's negligence claims at the pleading stage because not all the "facts of fraudulent concealment" were in Plaintiff's FAC[10] misapplies Rule 12. R.00734. As addressed below, Utah precedent makes Rule 12(b)(6) applicable to facially untimely complaints, and the UHMA's repose period is facially applicable to the FAC, which alleges the date of care at issue.

A. Rule 12(b)(6) requires dismissal of a facially untimely complaint.

In *Tucker v. State Farm Mut. Auto. Ins. Co.*, 2002 UT 54, ¶ 8, 53 P.3d 947, this Court recognized that in some cases "the existence of [an] affirmative defense may appear within the complaint itself." *Id.* "'A complaint showing that the statute of limitations has run on the claims is the most common situation in which the affirmative defense appears on the face of the pleading [and] inclusion of dates in the complaint

[10] To the contrary, Plaintiff clearly *attempted* to allege that the statute of repose should be tolled based on fraudulent concealment. Plaintiff dedicated an entire section of the FAC to "Equitable Tolling/Fraudulent Concealment," in which she alleges, in conclusory fashion, that "Defendants'" conduct "tolls the limitations period pursuant to the Utah Health Care Malpractice Act 78B-3-404(b) [sic]." R.00145–46. As the district court correctly acknowledged, these allegations as to Intermountain are entirely conclusory and include no affirmative acts of fraudulent concealment on Intermountain's part. R.00754.

indicating that the action is untimely renders its subject to dismissal for failure to state a claim' … *under Rule 12(b)(6)*." *Id.* (emphasis added). In *Tucker* the complaint did *not* allege the *date* that an insurance company refused to pay, but "[h]ad this date been specified by the [plaintiffs], the allegations of the complaint itself would have clearly demonstrated that the [plaintiffs'] claim was time barred, rendering the motion to dismiss an appropriate procedural vehicle for raising the statute of limitations." *Id.* at ¶ 9.[11]

Here, Plaintiff alleges she received negligent medical care in 2008, far more than four years before commencing legal proceedings in 2017. R.00132–37 at ¶¶ 37, 39–42, 45, 48. Because Plaintiff alleges the dates of her care and the UHMA includes a four-year *period of repose* that is dependent only on the *date of care*,[12] "the allegations of the complaint itself … have clearly demonstrated that the [Plaintiff's] claim [is] time barred, rendering the motion to dismiss an appropriate procedural vehicle for raising the statute of [repose]." *Tucker*, 2002 UT 54, ¶ 9.

Several Utah appellate decisions have upheld Rule 12(b)(6) dismissals when complaints *facially* establish an affirmative defense, including where plaintiffs have inadequately attempted to plead around facial untimeliness. Most recently, in *Young Resources Ltd. Partnership v. Promontory Landfill LLC*, 2018 UT App 99, 2018 WL 2470958, the Utah Court of Appeals affirmed a Rule 12(b)(6) dismissal of untimely claims because "the face of the complaint … establish[es] that the claims are time-barred

[11] Because the trial court in *Tucker* had to go outside the complaint's allegations to determine the date of the refusal to pay, this Court upheld dismissal under a converted motion for summary judgment. *Id.* at ¶ 10.

[12] *See* Utah Code Ann. § 78B-3-404(1)

[and the plaintiff failed to offer] a factual basis for tolling the statute." *Id.* at ¶ 31 (citing *Aldrich v. McCulloch Props., Inc.*, 627 F.2d 1036, 1041, n.4 (10th Cir. 1980) and *Butler v. Deutsche Morgan Grentell, Inc.*, 140 N.M. 111, ¶ 33, 140 P.3d 532 (2006)); *Mast v. First Madison Servs., Inc.*, 2009 UT App 162, 2009 WL 1709017, at *1 n.2 ("Dismissal under Rule 12(b)(6) … is appropriate where the claim is time-barred based on the allegations of the complaint itself" and finding equitable discovery allegations insufficient); *Lowery v. Brigham Young Univ.*, 2004 UT App 182, 2004 WL 1368173 (affirming dismissal under Rule 12(b)(6) based on facial untimeliness and finding allegations of tolling based upon alleged mental illness to be inadequately pled); *see also Bivens v. Salt Lake City Corp.*, 2017 UT 67, ¶ 54 n.6, 416 P.3d 338 (affirming dismissal because complaint facially pled the absence of exhaustion of administrative remedies, an affirmative defense).

In *Russell Packard Devel., Inc. v. Carson*, 2005 UT 14, 108 P.3d 741, this Court applied the same analysis to test the untimeliness of a pleading. The plaintiff avoided Rule 12(b)(6) dismissal, but *only* because the plaintiff's *allegations* "made a prima facie showing of fraudulent concealment." *Id.* at ¶¶ 13, 40. Notably, this Court in *Tucker* cited to federal authority, as it does frequently,[13] for the proposition that dismissal under Rule 12(b)(6) is procedurally proper when a complaint facially alleges that a limitations period has run, and tolling allegations are not adequately pled in accordance with Rule 9. *Tucker*, 2002 UT 54, ¶ 8 (quoting 5A Charles Alan Wright & Arthur R. Miller, Federal

[13] *See Oakwood Village LLC v. Albertsons, Inc.*, 2004 UT 101, ¶ 12 n.1, 104 P.3d 1226 (recognizing that Utah R. Civ. P. 12(b) is identical to Fed. R. Civ. P. 12(b) and when Utah case law is absent "we 'freely resort to federal law as a useful guide.'") (quoting *Plumb v. State*, 809 P.2d 734, 741 n.9 (Utah 1990)).

Practice and Procedure § 1357 at 345 (2d ed. 1990)). Federal authority on this point appears to be uniform.[14]

Contrary to this established procedural law, the district court here found Rule 12 inapplicable to Plaintiff's facially untimely negligence allegations, concluding that Plaintiff need not plead facts to overcome the facial untimeliness she alleges regarding her dates of care because "the facts of fraudulent concealment are not in the complaint and can't be unless the issue is before the Court in full."[15] R.00734. No authority is cited to support the district court's circular statement regarding what facts Plaintiff would need to plead in order to rule under Rule 12(b)(6) on a statute of repose. *See id.* And, contrary

[14] *See Boettcher v. Conoco Phillips Co.*, 721 Fed. Appx. 823, 824-25 (10th Cir. 2018) (affirming dismissal because untimeliness is evident from allegations and tolling is supported only by a "conclusory statement as to the application of [tolling without relevant] factual allegations"); *Lee v. Rocky Mtn. UFCW Unions and Employers Trust*, 13 P.3d 405, *1 (10th Cir. 1993) (limitations defense "may be appropriately resolved on a 12(b)(6) motion [because] the dates given in the complaint make clear that the right sued upon had been extinguished"); *Ballen v. Prudential Bache Securities, Inc.*, 23 F.3d 335, 336–37 (10th Cir. 1994) (affirming 12(b)(6) dismissal based on facial untimeliness and because plaintiff "has not adequately alleged fraudulent concealment to toll the limitations period"); *Conerly v. Westinghouse Elec. Corp.*, 623 F.2d 117, 119–20 (9th Cir. 1980) (affirming 12(b)(6) dismissal based on facial untimeliness and because plaintiff did not meet obligation to "plead with particularity the facts which give rise to the claim of fraudulent concealment"); *Summerhill v. Terminix, Inc.*, 637 F.3d 877, 879–80 (8th Cir. 2011) ("once it is clear from the face of the complaint that an action is [untimely plaintiff must] meet his burden of sufficiently pleading that the doctrine of fraudulent concealment saves his otherwise time-barred claims"); *Adams v. Am. Med. System, Inc.*, 2014 WL 1670090, at *2 (D. Utah April 28, 2014) (Rule 12(b)(6) dismissal where the complaint's dates made clear that the right sued upon has extinguished and the plaintiff fails to come forward with a factual basis to toll); *Warnick v. McCotter*, 2003 WL 23355718, at *3–4 (D. Utah Dec. 29, 2008) (Rule 12(b)(6) dismissal where dates in complaint made clear that claim was untimely and assertion of fraudulent concealment was unsupported).

