IN THE UTAH SUPREME COURT

Johannah Bright, Lisa Tapp, and Pia Merlo-Schmucker, Appellees/Respondents, v. Sherman Sorensen, M.D.; Sorensen Cardiovascular Group; St. Mark's Hospital; and IHC Health Services, Inc., Appellants/Petitioners.	**BRIEF OF APPELLANTS SHERMAN SORENSEN, M.D. AND SORENSEN CARDIOVASCULAR GROUP** Supreme Court No. 20180528-SC

On Consolidated Interlocutory Appeal from the Third District, Salt Lake County

Rhome D. Zabriskie **Zabriskie Law Firm LLC** 899 North Freedom Blvd., Suite 200 Provo, Utah 84604 Rand Nolen David Hobbs **Fleming, Nolen & Jez, LLP** 2800 Post Oak Blvd., Suite 4000 Houston, Texas 77056 Troy Booher **Zimmerman Booher** 341 S. Main Street, 4th Floor Salt Lake City, Utah 84111 Attorneys for Appellees/Respondents	Michael J. Miller Kathleen J. Abke Scarlet R. Smith **Strong & Hanni** 102 South 200 East, Suite 800 Salt Lake City, Utah 84111 Attorneys for Appellants/Petitioners Sherman Sorensen M.D. and Sorensen Cardiovascular Group

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INTRODUCTION

The central question in this appeal is whether a plaintiff can circumvent the clearly stated repose period in the Utah Health Care Malpractice Act ("the Act") by broadly alleging that the health care provider affirmatively acted fraudulently to conceal his misconduct. Utah Code Ann. § 78B-3-404. Utah law makes clear that a statute of repose cannot be equitably tolled. *Jensen v. Intermountain Healthcare, Inc.*, 2018 UT 27, ¶ 30 n.5, 424 P.3d 885. Indeed, by their very nature, statutes of repose "generally may not be tolled, even in cases of extraordinary circumstances beyond a plaintiff's control." *CTS Corp. v. Waldburger*, 573 U.S. 1, 9 (2014) (explaining that "a repose period is fixed and its expiration will not be delayed by estoppel or tolling" (citation and internal quotation marks omitted)). "Statutes of repose effect a legislative judgment that a defendant should be free from liability after legislatively determined period of time." *Id.* (citation and internal quotation marks omitted). Thus, the answer is clear, something more than a conclusory allegation is necessary to overcome the Act's repose period, if at all possible.

In this appeal, Appellees each commenced malpractice actions against the Appellants, alleging that they underwent medically unnecessary procedures performed by Dr. Sherman Sorensen. They also allege that the hospital at which

the procedure was performed knew Dr. Sorensen performed an unusually high number of cardiac procedures and encouraged Dr. Sorensen business for financial gain. Each Appellee alleges that they underwent the procedure between 2008 and 010. They also allege that Dr. Sorensen stopped performing these procedures in 2012. But none of the Appellees commenced their malpractice actions until January 2017 or later. Thus, it is generally undisputed that Appellees actions are time-barred by the Act's four-year repose period. Utah Code Ann. § 78B-3-404(1).

Appellees nevertheless broadly allege that they may proceed under a statutory exception in the Act that allows for more time to commence an action when the medical provider affirmatively and fraudulently concealed his malpractice. *Id.* § 78B-3-404(2)(b). The Act specifically provides:

> [I]n 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.

Id. But the district court generally concluded that a plaintiff need not allege fraudulent concealment or equitable tolling with any level of particularity because

they were not expected to plead facts in anticipation of affirmative defenses. This cannot be correct.

When read as a whole, the Act's repose period serves no other purpose than to provide a maximum cutoff for filing claims. The Legislature explicitly explained that the purpose of the Act was to "provide a reasonable time in which actions may be commenced against health care providers *while limiting that time to a specific period.*" *Id.* § 78B-3-402(3). As such, the statute of repose may not be tolled.

In any event, "when the dates given in the complaint make clear that the right sued upon has been extinguished, the plaintiff has the burden of establishing a factual basis for tolling the statute." *Aldrich v. McCulloch Props., Inc,*, 627 F.2d 1036, 1041 n.4 (10th Cir. 1980) (concluding statute of repose question may be decided on 12(b)(6) motions to dismiss); *Young Res. Ltd. P'ship v. Promontory Landfill LLC*, 2018 UT App 99, ¶ 31, 427 P.3d 457 ("[W]hen the face of the complaint would otherwise establish that the claims are time-barred, a plaintiff presumably bears some burden to invoke the discovery rule."). To meet this burden at the pleading stage, the plaintiff must *plead* facts sufficient to toll the applicable limitations period. *Tolle v. Fenley*, 2006 UT App 78, ¶ 55, 132 P.3d 63; *accord Tracey v. Blood*, 3 P.2d 263, 266 (Utah 1931) ("Apparently all courts are agreed, and in this

case it is conceded that the burden was upon the plaintiff to plead and prove facts sufficient to toll the statute of limitations."). Indeed, by the plain language of the statutory exception, a plaintiff must allege certain information including fraud and some affirmative act on the health care provider's part to trigger the exception. Utah Code Ann. § 78B-3-404(2)(b).

Moreover, "the plaintiff must make an initial showing that he did not know nor should he have reasonably known the facts underlying the cause of action in time to reasonably comply with the limitations period." *Young Res.*, 2018 UT App 99, ¶ 27 (citation and internal quotation marks omitted). "If a plaintiff had no such burden, 'a 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.'" *Id.* ¶ 31 (quoting *Butler v. Deutsche Morgan Grenfell, Inc.*, 2006-NMCA-084, ¶ 33, 140 P.3d 532).

The Amended Complaints allege no facts showing that, even taken as true, Dr. Sorensen affirmatively acted fraudulently to conceal his misconduct. Appellees failed to plead fraudulent concealment with any level of particularity as required by Rule 9(c) of the Utah Rules of Civil Procedure. Moreover, they completely failed to allege facts that can show that they were diligent in pursuing

their claim, that can show their actions were commenced within one year from discovering the alleged fraud, or that can show how the alleged concealment prevented discovery. Thus, considering the purpose of the repose period and that they have done nothing to show that they were prevented from discovering their cause of action, Appellees' claims fail as a matter of law and should be dismissed.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. *Issue*: The first issue turns on whether the Act's repose period can be tolled by a simple allegation of fraudulent concealment under the Statute's plain language.

   Preservation of Issue: (Bright 26–27, 245–247, 379–80, 658–59; Merlo 169–171, 401–02, 629–63, 663; Tapp 333.)

   Standard of Review: This issue presents a statutory construction question that appellate courts review for correctness. *Jensen v. Intermountain Healthcare, Inc.*, 2018 UT 27, ¶ 5, 424 P.3d 885.

2. *Issue*: The second issue is whether the trial courts erred when it determined that Appellees were not required to plead the Act's fraudulent concealment exception with any amount of particularity.

   Preservation of Issue: (Bright 382–383; Merlo 401–03; Tapp 337–38.)

Standard of Review: This issue also presents a statutory construction question that appellate courts review for correctness. *Id.* Moreover, reviewing a court's decision to grant or deny rule 12(b)(6) motion to dismiss is a question of law, which the appellate court reviews for correctness. *Salt Lake City Corp. v. Big Ditch Irrigation Co.*, 2011 UT 33, ¶ 19, 258 P.3d 539.

3. *Issue*: The third issue is whether Appellees sufficiently pleaded their claim for fraudulent concealment to survive a motion to dismiss under Rule 12(b)(6) of the Utah Rules of Civil Procedure.

   Preservation of Issue: (Bright 247–248, 380–81, 441; Merlo 177–180; Tapp 333–337.)

   Standard of Review: "A rule 12(b)(6) motion to dismiss admits the facts alleged in the complaint, but challenges the plaintiff's right to relief based on those facts." *Russell v. Standard Corp.*, 898 P.2d 263, 264 (Utah 1995). But legal conclusions, deductions, or opinions couched as fact do not bind the court. As such, the court looks to the sufficiency of the pleadings, *Oakwood Village LLC v. Albertsons, Inc.*, 2004 UT 101, ¶¶ 8–9, 104 P.3d 1226, giving no deference to the district court's determination, *Osguthorpe v. Wolf Mtn. Resorts, LC*, 2010 UT 29, ¶¶ 10–11, 232 P.3d 999.

STATEMENT OF THE CASE

The three cases in this appeal are just a few of more than a thousand making their way through litigation. Although the exact details of each case differ somewhat, the pertinent allegations in each of the cases are the same. Every plaintiff is a former patient of Dr. Sorensen. Dr. Sorensen, an interventional cardiologist, specialized in treating defects in the wall of tissue that separates the upper chambers of the heart, commonly referred to as "holes in the heart." He had privileges at various hospitals in the Salt Lake valley, including St. Mark's Hospital and Intermountain Medical Center. Dr. Sorensen retired in 2012.

In particular, between 2002 and 2012, Dr. Sorensen performed procedures to close the holes in the heart. (Bright 85–87, Merlo 98–105, Tapp 124–132.) Depending on the location and particularities of the defect, the opening is known as a patent foramen ovale ("PFO") or atrial septal defect ("ASD"). *(Id.)* These conditions are associated with an increased risk of stroke because blood clots can pass through the defect, bypassing the lungs, and travel to the brain. *(Id.)* Treatment for a PFO or ASD is accomplished by closing the defect using one of several devices designed for this purpose. The device is placed by echo-guided

cardiac catheter through the femoral artery. After the device is placed, over time, tissue grows over the device and completely closes the defect.

Appellees generally allege that Dr. Sorensen misrepresented that the PFO/ASD procedure was absolutely necessary as opposed to elective or merely preventative. (Bright 82–102; Merlo 122–148; Tapp 96–115.) They assert Dr. Sorensen fraudulently induced them into having the procedure. Appellees also allege that Dr. Sorensen made fraudulent notations in their medical records to justify the procedures. Furthermore, they allege that the hospitals knew of Dr. Sorensen's fraud or misrepresentations and encouraged him for financial gain.

Based on the Salient Dates in the Complaint Appellees' Actions Were Filed Past the Act's Four-Year Statute of Repose

Appellees' allegations make clear that their claims were commenced more than four years after Dr. Sorensen's alleged misconduct. Indeed, they allege that Dr. Sorensen only performed procedures or practiced until 2012. All malpractice actions were commenced in January 2017 or later. (Bright 3-9, 87–92; Merlo 4-8, 98–105; Tapp 5–9, 126–138.)

In particular, Appellee Johannah Bright underwent PSO closure on December 15, 2009, but did not request prelitigation review of her medical malpractice claim until January 2, 2017. (Bright 4–9, 69, 87–92.) After the

conclusion of the statutorily required administrative procedures before DOPL, Ms. Bright filed her complaint on September 25, 2017, alleging medical malpractice claims against Dr. Sorensen and St. Mark's. (*Id.* at 17.) Ms. Bright alleges that she only discovered the alleged misconduct until "recently . . . as a result [of] lawyer advertising." (*Id.* at 131.)

With regard to Appellee Pia Merlo-Schmucker, she started seeing Dr. Sorensen in 2010 and underwent a closure procedure on February 10, 2011. (Merlo 98–101.) But Ms. Merlo-Schmucker did not request prelitigation review until January 3, 2017 (*Id.* at 184) and did not file her complaint against Dr. Sorensen and St. Mark's until September 26, 2017 (*Id.* at 16). She has made virtually identical allegations as Ms. Bright, asserting that she did not discover the alleged misconduct until "recently . . . as a result [of] lawyer advertising." (*Id.* at 105.)

Appellee Lisa Tapp underwent a PFO procedure September 18, 2008 and was seen by Dr. Sorensen until October 2008. (Tapp 7–9, 132–38.) But she did not request prelitigation review until January 17, 2017 (*Id.* at 82) and only filed her action against Dr. Sorensen and IHC in the district court on August 4, 2017 (*Id.* at 17). Ms. Tapp's alleges she learned of Dr. Sorensen's alleged misconduct "through lawyer advertising in 2017." (*Id.* at 145.) She claims she "did not know, nor should

have known, of the cause of action against Defendants prior to being put on notice . . . in 2017."[1] (*Id.* at 146.)

Fraudulent Concealment Allegations

To circumvent the Act's four-year statute of repose, Appellees alleged "Fraudulent Non-Disclosure/Concealment" and "Equitable Tolling/Fraudulent Concealment." These claims were made in Appellees' first complaints. (Bright 12–13, 16–17; Merlo-Schmucker 11–12, 15–16; Tapp 13, 16–17.) They even amended their complaints to include additional factual allegations apparently to support these claims. (Bright 96–97, 99–11; Merlo-Schmucker 109–110, 112–113; Tapp 142, 145–146.)

Each Appellees' allegations are virtually identical to the other. Indeed, the allegations are so conclusory and broad that the allegations could apply to any plaintiff. The allegations show nothing about Appellees' specific inability to discover their cause of action or any specific subsequent action by Dr. Sorensen designed to conceal their cause of action. At most, Appellees re-allege the original

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1. Notably, Ms. Tapp asserts that she did not discover the alleged misconduct until 2017 (Tapp 145) but filed her notice to commence an action in November 2016 (*Id.* at 82, 91–95).

tortious behavior that purportedly induced them to have the elective procedure.

Specifically, Ms. Bright alleges:

> **FIFTH CLAIM FOR RELIEF: FRAUDULENT NON-DISCLOSURE/CONCEALMENT**
>
> 65. Plaintiff refers to and incorporates the preceding paragraphs as if set forth fully herein.
>
> 66. Defendants owed a duty to Plaintiff to disclose important facts, such as the medical necessity of Plaintiff's medical care, to Plaintiff.
>
> 67. Defendants knew that the medical care Defendants provided to Plaintiff was not medically necessary and failed to disclose this to Plaintiff.
>
> 68. Plaintiff did not know that the medical care provided by Defendants was not medically necessary.
>
> 69. Defendants' failure to disclose the fact that Plaintiff's medical care was not necessary was a substantial factor in causing Plaintiff's damages. Had Plaintiff known that her closure surgery was not necessary, Plaintiff would not have undergone the surgery.
>
> 70. Plaintiff has been injured and is entitled to recover general and special damages in an amount to be determined at trial.
>
> **EQUITABLE TOLLING/FRAUDULENT CONCEALMENT**
>
> 85. Plaintiff refers to and incorporates the preceding paragraphs as if set forth fully herein.
>
> 86. Because of Defendants' concealment of material facts and misleading conduct, Plaintiff was not aware of her causes of action.
>
> 87. Defendants took affirmative steps to conceal Plaintiff's cause of action. Given Defendants' concealment and misleading conduct, a

reasonable plaintiff would not have discovered the cause of action earlier.

88. Neither Sorenson, nor St. Mark's ever notified Plaintiff that she had received an unnecessary procedure, that she was never indicated for the surgery to begin with, that the device implanted into Plaintiff was never medically necessary, was retained in her body for no medical purpose, and that the informed consent contained fraudulent, misleading, and/or incomplete statements. Neither Sorenson, nor St. Mark's, ever compensated Plaintiff for the unnecessary medical surgery she underwent by reimbursing the costs of the procedure.

89. Neither Sorensen, nor St. Mark's, ever made a public statement, sent a letter, made a public announcement, or issued a press release to inform patients, such as Plaintiff, that they may have had medically unnecessary closures.

90. Defendants' misrepresentations and misleading conduct constitutes fraudulent concealment that tolls any proffered statute of limitation that may otherwise bar the recovery sought by Plaintiff.

91. Plaintiff did not know, nor should have known, of the causes of action against Defendants prior to being put on notice of Defendants' potential liability recently. She neither discovered, nor reasonably should have discovered, the facts underlying her causes of action before any proffered statute of limitations period expired.

92. As a result of Defendants' concealment of the true character, quality and nature of their conduct, they are estopped from relying on any statute of limitations defense. 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. Such conduct tolls the limitations pursuant to the Utah Health Care Malpractice Act 78B-3-404(b).

93. Defendants' conduct, because it was purposely committed, was known or should have been known by them to be dangerous,

> heedless, reckless, and without regard to the consequences or the rights and safety of Plaintiff.

(Bright 135–136, 138–139.) Ms. Merlo-Schmucker and Ms. Bright have asserted identical allegations to support their "fraudulent concealment" and tolling claims. (*See* Merlo-Schmucker 109–110, 112–113.) Ms. Tapp's allegations only differ slightly, and the differences are not material. (Tapp 142, 145–146.)

Procedural Posture

This appeal stems from three interlocutory orders denying Appellants' motions to dismiss. Each motion to dismiss was decided by a different judge in the Third District Court, but the decisions were similar. Each district court judge voiced at least some uncertainty about whether the motions to dismiss should be granted or denied, but ultimately decided to allow the cases to proceed.