[15] *See supra* n.10.

to the district court's statement, the on-point cases in Utah and elsewhere all recognize that the *only fact* necessary to permit dismissal based on untimeliness is the *date* that initiates the statutory period of repose or limitation. *See Tucker*, 2002 UT 54, ¶ 8 (dates in complaint); *Young Resources*, 2018 UT App 99, ¶ 31 (same); *Mast*, 2009 UT App 162, at *1 (same); *Lowery*, 2004 UT App 182, at *1 (same); *supra* n.9 (citing federal cases referencing dates in complaints).

B. The UHMA's repose period is facially applicable to Plaintiff's FAC.

Critically, when a *repose* rather than a *limitation* period is at issue, the only relevant date is the date the repose period begins because "accrual," "discovery," and other similar concepts are not part of a repose analysis.[16] When that date is alleged on the face of a complaint, the plaintiff bears the initial burden of alleging a basis for tolling that will save her claims. In short, if a plaintiff pleads herself out of court, she must also plead facts supporting an exception letting her back in. And in this case, as addressed in Section II *infra*, she must do so with particularity under Rule 9(c). *Young Resources* addressed this procedural question. The Utah Court of Appeals recognized that if a complaint's facially untimely allegations cannot trigger dismissal under Rule 12(b)(6), "a

[16] Repose periods as found in § 78B-3-404(1) serve the important public policy of ending the possibility of claims irrespective of accrual or injury. *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2182–83 (2014) ("[s]tatutes of repose effect a legislative judgment that a defendant should be free from liability after the legislatively determined period of time"); *Sun Valley Water Beds of Utah, Inc. v. Herm Hughes & Son, Inc.*, 782 P.2d 188, 189 (Utah 1989) ("Statutes of repose promote the public goal of certainty and finality … and terminate liability at a set time."); *Jensen v. Intermountain Healthcare, Inc.*, 2018 UT 27, ¶ 18, 424 P.3d 885 (confirming § 78B-3-404(1) contains a repose period running from the date of care).

statute of limitations defense that is subject to the discovery rule could never be successfully asserted in a motion to dismiss, and that is *clearly not the rule*." 2018 UT App 99, ¶ 31 (quoting *Butler*) (emphasis added).

Here, Plaintiff put repose untimeliness at issue by alleging that the negligent medical care occurred in 2008. R.00132–37 at ¶¶ 37, 39–42, 45, 48. Rather than plead facts creating a fact issue concerning affirmative fraudulent concealment and potential tolling of this date, Plaintiff instead sought to invoke an exception to facial untimeliness with nothing but a bare legal conclusion.[17] R.00146 at ¶ 108. This should have resulted in dismissal of all claims against Intermountain, rather than an invitation for Plaintiff to begin fishing for unalleged, *possible* affirmative fraudulent concealment (something she should have been aware of before filing her Complaint).

It is settled Utah law that after alleging a facially untimely claim, a plaintiff has the *burden* to come forward and allege a reason her complaint is timely. *Tucker*, 2002 UT 54, ¶ 9; *Young Resources*, 2018 UT App 99, ¶ 31; *Mast*, 2009 UT App 162, at *1 n.2; *Lowery*, 2004 UT App 182, at *1; *see also Bivens*, 2017 UT 67, ¶ 54.[18] Plaintiff has not

[17] Plaintiff's conclusory allegation that her claims fit within section 78B-3-404(2)(b)'s narrow exception is an explicit admission that she bears the burden to plead a tolling exception under § 78B-3-404(2)(b)—something the district court correctly found she failed to do, but *incorrectly* held did not compel dismissal of her FAC.

[18] Plaintiff cited no contrary Utah or other law in the district court. Plaintiff's and the district court's reliance on cases like *Zoumadakis v. Uintah Basin Med. Ctr., Inc.*, 2005 UT App 325, ¶ 6, 122 P.3d 891, is misplaced, because in that case, and the others cited, an affirmative defense was not apparent on the face of the plaintiff's own allegations. Indeed, in *Zoumadakis*, the court recognized that the general rule that complaints do not need to anticipate affirmative defenses has no application when "the allegations of the complaint itself set forth everything necessary to satisfy the affirmative defense, *such as when a complaint plainly reveals that an action is untimely under the governing statute of*

done so, and the district court's decision allowing her claims to survive dismissal is legal error and should be reversed.

II. THE DISTRICT COURT ERRED IN HOLDING THAT ALLEGATIONS OF FRAUDULENT CONCEALMENT UNDER UTAH CODE § 78B-3-404(2)(b) NEED NOT COMPLY WITH RULE 9(c).

The district court correctly held, in three separate written orders, that Plaintiff's Complaint and FAC allege nothing more than a bare legal conclusion of "affirmative fraudulent concealment" against Intermountain. R.00736; R.00753–56; R.00311–13 ("Defendants maintain that these new allegations [in the FAC] are still insufficient under Rule 9. … In fact, those additional allegations appear to be conclusory in nature without any measure of particularity."). Yet, because of the misapplication of Rule 12 addressed above, the district court found Plaintiff was not obligated to plead such facts, let alone do so with particularity. This failure to require the UHMA's repose exception to be pled with particularity runs counter to Utah law, which requires that allegations of fraudulent concealment *under § 78B-3-404(2)(b)* not only be pled, but be pled with particularity. *See Chapman v. Primary Children's Hosp.*, 784 P.2d 1181, 1185–86 (Utah 1989); *see also Roth v. Pedersen*, 2009 UT App 313, 2009 WL 3490974 (dismissing malpractice claims under Rule 9 for failure to plead affirmative fraudulent concealment with particularity). Contrary to the district court's opinion, for Plaintiff's remaining claims to survive, she must plead facts demonstrating the UHMA's affirmative fraudulent concealment exception is applicable, and the allegations must satisfy Rule 9(c).

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limitations." *Id.* (quoting *United States v. Lewis*, 411 F.3d 838, 842 (7th Cir. 2005)) (emphasis added).

A. Rule 9(c) is applicable to any allegations of fraud, including allegations of affirmative fraudulent concealment under the UHMA.

Rule 9(c) states that "[i]n *alleging* fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Utah R. Civ. P. 9(c) (emphasis added). The rule's plain language makes no exception based on whether the allegation is in an affirmative claim, a counterclaim, a defense, or a response to a defense. *Id.* And Utah courts read procedural rules like Rule 9(c) according to the "ordinary and accepted meaning" of the words used. *Drew*, 2011 UT 15, ¶ 16. In *Williams v. State Farm Ins. Co.*, 656 P.2d 966 (Utah 1982), this Court held that Rule 9 applies to *every* allegation of fraud, including those found in affirmative defenses:

> The Rule 9(b) requirement should not be understood as limited to allegations of common law fraud. The purpose of that requirement dictates that it reach all circumstances where the pleader alleges the kind of misrepresentations, omissions, or other deceptions covered by the term "fraud" in its broadest dimension.

Id. at 972.[19]

[19] *See also State v. Apotex Corp.*, 2012 UT 36, ¶ 22, 282 P.3d 66 (Rule 9(c) is not limited to allegations of common law fraud and the rule's purpose dictates that it reach all circumstances where a pleader alleges misrepresentations, omissions or other deceptions covered by the term fraud in its broadest dimension); *Otsuka Elecs. (USA, Inc.) v. Imaging Specialists, Inc.*, 937 P.2d 1274, 1276 (Utah Ct. App. 1997) (applying Rule 9 to fraud affirmative defense); *GDE Constr., Inc. v. Leavitt*, 294 P.3d 567, 571 (Utah Ct. App. 2012) (applying Rule 9 to mistake affirmative defense). Apparently recognizing Rule 9 applies to *all allegations of fraud* irrespective of the procedural posture of the pleading, Plaintiff originally *did not argue* that her allegation of affirmative fraudulent concealment was not subject to Rule 9. *See* R.00525–33 (arguing compliance with Rule 9). Plaintiff argued Rule 9 might not apply to her fraudulent concealment allegations under § 78B-3-404 only *after* the district court's *sua sponte* ruling regarding Rule 9's application.

Utah and federal cases routinely apply Rule 9 when fraud is pled as a possible way around an affirmative defense. For example, in *Norton v. Blackham*, 669 P.2d 857, 858 (Utah 1983), a plaintiff sued after a car accident and the defendant asserted the affirmative defense of a prior release. This Court held that in arguing the release was executed based upon "fraud," the plaintiff was required, *but failed to allege in the complaint*, the elements of fraud under Rule 9. *Id.* at 858.

Most importantly, this Court has found that allegations of affirmative fraudulent concealment satisfying the UHMA's repose exception must be pled with particularity. *See Chapman*, 784 P.2d at 1185–86. In *Chapman*, this Court stated that *allegations* of affirmative fraudulent concealment asserted under § 78B-3-404(2)(b) (at the time designated § 78-14-4(1)(b)) must be made under Rule 9 and "mere conclusory [affirmative fraudulent concealment] allegations in a pleading, unsupported by a recitation of relevant surroundings, are insufficient to preclude *dismissal* or summary judgment." *Id.* (emphasis added). This Court applied Rule 9 *to the statute at issue here*—§ 78B-3-404(2)(b)—and concluded that allegations of affirmative fraudulent concealment by Dr. Veasy, one of the defendant physicians, were sufficient, but such allegations against Dr. Myer, another defendant physician, were not. *Id.*[20]

[20] The trial court in *Chapman* granted summary judgment, finding that because matters outside the pleadings were considered, it was proper to view the matter as resolved under Rule 56. *Id.* at 1182 n.1. This Court noted the procedural history but it applied its analysis to *allegations*, and stated that a failure to comply with Rule 9 will result in "dismissal *or* summary judgment." *Id.* at 1186 (emphasis added).

Roth v. Pedersen is consistent with *Chapman* and addresses allegations that are indistinguishable from those made against Intermountain here. 2009 UT App 313. In *Roth*, the Utah Court of Appeals cited *Chapman* and held that under § 78B-3-404(2)(b) a plaintiff who failed to allege that he consulted with a defendant about prior medical care could not have been affirmatively misled into a delayed filing, and thus has not stated a legally sufficient tolling allegation *under Rule 9*. *Id.* at *3–4.[21] Consequently, the plaintiff's complaint was dismissed. *Id.*

Federal authorities also uniformly agree that Rule 9 applies to allegations of fraudulent concealment meant to plead around an affirmative defense to a facially untimely complaint. The treatise this Court cited in *Tucker*, for example, makes clear allegations of fraudulent concealment meant to toll a limitations period "fall within the heightened pleading requirement of Rule 9(b)." C. Wright & A. Miller, 5A Federal

[21] In connection with his March 7, 2018 leave to amend ruling, the district court cited *Roth* and concluded that "[a]lthough the Court [of Appeals] separately addressed the fraudulent concealment exception to the statute of limitations, it appeared to be addressing Plaintiff's alternative fraudulent concealment *claim* when it held that under Rule 9, that claim must be pled with particularity." R.00315. In *Roth*, the Utah Court of Appeals used the word "claim" without stating whether it intended to reference an affirmative claim or an allegation of fraudulent concealment for tolling (a response to a defense). 2009 UT App 313, at *3. In subsequently moving to dismiss Plaintiff's FAC, Intermountain supplied the district court with the appeal briefs in *Roth*. *See* R.00393–466. Those briefs remove any ambiguity and demonstrate that no affirmative concealment claim was ever made in *Roth*, and the Utah Court of Appeals applied Rule 9 to *tolling allegations under § 78B-3-404(2)(b)* that are indistinguishable from those made here against Intermountain. Specifically, the plaintiff in *Roth*, as Plaintiff has tried to do with Intermountain, relied exclusively on non-disclosure allegations. After these briefs were provided, Plaintiff has not asserted that the *Roth* opinion addresses an affirmative *claim* rather than possible *tolling* of the repose period due to affirmative fraud (*i.e.*, a response to an affirmative defense), and has otherwise failed to distinguish *Roth*.

Practice and Procedure § 1297 (3rd ed. 2017) (superseding § 1357 from 2nd ed.). Additional treatises and federal law uniformly recognize Rule 9 applies to a plaintiff's allegations of fraudulent concealment meant to toll a limitation or repose period.[22]

B. Plaintiff's remaining claims in the FAC fail to satisfy Rule 9(c).

The district court correctly recognized that Plaintiff makes no allegations of *affirmative fraudulent concealment* because Plaintiff fails to allege Intermountain even interacted with her, let alone *caused her* to delay filing her claims through *affirmative* fraud.[23] Instead, Plaintiff's allegations against Intermountain are almost exclusively that

[22] *See* 1 Bus. & Com. Litig. Fed. Cts. § 7:57 (4th ed. 2017) ("[Rule 9] applies where fraudulent concealment is pleaded in anticipation of the affirmative defense of the statute of limitations."); 54 C.J.S. Limitations of Actions § 402 (2018) (a "plaintiff must allege … fraudulent concealment with distinctness and particularity."); *Id.* § 420 (same); *Ballen*, 23 F.3d at 336–37 (affirming dismissal because untimeliness was clear from the complaint's facial allegations and concealment allegations were inadequately pled under Rule 9); *Conerly*, 623 F.2d at 119–20 (same); *Summerhill*, 637 F.3d at 879–80 (same); *Armstrong v. McAlpin*, 699 F.2d 79, 88–89 (2nd Cir. 1983) (same); *Gulley v. Pierce & Associates, P.C.*, 436 Fed. Appx. 662, 664 (7th Cir. 2011) (same).

[23] This stands in contrast to Plaintiff's allegations regarding Dr. Sorensen, whom the district court found had allegedly engaged in "affirmative misrepresentation at the outset" according to Plaintiff's FAC, and that such an initial fraud allegation satisfies the UHMA's fraudulent concealment exception. R.00752. This conclusion, though not required to support the district court's correct finding that Plaintiff has failed to allege any affirmative fraud *by Intermountain* "with any degree of particularity," R.00751, is inconsistent with Utah law. This Court in *Allred ex rel. Jensen v. Allred* held that tolling fraud claims based on fraudulent concealment is appropriate only when the concealment act is *separate from* (and therefore subsequent to) the alleged fraud. 2008 UT 22, ¶ 37, 182 P.3d 337 ("It would be circular to toll the statute of limitations … merely because the defendant commits fraud or breaches a fiduciary duty without some *further showing* that the defendant *also* concealed it from the plaintiff." (emphasis added)). State and federal courts routinely apply this principle from *Allred* to dispose of untimely claims, and applied properly in this case, it provides an independent basis for dismissal of Plaintiff's claims against Intermountain. *See, e.g.*, *Blackburn v. Blue Mtn. Women's Clinic*, 286 Mont. 60, 75 (1997) ("[F]ailure to disclose [must be] an act separate from the alleged act of malpractice upon which the claim for professional negligence rests."); *Liddell v. First*

of general *disclosure* that PFO closure "has not been found to reliably reduce migraines," or at most, passive silence ("IHC made a deliberate and conscious decision *not to inform* patients that they *may* have had a medically unnecessary surgery"). *See, e.g.*, R.00130–32 at ¶¶ 32–34 (emphasis added). Despite the absence of any supporting fraud facts, Plaintiff alleges the bare legal conclusion that her claims against "Defendants" are saved from facial untimeliness under the UHMA's narrow affirmative fraudulent concealment exception. R.00146 at ¶ 108; *State v. Watson Pharmaceuticals Inc.*, 2019 UT App 31, ¶ 19, -- P.3d – (relying on Rule 9(c) to affirm dismissal with prejudice of conclusory fraud claims "pleaded in the collective" against multiple defendants).