Johannah Bright

On December 8, 2017, Dr. Sorensen and St. Mark's moved to dismiss Ms. Bright's complaint under rule 12(b) of the Utah Rules of Civil Procedure, arguing her complaint was barred by the Act's four-year statute of repose. (Bright 20–38.) Ms. Bright then amended her complaint to include additional factual allegations in support of her fraudulent concealment and equitable tolling arguments. (*Id.* at 82–102.] On January 18, 2018, Dr. Sorensen and St. Mark's again moved to dismiss

the case on similar grounds as before. (*Id.* at 228–251.) Ms. Bright filed a combined response on February 1, 2018. (*Id.* at 255–278.)

Judge Laura Scott denied Dr. Sorensen's motion in a written Ruling and Order Re Pending Motions to Dismiss. (*Id.* at 372–373, 374–390.] In relevant part, the district court made three major findings. First, it determined that Ms. Bright was not required to plead fraudulent concealment with any level of particularity as required by Rule 9(c) of the Utah Rules of Civil Procedure. (*Id.* at 380–81.) "The court is not convinced that Rule 9(c) requires a plaintiff to plead defensive fraudulent concealment in her complaint in anticipation that a defendant may assert the statute of limitation or statute of repose in a motion to dismiss." (*Id.* at 380.)

Second, the court rejected the argument that the Act's fraudulent concealment exception requires a showing of a subsequent affirmative act to fraudulently conceal the health care provider's misconduct. (*Id.* 380–82.) It further concluded that, in any event, Ms. Bright has alleged some affirmative acts after the surgery, including his follow-up treatment and billing." (*Id.* at 382.)

Finally, the court determined that whether a plaintiff exercised reasonable diligence in not bringing her claims timely "is a fact-intensive matter for the fact

finder to ascertain except in only 'the clearest of cases.'" (*Id.*) It appears to have relied on equitable tolling considerations, not the plain language of the statutory exceptions. (*Id.* at 382–383.)

Pia Merlo-Schmucker

On November 30, 2017, Dr. Sorensen and St. Mark's moved to dismiss Ms. Merlo-Schmucker's complaint under Rule 12(b) of the Utah Rules of Civil Procedure, arguing that her complaint was barred by the Act's four-year statute of repose. (Merlo 19-36.] Ms. Merlo-Schmucker amended her complaint to include additional factual allegation. (*Id.* at 96–115.) On January 18, 2018, Dr. Sorensen and St. Mark's moved to dismiss her amended complaint on similar grounds. (*Id.* at 190–212.) Ms. Merlo-Schmucker filed a combined response, arguing that she was prevented from discovering misconduct on the part of the health care provider because the provider had affirmatively acted to fraudulently conceal the alleged misconduct. (*Id.* at 216–239, 243–266.)

After full briefing and argument on the motions, Judge Patrick Corum explained:

> It is not clear from the Amended Complaint whether any Defendant acted affirmatively within the meaning of the statute to fraudulently conceal anything. The word "affirmatively" was presumably and advisedly put in the statute—78B-3-404(1)—with meaning, and it

> appears to have a meaning different from the common law. Under the statute, some affirmative act of concealment is necessary to maintain an otherwise time-barred action. Defendants' argument that inaction or omission by a defendant is not sufficient to overcome the time bar appears to be well taken.
>
> That being said the Court is not convinced this issue is procedurally ripe at the Rule 12(b) stage and questions whether the Plaintiff is obligated to combat an affirmative defense, however, likely or inevitably it is to be raised, in its initial pleading.

(*Id.* at 490.) The court further determined that Ms. Merlo-Schmucker alleged facts with just enough detail "than what was apparently pled in [*Roth v. Pederson*, 2009 UT App 313]" to survive a 12(b)(6) motion to dismiss. (*Id.* at 490–91.) But somewhat conversely, it concluded that Ms. Merlo-Schmucker's Amended Complaint pleaded her fraud-based claims, including fraudulent concealment, with enough particularity to meet the requirements of Rule 9(c) of the Utah Rules of Civil Procedure. (*Id.* at 491.) The court therefore denied Dr. Sorensen's motion to dismiss.

Lisa Tapp

On October 24, 2017, Dr. Sorensen and IHC moved to dismiss Ms. Tapp's complaint. (Tapp 26–43, 50–80.) Ms. Tapp then amended her complaint to allege additional facts on November 21, 2017. (*Id.* at 122–148.) Again, Dr. Sorensen and IHC moved to dismiss. (*Id.* at 327–343.)

Judge Barry Lawrence denied the motions on August 9, 2018. (Tapp 732–739.) The district court "conclude[d] that it cannot rule on the statute of limitation/repose defense based on the pleadings." (*Id.* at 734.) Essentially, like the other two courts, Judge Lawrence determined that Ms. Bright was "not obligated to plead with particularity in her complaint facts in response to the statute of limitations/repose defense" and "not obligated to meet the heightened pleading requirement relating to facts that would serve to defeat an impending defense." (*Id.*) In any event, during the hearing on the motions, Judge Lawrence noted, particularly given the volume of cases and the importance of the issues, it "would make a lot of sense from a judicial economy perspective" for the appellate court to review the issues raised in Dr. Sorensen's and IHC's motions to dismiss on an interlocutory basis. (*Id.* 974–976.)

In sum, although the district court expressed doubt that Appellees' allegations demonstrated fraudulent concealment, each court essentially determined that it did not matter. It concluded a plaintiff need not plead facts to support fraudulent concealment in a complaint because it would require a plaintiff to anticipate the defendant's statute of limitations defense.

SUMMARY OF ARGUMENTS

In this appeal, Dr. Sorensen argues that Appellees' actions are time-barred by the repose period in the Act. Utah Code Ann. § 78B-3-404. The Act contains a provision with a statute of limitations and a repose period and a provision with two broad exceptions. First, Dr. Sorensen argues the repose period is an absolute cutoff period for commencing malpractice actions. Based on the plain language of the Act, a plaintiff cannot commence an action more than two years from the date they discover their injury, except where the case involves the health care provider leaving a foreign object in the plaintiff's person and where the plaintiff learns that the provider affirmatively acted to fraudulently conceal their claim. *Id.* But under no circumstances may an action be commenced after four years from the alleged misconduct or malpractice. *Id.* The exceptions do not toll the Act's repose period. Indeed, to allow the exceptions to toll the Act's statute of repose would render the repose period meaningless and would unnecessarily read a conflict in the Act where none exists.

In any event, even if the court finds that the repose period may be tolled, it can be tolled only by alleging facts that can support the elements of the statutory exception. So, once it is established that the action has been commenced past the

applicable repose period, the plaintiff carries the burden to establish a *prima facie* showing that a statutory exception tolls the repose period. Indeed, this court has recently held that a statute of repose cannot be equitably tolled and that if a repose period can be tolled it must be by statute. Therefore, the court is not to consider the equitable reasons for tolling as Appellees and the lower courts suggest, but whether Appellees have alleged facts that can support the elements of the statutory exception.

Keeping in mind the standard of review for a motion to dismiss, Appellees have failed to allege any facts that would support applying the Act's statutory exception. In relevant part, Appellees allege that Utah Code Ann. § 78B-3-404(2)(b) tolls the Act's repose period, arguing that Dr. Sorensen fraudulently concealed his malpractice. The plain language of the subsection states:

> (b) in an action where it is alleged that a patient has been prevented from discovering misconduct on the part of the 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.

Utah Code Ann. § 78B-3-404(2)(b). It expressly requires the plaintiff or patient to make certain allegations, including facts to show that they were prevented from

discovering the misconduct because the health care provider affirmatively acted to fraudulently conceal the alleged misconduct and that the action was commenced within one year of the discovery of the fraud using reasonable diligence. *Id.*

Here, in their original complaints, Appellees raised the issue of tolling and fraudulent concealment in the first instance. (Bright 12, 16–17; Merlo 11–12, 15–16; Tapp 13, 16–17.) Now they claim there is nothing that requires them to allege sufficient facts to support those claims. Appellees were even afforded the opportunity to amend their complaints. (Bright 96–100; Merlo 109–113; Tapp 142–146.) Yet, they have failed to make any allegations that shows that Dr. Sorensen made any subsequent act to conceal the alleged misconduct. They do not even allege facts showing that Dr. Sorensen took any actions except the purported original malpractice. Appellees have made no effort to establish that they tried to discover their claim and were somehow prevented from discovering their cause of action by Dr. Sorensen's concealment. And Appellees have failed to plead any of their allegations of fraudulent concealment with any amount of particularity as required by Rule 9 of the Utah Rules of Civil Procedure. They do not allege facts that can support the claim that they were diligent in making their claim. To the

contrary, Appellees simply claim they were blamelessly ignorant until a recent lawyer's advertisement. As a result, The Amended Complaints are insufficiently pleaded and should be dismissed.

ARGUMENT

Statutes of repose are a vital part of our legal landscape. They are promulgated for the welfare of society, especially in the context of medical malpractice where standards of care are ever-changing to keep up with developments in medicine. A statute or repose "puts an outer limit on the right to bring a civil action." *CTS Corp. v. Waldburger*, 573 U.S. 1, 8 (2014); *Berry ex rel Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 672–73 (Utah 1985) (explaining that a "statute of repose is sweeping and absolute once the statutory period has lapsed). And "the injury need not have occurred, much less have been discovered" for the repose period to apply. *Id.* In sum, repose periods "represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.'" *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (quoting *Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944)).

Although the "absolute bar" created by a statute of repose may seem harsh, their purpose justifies their existence. Justice Jackson explained:

> Statutes of limitations find their justification in necessity and convenience rather than logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through judicial process but through legislation. They represent public policy about the privilege to litigate.

Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945) (citations omitted). With regard to the Act, the Legislature weighed the competing interests of the parties and determined that the plaintiff's right to commence a civil action ends after four years from the alleged malpractice. Utah Code Ann. § 78B-3-402(3). Specifically,

> In enacting [the 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.

Utah Code Ann. § 78B-3-402(3). "It is therefore seen that the Act was premised upon the need to protect and insure the continued availability of health care

services to the public." *Allen v. Intermountain Health Care, Inc.*, 635 P.2d 30, 32 (Utah 1981) (upholding the constitutionality of the Act's statute of limitations).

Statutes of repose reconcile various competing interests. On one hand, they encourage plaintiffs to pursue diligently their claims which ensures evidence remains, witnesses are available, and memories are fresh.

> Statutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system. Making out the substantive elements of a claim for relief involves a process of pleading, discovery, and trial. The process of discovery and trial which results in the finding of ultimate facts for or against the plaintiff by the judge or jury is obviously more reliable if the witness or testimony in question is relatively fresh. Thus in the judgment of most legislatures and courts, there comes a point at which the delay of a plaintiff in asserting a claim is sufficiently likely either to impair the accuracy of the fact-finding process or to upset settled expectations that a substantive claim will be barred without respect to whether it is meritorious.

Board of Regents v. Tomanio, 446 U.S. 478, 487 (1980); *Kubrick*, 444 U.S. at 117 (asserting that statutes of limitation "protect defendants and the courts from having to deal with cases which the search for truth may be seriously impaired by loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise"). On the other hand, repose periods allow peace of mind for the defendant, prevent disrupting settled expectations, reduce uncertainty about the future, and reduce the costs of litigating

untimely claims. Utah Code Ann. § 78-3-402(3); *Kubrick*, 444 U.S. at 116–17. "Considering the function of a statute of limitations as a device for repose a potential defendant's equities are the same whether the plaintiff knows of his condition or not." *Schwartz v. Heyden Newport Chem. Corp.*, 188 N.E.2d 142, 145 (N.Y. 1963).

Importantly, several courts have attributed to statutes of repose the function of filtering out those claims which are spurious, inconsequential, and unfounded, because meritorious claims "are not usually allowed to remain neglected." *Riddlesbarger v. Hartford Ins. Co.*, 74 U.S. 386, 390 (1868). "The lapse of years without any attempt to enforce a demand creates . . . a presumption against its original validity, or that it has ceased to subsist." *Id.* In other words, some courts hold "the very purpose of the statute of limitations was to prevent fraud." *Pashley v. Pacific Elec. Co.*, 153 P.2d 325, 328 (Cal. 1944). "It is hard to say for certain, but perhaps the possibility of feigned cases against unprepared defendants and the difficulties of proof in meritorious cases led to a decision that society is best served by complete repose after a certain number of years even at the sacrifice of a few unfortunate cases." *Schwartz*, 188 N.E.2d at 145.

Accordingly, given their distinct purpose, statutes of repose "may preclude an alleged tortfeasor's liability before a plaintiff is entitled to sue, before an actionable harm ever occurs." *CTS Corp.*, 573 U.S. at 17. They are not subject to equitable tolling and "generally may not be tolled, even in cases of extraordinary circumstances beyond a plaintiff's control." *Id.* at 9; *Jensen v. Intermountain Healthcare, Inc.*, 2018 UT 27, ¶ 30 n.5, 424 P.3d 885 (explaining that statutes of repose cannot be equitably tolled). Therefore, "when the dates given in the complaint make clear that the right sued upon has been extinguished, the plaintiff has the burden of establishing a factual basis for tolling the statute." *Aldrich v. McCulloch Props., Inc.*, 627 F.2d 1036, 1041 n.4 (10th Cir. 1980); *Young Res. Ltd. P'ship v. Promontory Landfill LLC*, 2018 UT App 99, ¶ 31, 427 P.3d 457 ("[W]hen the face of the complaint would otherwise establish that the claims are time-barred, a plaintiff presumably bears some burden to invoke the discovery rule.").

Here, the Act's repose period is absolute and cannot be tolled. But, even if it can be tolled, the four-year statute of repose cannot be equitably tolled. Appellees must allege sufficient facts to establish a *prima facie* showing of the statutory exception under Utah Code subsection 78B-3-404(2)(b). As a result, to survive a motion to dismiss, Appellees must plead facts that, if taken as true, can prove that

Appellants affirmatively acted to fraudulently conceal his alleged misconduct. By its plain language, the Act also requires Appellees to show that they pursued their claims diligently. As established below, Appellees' claims fail and should be dismissed.

I. THE ACT'S REPOSE IS NOT TOLLED BY SUBSECTION (2).

To read Subsection (2) as a toll on the statute of repose would unjustifiably find an inconsistency where none exists and would render the repose period meaningless. "It is well settled that when faced with a question of statutory interpretation, [the] primary goal is to evince the true intent and purpose of the Legislature." *Marion Energy, Inc. v. KFJ Ranch P'ship*, 2011 UT 50, ¶ 14, 267 P.3d 863 (citation and internal quotation marks omitted). "The best evidence of the legislature's intent is the plain language of the statute itself." *Id.* (citation and internal quotation marks omitted). But "we do not interpret the 'plain meaning' of a statutory term in isolation." *Olsen v. Eagle Mountain City*, 2011 UT 10, ¶ 12, 248 P.3d 465. Instead, the task "is to determine the meaning of the text given the relevant context of the statute (including, particularly, the structure and language of the statutory scheme)." *Id.* (citing *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991) ("[T]he meaning of statutory language, plain or not, depends on context.").

Generally, the Act provides a two-year statute of limitations and a four-year statute of repose, followed by two broad exceptions. Utah Code Ann. § 78B-3-404. It states,

> (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 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.

Id.[2]

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2. Notably, the Utah Supreme Court analyzed a similar issue based on an earlier version of the Act in *Day v. Meek*, 1999 UT 28, 976 P.2d 1202. There, in concluding

When read in isolation, the phrase "Notwithstanding Subsection (1)" may suggest that the exceptions displace Subsection (1) altogether. An argument may

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that Subsection (2) tolled only the statute of repose, the Court used basic canons of construction, including the "last antecedent" rule. *Id.* ¶¶ 10–11, 27. But the ambiguous language analyzed by the Court is no longer in the Act. *Compare* Utah Code Ann. § 78-14-4(1) (1996), *with id.* § 78B-3-404 (2008).

In 2008 the Legislature recodified and amended the Act, replacing only the language—"except that"—interpreted by this Court in *Day*. Recodification, Revision, and Renumber of Title 78, ch. 3, 2008 Utah Laws 710 (codified as amended as Utah Code Ann. § 78B-3-404 (2008)). Arguably, the Legislature's amendment indicates a rejection of the *Day* court's interpretation. Nonetheless, the *Day* court's analysis and conclusion is no longer applicable. For instance, the new language does not fall within the parameters of the last antecedent rule because the new language is an entirely new provision. It can no longer be read as a qualifier of preceding terms. Thus, although *Day* may appear relevant to this appeal, this Court must analyze the Act anew, interpreting the plain language of the current statute to give effect to the Legislature's decision to amend the language.

even be made that the Act is ambiguous because the language might be susceptible to at least three meanings—that the exceptions toll (1) the statute of limitations only; (2) the statute of repose only; or (3) both the statute of limitations and the statute of repose. But these conclusions lose their validity with context and consideration of the Act's purpose.