Despite this, the district court found Rule 9 inapplicable to an "affirmative fraudulent concealment" allegation made in *response* to an affirmative defense. R.00734. In doing so, the district court effectively barred the statute of repose defense from being raised under Rule 12(b)(6), something that is entirely inconsistent with Utah cases and the very purpose of Rule 9. *See supra* Section II.A. Rule 9 contains no such limitation, and its express language applies to *every allegation* of fraud, whether pled in an affirmative claim, in an affirmative defense, or in a response to an affirmative defense as Plaintiff attempts to do in paragraph 108 of her FAC.

C. Fraud discovery is improper when a plaintiff cannot satisfy Rule 9(c).

Utah and federal case law also recognize that a critical purpose of Rule 9 is to prevent fraud discovery from proceeding *before* fraud has been alleged with particularity,

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Family Fin. Servs., Inc., 146 F. App'x 748, 751 (5th Cir. 2005) ("Plaintiffs must prove a subsequent affirmative act of fraudulent concealment to toll the limitations [period].").

and the scope of such discovery thereby properly framed. *See Shah v. Intermountain Healthcare, Inc.*, 2013 UT App 261, ¶ 12, 314 P.3d 1079 ("[A] plaintiff alleging fraud must know what his claim is when he files it" and a fraud claim should "seek to redress … a wrong, not … find one") (quoting *Farlow v. Peat, Marwick, Mitchell & Co.*, 956 F.2d 982, 990 (10th Cir. 1992) and *Segal v. Gordon*, 467 F.2d 602, 607–08 (2nd Cir. 1972)); *Fid. Nat. Title Ins. Co. v. Worthington*, 2015 UT App 19, ¶ 11, 344 P.3d 156 ("Plaintiff's assertion that they will 'not know until discovery' the specific misrepresentations made is precisely what Rule 9(b) seeks to prevent.").

Indeed, because the filing of the lawsuit itself evidences a plaintiff's undisputed knowledge of his or her claims, a plaintiff alleging claims could not have been brought earlier because of a defendant's fraudulent concealment must necessarily be in possession of the specific facts of such concealment. This is particularly true here, where such concealment must be *affirmative*. Otherwise, a plaintiff lacks the facts needed to bring the suit in the first instance. Relieving a plaintiff of the burden to make such a showing runs counter to the purpose of Rule 9(c), which requires *allegations* of fraud to be pled with particularity, *i.e.*, to keep the doors of discovery closed to fraud claims that are easily alleged, but difficult to prove. Requiring specificity commits a plaintiff to a version of events that must at least appear plausible before being given the full powers of formal discovery to go in search of evidence to support allegations of such serious wrongdoing.

Under this settled law, the district court erred in refusing to dismiss Plaintiff's FAC, and Plaintiff should not be allowed to proceed with discovery regarding an unpled

fraud. Utah and federal cases recognize that discovery in this context is simply improper. *See* cases cited *supra*; *Caprin v. Simon Transp. Servs.*, 112 F. Supp. 2d 1251, 1255 (D. Utah 2000) ("The purpose of Rule 9(b) is to prevent the filing of a complaint as a pretext for the discovery of unknown wrongs."). Accordingly, Intermountain requests that this Court reverse the district court's decision misapplying Rule 12 and refusing to apply Rule 9's heightened pleading standards to Plaintiff's allegations of affirmative fraudulent concealment under § 78B-3-404(2)(b). The Court should dismiss Plaintiff's remaining claims with prejudice.

CONCLUSION

Intermountain respectfully requests that the Court reverse the district court's application of Rules 12(b)(6) and 9(c) of the Utah Rules of Civil Procedure and dismiss as untimely under section 78B-3-404(1) all remaining claims against Intermountain with prejudice.

DATED this 18th day of March, 2019.

MANNING CURTIS BRADSHAW & BEDNAR PLLC

/s/ Jack T. Nelson

Alan C. Bradshaw
Chad R. Derum
John (Jack) T. Nelson

Attorneys for IHC Health Services, Inc.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Rule 24(g) of the Utah Rules of Appellate Procedure. I have relied on the word count function of Microsoft Office Word 2016, which has calculated that the total words in this brief, exclusive of table of contents, table of authorities, addendum, and this Certificate, is 6,654.

/s/ Jack T. Nelson

_____

John (Jack) T. Nelson

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of March, 2019, I caused to be served in the manner indicated below a true and correct copy of the attached and foregoing **BRIEF OF APPELLANT IHC HEALTH SERVICES, INC.** upon the following:

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/s/ Julia Cox

_____

ADDENDUM

Contents: (1) Utah Code § 78B-3-404; (2) August 9, 2018 Order; (3) August 9, 2018 Discovery Order

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.

(3) The limitations in this section shall apply to all persons, regardless of minority or other legal disability under Section 78B-2-108 or any other provision of the law.

The Order of the Court is stated below:
Dated: August 09, 2018 10:29:54 AM **/s/** BARRY LAWRENCE
District Court Judge

Rhome D. Zabriskie

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IN THE THIRD JUDICIAL DISTRICT COURT – SALT LAKE CITY

SALT LAKE COUNTY, STATE OF UTAH

LISA TAPP, Plaintiff, v.	))))))	~~**PROPOSED**~~ **ORDER** Case No. 170904956 **Judge Barry Lawrence**

SHERMAN SORENSEN, M.D.; SORENSEN CARDIOVASCULAR GROUP; AND IHC HEALTH SERVICES, INC., Defendants.	)))))))	

This matter having come before the Court on May 25, 2018 before the Honorable Judge Barry Lawrence. Rand Nolen, David Hobbs, and Rhome Zabriskie appeared on behalf of Plaintiff Lisa Tapp. Alan Bradshaw and Jack Nelson appeared on behalf of Defendant IHC Health Services, Inc., and Michael Miller and Kathleen Abke appeared on behalf of Defendants Sherman Sorensen and Sorensen Cardiovascular Group. The matter before the Court was a hearing on Defendants' motions to dismiss Plaintiffs' amended complaint.

The Court notes the relevant procedural history. After plaintiff filed her Complaint, a motion to dismiss was filed, followed by a request to file an amended complaint. On February 20, 2018, the Court held argument on the motion to amend and rejected defendants' futility arguments in an Order dated March 7, 2018. After the Amended Complaint, was filed another set of motions to dismiss were filed; they were heard on May 14, 2018. The Court announced its ruling in a telephone conference on May 25, 2018. That ruling is reflected herein; but to the extent that ruling differs from this Order, the oral ruling should control.

Having considered the motions, the Court dismisses the fraud/misrepresentation claims against IHC Health Services, Inc. and the conspiracy claim as to all Defendants. Other than that, the Court denies the motions, leaving the negligence claims against Dr. Sorensen, the negligence claims against IHC Health Services, Inc., and the fraud/misrepresentation claims against Dr. Sorensen.

The Court concludes that it cannot rule on the statute of limitation/repose defense based on the pleadings. Plaintiff is not obligated to plead with particularity in her complaint facts in response to the statute of limitation/repose defense. The Plaintiff is not obligated to meet a heightened pleading requirement relating to facts that would serve to defeat an impending defense. *Zoumadakis v. Uintah Basin Med. Ctr., Inc.*, 2005 UT App 325, ¶ 6, 122 P.3d 891, 893–94 ("the burden of pleading the inapplicability of [privilege] is not initially on the plaintiff, and it is not incumbent on the plaintiff or party filing a complaint to anticipate an affirmative defense which the answer may disclose").

The Court is not persuaded by the Defendants' argument to the contrary, and there is a distinction for cases where the complaint is "facially invalid" or untimely. The Court reads Defendants' cited cases as standing for the proposition that when all the facts necessary to determine an affirmative defense are stated in the complaint, then the affirmative defense can be resolved in a Rule 12 motion. That is not the case here where the facts of fraudulent concealment are not in the complaint and can't be unless the issue is before the Court in full.