"The fact that the statutory language may be susceptible to multiple meanings does not render it ambiguous; 'all but one of the meanings is ordinarily eliminated by context.'" *Olsen*, 2011 UT 10, ¶ 13 (quoting *Deal v. United States*, 508 U.S. 129, 131–132 (1993)). As such, "the statutory text may not be 'plain' when read in isolation, but may become so in light of its linguistic, structural, and statutory context." *Id.* ¶ 9. In other words, "[w]henever a statute is susceptible of two plausible interpretations, it will always be the case that the legislature could have spoken more clearly if it had anticipated the precise question before the court. But that fact is hardly ever material, since one can almost always imagine clarifying amendments cutting both ways." *In re Adoption of Baby E.Z.*, 2011 UT 38, ¶ 75, 266 P.3d 702 (Lee, J., concurring in part and concurring in the judgment). Therefore, the court should read statutory language to determine whether any perceived ambiguity can be eliminated by context. *Olsen*, 2011 UT 10, ¶ 13.

Furthermore, it is the court's "duty, if possible, to adopt that interpretation which will give effect to each provision and harmonize them with each other, so that neither will be meaningless." *Buckle v. Ogden Furniture & Carpet Co.*, 216 P. 684, 685 (Utah 1923). "[E]ffect is to be given, if possible, to every word, clause, and sentence, and as far as practicable reconcile the different provisions so as to make them consistent and harmonious and to give a sensible and intelligent effect to each." *Id.* "Hence there can be no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 180 (2012). The plain language of the Act must therefore be read as a whole and in a way that avoids an interpretation "which renders parts or words in a statute inoperable or superfluous." *State v. Rushton*, 2017 UT 21, ¶ 11, 395 P.3d 92 (citation omitted).

A. Reading the Statute's Repose Period as an Absolute Bar Renders the Provisions Harmonious and Makes the Most Sense Given the Context.

The gap between the limitations and the repose periods in Subsection (1) shows that the Legislature expressly contemplates that under certain circumstances an action may be commenced after the expiration of the two-year limitations period. Utah Code Ann. § 78B-3-404(1). But it unequivocally provides

that no action may be commenced after the four-year repose period. *Id.* There could be up to a two-year gap between the end of the limitations period and the four-year repose period. *Id.* Thus, in context, the exceptions enumerated in Subsection (2) provides the ways the Legislature anticipated the plaintiff or patient could commence an action after the two-year limitations period—within the gap between expiration of the limitations and repose period. *Id.* § 78B-3-404(2).

To interpret the Act otherwise would create inconsistences where none exist. The repose period does not conflict with the limitations in Subsection (2)(b), and therefore does not need to be reconciled away. The repose period runs regardless of whether the plaintiff or patient has or could have discovered the alleged act, omission, neglect, or occurrence. *Id.* § 78B-3-404(1). Put another way, the patient's knowledge of the alleged malpractice has no bearing on the running of the repose period. By contrast, the application of the limitations period and the exceptions in Subsection (2) rest on the time in which the plaintiff or patient discovered or should have discovered certain information. *Compare* Utah Code Ann. § 78B-3-404(1), *with id.* § 78B-3-404(2)(b). In those instances, the Act expressly requires the plaintiff to use diligence to discover the necessary information to commence an action. But no such requirement exists regarding the running of the

repose period. So, while the exception could conflict with the Act's limitation period, it does not conflict with the repose.

Read as a whole, the Legislature has expressly carved out an exception for when the plaintiff or patient could not have discovered the necessary information within the ordinary two-year period because of the healthcare providers' fraud. This accounts for the circumstances for which the Legislature anticipated a plaintiff could commence an action in the gap between the two-year limitations period and the four-year repose period.

This makes sense considering the legislative history of health care malpractice actions in Utah. Before the Act was enacted, malpractice actions were subject to the ordinary four-year limitations period in the judicial code. *See* Utah Code Ann. § 78-12-25 (1953); *Peteler v. Robison*, 17 P.2d 244, 246 (Utah 1932). "The legislature [then] exercised its discretionary prerogative in determining that the shortening of the statute of limitation (along with requiring notice of intention to sue), would insure the continued availability of adequate health care services." *Allen v. Intermountain Health Care, Inc.*, 635 P.2d 30, 32 (Utah 1981). It deliberately reduced the time for which a patient could commence a malpractice action by two years and made clear an action was "not to exceed four years after the date" of the

alleged misconduct. Utah Code Ann. § 78B-3-404(1). The Legislature recognized there were going to be instances where a plaintiff could commence an action after two years, but before the four-year repose period when it promulgated exceptions to the two-year limitations period. Under this reading, all provisions in the Act exist harmoniously.

B. Reading the Fraudulent Concealment Exception to Toll the Repose Period Renders the Act of Repose Meaningless and With No Effect.

To read the Act's exceptions as a toll on the four-year statute of repose would render it meaningless. The inclusion of the repose period where the statute already contains a statute of limitations can have no significance "other than to impose an outside limit." *See Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991) *overruled on other grounds by Merck & Co., Inc. v. Reynolds*, 130 S. Ct. 1784 (2011). "By establishing a fixed limit, a statute of repose implements a 'legislative decisio[n] that as a matter of policy there should be a specific time beyond which a defendant should no longer be subjected to protracted liability.'" *California Pub. Employees' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2051 (2017) (alteration in original) (quoting *CTS*, 573 U.S. at 9). Indeed, the Legislature explicitly explained that the purpose of the Act was to "provide a reasonable time

in which actions may be commenced against health care providers *while limiting that time to a specific period.*" Utah Code Ann. § 78B-3-402(3).

This may seem like a particularly harsh result. But "[n]ot every harsh result indicates a contradiction that must be 'reconciled' away." Scalia & Garner, *supra*, at 181. So, although the Utah Supreme Court has noted that a physician could hypothetically be rewarded for concealing their wrongful acts, *Day v. Meek*, 1999 UT 28, ¶ 18, 976 P.2d 1202, those risks must be considered given the purpose of a repose and the Act itself. The defendant "ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations, and he ought not be called on to resist a claim when evidence has been lost, memories have faded, and witnesses have disappeared." *Rosenberg v. Town of North Bergen*, 293 A.2d 662, 667–68 (NJ. 1972) (citation and internal quotation marks omitted). Indeed, "[o]ne of the chief purposes of the [Act] was to prevent the filing of unjustified lawsuits against health care providers, with all the attendant costs, economic and otherwise, that such suits entail." *Foil v. Ballinger*, 601 P.2d 144, 148 (Utah 1979). "Considering the function of a statute of limitations as a device for repose a potential defendant's equities are the same whether the plaintiff knows of his condition or not." *Schwartz v. Heyden Newport Chem. Corp.*, 188 N.E.2d 142,

145 (N.Y. 1963). Accordingly, at some point the remote chance that a provider will affirmatively act to conceal his misconduct *and* actually prevent the patient from discovering their injury despite the patient's due diligence is substantially outweighed by the Legislature's express intent to prohibit the filing of stale malpractice claims. The Legislature has expressly indicated that the tipping point is four years.

This is especially true in medical malpractice cases. Research and developments in medicine has led to major accomplishments as well as reversals of prior practices. These changes sometimes lead to changes in the very basic definition of what represents the standard of care. So, a physician's treatment with the most up-to-date training and skill in one year may be outdated within a few short years later. Physicians should not be subjected to stale claims based on standards distorted by hindsight.

The Legislature certainly recognized this when they included a maximum cut-off date for filing claims in the Act, and expressly stated that the purpose of the Act was to "alleviat[] the adverse effects" such as health care providers "practicing defensive medicine because he views a patient as a potential adversary" and discouraging health care providers from "continuing to provide

services because of the high cost and possible unavailability of malpractice insurance." *Id.* § 78B-3-402.

In sum, the Act has a two-year statute of limitations, a four-year repose period, and two broad exceptions. When read as a whole and given the context, the exceptions provide the circumstances in which a plaintiff may commence an action after the two-year limitations period but before the four-year repose period. To allow the exceptions to toll the statute of repose runs against the Legislature's express purpose to limit that time for which a health care provider may be liable. *Id.* § 78B-3-402(3). More importantly, the repose period—expressly limiting claims to four years—can serve no other purpose than to create an absolute cutoff. So, an interpretation of the Act which allows the exceptions in Subsection (2) to toll the repose period renders the repose meaningless. The language limiting claims to four years would be rendered superfluous. Any prospective defendant could never enjoy a repose and would be called to defend a lawsuit at any time as long as the plaintiff broadly alleges fraudulent concealment. This could not have been what the Legislature intended.

Here, Appellees' claims are therefore facially time-barred because the allegedly negligent act, omission, or occurrence was well beyond the four-year

repose period. There can be no dispute the facts alleged in the Amended Complaints, if accepted as true, prove that both the statute of limitations and statute of repose have lapsed. (Bright 3–8, 67; Merlo 4–9, 70; Tapp 3–9, 82.) The Act provides that no action may be commenced after "four years after the date of the alleged act, omission, neglect, or occurrence." Utah Code Ann. § 78B-3-404(1). In the Amended Complaints, Appellees allege that Appellants performed the unnecessary procedures and committed the alleged misconduct between 2007 and 2009. (Bright 3–4, 85–87; Merlo 4–9, 87–92; Tapp 5–7, 126–132.) They also allege that Dr. Sorensen resigned—providing no further care—in 2012. (Bright 3–4; Merlo 4–6; Tapp 3–7.) Appellees' actions were only commenced in 2017 or later. (Bright 17, 67; Merlo 16, 70; Tapp 17, 82.) Therefore, by the facts expressly pleaded in the Amended Complaints, Appellees' actions are time-barred by the Act's repose period.

II. APPELLEES' PLEADINGS ARE INSUFFICIENT, AND MUST BE DISMISSED AS A MATTER OF LAW.

Even if this Court determines that the statute of repose may be tolled by Subsection (2)(b), the district courts erred by not requiring Appellees to make a *prima facie* showing as expressly required by the Act. Specifically, the courts made at least two major erroneous conclusions: Appellees' equitable tolling or

fraudulent concealment claim presents questions of fact that cannot be decided on a motion to dismiss and Appellees need not plead facts in anticipation of the statute of limitations defense. (Bright 374–390; Merlo 351–353; Tapp 734–35.) Essentially, the courts determined that, although Defendants successfully established that the applicable statute of limitations and repose had lapsed, Appellees had a right to litigate their claims because they baldly alleged fraud. To be clear, Appellees conclude Appellants engaged in fraudulent concealment, but all factual allegations merely reiterate the original tortious conduct and no subsequent action designed to conceal the cause of action. (Bright 82–102; Merlo 96–115; Tapp 122–148.) This cannot be what the Legislature intended. Under this approach no motion to dismiss based on the lapse of a statutory limitations period would ever be successful. *Young Res. Ltd. P'ship v. Promontory Landfill LLC*, 2018 UT App 99, ¶ 31, 427 P.3d 457.

Because the statute of repose cannot be equitably tolled, on a motion to dismiss, the district court must look to the pleadings and assess whether Appellees have made sufficient allegations that if proved can support the requirements of the statutory exception. *Oakwood Village, LLC v. Albertsons, Inc.*, 2004 UT 101, ¶¶ 8–9, 104 P.3d 1226. Requiring Appellees to allege the elements of the statutory

exception does not unfairly require them to anticipate a litany of possible affirmative defenses as the district courts suggest. Rather, it simply holds the plaintiff accountable for knowing the statute of limitations as required by Utah law. *See Russell Packard Dev., Inc. v. Carson*, 2005 UT 14, ¶ 20, 108 P.3d 741 (explaining that a plaintiff's ignorance of the statute of limitations is no excuse for filing an untimely claim). Nevertheless, Appellees asserted their fraudulent concealment and equitable tolling claims before Appellants even moved to dismiss showing that they already knew their complaints were time-barred. (Bright 17; Merlo 16; Tapp 17.) The courts even gave Appellees the opportunity to amend their complaints after Appellants moved to dismiss, and they allege additional facts in support of their claims for equitable tolling and fraudulent concealment. (Bright 82–102; Merlo 122–148; Tapp 96–115.) Therefore, like any cause of action alleged in a complaint, Plaintiff must allege facts that if proved could support their claim as a matter of law.

The issues thus presented by Appellants are squarely within the province of a motion to dismiss—to determine the sufficiency of the pleadings. In sum, as established below, because their equitable and statutory tolling claim fails as a

matter of law because (A) statutes of repose cannot be equitably tolled and (B) the allegations, even if proven, cannot support the elements of the statutory exception.

A. Appellees Can Only Toll the Statute of Repose by Pleading the Elements of Subsection (2) Because Statutes of Repose Cannot Be Equitably Tolled.

"Once a statute has begun to run, a plaintiff must file his or her claim before the limitations period expires or the claim will be barred." *Russell Packard Dev., Inc. v. Carson*, 2005 UT 14, ¶ 20, 108 P.3d 741. "Mere ignorance of the existence of a cause of action will neither prevent the running of the statute of limitations nor excuse a plaintiff's failure to file a claim within the relevant statutory period." *Id.* Accordingly, under Utah law, a plaintiff is charged with knowing and anticipating the statute of limitations or statute of repose when bringing an action. Sufficiently pleading the elements to satisfy an exception to that limitations or repose period should be no different. This is especially true where, as in this case, the plaintiff alleges that a repose period is tolled by the defendant's alleged fraud. (Bright 96–100; Merlo 109–113; Tapp 142–146.)

Only "two narrow settings [exist] in which a statute of limitations may be tolled until the discovery of facts forming the basis for the cause of action." *Id.* ¶ 21 (citations and internal quotation marks omitted). This rule is commonly referred to as the "discovery rule." *Id.* In the first instance, the rule applies when

the relevant statute, by its own terms, mandates application of the discovery rule. *Id.* By contrast, in the second setting, the discovery rule applies when the court finds it equitable to toll the limitations period where exceptional circumstances exist. *Id.* ¶¶ 24–25. But the Utah Supreme Court has emphasized that the "equitable exceptions apply *only* where a statute of limitations does not, by its own terms, already account for such circumstances—i.e., where a statute of limitations lacks a statutory discovery rule." *Id.* ¶ 25. Accordingly, equitable exceptions and considerations will not apply in this case because a statutory discovery rule exists.

Under Utah law, statutes of repose cannot be equitably tolled. *Jensen v. Intermountain Healthcare, Inc.*, 2018 UT 27, ¶ 30 n. 5, 424 P.3d 885; *Craftsman Builder's Supply, Inc. v. Butler Mfg. Co.*, 1999 UT 18, ¶¶ 24–27, 974 P.2d 1194 (concluding that statute of repose provisions are not subject to a discovery rule); *Willis v. DeWitt*, 2015 UT App 123, ¶¶ 8, 13, 350 P.3d 250 ("[A] party's ignorance of the injury, which is generally a ground for equitable tolling of a statute of limitations, does not toll a statute of repose."); *In re Estate of Strand*, 2015 UT App 259, ¶¶ 4–9, 362 P.3d 739 (concluding that a statute of repose in the Probate Code is not subject to equitable tolling despite allegations of fraudulent concealment). The United States Supreme Court has similarly explained, "it is evident that the equitable tolling doctrine is

fundamentally inconsistent" with a statute of repose. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991), *overruled on other grounds by Merck & Co., Inc. v. Reynolds*, 130 S. Ct. 1784 (2011). Consequently, statutes of repose "generally may not be tolled, even in cases of extraordinary circumstances beyond a plaintiff's control." *CTS Corp. v. Waldburger*, 573 U.S. 1, 8 (2014).

In sum, because a statutory discovery rule exists in the Act, the equitable discovery rule does not apply in this case, and those equitable exceptions and principles should not be determinative. And the court need not weigh the facts developed through discovery and assess whether the statute of repose should be equitably tolled as the district court and Appellees suggest. Instead, whether the Act's repose period is tolled is a question of law that turns entirely on the plain language of Subsection (2)(b). The court must assess the pleadings to determine whether the plaintiff has sufficiently pleaded the elements of the express language of the Act's discovery rule.

B. Appellees' Pleadings Cannot Survive a Motion to Dismiss.

The plain language of Subsection (2)(b) makes clear that Appellees must allege certain information for the exception to apply. Specifically, the exception states:

(2) Notwithstanding Subsection (1):

. . .

(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.

Utah Code Ann. § 78B-3-404(2)(b) (emphasis added). It expressly requires the plaintiff or patient to (1) allege that they have been prevented from discovering misconduct on the part of the healthcare provider because that health care provider (2) has affirmatively acted to (3) fraudulently conceal the alleged misconduct and (4) the claim has been commenced within one year of discovery through reasonable diligence. *Id.*

1. Appellees Have The Burden to Allege Certain Facts in The Pleadings.

Generally, when a complaint includes all information, including salient dates, a statute of limitations defense may be raised in a motion to dismiss. *Tucker v. State Farm Mut. Auto. Ins. Co.*, 2002 UT 54, ¶ 8, 53 P.3d 947. "[T]he inclusion of dates in the complaint indicating that the action is untimely renders it subject to dismissal for failure to state a claim." *Id.* (quoting 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1357 at 345 (2d ed. 1990)). "This

particularly is true if the action sued on is statutory in origin, because the bar of the statute of limitations then is said to extinguish not only the remedy but the underlying substantive right as well." Wright & Miller, Federal Practice, and Procedure § 1357 at 345.