In *Tucker v. State Farm Mut. Auto. Ins. Co.*, 2002 UT 54, ¶ 8, 53 P.3d 947, all of the

applicable dates were in the complaint and so the court ruled as a matter of law. There was no assertion of a defense to the defense of statute of limitation, and so it was not inappropriate for the court to rule. Again, it appears to the Court that all facts necessary to decide the Rule 12 motion were in the complaint, which again is a far cry from this case. *Van De Grift v. State*, 2013 UT 11, 299 P.3d 1043 was dismissed on immunity grounds because there is immunity for claims that arise based on fraud and the complaint alleged facts of fraud. *Bivens v. Salt Lake City Corp.*, 2017 UT 67 involved exhaustion of remedies, which is a jurisdictional issue. There the complaint made clear that there was no exhaustion. And, in footnote the *Bivens* court said: "We do not hold today that a plaintiff's complaint must affirmatively plead exhaustion of legal remedies." And in *Lowery v. Brigham Young University*, 2004 UT App 182, the complaint on its face reflected when the plaintiff discovered his claim, which meant that as a matter of law, the discovery rule could not apply and, therefore, the court could rule on the pleadings. None of these cases stand for the proposition that a plaintiff in the first instance has the obligation to state facts necessary to defeat a statute of limitations defense at all, let alone with a degree of particularity. The issue of whether the plaintiff can prove fraudulent concealment required under § 78B-3-404 will have to be based upon what we learn factually in discovery and to be decided at summary judgment or at trial. Accordingly, the Court **DENIES** all of the statute of limitations issues raised by the Defendants.

The Sorensen Defendants argue that Plaintiff's claims should be consolidated into one medical malpractice claim. While the Utah Health Care Malpractice Act does have a broad definition of what a malpractice claim is for procedural purposes, the Court is not aware of any

authority that prevents a plaintiff from asserting alternative facts of fraud or negligence against Dr. Sorensen, and the elements of each would have to be proven at trial. However, the Court notes that it appears that there are multiple claims of negligence and multiple claims of fraud, and The Court will not dismiss those at this time. The plaintiff is certainly entitled to pursue its claims. But ultimately at trial, there will be one negligence claim against Dr. Sorensen and one fraud claim and if the standard of care encompasses various things that's fine, but those are not separate claims. Accordingly, the Court **DENIES** the Sorensen Defendants' motion.

IHC Health Services, Inc.'s motion to dismiss the misrepresentation claims is **GRANTED**. It is important to note that there is a distinction here between the fraud associated with the 2008 surgery and any alleged fraud that took place thereafter that is relevant to statute of limitation/repose. The allegations of IHC Health Services, Inc.'s fraud in inducing Ms. Tapp to have surgery are non-existent. There is nothing but conclusory statements where the plaintiff lumps the "defendants" in together and there is not one fact in the complaint that would support that IHC Health Services, Inc. was somehow involved in a fraud in 2008. There is no fact stated in the complaint that even alleges, let alone with any degree of particularity, as required under Rule 9, U.R.C.P., that IHC Health Services, Inc. was involved in a fraud on Plaintiff in 2008. So that claim against IHC Health Services, Inc. is **DISMISSED**. The fraud claim against Dr. Sorensen will survive and the motion **DENIED**. There are ample allegations of facts supporting this fraudulent inducement theory in 2008 by Dr. Sorensen. But there is absolutely nothing demonstrating any fraud by IHC Health Services, Inc. or any sort of illegal conduct or wrong by IHC Health Services, Inc. and the predicate for a conspiracy claim has not been alleged. There

are no facts alleged against IHC Health Services, Inc. of fraud and conspiracy at the time the surgery was done.

The conspiracy claim, like the fraud claims, is governed by Rule 9 and Rule 9 requires a showing of particularity. *Williams v. State Farm*, 656 P.2d 966 (1982); *Coroles v. Sabey*, 2003 UT App 339, 79 P.3d 974 (2003); *Fidelity Nat. Title Ins. Co. v. Worthington*, 2015 UT App 19, 344 P.3d 156. Having dismissed fraud claims against IHC Health Services, Inc. the Court is compelled to dismiss the conspiracy claim between the Defendants as well. (Having dismissed the underlying predicate for the conspiracy claim (i.e., the fraud claim), there can be no conspiracy claim as a matter of law.). The Court **GRANTS** Defendants' motions as to conspiracy and **DISMISSES** the conspiracy claim against all Defendants.

In summary, the Court:

GRANTS IHC Health Services, Inc.'s motion as to the misrepresentation claims and **DISMISSES** the Third; Fifth; and Sixth Claims for Relief against IHC Health Services, Inc.;

GRANTS the Defendants' motions as to the conspiracy claim and **DISMISSES** the Seventh Claim for Relief against all Defendants; and otherwise

DENIES the motions to dismiss.

*****Executed and entered by the Court as indicated by the date and seal at the top of the first page*****

----------END OF DOCUMENT----------

Approved as to form:

ZABRISKIE LAW FIRM

/s/ Jack T. Nelson (signed with permission on behalf of David Hobbs)
David Hobbs

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STRONG & HANNI

/s/ Jack T. Nelson (signed with permission on behalf of Michael J. Miller)
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CERTIFICATE OF SERVICE

I hereby certify that that a true and exact copy of the foregoing has been served on the following via email on 31st day of July 2018:

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/s/ Jack T. Nelson

THIRD JUDICIAL DISTRICT COURT, STATE OF UTAH

SALT LAKE COUNTY, SALT LAKE DEPARTMENT

LISA TAPP, Plaintiff, v. SHERMAN SORENSEN, M.D., et. al., Defendants.	**DISCOVERY ORDER BASED ON THE INTERPRETATION OF UTAH CODE ANN. § 78B-3-404 AND DISCOVERY PLAN** Case No.: 170904956 Judge: BARRY G. LAWRENCE

The parties have met and conferred as ordered by the Court to attempt to reach an agreement as to the scope of discovery in this matter. The parties have been unable to reach a consensus and have each submitted a proposed discovery plan. The proposal for each side is dramatically different, because each side views the governing statute (the fraudulent concealment exception to the four-year statute of repose contained in the Medical Malpractice Act, Utah Code Ann. § 78B-3-404 (2)(b)) differently. All parties have sufficiently briefed the issues relating to the statute's interpretation in conjunction with the Defendants' motions to dismiss, and have supplemented that with the materials submitted in support of their respective discovery plans. Accordingly, in order to properly set the parameters for discovery, the Court issues the following rulings regarding the interpretation of the noted statute and the scope of discovery.

I. THE COURT'S INTERPRETATION OF SECTION 404 CONTROLS THE DISCOVERY PLAN

A. The Court's Role in Interpreting the Statute

First, the Court notes that the issue of statutory interpretation is a purely legal determination for this Court. *Waite v. Utah Labor Commission*, 2017 UT 86, ¶ 5, 416 P.3d 635. Moreover, under the established rules of statutory construction, this Court looks "first to the plain meaning of the pertinent language in interpreting this section; only if the language is ambiguous [is it to] consider other sources for its meaning." The statute must be interpreted "in harmony with other statutes in the same chapter and related chapters." *Fla. Asset Financing Corp. v. Utah Labor Com'n*, 2006 UT 58, ¶9, 147 P.3d 1189. And, the Court is to give "effect to every word of a statute, avoiding any interpretation which renders parts or words in a statute inoperative or superfluous." *Turner v. Staker & Parson Companies*, 2012 UT 30, ¶ 12, 284 P.3d 600. *See also Scott v. Scott*, 2017 UT 66, ¶ 22 ("When we interpret statutes, our primary objective is to ascertain the intent of the legislature. Since the best evidence of the legislature's intent is the plain language of the statute itself, we look first to the plain language of the statute. In so doing, we presume that the legislature used each word advisedly. When we can ascertain the intent of the legislature from the statutory terms alone, no other interpretive tools are needed, and our task of statutory construction is typically at an end." (citations and quotations omitted)).

The goal "is to give effect to the legislative intent, as evidenced by the statute's plain language, in light of the purpose the statute was meant to achieve." *Fla. Asset,* 2006 UT 58 at ¶ 9 (citation and quotations omitted). Notably, the legislature codified its "Legislative Findings and Declarations" stating their intent behind the Health Care Malpractice Act ("Act") in Utah Code Annotated Section 78B-3-402 (addressing the purpose of the Act). The

Act was borne out of the legislatures' concern that increasing malpractice claims had resulted in "substantial increases" in medical malpractice insurance, and the resulting "increased health care costs" which are then passed through to the patient. *See* Utah Code Ann. §78B-2-402(1). The legislature also recognized the concern that this in turn caused doctors to "practice defensive medicine" and discouraged some health care providers "from continuing to provide services because of the high cost and possible unavailability of malpractice insurance." *Id.* Thus, the legislature intended to curtail medical malpractice cases in the "public interest by enacting measures designed to encourage private insurance companies to continue to provide health-related malpractice insurance while at the same time establishing a mechanism to ensure the availability of insurance in the event that it becomes unavailable from private companies." *Id.*, §78B-2-402(2).

Paragraph 3 of that section expressly addresses the applicable statute of limitations:

> In enacting this act, it is the purpose of the Legislature to provide 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*; and to provide other procedural changes to expedite early evaluation and settlement of claims.

Id. (emphasis added.) The Court is mindful of this intent in its analysis of Section 78B-3-404(2)(b).

B. <u>The Applicable Statute of Limitations and its Exceptions</u>

Plaintiff's claims herein are all governed by the Utah Healthcare Malpractice Act. Subpart (1) of Section 78B-3-404 provides that such claims are subject to a two-year statute of limitations and four-year statute of repose. *See* Utah Code Ann.. §78B-3-404. Subpart (2) carves out two exceptions to the applicable statute of limitations and repose. *Id.* There is no dispute that here, where the surgery at issue in this matter took place in 2008 and the related

lawsuit was not filed until 2017, that Plaintiff's claim would be barred if not for one of the exceptions.

The first exception, Sec. 78B-3-404(2)(a), applies when "a foreign object has been wrongfully left within a patient's body," in which case the claim does not begin to run until the patient discovers "the existence of the foreign object wrongfully left in the patient's body." *Id.* That exception *does not* apply on its face to the present facts based on the plain language of the statute. Here, the "device" that was placed into Plaintiff was the precise device that was contemplated for the surgery that Dr. Sorensen performed. Accordingly, it was not a "foreign" object.[1] Moreover, and perhaps more to the point, this exception contemplates that a patient *does not know* that an object has been placed in her body; thus the statute does not begin to run until its discovery. Here, the patient knew all along that a device had been placed in her body. It would be non-sensical to apply this statute to medical devices that were the very object of a patient's surgery.

The second exception to the statute – which is at issue here – is the exception for certain acts of fraudulent concealment. *See* Sec. 78B-3-404(2)(b). That exception provides:

> (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.

[1] The common understanding of this statute has been that it applies where, for example, a sponge has been left in a person's body. *See e.g., Day v. Meek,* 1999 UT 28, 976 P.2d 1202. That is simply not the type of case we have here.

Id. (emphasis added.) The burden is on the party seeking to avail itself of this exception, in this case the Plaintiff. *See e.g. Russell Packard Dev., Inc. v. Carson*, 2005 UT 14, ¶¶ 27-29, 108 P.3d 741.

This exception thus requires a plaintiff to show the following:

1. That the provider "*affirmatively acted* to fraudulently conceal the alleged misconduct."
2. That, as a result, the plaintiff was prevented from discovering the provider's misconduct.
3. That plaintiff filed her claim within one year of (actually or constructively) discovering concealment.

Id. Moreover, the Court notes that the language of the statute plainly requires a plaintiff to prove fraudulent concealment on the part of each of the respective providers. (The statute refers to fraudulent acts of "*that* health care provider." *Id.*) Thus, the analysis for the claims against Dr. Sorensen is distinct from the analysis against the IHC; all parties appear to recognize that to be the case. The Court will thus address them separately.

C. Applying the Statute to Defendant, Dr. Sorensen

Plaintiff alleges that Dr. Sorensen engaged in fraudulent conduct from the outset (in this case beginning in 2008 when he performed surgery on Plaintiff) by misrepresenting the need and medical efficacy of the surgery at issue. She alleged that from then on, Dr. Sorensen – her physician – occupied a position of trust and thus was obligated to disclose that his actions were appropriate. Thus, Plaintiff argues that she was prevented from discovering Dr. Sorensen's misconduct because Dr. Sorensen *affirmatively acted to fraudulently conceal the alleged misconduct* in an ongoing course of events from 2008 until 2016. In other words,

the fraudulent misrepresentation at the outset, followed by years of perpetuating that falsehood by his silence, meets the standard for fraudulent concealment under the statute.

On the other hand, Dr. Sorensen argues that the statute implicitly requires some *later affirmative act* of fraud that kept Plaintiff from discovering the wrongfulness of his actions. In other words, he argues that a provider who "tricks" a patient into having an unnecessary surgery, can get away with his actions so long as he perpetuates the lie by remaining silent.

The parties' dispute is likely the result of a unique fact pattern. The language of the statute appears to contemplate the classic fact pattern where: i) a provider engages in negligence and commits malpractice; ii) the provider later recognizes his/her error, and engages in a course of conduct designed to cover up his/her mistake; iii) patient discovers the "cover up" years after the statute of repose expires. In those situations, it is easy to see the inequity of applying the statute of repose to bar claims for such patients' (who are the victim of malpractice *and* the victim of a subsequent fraud.) Here, it is alleged that Dr. Sorensen engaged in negligent *and fraudulent* conduct from the outset, and allegedly continued to perpetuate his fraud by continuing to conceal the truth from his patients. Although this may be a unique factual circumstance, the Court must nonetheless strive to interpret the statute according to its plain meaning.

The plain language of the statute does not support Dr. Sorensen's position. The Court does not read the statute to require a *later* act of fraud when, as alleged here, there was *an affirmative act of fraud at the outset.* In other words, Dr. Sorensen's affirmative misrepresentation at the outset suffices under the statute; there is no express requirement for a second or later act of fraud; nor is the Court persuaded by Dr. Sorensen's arguments that there is an implicit requirement for a subsequent fraudulent act.

Moreover, interpreting the statute as argued by Dr. Sorensen would lead to an unintended and absurd result. The result would be that the statute applies to give a plaintiff a remedy if he/she was the victim of negligent conduct, *followed* by a fraudulent cover-up. Yet, it would not apply if the patient were the victim of a fraudulent scheme (at the hands of its trusted medical provider no less), where the provider continued to perpetuate a fraudulent scheme to cover up his actions. The result posed by Dr. Sorensen would literally treat a doctor who engages in an ongoing scheme of fraud, better than a doctor whose primary error was negligence, but followed by a fraudulent course of conduct to cover up a mistake. The Court cannot find support in the statute for such an interpretation.

Thus, in order to avail herself of this statutory exception against Dr. Sorensen, it is sufficient for Plaintiff to show that Dr. Sorensen's (alleged) fraudulent representations at the outset met the statute's requirement of an "affirmative act of fraudulent concealment." Accordingly, Plaintiff is entitled to *broadly* inquire of Dr. Sorensen about this alleged conduct and pattern of alleged fraud from the beginning of his doctor-patient relationship with her, until this case was filed. That discovery would address Dr. Sorensen, his actions and his medical records, and communications with Plaintiff, which can be fully explored in his deposition.

D. <u>Applying the Statute to Defendant, IHC</u>

Applying this statute to IHC is far more complicated. IHC was not involved in any alleged fraud from the outset; instead, Plaintiff claims that at some point later in time, IHC learned about Dr. Sorensen's malfeasance and thus had a duty to alert Plaintiff. (In fact, the Court dismissed on a Rule 12 motion Plaintiff's claims of fraud against IHC relating to the

surgery in 2008 because there were no facts pled, let alone facts with a level of particularity, to support such a claim against IHC.)