As in this case, "when the dates given in the complaint make clear that the right sued upon has been extinguished, the plaintiff has the burden of establishing a factual basis for tolling the statute." *Aldrich v. McCulloch Props.*, 627 F.2d 1036, 1041 n.4 (10th Cir. 1980); *Tracey v. Blood*, 3 P.2d 263, 266 (Utah 1931) ("Apparently all courts are agreed, and in this case it is conceded that the burden was upon the plaintiff to plead and prove facts sufficient to toll the statute of limitations."); *Young Res. Ltd. P'ship v. Promontory Landfill LLC*, 2018 UT App 99, ¶ 31, 427 P.3d 457 ("[W]hen the face of the complaint would otherwise establish that the claims are time-barred, a plaintiff presumably bears some burden to invoke the discovery rule."); 51 Am. Jur.2d *Limitations of Actions* § 155 (explaining that "the burden for such relief rests on the party seeking it"). Even under the fraudulent concealment version of the discovery rule, Utah law holds "that a plaintiff must make a *prima facie* showing of fraudulent concealment." *Berenda v. Langford*, 914 P.2d 45, 53 (Utah 1996) (leaving "as the law the general rule that a plaintiff must make a *prima facie*

showing of fraudulent concealment and then demonstrate that, given the defendant's actions, a reasonable plaintiff would not have discovered his or her claim earlier"); *accord Berneau v. Martino*, 2009 UT 87, ¶ 23, 223 P.3d 1128 (explaining that "the plaintiff must make an initial showing that he did not know nor should have reasonably known the facts underlying the cause of action in time to reasonably comply with the limitations period"). "If a plaintiff had no such burden, 'a 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.'" *Young Res.*, 2018 UT App 99, ¶ 31 (quoting *Butler v. Deutsche Morgan Grenfell, Inc.*, 2006-NMCA-084, ¶ 33, 140 P.3d 532).

More important, the plain language of Subsection (2)(b) expressly requires the plaintiffs to "allege" certain information. Utah Code Ann. § 78B-3-404(2)(b) (stating "(b) in an action where *it is alleged* that a patient has been prevented from discovering misconduct"). Allegations are made in the pleadings, *i.e.* the complaint. Utah R. Civ. P. 7(a). It is the plaintiff's "duty to plead a matter in order for that matter to be heard in the lawsuit." *Burden of Allegation*, Black's Law Dictionary (10th ed. 2014). To be considered in the lawsuit, Appellees must make

sufficient allegations in the Amended Complaint to show that the exception tolls the relevant limitations period.

In any event, whether the plaintiffs should be expected to anticipate Dr. Sorensen's statute of limitations affirmative defense is moot. Appellees alleged claims for fraudulent concealment and equitable tolling in their original complaint. (Bright 12–17; Merlo 11–16; Tapp 13–17.) In effect, they opened the door to the sufficiency of the pleadings. So, contrary to the district court's determinations, Appellees are not being asked to anticipate some unknown affirmative defense. (Bright 374–390; Merlo 400–405; Tapp 732–739.) Appellees were even afforded the opportunity to amend their complaints to allege more facts after Appellants moved to dismiss. Allowing them to allege these claims without requiring them to support them with allegations as required by Rules 8 and 9 of the Utah Rules of Civil Procedure is unjust. It would be the equivalent of allowing Appellees to amend the complaint to remove the salient dates that show the complaint is time-barred to avoid a motion to dismiss. It would be unfair and defy the purpose of procedural rules.

Even if a court liberally construes the allegations made in the Amended Complaints, Appellees' allegations do not sufficiently support the elements of the

Act's exception. They are mere legal conclusions and opinions couched as fact. Moreover, Appellees fail to allege the required elements of Subsection (2)(b). For instance, they have failed to make any allegation that shows Appellants affirmatively acted to conceal the original misconduct. Instead, Appellees assert that Appellants' original misconduct was misleading and that is why they never discovered their injury. (Bright 85–87, 96–100; Merlo 98–101, 109–113; Tapp 126–132, 142–146.) As demonstrated below, this is insufficient to satisfy Appellees' burden.

2. Appellees Fail to Allege Any Affirmative Act to Conceal the Original Misconduct.

The Act requires the plaintiff to allege that the health care provider "affirmatively acted" to conceal the alleged misconduct. Utah Code Ann. § 78B-3-404(2)(b). This requires an allegation that the provider "'took affirmative steps to conceal the plaintiff's cause of action.'" *See Rappleye v. Rappleye*, 2004 UT App 290, ¶ 20, 99 P.3d 348 (quoting *Berenda v. Langford*, 914 P.2d 45, 51 n.2 (Utah 1996) (applying the fraudulent concealment version of the discovery rule)). Fraudulent concealment of the alleged misconduct cannot be supported by a mere allegation of the original tortious behavior. *See Plain v. Vassar Bros. Hosp.*, 115 A.D.3d 922, 923–24 (N.Y. App. Div. 2014) ("A plaintiff must allege a later fraudulent

misrepresentation made for the purpose of concealing the former tort." (citations and internal quotation marks omitted)). Instead, it requires an allegation of some fraudulent act to conceal the original misconduct. *Id.* In other words, "[i]t is not sufficient to show mere misconduct, but the plaintiff must be able to show that the defendant said or did something to lull or induce the plaintiff to delay the filing of his claim after the limitations period has run." *Foster v. Plaut*, 625 N.E.2d 198, 203 (Ill. App. Ct. 1993).

More importantly, an alleged concealment that is "nothing but defendants' failure to disclose the wrongs they had committed," is insufficient. *Plain*, 115 A.D.2d at 923–24 (citation and internal quotation marks omitted). For example, in *Roth v. Pedersen*, 2009 UT App 313, the Utah Court of Appeals determined that a doctor's failure to inform a patient of his alleged misconduct did not prevent the patient from discovering his cause of action. *Id.* *4. There, the plaintiff alleged that a doctor removed the wrong section of his colon and that he had to have a second surgery to remove the cancerous section of his colon. *Id.* *2. It was clear from the pleadings that the plaintiff was aware of the legal injury in May 2006. *Id.* Although he knew of his injury, he was unaware of the identity of the wrongdoer. *Id.* Still, the plaintiff waited until 2008—three months after the statute of limitations had

expired—to file his complaint. *Id.* The district court correctly dismissed the complaint on the pleadings. *Id.*

On appeal, the plaintiff argued that the limitations period was tolled, alleging fraudulent concealment. *Id.* Essentially, the plaintiff alleged that the doctor "concealed the fact that he failed to properly consult with [the general surgeon] in May 2004" which led him to take the wrong portion of plaintiff's colon. *Id.* *3. The plaintiff argued that the doctor's "failure to speak" fraudulently concealed the underlying misconduct. *Id.* But the appellate court disagreed, stating that the plaintiff "fail[ed] to allege that [the doctor] 'affirmatively acted to fraudulently conceal the alleged misconduct.'" *Id.* (quoting Utah Code Ann. § 78B-3-404(2)(b)(2008)). It explained that the plaintiff failed to make any allegations that showed that the doctor's actions precluded him from discovery the injury. *Id.* "Without such factual allegations," according to the court, "[the plaintiff's] fraudulent concealment claim is nothing more than a mere conclusory allegation that is insufficient to preclude dismissal." *Id.*

In another example, in *Adams v. Richardson*, 714 P.2d 921 (Colo. Ct. App. 1986), the Colorado Court of Appeals concluded that in "order for fraudulent concealment to occur, the defendant, in essence, must commit not one, but two

wrongs: the original [tortious] act and the subsequent fraudulent concealment of the same." *Id.* at 925. In that case, a husband and wife sued the wife's doctor for negligently prescribing and administering excessive radiation therapy for her lung cancer. *Id.* at 922. The couple filed their claim under Colorado's medical malpractice statute which contained a three-year repose period. *Id.* at 923. In their complaint, the couple alleged that she was treated by the doctor in 1978 and developed health issues in 1979 that were caused by the earlier treatment. *Id.* She was treated for these health issues until 1981—five months prior to the expiration of the repose period. *Id.* But the couple only filed their action in May 1982—about three years after the final radiation had been administered. *Id.*

Like Utah's Malpractice statute, the plain language of the Colorado medical malpractice statute provides two exceptions to the three-year repose period: where the act or omission was knowingly concealed or where it consisted of leaving a foreign object in the claimant's body. *Id.*; *see also* Colo. Rev. Stat. Ann. § 13-80-102.5(1), (3). It was generally undisputed that the physician had not provided the wife treatment after 1978 and the district court found no evidence of concealment. *Id.* at 925. On appellate review, the Colorado Supreme Court affirmed the district court's dismissal of the couple's complaint as time-barred, holding that fraudulent

concealment "occurs when a plaintiff suspects or discovers that a wrong has been committed and is *subsequently* misled or misadvised by the doctor concerning what was done or its effect." *Id.* (emphasis added). Accordingly, because the couple failed to allege any subsequent act designed to mislead or conceal the original misconduct, the factual assertion were insufficient "to bring [the couple's] case within the exception to the repose provision." *Id.* at 926.

The same conclusion can be made here. The alleged facts to support Appellees' fraudulent concealment claims are exactly the same as those alleged to support their misrepresentation and negligence claims—there is no distinction. (Bright 82–102; Merlo 96–115; Tapp 122–148.) Appellees cannot rely on Dr. Sorensen's alleged misrepresentations or omissions about the closure procedures because these occurred before the procedure. (Bright 85–92, Merlo 98–105, 109–113; Tapp 126–138, 142–46.) The alleged misconduct had not even occurred yet. A review of the allegations show that Appellees claim Dr. Sorensen misrepresented information about the procedure to induce her into having the procedure, not that he made misrepresentation to conceal an alleged misconduct after the procedure. Nothing prevented Appellees from obtaining a second opinion before having the closure procedure.

There is an important distinction between Dr. Sorensen's failing to tell Appellees that he performed an unnecessary surgery or engaged in malpractice and Dr. Sorensen subsequently lying or refusing to answer questions truthfully in an attempt to conceal the misconduct. Fraudulent concealment must go beyond a mere failure to tell Appellees that they committed malpractice. *Adams*, 714 P.2d at 925–26; *Plain*, 115 A.D.2d at 923–24. To determine otherwise would render the discovery rule and the statutory exception meaningless—no health care provider is going to voluntarily inform the patient that they committed some action or omission that would amount to malpractice. This is especially true where nothing even infers that the patients have asked whether the procedure was absolutely necessary as opposed to elective. Essentially, under Appellees' interpretation, every time a healthcare provider allegedly commits malpractice, the patient can claim that the failure to inform them of the malpractice was an act to fraudulently conceal the cause of action. This cannot be what the Legislature intended, especially considering the important role of statutes of repose and the severe nature of fraud allegations.

To say that in every case where the medical provider failed to inform the patient of their alleged misconduct and the plaintiff was unaware of the alleged

wrong a fact question exists as to fraudulent concealment, is to do damage to the Legislature's expression of public policy as embodied in the four-year repose period. There must be something more than a mere continuation of a prior nondisclosure. There must be an allegation that, if proved, can create a fact question as to some positive act of fraud or something so furtively planned and secretly executed as to keep the plaintiff's cause of action concealed.

3. Appellees Fail to Allege Fraud with Any Particularity as Required by Rule 9 of the Utah Rules of Civil Procedure.

The Act expressly requires the plaintiff to allege that the health care provider acted to "*fraudulently* conceal the alleged misconduct." Utah Code Ann. § 78B-4-404(2) (emphasis added). It makes clear that the plaintiff must allege some act of fraud designed to conceal the original misconduct or tort. *Id.* Accordingly, Appellees' allegations must meet the heightened level of particularity of all fraud claims. *Precision Vascular Sys., Inc. v. Sarcos, L.C.*, 199 F.Supp.2d 1181, 1191 (D. Utah 2002) (explaining that fraudulent concealment causes of action require that a complaint plead material misrepresentation and scienter with particularity); *Roth v. Pedersen*, 2009 UT App 313, *4 (affirming the dismissal with prejudice, in part, because the plaintiff failed to plead fraudulent concealment with particularity as required by rule 9).

Under Utah law, a fraud claim must be pleaded with a heightened level of particularity. Utah R. Civ. P. 9(c). "In alleging fraud . . . , a party must state with particularity the circumstances constituting fraud or mistake." *Id.* "[M]ere conclusory allegations in a pleading, unsupported by a recitation of relevant surrounding facts, are insufficient to preclude dismissal or summary judgment." *Chapman v. Primary Children's Hosp.*, 784 P.2d 1181, 1186 (Utah 1989); *see also Armed Forces Ins. Exch. v. Harrison*, 2003 UT 14, ¶ 16, 50 P.3d 35 (stressing that mere conclusory allegations are insufficient to preclude summary disposition). Moreover, "a mere naked falsehood or misrepresentation is not enough" to properly plead a fraud claim. *Christensen v. Board of Review of Indus. Comm'n*, 579 P.2d 335, 338 (Utah 1978) (citation and internal quotation marks omitted). Rather, the plaintiff must allege fraudulent concealment with sufficient details and supporting facts to establish that the health care provider's actions were intended to conceal.

For instance, in *Chafin v. Wisconsin Province of Society of Jesus*, 917 N.W.2d 821, (Neb. 2018), the Nebraska Supreme Court affirmed the dismissal of a plaintiff's complaint for failing to sufficiently plead her fraudulent concealment argument. *Id.* at 825. The Court explained, "In order to survive a motion to dismiss,

a complaint alleging fraudulent concealment must plead with particularity how material facts were concealed to prevent the plaintiff from discovering the misconduct and how, through diligence, the plaintiff failed to discover his or her injury." *Id.*

This heightened duty makes sense because of the severe nature of fraud allegations. Charging someone with fraud or with acting fraudulently will no doubt damage the defendant's reputation and raise implications of moral turpitude. *Fidelity Nat. Title Ins. Co. v. Worthington*, 2015 UT App 19, ¶ 11, 344 P.3d 156.[3] This is especially true where, as in this case, the defendant is a professional in the community that relies on the public's trust. Patients look to their healthcare

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3. "A number of reasons have been advanced to justify the more stringent pleading requirement." *Fidelity Nat. Title Ins. Co. v. Worthington*, 2015 UT App 19, ¶ 11, 344 P.3d 156.

> Commentators have explained that rules analogous to our rule [9(c)] exist to discourage lightly made claims charging the commission of acts that involve some degree of moral turpitude. Others have suggested that the rule stems from the common law's historical reluctance to reopen transactions. The rule also serves to deter filing exploratory suits with little information in the hopes that discovery will uncover information to support the allegations.

Id. (citations and internal quotation marks omitted).

providers to be honest and qualified to give them quality treatment. And any suggestion that the healthcare provider acted fraudulently to hide an initial misconduct is even more detrimental to their reputation. The public can be forgiving of the provider's mistake or misconduct but will seek to punish the provider for any subsequent fraud.

Additionally, the heightened pleading requirement "is designed, not only to put defendants on notice of alleged misconduct, but also to prevent fishing expeditions." *Id.* ¶ 11 (citation and internal quotation marks omitted). Not only will a defendant know precisely what conduct the plaintiff believes constitutes a fraud and be able to prepare accordingly, but the pleading requirement will also avoid the embarrassment, prejudice and expense that comes with having to defend against a baseless and invasive fishing expedition. This is only fair considering the grave consequences of such claims. Thus, a plaintiff should not be allowed to move forward with an allegation of fraud without meeting the heightened requirements of Rule 9.

Here, Appellees have failed to make any allegations that would meet the heightened particularity requirement of Rule 9. Actually, the allegations in the Amended Complaints are the exact averments that the rule serves to prohibit.

Even if liberally construed, Appellees merely regurgitate the conclusory language of the fraudulent concealment exception. They broadly assert opinions and legal conclusions couched as fact. Nothing about Appellees' allegations reveals how Dr. Sorensen's actions fraudulently concealed their causes of action.

Indeed, the only allegations with any amount of detail or surrounding fact are merely reiterations of the alleged malpractice, not subsequent fraud intended to conceal. Specifically, Appellees allege that Dr. Sorensen failed to disclose that the procedures were not medically necessary and that "had Plaintiff known that her closure was not necessary, Plaintiff would not have undergone the surgery." (Bright 92; Merlo 109; Tapp 142.) Thus, by their own account, the alleged fraud occurred before the procedure or was intended to induce the patient to undergo the procedure.

There are a dozen reasons Dr. Sorensen may not have disclosed that the procedure was elective *after* it was performed. For instance, he may have assumed the patient knew it was elective or he could have believed that information was clear from other information given to each plaintiff. (Bright 91; Merlo 104; Tapp 135–36 (alleging that the information provided indicated that the procedure was "an aggressive" and "preventative strategy").) Dr. Sorensen may have even

believed that he had already informed the patient that the procedure was elective or preventative. Indeed, Appellees acknowledge they were given informed consent documents. (Bright 96–97; Merlo 109–110; Tapp 142–145.) This is even more likely considering there is no allegation that the patients even asked whether the procedure was medically necessary. Each of those possible explanations are mere mistakes or inadvertent errors, not fraud. Accordingly, a mere failure to disclose does not amount to fraud without additional allegations with supporting facts that could show that Dr. Sorensen intended to conceal the necessity of the procedure to prevent Appellees from discovering their injuries. Therefore, without sufficient allegations, Appellees should not be allowed to circumvent the clear language of the statute and engage in an invasive fishing expedition.

4. Appellees Fail to Allege Any Facts that Show Any Amount of Diligence to Discover Their Causes of Action.

The Act makes clear that the plaintiff or patient must have acted diligently to discover the injury and fraud. Utah Code Ann. § 78B-3-404(1), (2)(b). "[B]efore a plaintiff may rely on the fraudulent concealment doctrine, he must have actually made an attempt to investigate his claim and that such an attempt must have been rendered futile as a result of the defendant's fraudulent or misleading conduct." *See Colosimo v. Roman Catholic Bishop of Salt Lake City*, 2007 UT 25, ¶ 40, 156 P.3d

806 (applying the fraudulent concealment version of the discovery rule); *see also Russell Packard Dev., Inc. v. Carson*, 2005 UT 14, ¶ 26, 108 P.3d 741) (emphasizing that plaintiff should use due diligence to discover facts supporting the cause of action "despite the defendant's efforts to conceal it"). Thus, to survive a motion to dismiss, the plaintiff must allege facts that can "prove that his or her failure to meet a requirement in filing his or her pleading is not attributable to a larger failure to act diligently in pursuing his or her judicial remedies during the statutory period." *See* 51 Am.Jur.2d *Limitation of Actions* § 155 (discussing the fraudulent concealment version of the discovery rule); *see also* Utah Code Ann. § 78B-3-404(2)(b).

"Indeed, if a plaintiff has made no inquiry, there can generally be no factual basis on which to conclude that an inquiry would have been futile." *Colosimo*, 2007 UT 25, ¶ 43; *Berenda v. Langford*, 914 P.2d 45, 53 (Utah 1996) (expressly refusing "to excuse the diligence requirement [even] when . . . successful concealment would fool even the most diligent hypothetical plaintiff"). "'A party who has opportunity of knowing the facts constituting the alleged fraud cannot be inactive and afterwards allege a want of knowledge.'" *Id.* ¶ 40 (quoting *Baldwin v. Burton*, 850 P.2d 1188, 1196 (Utah 1993)). Accordingly, the plaintiff "cannot idly wait for a

claim to present itself; rather, a plaintiff must act with reasonable diligence to discover the facts constituting his or her cause of action." *Id.* (citation and internal quotation marks omitted). "[A] defendant's mere silence in the face of a plaintiff's failure to use reasonable diligence in investigating a claim is insufficient evidence of fraudulent concealment to warrant tolling the statute of limitations." *Id.* ¶ 44 (noting that "[o]ther jurisdictions have similarly held that Appellees with knowledge of underlying facts must reasonably investigate their claims in order to rely on the fraudulent concealment doctrine").[4] Therefore, without factual

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4. *See, e.g., Truck Drivers & Helpers Union, Local No. 170 v. NLRB*, 993 F.2d 990, 998 (1st Cir. 1993) ("Irrespective of the extent of effort to conceal, the fraudulent concealment doctrine will not save a charging party who fails to exercise due diligence, and is thus charged with notice of a potential claim."); *Evans v. Rudy-Luther Toyota, Inc.*, 39 F. Supp.2d 1177, 1185 (D. Minn. 1999) (holding that the plaintiff failed to plead facts that could show she exercised due diligence); *Cevenini v. Archbishop of Washington*, 707 A.2d 768, 770 (D.C. 1998) (refusing to toll the statute of limitations, reasoning that it was "unwilling to hold that a failure to disclose information that has not even been requested constitutes fraudulent concealment").

allegations that, if proven, could show that the plaintiff at least attempted to discover the alleged misconduct, the plaintiff cannot meet his burden.

This concept is not new. In *Wood v. Carpenter*, 101 U.S. 135 (1879), the United States Supreme Court explained that, "the plaintiff is held to stringent rules of pleading and evidence, and especially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether, by ordinary diligence, the discovery might not have been before made." *Id.* at 140 (citation and internal quotation marks omitted). It emphasized, "A general allegation of ignorance at one time and of knowledge at another are of no effect." *Id.* "If the plaintiff made any particular discovery, it should be stated when it was made, what it was, how it was made, and why it was not made sooner." *Id.* at 141. The Court thus concluded, "A party seeking to avoid the bar of the statute on account of fraud must aver and show that he used due diligence to detect it, and if he had the means of discovery in his power, he will be held to have known it." *Id.*

For example, in *Pelullo v. National Union Fire Ins. Co. of Pittsburgh*, 131 Fed. Appx. 864 (3rd Cir. 2005), the Third Circuit Court of Appeals affirmed the district court's decision to grant the defendants' motion to dismiss, concluding that the

plaintiffs failed to plead facts to support an inference that their ignorance of their claims was not attributable to their own lack of due diligence. *Id.* at 866. There, plaintiffs brought a civil racketeering action against an insurance company and several attorneys, asserting the attorneys committed malpractice in connection with their representation of the plaintiffs. *Id.* It was clear the complaints were filed after the four-year statute of limitations, but the plaintiffs alleged the defendants "fraudulently concealed their activity" comprising their conspiracy and therefore the statute of limitations should have been equitably tolled. *Id.* The district court disagreed, and the appellate court affirmed. *Id.* Specifically, the Circuit Court explained that the statute of limitations began to run when the plaintiffs knew or should have known of his injury, and as such the plaintiffs must allege facts to show that their ignorance was not attributable to their own lack of reasonable due diligence. *Id.* It stated,

> Even assuming as the District Court did, that the [defendants] actively misled Plaintiffs, . . . Plaintiffs have failed to allege any facts which support an inference that such active misleading prevented them from recognizing the validity of their claims within the four-year statutory period or that the Plaintiffs' ignorance was not attributable to their own lack of reasonable due diligence.

Id. It therefore concluded, "[w]hile our standard of review requires us to accept as true all factual allegations in the complaint, we need not accept as true

unsupported conclusions and unwarranted inferences." *Id.* (citation and internal quotation marks omitted).

Even assuming all inferences in favor of Appellees, they have done nothing to discover the alleged misconduct or the alleged fraud within the repose period. In fact, by their own account, Appellees did not investigate or even consider the issue until an advertisement prompted them to. (Bright 138; Merlo-Schmucker 112; Tapp 145.) Appellees did exactly what Utah case law cautions against—they have idly waited for a claim to present itself (quite literally) on the television or the attorneys' advertisements. *Colosimo*, 2007 UT 25, ¶ 40; *Baldwin*, 850 P.2d at 1196. No allegations have even been made to show that Appellees made any inquiries whatsoever as to the necessity of the closure procedure. They simply claim that they were blamelessly ignorant.

More importantly, Appellees' failure to allege how they discovered the alleged fraud prevents them from meeting their burden to show that their actions were commenced within one year from the discovery of the alleged fraud. Utah Code Ann. § 78B-3-404(2)(b). Appellants moved the court to dismiss the Amended Complaints, alleging that the actions were not timely. Undisputedly, the actions were raised outside the Act's repose period, and the only possible way around the

cutoff is to show that their actions were commenced within one year of Appellees' discovery of the purported fraud. Accordingly, Appellees cannot even meet their burden to show that the Amended Complaints were commenced within the time limit prescribed by subsection (2)(b).

In sum, Appellees do not even suggest that they exercised due diligence in seeking out the information that they claim was wrongfully concealed. They merely assert that they were ignorant of the cause of action and the facts underlying their causes of action because Dr. Sorensen did not come right out and tell them he committed malpractice. (Bright 96–100; Merlo 109–113; Tapp 142–46.) "A general allegation of ignorance at one time and of knowledge at another are of no effect." *Wood*, 101 U.S. at 140. Accordingly, Appellees cannot survive a motion to dismiss because even if this Court were to assume the veracity of their allegations, nothing shows that they made any inquiry into whether they had a cause of action or why they may have been prevented from discovering the alleged misconduct. *Pelullo*, 131 Fed. Appx. at 866. Similarly, nothing shows that the actions were commenced within one year of discovering the alleged fraud or when a reasonable person should have discovered the alleged fraud. Therefore, Appellees' pleadings are insufficient and should be dismissed as a matter of law.

CONCLUSION

This is not a case in which Appellees are being asked to anticipate some arbitrary affirmative defense. They alleged tolling and fraudulent concealment in the first instance and now expect to survive a motion to dismiss with nothing more than broad opinions and legal conclusions couched as factual allegations. The Legislature enacted the Act for the specific purpose to create a time limit on health care malpractice actions. It even reduced the statute of limitations by two years and expressly indicated that no claim may be commenced after four years. To give meaning to the Act and effect to the Legislature's intentions, this court must read the Act's repose period as an absolute bar of Appellees claims. But, even if this court determines that the repose period may be tolled by the exceptions in Subsection (2), it is clear the Amended Complaints fail as a matter of law. Appellees' opinions and legal conclusions do not satisfy the requirements of the Act and the Utah Rules of Civil Procedure. In other words, the sufficiency of the pleadings preclude Appellees' claims. In particular, Appellees failed to plead facts that could demonstrate Dr. Sorensen affirmatively acted to fraudulently conceal the alleged injury or that they attempted to discover their causes of action but were inevitably prevented because of Dr. Sorensen's fraudulent concealment.

CERTIFICATE OF COMPLIANCE WITH RULES 21(g) and 24 OF THE UTAH RULES OF APPELLATE PROCEDURE

Pursuant to Rule 21(g) of the Utah Rules of Appellate Procedure, the undersigned certifies that the foregoing brief contains no non-public information as defined by the rule and in all other respects complies with the rule.

Pursuant to rule 24(f)(1)(C) of the Utah Rules of Appellate Procedure, the undersigned certifies that this brief was prepared in accordance with the rule. It contains 13987 words, according to the Microsoft Word wordcount tool, excluding the parts of the brief exempted by the rule. The brief was prepared in 13-point Palatino Linotype font.

Michael J. Miller
Attorney for Defendants/Appellants
Sherman Sorensen, M.D. and Sorensen
Cardiovascular Group

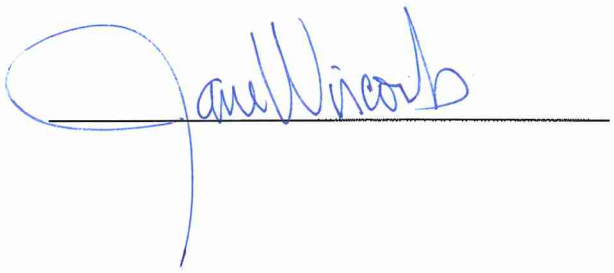
CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of March 2019, a true and correct copy of the foregoing document was served upon the parties of record in this proceeding set forth below by the method indicated:

Rhome D. Zabriskie ZABRISKE LAW FIRM, LLC 899 N. Freedom Blvd, Suite 200 Provo, UT 84604 *Attorneys for Plaintiffs*	____ - Electronic Filing __/__ - Email ____ - U.S. Mail ____ - Hand Delivery
Rand Nolen David Hobbs FLEMING, NOLEN & JEZ, LLP 2800 Post Oak Blvd., Suite 4000 Houston, TX 77056 *Attorneys for Plaintiffs*	____ - Electronic Filing __/__ - Email ____ - U.S. Mail ____ - Hand Delivery
Troy Booher ZIMMERMAN BOOHER 341 S. Main Street, 4th Floor Salt Lake City, UT 84111 *Attorneys for Plaintiffs*	____ - Electronic Filing __/__ - Email ____ - U.S. Mail ____ - Hand Delivery
Eric P. Schoonveld Tawni Anderson HALL PRANGLE & SCHOONVELD 111 East Broadway, Suite 700 Salt Lake City, UT 84111 *Attorneys for Defendant St. Mark's Hospital*	____ - Electronic Filing __/__ - Email ____ - U.S. Mail ____ - Hand Delivery

Alan Bradshaw
Jack Nelson
MANNING CURTIS BRADSHAW & BEDNAR, PLLC
136 E. South Temple, Suite 1030
Salt Lake City, UT 84111
Attorneys for Defendant IHC Health Services, Inc.

____ - Electronic Filing
__✓__ - Email
____ - U.S. Mail
____ - Hand Delivery



IN THE UTAH SUPREME COURT

Johannah Bright, Pia Merlo-Schmucker, and Lisa Tapp Appellees/Respondents, v. Sherman Sorensen, M.D.; Sorensen Cardiovascular Group; St. Mark's Hospital; and IHC Health Services, Inc., Appellants/Petitioners.	**ADDENDA TO APPELLANTS SHERMAN SORENSEN, M.D.'S AND SORENSEN CARDIOVASCULAR GROUP'S BRIEF** Supreme Court No. 20180528-SC

On Consolidated Interlocutory Appeal from the Third District, Salt Lake County

Rhome D. Zabriskie **Zabriskie Law Firm LLC** 899 North Freedom Blvd., Suite 200 Provo, Utah 84604 Rand Nolen David Hobbs **Fleming, Nolen & Jez, LLP** 2800 Post Oak Blvd., Suite 4000 Houston, Texas 77056 Troy Booher **Zimmerman Booher** 341 S. Main Street, 4th Floor Salt Lake City, Utah 84111 Attorneys for Appellees/Respondents	Michael J. Miller Kathleen J. Abke Scarlet R. Smith **Strong & Hanni** 102 South 200 East, Suite 800 Salt Lake City, Utah 84111 Attorneys for Appellants/Petitioners Sherman Sorensen M.D. and Sorensen Cardiovascular Group

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SORENSEN'S ADDENDUM A

78B-3-402 Legislative findings and declarations -- Purpose of act.

(1) The Legislature finds and declares that the number of suits and claims for damages and the amount of judgments and settlements arising from health care has increased greatly in recent years. Because of these increases the insurance industry has substantially increased the cost of medical malpractice insurance. The effect of increased insurance premiums and increased claims is increased health care cost, both through the health care providers passing the cost of premiums to the patient and through the provider's practicing defensive medicine because he views a patient as a potential adversary in a lawsuit. Further, certain health care providers are discouraged from continuing to provide services because of the high cost and possible unavailability of malpractice insurance.

(2) In view of these recent trends and with the intention of alleviating the adverse effects which these trends are producing in the public's health care system, it is necessary to protect 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.

(3) 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.

Renumbered and Amended by Chapter 3, 2008 General Session

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

SORENSEN'S ADDENDUM B

SORENSEN'S ADDENDUM B(1)

Rhome D. Zabriskie
ZABRISKIE LAW FIRM, LLC
899 North Freedom Blvd, Suite 200
Provo, Utah 84604
Tel: (801) 375-7680
Fax: (801) 375-7686
Email: rhomelawyer@yahoo.com

Counsel for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT – SALT LAKE CITY

SALT LAKE COUNTY, STATE OF UTAH

JOHANNAH BRIGHT,	)	**FIRST AMENDED COMPLAINT (Tier 3 Filing)**
Plaintiff,	)	**(Jury Demanded)**
v.	)	
SHERMAN SORENSEN, M.D.; SORENSEN CARDIOVASCULAR GROUP; AND ST. MARK'S HOSPITAL,	)	**Civil No. 170906790**
	)	**Judge: Laura Scott**
Defendants.	)	

COMES NOW Plaintiff, by and through counsel, and hereby complain for causes of action against the above-captioned Defendants, alleging as follows:

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff Johannah Bright is, and at all relevant times has been, a resident of Davis County, State of Utah.

2. Defendant SHERMAN SORENSEN, M.D. was, at all relevant times, a licensed physician providing health care services in Salt Lake County, State of Utah.

3. Defendant SORENSEN CARDIOVASCULAR GROUP (SCG), was at all material times, a Utah professional corporation in the business of providing health care services to residents of Utah. Defendant SCG's principal place of business is located at 5169 Cottonwood Street, No. 610, Murray, Utah. Defendant Sherman Sorensen owned and operated SCG as his primary medical practice.