As there is no initial affirmative act of fraud by IHC, Plaintiff has a much steeper hill to climb to avail itself of the statutory exception at issue. Plaintiff nonetheless argues that IHC had a duty to make a disclosure (i.e., to not remain silent) to Plaintiff based on the parties' relationship; in other words, IHC's silence in the face of such a duty was itself an act of fraudulent concealment. Plaintiff's position, however, fails to ascribe any meaning to the phrase "affirmative act;" instead relying on the broader, general interpretation of "fraudulent concealment."

On the other hand, IHC argues that the statute does not just require Plaintiff to prove "fraudulent concealment" (which, in the normal parlance, might encompass silence in the face of a duty to disclose) but a much narrower "*affirmative act* to fraudulently conceal." Thus, IHC argues that the legislature expressly intended to exclude the very scenario argued by Plaintiff – i.e., that a duty to disclose arose based on the parties' relationship, such that IHC's silence was itself an act of fraudulent concealment. Because IHC's proposed interpretation is consistent with the settled rule of statutory construction to give vitality to *every* term and phrase, and Plaintiff's interpretation is not, the Court adopts IHC's interpretation of the statute.

In *Jensen v. IHC*, 944 P.2d 327 (Utah 1997), the Utah Supreme Court summed up the parameters of the principle of fraudulent concealment, in a case that likewise addressed this very statute, and recognized the two branches that comprise the concept of fraudulent concealment, explaining:

> Fraudulent concealment requires that one with a legal duty or obligation to communicate certain facts remain silent or otherwise act to conceal material

> facts known to him. Such a duty or obligation may arise from a relationship of trust between the parties, an inequality of knowledge or power between the parties, or other attendant circumstances indicating reliance. The party's silence must amount to fraud, i.e., silence under the circumstances must amount to an affirmation that a state of things exists which does not exist, and the uninformed party must be deprived to the same extent as if a positive assertion had been made. Such concealment or nondisclosure becomes fraudulent only when there is an existing fact or condition ... which the party charged is under a duty to disclose. *Making use of a device that misleads, some trick or contrivance that is intended to exclude suspicion and prevent inquiry, may also amount to fraudulent concealment. It is this aspect of fraudulent concealment that is at issue in the instant case.*

Id. at 333. In other words, there are two independent sets of circumstances that can give rise to a showing of "fraudulent concealment": 1) silence when there is a duty to disclose; and, 2) an affirmative act concealing material facts, i.e., by "making use of a device that misleads, some trick or contrivance that is intended to exclude suspicion and prevent inquiry." *Id.* And, the only way to reconcile the legislature's use, in Section 404, of the phrase "affirmatively acted to fraudulently conceal" rather than the broader "fraudulently concealed," is that the legislature intended that only the "affirmative act" branch of fraudulent concealment – and not concealment by silence –would apply as an *exception* under the statute.

Thus, while Plaintiff is correct that the term "fraudulent concealment" *generally* encompasses both silence when one should speak as well as affirmative conduct, only the latter provides the predicate for an exception *under this statute*. This Court must interpret the statute to recognize that distinction and give vitality to the phrase "affirmative act." Conversely, if this Court were to adopt Plaintiff's view, then the phrase "affirmative act" would effectively be written out of the statute.[2]

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[2] It would be improper for this Court to essentially re-write the statute *see e.g., Gables at Sterling Village Homeowners Association, Inc. v. Castlewood-Sterling Village I, LLC*, 2018 UT 04, ¶ 42, 417 P.3d 95, rather than presume that the legislature "used each word advisedly." *Bagley v. Bagley*, 2016 UT 48, ¶ 10, 387 P.3d 1000.

So, regardless of the relationship between Plaintiff and IHC, and even assuming that based on that relationship IHC might normally have had a duty to make certain disclosures to Plaintiff (which the Court does not reach) which might normally constitute "fraudulent concealment," those types of facts are irrelevant here, where only "affirmative acts of fraudulent concealment" may toll the statute of repose. Thus, only affirmative acts or devices by IHC designed to mislead Plaintiff are relevant to this inquiry. And, based on the requisite causal nexus (i.e., the affirmative conduct must be the *cause* of a plaintiff's inability to have discover the alleged misconduct by the provider), only those affirmative acts directed toward the patient are relevant under this statute. (So, the unfettered discovery of IHC sought by plaintiff appears to go well beyond the material issues relating to whether her claims are timely under this statute.)

Admittedly, this view of the statute could lead to inequitable results in some circumstances where a provider remains silent but might otherwise have a duty to speak. However, this Court presumes that the legislature chose its words for the statute advisedly, recognized that distinction, and intended to enact a narrow exception to the statute of repose predicated on a demonstrable affirmative act, and not based on a more factually intensive determination concerning whether a party has a duty to make disclosures. Further, this view is supported by the cautionary language in the legislature's findings and declarations regarding the need for strict statutes of limitation and statutes of repose in medical malpractice cases. *See* Utah Code Ann. § 78B-3-402.

II. THE RESULTING DISCOVERY PLAN

A. The Impact of the Statute Upon Discovery

Bifurcation: As the Court has stated previously, given the significant time that has elapsed since the medical care at issue was provided (in 2008), supporting a statute of limitations defense, it is reasonable to bifurcate the statute of limitations analysis from the merits in this case. In fact, the legislature envisioned such a process. *See* Utah Code Ann. § 78B-2-114 ("An issue raised by the defense regarding the statute of limitations in a case may be tried separately if the action is for professional negligence or for rendering professional services without consent[.]") This is particularly indicated here, where the issue on the statute of limitations is a fraudulent concealment analysis, which is distinct from a determination on the merits, and which would undoubtedly be prejudicial to the merits analysis, particularly as to IHC.

The Court is mindful of Plaintiff's concern of possible duplicative discovery on the bifurcated proceedings, and to some extent shares that concern. The Court will indicate in which circumstances it is reasonable to conduct discovery that goes beyond the statute of limitations issue and addresses the merits of this case, to avoid such duplication. Namely regarding the discovery (depositions and document requests) between plaintiff and Dr. Sorenson; there is no good reason not to allow the parties to undertake merits discovery at the same time the parties are discovering facts relating to Dr. Sorenson's statute of limitations defense.

Rule 26 Limits on Discovery: Rule 26 sets forth the limitations on discovery. Generally, "[p]arties may discover any matter, not privileged, which is relevant to the claim or

defense of any party if the discovery satisfies the standards of proportionality set forth below." U.R.C.P. 26(b)(1). Among other things, Rule 26(b)(2) states that discovery is proportional if "[it] is reasonable, considering the needs of the case, the amount in controversy, the complexity of the case, the parties' resources, the importance of the issues, and the importance of the discovery in resolving the issues;" and if "the likely benefits of the proposed discovery outweigh the burden or expense." Moreover, "[t]he party seeking discovery always has the burden of showing proportionality and relevance." *Id.* at R. 26(b)(3). Finally, the Court notes that Rule 26(c)(5) sets forth presumptive limits on discovery and even for the most complicated Tier 3 cases, "standard fact discovery" only allows 30 hours of depositions per side, and requires 210 days for fact discovery to be completed – subject, of course, to extensions and reprieves for "extraordinary" circumstances.

On one hand, as a Tier 3 case, there are prescriptive standards that must be considered.[3] On the other hand, delving into areas that can have no relevance to the parties' dispute take those areas of inquiry outside the parameters of Rule 26(b)(1) ("[Parties may discover any matter, not privileged, *which is relevant to the claim*[.]")

Discovery Relating to Dr. Sorenson: The Court has adopted, in large part, Plaintiff's view of the statute as it pertains to Dr. Sorensen. Plaintiff should be permitted to broadly explore any and all issues relating to the claims and the statute of limitations defense, as it relates to Dr. Sorenson.