4. Defendant ST. MARK'S HOSPITAL. (St. Mark's) is a for-profit corporation based in Salt Lake City, Utah with its principal place of business and corporate office at 1200 E 3900 S Salt Lake City, UT 84124. St. Mark's Registered Agent for Service CT Corporation System, 1108 E South Union Ave., Midvale UT 84047.

5. Upon information and belief, at all material times, each of the Defendants were, or may have been, an agent, servant, employer, employee, joint venture, partner, and/or alter ego of one or more of each of the remaining Defendants, and were at all times acting within the purpose and scope of such agency, servitude, joint venture, alter ego, partnership, or employment, and with the authority, consent, approval, and/or ratification of each remaining Defendant.

6. At all material times, Defendants were health care providers within the meaning of the Utah Health Care Malpractice Act, Utah Code Ann. § 78B-3-401 et seq., and each Defendant provided health care services to Plaintiff.

7. This Court has jurisdiction over this action pursuant to Utah Code Ann. § 78A-5-102.

8. Venue is proper in this Court pursuant to Utah Code Ann. § 78B-3-307.

9. In bringing this action, Plaintiff complied with all statutory requirements regarding pre-litigation review of this matter as set forth in the Utah Health Care Malpractice Act, Utah Code Ann. § 78B-3-416.

BACKGROUND

10. This case is one of more than a thousand cases that are presently working their way through the prelitigation process, which involve the medically unnecessary heart surgery by Dr. Sherman Sorensen related to two kinds of holes in the heart. One is called an atrial septal defect (ASD), and the other is a patent foramen ovale (PFO). Both are holes in the wall of tissue (septum) between the left and right upper chambers of the heart (atria). An ASD is considered a birth defect and is a failure of the septal tissue to form between the atria, PFOs can only occur after birth when the foramen ovale fails to close.[1]

11. Life threatening ASD's are generally discovered at birth and corrected immediately. However, there are billions of adults who have small openings between the left and right atriums of their hearts. The foramen ovale is an opening located in the wall separating the two upper chambers of the heart, the atrial septum, which is used during fetal circulation to redirect blood through the heart. In 75% of the population, the foramen ovale closes at birth when increased blood pressure on the left side of the heart forces the opening to close. In those cases, where the foramen ovale does not close at birth, a patent foramen ovale (PFO) results.

12. Approximately 25% of the healthy population have a PFO and will never require any treatment or evaluation. Apart from extremely rare cases, patients with a PFO remain completely unaware of the presence of the PFO because it's almost never associated with symptoms. Persistent patency of the foramen ovale is considered a normal anatomic variation.

[1] Dr. Sorensen at times earlier in his career referred to these two conditions interchangeably, but for insurance reimbursement purposes decided that all PFO's were ASD's later in his practice. Either way, and no matter what he called them, he closed holes indiscriminately and without medical justification on thousands of people, including the Plaintiff.

13. Only if a patient has a recurrence of cryptogenic (originating from unexplained causes) stroke or transient ischemic attack (TIA), likely due to paradoxical embolization through a PFO, and despite optimal medical therapy, may it be appropriate to close the PFO. Generally, this closure is performed through a percutaneous surgical procedure. In the percutaneous procedure, a patient undergoes a cardiac catheterization to determine the size and location of the PFO.

14. There has long been general agreement in the medical community—as far back as 2003—that PFO closure is not medically necessary, except in the limited circumstances where there is a confirmed diagnosis of a recurrent cryptogenic stroke or TIA, despite optimum medical management. At all material times, no widely accepted medical group specializing in cardiology in the United States has ever recommended, advised, or suggested that closure is appropriate for stroke or migraine prevention to patients that have not had recurrent cryptogenic strokes.

GENERAL ALLEGATIONS

15. The following general allegations are common to all claims alleged herein:

16. As noted, Defendant Dr. Sorensen is a cardiologist and was practicing interventional cardiology. He had privileges at Defendant St. Mark's and at other hospitals. From roughly 2002 to 2012, Defendant Sorensen performed more than 4,000 PFO and ASD closures, many of those at St. Mark's. Dr. Sorensen performed the procedures at a rate that dwarfed the rest of the country by a factor of ten-to-twenty fold, making him a true outlier.

17. The administration at St. Mark's was on notice because of the sheer volume of the procedures performed by Defendant Sorensen and because of complaints from other practitioners and employees that Defendant Sorensen was engaged in a practice of regularly performing

unnecessary, invasive cardiac procedures on his patients. St. Mark's ignored obvious warnings to halt these procedures so that it could secure and maintain a lucrative stream of income.

18. Further, during the hiring and credentialing process at St. Mark's, Sorensen advised St. Mark's representatives of how he would perform closures and under what conditions. And a result, St. Mark's was aware that he would be performing unnecessary closures on patients that did not have recurrent cryptogenic strokes.

19. Further, Sorensen's cardiac privileges at another hospital were suspended on or about June 27, 2011, following an internal investigation concluded that Sorensen had performed multiple, medically unnecessary PFO closures and that Sorensen represented a threat to the health and safety of the patients treated. And St. Mark's CEO Steve Bateman and physician liaison Nikki Gledhill were aware of Sorensen's suspension.

20. Defendants Sorensen and St. Mark's created false statements and documents to conceal the fact that Sorensen was performing medically unnecessary closures. These statements include documenting migraine or stroke history where none existed. For instance, Sorensen often created medical charts that falsely reflected that the patients had suffered from, or were at risk of suffering from, recurrent cryptogenic stroke in order to get insurance to pay for the procedure. The effort to disguise the true diagnosis and reason for the closures shows that Sorensen was always aware of and understood the true standard of care for these procedures.

21. Sorensen would routinely mislead his patients, who had no previous strokes or TIAs, into believing that they were at extreme risk of debilitating stroke because of their PFO or ASD. He would further mislead them that a closure procedure would be effective and was medically necessary in order to prevent strokes. These misrepresentations were made to the vast majority of his patients, including Plaintiff.

22. Despite the fact that St. Mark's knew that Sorensen was performing medically unnecessary closures, and knew that Sorensen had been suspended for performing medically unnecessary closures at another hospital, St. Mark's Hospital continued to court Sorensen's business, provide a platform and assistance to Sorensen, and advertise and promote Sorensen and closure practice to the public for its own financial gain.

23. In particular, the catheterization lab staff at St. Mark's became financially dependent on Sorensen's incredible volume. The majority of patients at St. Mark's cardiac catheterization laboratory came from Sorensen, dwarfing all other cardiology business at St. Mark's. As a result, St. Mark's provided special treatment to Sorensen with staffing and scheduling in its catheterization lab, often to the detriment of true cardiac patients and other cardiologists. St. Mark's also provided open access for PFO industry representatives to the lab and personnel. Industry provided order-in meals were available to those catheterization lab personnel that were willing to share in the largesse.

24. Ultimately, St. Mark's made a deliberate and conscious decision not to inform patients that they may have had a medically unnecessary surgery, and chose not to reimburse Plaintiff, her insurance company, or any of its other patients who had procedures performed unnecessarily. Instead, St. Mark's kept the profits for itself.

PLAINTIFF'S CLOSURE AND INJURIES

25. On 9-21-07, Ms. Bright was seen in referral by Sorensen for migraine headaches and a transesophageal echocardiogram reported to show right to left shunting across the atrial septum. On 9-21-07, in Dr. Sorensen's office, Ms. Bright underwent a transthoracic echocardiogram (TTE) with bubble study and a transcranial doppler study (TCD). The echocardiogram was interpreted to show "severe rest and valsalva shunt by bubble study." The

TCD was interpreted to show conductance grade of 4/5 at rest and 5/5 with calibrated respiratory strain. Dr. Sorensen noted that the patient has described "minor palpitations."

26. On 10-1-07, a brain MRI is performed at Western Neurological Associates. It was interpreted as "normal contrast-enhanced MRI of the brain."

27. On 11-28-07, Ms. Bright was seen in office follow-up by Dr. Sorensen. He did not recommend closure of her septal defect: "The options for closure for stroke prevention [were] reviewed but she [did] not have risk stratification features other than migraine." Dr. Sorensen asked Ms. Bright to consider enrolling in a randomized trial called the PREMIUM trial. That never occurred.

28. On 11-4-09, a repeat consult was performed by Dr. Sorensen. Dr. Sorensen's neurologic exam on Ms. Bright was not comprehensive. For instance, it did not include a sensory exam. In the impression section of this history and physical, Dr. Sorensen dictated: "This woman has high risk features for stroke which include the presence of progressive migraine, moderately severe persistent shunting, severe Valsalva shunting, and an interatrial septal aneurysm." This note was contrary to his previous note of 11-28-07 in which he dictated: "but she does not have risk stratification features other than migraine."

29. On 12-15-09, Dr. Sorensen performed an intracardiac echo-guided septal defect closure. He deployed a 20 mm Gore HELEX device.

30. On 3-18-10, Ms. Bright underwent a TTE and a TCD in Dr. Sorensen's office. Both studies demonstrated the presence of a residual shunt. A bubble study during the echocardiogram showed "mild right to left shunt at rest" and moderate right to left shunt" after valsalva. The TCD is interpreted to show a conductance grade of 2/5 at rest and 4/5 during calibrated respiratory strain. Dr. Sorensen's TCD reports gave slightly different guidelines for a "diagnostic TCD"

versus a "post-device TCD." In the diagnostic TCD, a conductance grade of 4/5 is termed a "mild to moderate" shunt with moderate probability for PFO, ASD, or AVM. There was a "low risk for stroke." In the post device TCD, a conductance grade of 4/5 is termed a "mild residual shunt." A conductance grade of 5 or 5+/5 in a post device TCD is termed a "significant residual shunt" and "further evaluation is indicated."

31. On or about June 28, 2010, Ms. Bright had a 6 month follow TTE and TCD. These studies were interpreted to show a decrease in the magnitude of the residual shunt. The echocardiogram was interpreted to show no right to left shunt at rest and a mild right to left shunt with valsalva. The TCD was interpreted to show 1/5 conductance grade at rest and 3/5 conductance grade with calibrated respiratory strain. The guidelines included in the TCD report indicates that a 3/5 conductance grade means "no significant shunt."

32. The accepted indications for closure of an atrial septal defect include right ventricular chamber enlargement, orthodeoxia-platypnea, and paradoxical embolism. Ms. Bright did not have the first two. And, Dr. Sorensen failed to perform the appropriate assessment as to the last.

33. In a patient with strong or definitive evidence for embolic stroke, the standard of care requires a comprehensive evaluation for all of the causes of embolic stroke. This was not performed by Dr. Sorensen in his care of Ms. Bright. A comprehensive evaluation for causes of "cryptogenic" stroke includes an MRI of the brain, imaging of the extra cranial and intracranial cerebral arteries, 3-4 week rhythm monitoring to look for paroxysmal atrial fibrillation, imaging of the aorta to look for atherosclerotic disease, lower extremity venous doppler/ultrasound, MRV of the abdominal and pelvic veins, and a hyper coagulability workup. Here, Dr. Sorensen did not meet this standard of care by, among other things, failing to give the details of alleged trans

ischemic attacks that Sorensen (not a neurologist) diagnosed, failing to get a neurology consultation, failing to have neuro-cognitive testing performed to document "cognitive decline," and failing to repeat a brain MRI to look for objective evidence of stroke. In short, Sorensen did not perform the required comprehensive evaluation.

34. To persuade Ms. Bright to undergo closure, Sorensen represented to her that she was at high risk of a debilitating stroke due to the presence of her PFO/ASD and that closure was medically necessary. In truth, the mere presence of the defect, without more, including a history of cryptogenic stroke, is not a significant risk factor for stroke. Further, Sorensen passed out a Patient Information Patent Foreman Ovale (PFO) handout to Ms. Bright. Sorensen's patient literature contained fraudulent misrepresentations, unsupported data and statistics, outright falsehoods, and other misleading statements, such as the following:

- "Until recently, 40% of all strokes were unknown cause. We now know that most of these unexplained strokes may be caused by a PFO (Patent Foramen Ovale)"
- "Strokes resulting from septal defects have a 50% mortality rate."
- "PFO is diagnosed in 50-70% of patients with stroke of unknown cause"
- "Continued lifelong risk of stroke ranging from 2-9% each year."
- "Stroke reduction to less than 1%"
- "Septal Defect Closure Safety and Efficacy"
- "Our rigorous Program requirements assure that you are informed and receive the safest and most effective treatment"

In addition, to the handout Sorensen made other misrepresentations to Ms. Bright both orally and in writing. These misrepresentations include:

- "Our approach is a preventative strategy. It is scientifically based, but it is an aggressive strategy." In fact, Dr. Sorenson's method has never been accepted in any scientific journal, organization, been approved for a randomized clinical trial, and/or the peer review process for his data and proposed indication for PFO closure. "We, therefore follow a preventative strategy and risk stratify patients based on the studies…proposed by the American Academy of Neurology." That is false; the AAN did not recommend closure outside of clinical trials and encouraged patients to participate in research protocols.
- "8 studies demonstrate that very high flow is the main feature of stroke risk." In fact, the AAN Practice Parameter did not find an association, much less causation, of shunting and risk of stroke recurrence.
- "Randomized trials are not available currently." In reality, the Closure I trial was opened in Salt Lake City, Utah. It was halted due to Defendant Sorensen's medically unnecessary off-label PFO procedures of patients outside the trial.
- "Coumadin is considered to be unsafe and ineffective…based on studies." In fact, the SPIRIT, WASID and WARRS studies referenced by Sorensen showed no such thing.
- Sorenson certified that his echocardiography lab was certified by ICAEL (Intersocietal Commission for Accreditation Laboratories) using the ICAEL logo on his echochardiogram. In fact, his lab was never accredited by ICAEL and this was false.

These false statements were intended to and did in fact induce Ms. Bright to undergo closure at St. Mark's by inducing fear of an imminent and debilitating stroke, downplaying safer and accepted treatment options, misrepresenting the indication for closure, and downplaying the risks of closure.

35. Despite St. Mark's awareness of Sorensen's fraudulent and/or negligent practices, it did nothing to notify Ms. Bright. Instead, St. Mark's actively allowed Sorensen's practice to continue in order to profit from the thousands of unnecessary procedures performed on patients like Ms. Bright. In fact, St. Mark's has to this day actively concealed its knowledge about Sorensen's rogue and fraudulent practices at its facility from patients, third party payers, and the public, and has retained the money earned off of Sorensen's medically unnecessary surgeries.

36. Ms. Bright could not have known that the information provided by Defendants was false. Instead, she trusted that Defendants Sorensen and St. Mark's, as her health care providers, were being truthful. Further, even if she had been aware of some of the factual mischaracterizations, as a non-expert she could not have understood their implications as it relates the appropriateness of her medical treatment.

37. Because of Defendants' fraudulent statements and omissions, Ms. Bright was until recently unaware of her cause of action. In fact, Ms. Bright only learned of the Defendants' misconduct as a result lawyer advertising. Her diligent investigation resulted in the noticing and filing of this action within the statutory period.

38. Because of Defendants' conduct, Ms. Bright suffered significant damages, including:

i. undergoing an unnecessary surgical procedure and hospital stay,

ii. paying significant medical expenses to Defendants,

iii. physical pain, and

emotional anguish as a result of being told she was at immediate risk of a debilitating or even deadly stroke.

FIRST CLAIM FOR RELIEF: NEGLIGENCE (HEALTH CARE MALPRACTICE)

39. Plaintiff refers to and incorporates the preceding paragraphs as if set forth fully herein.

40. Defendants, individually, collectively, and through the acts and omissions of their agents, servants, employees, physicians, nurses, therapists, and technologists (hereinafter collectively "Defendants") accepted Plaintiff as a patient, and thereby assumed various duties of care.

41. At all relevant times, Defendants held themselves out as being able to provide full care and treatment for patients requiring medical care of the type that Plaintiff required.

42. The degree of care and treatment provided to Plaintiff fell below the acceptable standards of care for the types of medical care and treatment required by Plaintiff and provided by Defendants.

43. Specifically, Defendants breached the applicable standards of care in multiple ways including, but not limited to:

a. Falsifying Plaintiff's medical records to indicate that Plaintiff was an appropriate candidate for closure;

b. Misleading Plaintiff regarding the risks and benefits associated with closure and regarding the necessity of treatment;

c. Failing to obtain an adequate history which resulted in an improper medical diagnosis that Plaintiff was an appropriate candidate for closure;

d. Failing to conduct an adequate physical and to obtain appropriate diagnostic testing, which resulted in an improper medical diagnosis that Plaintiff was an appropriate

candidate for PFO closure; Performing a medically unnecessary medical procedure with a device that was not FDA approved for this use; and

44. As a sole, proximate, and foreseeable result of Defendants' acts and omissions, Defendants caused Plaintiff to undergo unnecessary medical procedures, testing, and follow-up visits, incur unnecessary medical expenses, and experience physical injuries and emotional anguish.

45. As a sole, proximate, and foreseeable result of Defendants' acts and omissions, Plaintiff has suffered personal injuries, including by not limited to unnecessary medical procedures, testing, follow-up visits, medical expenses, and emotional anguish.

46. Plaintiff has therefore been injured and is entitled to recover general and special damages in an amount to be determined at trial.

SECOND CLAIM FOR RELIEF: NEGLIGENCE

47. Plaintiff refers to and incorporates the preceding paragraphs as if set forth fully herein.

48. At all relevant times, Defendants owed Plaintiff various duties of care, including but not limited to common law and statutory duties.

49. Defendants, individually and collectively, breached these duties of care.

50. As a sole, proximate, and foreseeable result of Defendants' acts and omission, Defendants caused personal and other injuries to Plaintiff.

51. Plaintiff has been injured and is entitled to recover general and special damages in amounts to be determined at trial.

THIRD CLAIM FOR RELIEF: NEGLIGENT MISREPRESENTATION

52. Plaintiff refers to and incorporates the preceding paragraphs as if set forth fully herein.

53. Defendants, individually and collectively, represented to Plaintiff that medical procedures, testing, and follow-up visits were medically necessary.

54. Defendants' representations that Plaintiff's medical procedures, testing, and follow-up visits were medically necessary was, in fact, not true.

55. Defendants failed to use reasonable care to determine whether the representations regarding the necessity of Plaintiff's medical care was true.

56. Defendants were in a better position than Plaintiff to know the true facts regarding Plaintiff's medical procedures, testing, and follow-up care.

57. Defendants had a financial interest in performing medically unnecessary procedures, testing, and follow-up care on Plaintiff.

58. Plaintiff relied on Defendants' representations, and it was reasonable for her to do so.

59. Plaintiff has therefore been injured as a result of relying on Defendants' representations and is entitled to recover general and special damages in an amount to be determined at trial.

FOURTH CLAIM FOR RELIEF: NEGLIGENT CREDENTIALING

60. Plaintiff refers to and incorporates the preceding paragraphs as if set forth fully herein.

61. Defendant St. Mark's owes a duty to patients to exercise reasonable care in the selection of its medical staff and in granting specialized privileges to them. It also has the duty to periodically monitor and review the qualifications and competency of its medical staff.

62. Defendant St. Mark's breached its duty to exercise reasonable care in its selection of its medical staff, and in granting specialized privileges to and periodically monitoring and reviewing the qualifications and competency of its medical staff.

63. As a sole, proximate, and foreseeable result of its breach, Defendant St. Mark's caused harm to Plaintiff.

64. Plaintiff has been injured and is entitled to recover general and special damages in an amount to be determined at trial.

FIFTH CLAIM FOR RELIEF: FRAUDULENT NON-DISCLOSURE/CONCEALMENT

65. Plaintiff refers to and incorporates the preceding paragraphs as if set forth fully herein.

66. Defendants owed a duty to Plaintiff to disclose important facts, such as the medical necessity of Plaintiff's medical care, to Plaintiff.

67. Defendants knew that the medical care Defendants provided to Plaintiff was not medically necessary, and failed to disclose this to Plaintiff.

68. Plaintiff did not know that the medical care provided by Defendants was not medically necessary.

69. Defendants' failure to disclose the fact that Plaintiff's medical care was not necessary was a substantial factor in causing Plaintiff's damages. Had Plaintiff known that her closure surgery was not necessary, Plaintiff would not have undergone the surgery.

70. Plaintiff has been injured and is entitled to recover general and special damages in an amount to be determined at trial.

SIXTH CLAIM FOR RELIEF: FRAUD

71. Plaintiff refers to and incorporates the preceding paragraphs as if set forth fully herein.

72. At all relevant times, Defendants had a duty and obligation to disclose to Plaintiff true facts concerning the medical care provided to Plaintiff by Defendants.

73. Defendants intentionally concealed material facts concerning Plaintiff's medical care from Plaintiff including, but not limited to the following:

a. Falsifying Plaintiff's medical records to indicate that she was an appropriate candidate for closure;

b. Performing medically unnecessary medical procedures with a device that was not FDA approved for this use; and

c. Concealing from Plaintiff that medical procedures, testing, and follow-up care was unnecessary.

74. Defendants made false statements and misrepresentations about important facts regarding Plaintiff's medical care.

75. Defendants made these false statements and misrepresentations described above knowing that the statements were false, or with reckless disregard for their truth.

76. Defendants made the false statements and misrepresentations to Plaintiff, with the intent that Plaintiff would rely on the statements.

77. Plaintiff did reasonably rely on the false statements and misrepresentations made by Defendants.

78. As a sole, proximate, and foreseeable result of Defendants' false statements and misrepresentations, Plaintiff has suffered personal injuries, including but not limited to unnecessary medical procedures, testing, follow-up visits, medical expenses, and emotional anguish.

SEVENTH CLAIM FOR RELIEF: CIVIL CONSPIRACY

79. Plaintiff refers to and incorporates the preceding paragraphs as if set forth fully herein.

80. Defendants were acting in a conspiracy to commit fraud, thereby increasing their profits through the performance of medically unnecessary procedures on patients, including Plaintiff.

81. There was an agreement and meeting of the minds among Defendant Sorensen, Defendant SCG, and Defendant St. Mark's to misrepresent the need for and induce patients, including Plaintiff, into undergoing medically unnecessary procedures, testing, and follow-up. Defendants agreed to act in concert in making these misrepresentations about the necessity of medical procedures to Plaintiff.

82. There were multiple unlawful, overt acts by Defendant Sorensen, Defendant SCG, and Defendant St. Mark's in furtherance of their scheme, including without limitation, Defendants' fraud.

83. As a result of this conspiracy, Defendant Sorensen, Defendant SCG, and Defendant St. Mark's, should be held jointly and severally liable for the conduct of the other co-conspirators and the damages that Plaintiff sustained as a proximate result thereof, including without limitation personal injuries and other injuries.

84. Plaintiff would further show that Defendant Sorensen and Defendant SCG were operating as alter egos for the purpose of perpetrating the above described conspiracy. There was such a unity of interest and ownership that the separate personalities of the company and the individual did not exist. Observing the corporate form will sanction this conspiracy, promote injustice, and allow an inequitable result.

EQUITABLE TOLLING/FRAUDULENT CONCEALMENT

85. Plaintiff refers to and incorporates the preceding paragraphs as if set forth fully herein.

86. Because of Defendants' concealment of material facts and misleading conduct, Plaintiff was not aware of her causes of action.

87. Defendants took affirmative steps to conceal Plaintiff's cause of action. Given Defendants' concealment and misleading conduct, a reasonable plaintiff would not have discovered the cause of action earlier.

88. Neither Sorenson, nor St. Mark's ever notified Plaintiff that she had received an unnecessary procedure, that she was never indicated for the surgery to begin with, that the device implanted into Plaintiff was never medically necessary, was retained in her body for no medical purpose, and that the informed consent contained fraudulent, misleading, and/or incomplete statements. Neither Sorenson, nor St. Mark's, ever compensated Plaintiff for the unnecessary medical surgery she underwent by reimbursing the costs of the procedure.

89. Neither Sorensen, nor St. Mark's, ever made a public statement, sent a letter, made a public announcement, or issued a press release to inform patients, such as Plaintiff, that they may have had medically unnecessary closures.

90. Defendants' misrepresentations and misleading conduct constitutes fraudulent concealment that tolls any proffered statute of limitation that may otherwise bar the recovery sought by Plaintiff.

91. Plaintiff did not know, nor should have known, of the causes of action against Defendants prior to being put on notice of Defendants' potential liability recently. She neither discovered, nor reasonably should have discovered, the facts underlying her causes of action before any proffered statute of limitations period expired.

92. As a result of Defendants' concealment of the true character, quality and nature of their conduct, they are estopped from relying on any statute of limitations defense. 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. Such conduct tolls the limitations pursuant to the Utah Health Care Malpractice Act 78B-3-404(b).

93. Defendants' conduct, because it was purposely committed, was known or should have been known by them to be dangerous, heedless, reckless, and without regard to the consequences or the rights and safety of Plaintiff.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for a judgment (under URCP: Tier 3) against Defendants in an amount to be determined by the trier of fact for the following damages:

a. For special damages in an amount to be determined at trial;

b. For general damages in an amount to be determined at trial;

c. For pre and post judgment interest on all special damages pursuant to Utah law;

d. For costs and attorney fees to the extent allowed by law; and

e. For such other relief as the Court deems appropriate.

RESPECTFULLY SUBMITTED this 21st day of December 2017.

/s/ Rhome D. Zabriskie
Rhome D. Zabriskie
ZABRISKIE LAW FIRM, LLC
899 North Freedom Blvd, Suite 200
Provo, Utah 84604
Tel: (801) 375-7680
Fax: (801) 375-7686
Email: rhomelawyer@yahoo.com

FLEMING, NOLEN & JEZ, LLP
Rand P. Nolen (Pro Hac Vice submission in progress)
David L. Hobbs (Pro Hac Vice submission in progress)
2800 Post Oak Blvd., Suite 4000
Houston, TX 77056-6109
Telephone: (713) 621-7944
Facsimile: (713) 621-9638
Email: rand_nolen@fleming-law.com
Email: david_hobbs@fleming-law.com

Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that that a true and exact copy of the foregoing has been served on the following via the Court's ECF filing system and/or Email on 21st day of December, 2017:

Eric P. Schoonveld
Tawni J. Anderson
Nathan E. Dorsey
Hall Prangle & Schoonveld, LLC
111 East Broadway, Suite 700
Salt Lake City, UT 84111
Phone: 801-320-0900
Fax: 801-320-0896
eric@hpslaw.com
tanderson@hpslaw.com
ndorsey@hpslaw.com

Attorneys for St. Mark's Hospital

Michael J. Miller
Strong & Hanni
102 South 200 East, Suite 800
Salt Lake City, UT 84111
mmiller@strongandhanni.com

Attorney for Defendants Sherman Sorensen, M.D. and Sorensen Cardiovascular Group

/s/ Rhome D. Zabriskie
Rhome D. Zabriskie

SORENSEN'S ADDENDUM B(2)

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

JOHANNAH BRIGHT, Plaintiff, vs. SHERMAN SORENSEN, M.D.; SORENSEN CARDIOVASCULAR GROUP; AND ST MARK'S HOSPITAL, Defendants.	RULING AND ORDER RE PENDING MOTIONS TO DISMISS Case No. 170906790 June 20, 2018 Judge Laura S. Scott

Before the court is the *Motion to Dismiss Plaintiff's First Amended Complaint* filed by Defendants Sherman Sorensen, M.D. and Sorensen Cardiovascular Group (collectively Sorensen Defendants) and the *Motion to Dismiss Amended Complaint* filed by Defendant St. Mark's Hospital. The court heard oral argument on the Motions on May 1, 2018 and took them under advisement. Having considered the briefing, arguments of counsel, and applicable law, the court now issues the following Ruling and Order:

ALLEGATIONS OF THE FIRST AMENDED COMPLAINT

1. This case involves surgery to close a patent foramen ovale (PFO), which is a hole in the heart that occurs after birth when the foramen ovale fails to close.[1] According to the First Amended Complaint, approximately 25% of the healthy population have a PFO and will never require any treatment or evaluation. PFO closure is not medically necessary unless there is a confirmed diagnosis of recurrent cryptogenic stroke or transient ischemic attack (TIA).[2]

[1] The second type of hole is called an atrial septal defect (ASD), which is considered a birth defect.

[2] *See* First Amended Complaint, ¶¶ 10-14, which was filed on December 21, 2017.

2. Dr. Sorensen is a cardiologist who was practicing interventional cardiology. Dr. Sorensen had privileges at St. Mark's.[3]

3. From approximately 2002 to 2012, Dr. Sorensen performed more than 4,000 PFO and ASD closures, many of those at St. Mark's. He performed these procedures at a rate that dwarfed the rest of the country.[4]

4. St. Mark's was on notice that Dr. Sorensen was engaged in the practice of regularly performing unnecessary and invasive PFO closures on his patients because of the sheer volume of the procedures and complaints from other practitioners and employees.[5]

5. Also, during the hiring and credentialing process, Dr. Sorensen told St. Mark's how and under what conditions he would perform PFO and ASD closures, including that he would perform closures on patients who did not have recurrent cryptogenic strokes.[6]

6. The catheterization lab at St. Mark's became financially dependent on Dr. Sorensen's practice. Consequently, despite knowing that Dr. Sorensen was performing medically unnecessary closures, St. Mark's continued to court his business, provide a platform and assistance to him, and advertise and promote Dr. Sorensen's practice.[7]

7. The Sorensen Defendants and St. Mark's created false statements and documents to conceal the fact that Dr. Sorensen was performing medically unnecessary closures, including medical charts.[8]

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[3] *Id.*, ¶ 16.

[4] *Id.*

[5] *Id.*, ¶ 17.

[6] *Id.*, ¶ 18.

[7] *Id.*, ¶¶ 22, 23.

[8] *Id.*, ¶ 20.

8. In 2007, Plaintiff Johannah Bright was referred to Dr. Sorensen because she was experiencing migraines and a transesophageal echocardiogram showed right to left shunting across the atrial septum. She was seen by Dr. Sorensen on September 21, 2007 at his offices, where she underwent a transthoracic echocardiogram (TTE) with bubble study and transcranial Doppler study (TCD).[9]

9. On October 1, 2007, Western Neurological Associates performed a brain MRI on Ms. Bright, which was interpreted as "normal contrast-enhanced MRI of the brain."[10]

10. On November 28, 2007 at a follow-up office visit, Dr. Sorensen did not recommend closure because "she [did] not have risk stratification features [for stroke] other than migraine.[11]

11. On November 4, 2009, Ms. Bright returned to Dr. Sorensen for a second consultation. Dr. Sorensen's neurologic exam was not comprehensive. Contrary to his 2007 note, Dr. Sorensen's 2009 note states that Ms. Bright "has high risk features for stroke" and "an interatrial septal aneurysm."[12]

12. To induce her to undergo the PFO closure procedure, Dr. Sorensen told Ms. Bright that she had a high risk of a debilitating stroke and that the PFO closure would be effective and was medically necessary in order to prevent strokes. Dr. Sorensen also provided Ms. Bright with a PFO handout that contained fraudulent statements and unsupported data.[13]

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[9] *Id.*, ¶ 25.

[10] *Id.*, ¶ 26.

[11] *Id.*, ¶ 27.

[12] *Id.*, ¶ 28.

[13] *Id.*, ¶ 34.

13. Dr. Sorensen's statements were made with the intent to induce Ms. Bright to undergo the unnecessary procedure. Ms. Bright did not know the statements were false or misleading. And she relied on these statements in agreeing to undergo the procedure.[14]

14. On December 15, 2009, Ms. Bright underwent the PFO closure procedure.[15]

15. On March 18, 2010 and June 28, 2018, Ms. Bright had follow-up tests in Dr. Sorensen's office.[16]

16. On or about June 27, 2011, Dr. Sorensen's privileges at another hospital were suspended. St. Mark's CEO Steve Bateman and physician liaison Nikki Gledhill were aware of the suspension.[17]

17. St. Mark's knew about Dr. Sorensen's practices but did not inform Ms. Bright that she may have had a medically unnecessary surgery and chose not to reimburse her or her insurance company for the procedure. To this day, St. Mark's has actively concealed its knowledge about Dr. Sorensen's practices from patients, third party payors, and the public.[18]

18. Because of their fraudulent statements and omissions, Ms. Bright only learned of Defendants' misconduct as a result of lawyer advertising.[19]

19. Ms. Bright has suffered significant damages, including undergoing an unnecessary surgical procedure and hospital stay, paying significant medical expenses, physical pain, and emotional anguish.[20]

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[14] *Id.*, ¶ 34.

[15] *Id.*, ¶ 29.

[16] *Id.*, ¶¶ 30, 31.

[17] *Id.*, ¶ 19.

[18] *Id.*, ¶ 35.

[19] *Id.*, ¶ 37.

[20] *Id.*, ¶ 38.

RULING AND ORDER

Rule 12(b) Standard

On a rule 12(b)(6) motion, the court determines whether the plaintiff has alleged enough facts in the complaint to state a cause of action.[21] The court presumes "the factual allegations in the complaint are true and . . . draw[s] all reasonable inferences in the light most favorable to the plaintiff."[22] The court's sole concern is "the sufficiency of the pleadings, [and] not the underlying merits of [the] case."[23] Thus, a plaintiff's claims are subject to dismissal only when the allegations of the complaint "clearly demonstrate that the plaintiff does not have a claim."[24]

Collateral Estoppel (Issue Preclusion)

The Sorensen Defendants first argue that Ms. Bright's claims are barred by collateral estoppel because her allegations "are the same basic allegations asserted in the *qui tam* case and are based on the same facts and issues." As discussed at the hearing, the court is not persuaded by this argument because the issue decided in the qui tam case – whether Defendants "submitted objectively false claims for payment" – is not identical to the issues presented in this case. Nor have the Sorensen Defendants established the other elements of collateral estoppel, *i.e.*, that the parties are the same or in privity with each other or that the issues in this case have been completely, fairly, and fully litigated in the *qui tam* case.[25]

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[21] *Alvarez v. Galetka*, 933 P.2d 987, 989 (Utah 1997).