Moreover, the Court agrees that the scope of discovery should be for the period 2008 (i.e., to begin with Plaintiff's initial encounter with Dr. Sorensen) through 2012. Any pre-

[3] Although given that there are many cases pending that will address these Defendants and these circumstances and likely this very question, principles of proportionality preponderate in favor of broad discovery here. That discovery, nonetheless, can only address *relevant* inquiries.

2008 conduct is irrelevant for these purposes; and, both parties agree that the scope of discovery need not go beyond September 18, 2012.

Discovery Relating to IHC: As the Court has adopted IHC's interpretation of the statute, the Court has serious reservations regarding the broad based discovery requested by Plaintiff of IHC.[4] That discovery plan – which seeks a fishing expedition into IHC's administration, knowledge, and decision-making, as well as its relationship between Dr. Sorensen and IHC – is not relevant to the narrow issue of the statute of limitations based on *affirmative* fraudulent conduct and therefore, would not be proportional under Rule 26. *See e.g. Heslop v. Bear River Mutual Insurance Company*, 2017 UT 5, ¶ 51, 390 P.3d 314 ("[O]verly broad areas of inquiry may suggest to a court that a party is involved in a 'fishing expedition' rather than a sincere opportunity to provide the court with information[.]" (citation omitted)). Accordingly, the Court rejects much of Plaintiff's requested discovery and adopts, generally, IHC's view of permissible discovery, with some modifications.

B. The Discovery Order

The Court intends this Discovery Order to constitute guidelines for discovery. The Court does not intend to micromanage the discovery process, and expects counsel to work together to schedule and complete fact discovery relating to the statute of limitations issue given these general parameters.

1. The Scope of Documents Review

[4] Plaintiff has requested for example, the following discovery from IHC: communications between themselves, other physicians, staff, and patients regarding patent foramen ovale ("PFO") procedures; internal guidelines, standards, and practices relating to surgical procedures and PFO procedures specifically; written and oral patient information, and patient contact; advertising; written communications relating to the information that was disseminated to the public and specifically to patients regarding PFO procedures, including but not limited to eligibility for the procedure, diagnosis, benefits, risks, and short and long term prognosis; follow up correspondence to patients, and other relevant documents related to the above. *See* Pl.'s Proposed Discovery Plan, ¶4.

The Court rejects Plaintiff's broad request to delve into all of the communications "between [the named Defendants], other physicians, staff, and patients regarding patent foramen ovale ("PFO") procedures" and IHC's "internal guidelines, standards, and practices relating to surgical procedures and PFO procedures" and other information that appears related to other patients and the public regarding PFO procedures. *See* Pl.'s Proposed Discovery Plan, ¶4. On the other hand, discovery should not be quite as antiseptic as IHC requests. First, limiting discovery to *interactions* between Plaintiff and IHC seems too narrow. Plaintiff is at least entitled to receive any documents that IHC may have that in any way relate or refer *to this particular plaintiff*, including any medical records, or otherwise. All such documents would clearly be discoverable on the merits, and so for economy purposes, Plaintiff is entitled to *broadly* receive any and all documents maintained by Dr. Sorensen and/or IHC that concern, refer to, reflect or address Plaintiff and her medical care, just as she would be entitled in any other medical malpractice case. Plaintiff's broader request for all IHC documents including internal discussions and communications regarding *other* patients and the PFO procedure generally, do not appear relevant to IHC's statute of limitations defense.

Accordingly, Plaintiff may discover all documents that Defendants have that relate to her medical care, treatment and follow-up, including any communications regarding or otherwise *pertaining to her*. Any document that identifies her by name (or any other type of identification marker e.g., account no., patient no., etc) should be provided. However, as to IHC, plaintiff is not entitled to embark on the fishing expedition she proposes.

In turn, Defendants are of course entitled to any document Plaintiff may have that concerns, refers or relates to her medical condition, care and treatment.

2. Depositions

Defendants may depose Plaintiff on all issues (i.e., relating to the limitations defense *and* the merits to avoid potential duplication of efforts.) Similarly, Plaintiff may depose Dr. Sorensen broadly on all issues as well (i.e., relating to the limitations defense *and* the merits to avoid potential duplication.) Plaintiff may depose the appropriate IHC representatives; for those, however, the Court will limit that discovery to the issues relating to statute of limitations as discussed above – i.e., affirmative contact, communications, treatment and interactions between IHC and this specific plaintiff.

Any depositions of others, to the extent necessary, are obviously subject to the parameters stated herein.

3. Rule 26 Limits and Scheduling Order

Tier 3 Discovery under Rule 26 contemplates: 210 days to complete fact discovery, with the following limits per side: 30 hours of fact depositions, 20 Interrogatories, 20 Requests for Admissions, and 20 Requests for Production. At this time, the Court orders the following (mainly addressing the statute of limitations defense with the broader exception for merits discovery, as indicated above):

1. The fact discovery deadline for this bifurcated statute of limitations issue is December 31, 2018.
2. Plaintiff is entitled to 25 hours of fact depositions. Dr. Sorenson and IHC are each entitled to 18 hours of depositions. The parties may divide these hours up however they wish, and the Court expects counsel to cooperate with one another to schedule and complete all necessary depositions. (Given the Court's decision above, it

would appear that most of that deposition time will be spent deposing Ms. Tapp and Dr. Sorenson, addressing *both* to the limitations defense and the merits.)

3. Each side may utilize 10 interrogatories, 10 requests for admissions, and 10 requests for production. (Although, given the Court's decision stated above regarding Defendants' documents that must be produced, the Court would expect many of those documents to be provided as part of the parties' initial disclosures or stipulation without the need for a formal discovery request.)
4. The Court will hold a scheduling conference on January 2, 2019, at 9:30 a.m., after the close of fact discovery, to set the bifurcated limitations defense for trial. (Although Plaintiff originally requested a five day trial, it appears that a much shorter trial will be necessary based upon the Court's limited construction of Section 404.)

III. THE BENEFIT OF AN IMMEDIATE APPEAL

The Court recognizes the practical implications of this case. According to the parties, there are hundreds of cases involving alleged improper surgeries undertaken by Dr. Sorensen. As this is the first case to progress into discovery, the Court recognizes the importance of this decision in particular. As stated above, this Court's decision placing limitations on discovery is based on its interpretation of the statute at issue. The issue of that statute's construction to the facts of this unique case is novel, and there are many more cases to come.

Although this is not a final order, the Court believes that appellate review of the matter now would be helpful for at least three significant reasons:

First and foremost, having a reported decision on the case will help to avoid inconsistent rulings by the various state district courts. Every case will need to address the

issue regarding the interpretation of Section 404 and the scope of discovery. Having a reported appellate decision would help provide guidance to the parties and uniformity in administering those cases.

Second, an appeal at this juncture would promote judicial economy. A reported decision with a clear statement of the law would help to avoid protracted motion practice in every one of the hundreds of cases. Otherwise, there will likely be Rule 12 Motions and significant discovery disputes in every case. Having one decision from an appellate court will allow the district courts to better manage their dockets.

Finally, an appellate determination would help set the parties' expectations in these cases which could possibly lead to a resolution. Plaintiff's counsel has stated that they intend to bring a few cases as "trial balloons," and that based on the results in these few cases might be able to gauge the value of the remaining cases and try to resolve them. Early intervention from the appellate courts would aid in that process.

For all of these reasons, this Court welcomes appellate review of this order at this time, before discovery proceeds. Moreover, today, this Court also entered its order denying Defendant's Motion to Dismiss. Again, even though neither of these is a final order, "there is no just reason to delay" appellate review of either of these rulings. U.R.C.P., Rule 54(b). This Court would welcome that review at this time given the unique circumstances of this case and the hundreds of others that are similarly situated.

This ruling and order stands as the orders of this Court as to the matters addressed herein. No further order is required. U.R.C.P. 7 (j)(1).

So ORDERED this 9th day of August 2018.

BY THE COURT:

BARRY G. LAWRENCE
DISTRICT COURT JUDGE

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 170904956 by the method and on the date specified.

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Date: 08/09/2018 /s/ NICOLE ODOHERTY

Deputy Court Clerk