[22] *Commonwealth Prop. Advocates, LLC v. Mortg. Elec. Registration Sys., Inc.*, 2011 UT App 232, ¶ 16, 263 P.3d 397, 404.

[23] *Oakwood Vill. LLC v. Albertsons, Inc.*, 2004 UT 101, ¶ 8, 104 P.3d 1226, 1230 (citing *Alvarez*, 933 P.2d at 989).

[24] *Alvarez* at 989.

[25] *Gunmundson v. Del Ozone*, 2010 UT 33, ¶ 9, 232 P.3d 1059, 1067.

Statue of Repose

Defendants argue that Ms. Bright's claims are barred by the statute of repose set forth in the Utah Medical Malpractice Act. As set forth below and applying the motion to dismiss standard, the court is unable to conclude at this time that the statute of repose was not tolled as result of Defendants' alleged affirmative acts to fraudulently conceal their misconduct.[26]

"As a general rule, a statute of limitations begins to run upon the happening of the last event necessary to complete the cause of action."[27] Once a statute begins to run, a plaintiff must file her claim before the limitations period expires or the claim will be barred.[28] However, there are "two narrow settings in which a statute of limitations may be tolled until the discovery of facts forming the basis for the cause of action."[29] "The first setting . . . involves situations in which a relevant statute of limitations, by its own terms, mandates application of the discovery rule."[30] This setting is referred to as the statutory discovery rule. The second setting, which is referred to as the equitable discovery rule, applies *only* where a statute of limitations does not, by its own terms, already account for such circumstances."[31]

As a preliminary matter, the parties appear to agree that Ms. Bright's claims are subject to the statute of limitations found in the Utah Health Care Malpractice Act, which contains a statutory discovery rule. The Act also includes a statue of repose, which bars claims commenced more than four years after the date of the alleged act, omission, neglect, or occurrence"

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[26] At the hearing, Ms. Bright argued the foreign object exception of § 78B-3-404(2)(A) also applies. The court disagrees. The catheter was not "wrongly left" within her body. And there is no allegation that Ms. Bright did not know that it was placed in her body as part of the closure procedure.

[27] *Myers v. McDonald,* 635 P.2d 84, 86 (Utah 1981) (citation and internal quotation marks omitted).

[28] *See id.*

[29] *Russell Packard Dev., Inc. v. Carson,* 2005 UT 14, ¶ 21, 108 P.3d 741, 746

[30] *Id.*

[31] *Id.* at ¶ 25

regardless of when a plaintiff discovers her injury.[32] However, "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."[33] Thus, "[i]n medical malpractice cases, the running of the statute of limitations [can only be] tolled when a patient has been prevented from discovering the malpractice by the health care provider's affirmative acts of fraudulent concealment."[34]

Defendants first argue Ms. Bright failed to plead fraudulent concealment with particularity under Rule 9(c). The court is not convinced that Rule 9(c) requires a plaintiff to plead defensive fraudulent concealment in her complaint in anticipation that a defendant may assert the statute of limitations or statute of repose in a motion to dismiss. With the exception of *Roth v. Pedersen* discussed further below, the appellate courts in the cases cited by Defendants were reviewing the district court's grant of summary judgment, not a dismissal under Rule 12(b).[35] The court accordingly rejects this argument at this juncture.

Turning to their primary argument, as the court understands it from the briefing and oral argument, Defendants assert the statute of repose was not tolled because Ms. Bright has not alleged "active" concealment. "Fraudulent concealment requires that one with a legal duty or

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[32] Utah Code Ann. § 78B-3-404(1).

[33] Utah Code Ann. § 78B-3-404(2) (emphasis added).

[34] *Roth v. Joseph*, 2010 UT App 332, ¶ 31, 244 P.3d 391, 398 (emphasis added) (citing *Chapman v. Primary Children's Hosp.*, 784 P.2d 1181, 1184–87 (Utah 1989) (applying statute)).

[35] *See Berenda v. Langford*, 914 P.2d 45 (Utah 1996) (summary judgment); *Chapman v. Primary Children's Hosp.*, 784 P.2d 1181 (Utah 1989) (summary judgment); *Roth v. Joseph*, 2010 UT App 332, 244 P.3d 391 (summary judgment); *see also Jensen v. IHC Hosps., Inc.*, 944 P.2d 327, 333 (Utah 1997) (motion in limine and trial).

obligation to communicate certain facts remain silent or otherwise act to conceal material facts known to him."[36] Defendants do not dispute that a health care provider is required to disclose "material information concerning the patient's physical condition. This duty to inform stems from the fiduciary nature of the relationship and the patient's right to determine what shall or shall not be done with his body."[37] But, Defendants argue, the statute's inclusion of the phrase "affirmatively acted" means that silence or "pure, uninvited non-disclosure" is not enough. According to Defendants, Ms. Bright must have "directly engaged with each defendant that she accuses of affirmatively fraudulently concealing her injury from her, and then the individual defendant must have done something affirmative to prevent her from discovering her legal injury." Defendants also appear to argue the "engagement" and "affirmative" responsive act must have occurred after the surgery.

Defendants' argument finds some support in the holding in *Roth v. Pedersen*, a short memorandum decision. The Utah Court of Appeals affirmed the grant of the motion for judgment on the pleadings because the plaintiff "failed, as required by the Act, to commence litigation within two years of discovery of his legal injury, which occurred, at the latest, in May 2006" when he initiated legal action against his general surgeon. The Court then addressed the plaintiff's alternative argument regarding fraudulent concealment. Because the plaintiff did not allege that he consulted with the defendant about the surgery or that the defendant provided him with information that misrepresented or concealed his involvement in the surgery, the Court affirmed the district court's dismissal of his claim "for failure to plead fraud with sufficient particularity."[38] In *Roth*, the plaintiff had inquiry notice. There was no such notice here.

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[36] *Jensen,* 944 P.2d at 333.

[37] *Nixdorf v. Hicken*, 612 P.2d 348, 354 (Utah 1980) (citations and internal quotation marks omitted).

[38] *Pedersen v. Roth*, 2009 UT App 313.

Even if the court were to ultimately rule the fraudulent concealment had to occur after the surgery, the court is not convinced that "affirmatively acted" in the context of this case means that Ms. Bright must have "directly engaged" with the Sorensen Defendants and St. Mark's *if* she can demonstrate they were in possession of specific facts they had a duty to disclose and the disclosure of such facts would have put her on notice of the alleged misconduct.[39] For St. Mark's, such facts may include Dr. Sorensen's suspension or any other specific information it may have had regarding Dr. Sorensen's alleged misconduct in connection with Ms. Bright's surgery. Finally, with respect to Dr. Sorensen, Ms. Bright has alleged some affirmative acts that occurred after the surgery, including his follow-up treatment and billing.

Defendants also argue that Ms. Bright has failed to allege she conducted any investigation or inquiry into the medical care she received from Dr. Sorensen, or that her investigation was thwarted by any alleged affirmative act on the part of Defendants. A plaintiff seeking to save her claims under the discovery rule must demonstrate she exercised reasonable diligence in not bringing her claims in a timely manner. This is a fact-intensive matter for the fact finder to ascertain except in only "the clearest of cases."[40] In determining reasonable diligence, the fact finder considers the "difficulty a plaintiff may have in recognizing and diligently discovering a cause of action when a defendant affirmatively and fraudulently conceals it."[41] Here, Ms. Bright's claims relate to an allegedly unnecessary surgery which did not have an adverse outcome or any complications. And, unlike in the cases cited, Defendants have failed to

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[39] St. Mark's argues that it has no duty to "analyze and disclose judgments by a treating physician, particularly when no physical complication is alleged" or to "investigate all procedures performed in its cath lab for medical necessity." The court does not necessarily disagree. But the fact that St. Mark's may not have had a duty to analyze or investigate does not necessarily mean that it did not have a duty to disclose specific information it may have had related to Ms. Bright's surgery.

[40] *Russell Packard Dev., Inc.*, at ¶ 39.

[41] *Berenda*, 914 P.2d at 54.

identify any facts that Ms. Bright had knowledge of that would have put her on inquiry notice that the surgery was medically unnecessary.[42] As the Utah Supreme Court observed in *Colosimo*, Ms. Bright cannot be expected to inquire about the existence of a claim that is entirely concealed from her when there is nothing to put her on inquiry notice. Accordingly, the court is unable to conclude that her "failure to investigate possible misconduct" makes this one of the "clearest of cases" that warrants dismissal pursuant to a motion to dismiss.[43]

Having rejected Defendants' statute of repose arguments in light of the motion to dismiss standard, the court now turns to the other possible grounds for dismissing Ms. Bright's claims.

Ms. Bright's Negligence Claim (Second Claim for Relief)

Defendants argue that Ms. Bright's common law negligence claim is duplicative of her negligence (health care malpractice) claim. The court agrees because Ms. Bright has not identified a common law or statutory duty that Dr. Sorensen or St. Mark's owed her that is independent from the duty that arose from their provider-patient relationship. Accordingly, Ms. Bright's Second Claim for Relief should be dismissed because it fails to state a claim upon which relief may be granted.

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[42] *See Daniels v. Gamma West Brachytherapy, LLC*, 2009 UT 66, ¶ 30, 221 P.3d 256 ("it seems somewhat incongruous that an injured person must commence a malpractice action prior to the time he knew, or reasonably should have known, of his injury and right of action."); *Russell Packard Dev., Inc.* at ¶ 28 ("to permit one practicing a fraud and the concealing it to plead the statute of limitations when, in fact, the injured party did not know of and could not with reasonable diligence have discovered the fraud" would be "not only subversive of good morals, but also contrary to the plainest principles of justice"); *Foil v. Ballinger*, 601 P.2d 144, 147 (Utah 1979) (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) (all internal citations omitted).

[43] *See Day v. Meek*, 1999 UT 28, ¶ 21, 976 P.2d 1202 (interpreting statute in light of obvious unfairness of unreasonably barring claims that have been fraudulently concealed).

Ms. Bright's Negligent Credentialing Claim (Fourth Claim for Relief)

In support of her negligent credentialing claim against St. Mark's, Ms. Bright alleges that St. Mark's had a duty to "periodically monitor and review the qualifications and competency of its medical staff" and that it breached this duty, presumably in connection with its granting of privileges to Dr. Sorensen. However, "[i]t is the policy of this state that the question of negligent credentialing, as applied to health care providers in malpractice suits, is not recognized as a cause of action."[44] Accordingly, Ms. Bright's Fourth Claim for Relief should be dismissed because it fails to state claim upon which relief may be granted.

Fraudulent Non-Disclosure or Concealment (Fifth Claim for Relief)

To prevail on her fraudulent non-disclosure or concealment claim, "a plaintiff must prove the following three elements: (1) the nondisclosed information is material, (2) the nondisclosed information is known to the party failing to disclose, and (3) there is a legal duty to communicate."[45] Ms. Bright alleges Defendants "owed a duty [to] disclose important facts, such as the medical necessity of [her] medical care." This is simply the converse of her primary fraud and negligent misrepresentation allegation, *i.e.,* Dr. Sorensen told her the procedure was medically necessary because she had a high risk of stroke. Ms. Bright also fails to identify a duty different or separate from the duty that arises from the provider-patient relationship. Thus, the court concludes her fraudulent concealment claim against the Sorensen Defendants is subsumed within her malpractice, fraud, and/or negligent misrepresentation claims.

With respect to St. Mark's, the court agrees that Ms. Bright fails to state a claim upon which relief can be granted. She does not plead any facts from which the court may infer that St.

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[44] Utah Code Ann. §78B-3-425.

[45] *Hermansen v. Tasulis*, 2002 UT 52, ¶ 24, 48 P.3d 235

Mark's knew that her particular surgery was not medically necessary prior to the surgery.[46] And while St. Mark's alleged failure to notify patients that Dr. Sorensen's privileges had been suspended for performing unnecessary closure procedures may be sufficient to defeat a motion to dismiss based on the statute of repose, it cannot form the basis of an affirmative fraudulent concealment claim. Indeed, Ms. Bright could not have relied on St. Mark's silence regarding the suspension in agreeing to the surgery because the suspension happened after her surgery. Accordingly, the court dismisses Ms. Bright's fraudulent concealment claim.[47]

Ms. Bright's Other Claims Are Not Subsumed into a Single Malpractice Claim

Defendants argue Ms. Bright's other claims should be dismissed because they are subsumed into her First Claim for Relief for Negligence – Health Care Malpractice. Specifically, Defendants argue that all alleged breaches of duty in a provider-patient relationship are "properly actionable under the Utah Health Care Malpractice Act and not as separate claims." They base this argument on § 78B-3-403, which defines a malpractice action against a health care provider as "any action against a health care provider, whether in contract, tort, breach of warranty, wrongful death, or otherwise, based upon alleged personal injuries relating to or arising out of health care rendered or which should have been rendered by the health care provider."[48] Although the court agrees that Ms. Bright's negligence claim is subsumed within her malpractice claim, the court is not otherwise persuaded that the Act prevents Ms. Bright from bringing her negligent misrepresentation, fraud, and civil conspiracy claims, which do not necessarily depend upon an "alleged breach of duty to provide accurate information concerning the necessity of

[46] In general, a hospital does not owe an independent duty to obtain a patient's informed consent to treatment. *See Buu Nguyen v. IHC Med. Servs., Inc.*, 2102 UT App 288, ¶ 11, 288 P.3d 1084.

[47] Additionally, if there is other material information that Defendants failed to disclose prior to her surgery, Ms. Bright has not sufficiently identified it as required by Rule 9(c) of the Utah Rules of Civil Procedure, which is discussed further below.

[48] Utah Code Ann. § 78B-3-403.

medical care relating to the PFO closure procedure" as argued by Defendants. Indeed, duty is not an element of a fraud, negligent misrepresentation, or civil conspiracy claim.

Rule 9(c)'s Particularity Requirement for Affirmative Claims

Ms. Bright's fraud, misrepresentation, and civil conspiracy claims against Defendants implicate Rule 9(c) of the Utah Rules of Civil Procedure, which requires a plaintiff to state with particularity the circumstances constituting the fraud. Pleadings satisfy this standard only if they include a sufficiently clear and specific description of the facts underlying the claim,[49] including the who, what, when, where, and how.[50] Defendants argue Ms. Bright has failed to satisfy this standard and, consequently, these claims should be dismissed. As discussed further below in connection with each claim, the court concludes that Ms. Bright has complied with Rule 9(c).

Negligent Misrepresentation and Fraud Claims (Third and Sixth Claims for Relief)

With respect to her fraud and negligent misrepresentation claims, Ms. Bright must prove "(1) that a representation was made (2) concerning a presently existing material fact (3) which was false and (4) which the representor either (a) knew to be false or (b) made recklessly, knowing that there was insufficient knowledge upon which to base such a representation, (5) for the purpose of inducing [her] to act upon it and (6) that [she], acting reasonably and in ignorance of its falsity, (7) did in fact rely upon it (8) and was thereby induced to act (9) to [her] injury and damage."[51]

The court concludes Ms. Bright has pled her fraud and negligent misrepresentation claims with sufficient particularity as to Dr. Sorensen. Ms. Bright alleges the "who" (Dr. Sorensen), "what" (false statement that she had a high risk of debilitating stroke and PFO closure

[49] *Carlton v. Brown*, 2014 UT 6, ¶ 8, 323 P.3d 571.

[50] *Webster v. JP Morgan Chase Bank, NA*, 2012 UT App 321, ¶19, 290 P.3d 930.

[51] *Fid. Nat. Title Ins. Co. v. Worthington*, 2015 UT App 19, ¶ 10, 344 P.3d 156, 159.

was necessary to prevent strokes), "where" (Dr. Sorensen's offices), "when" (November 4, 2009), and "how" (Dr. Sorensen told her the false statement directly and provided her with a handout containing false statements and data). She sets forth how she reasonably relied on the allegedly false statements in deciding to have the surgery and how she was damaged thereby.

In contrast, Ms. Bright has not pled these claims with sufficient particularity with respect to St. Mark's. It does not appear St. Mark's made any statements to Ms. Bright prior to the surgery. And to the extent her claims against St. Mark's are based on a failure to disclose, Ms. Bright has not alleged facts from which the court can infer that St. Mark's owed a duty to her prior to surgery or that she somehow relied on St. Mark's silence in deciding to have the surgery.

Civil Conspiracy (Seventh Claim for Relief)

With respect to her civil conspiracy claim, Ms. Bright must prove "(1) a combination of two or more persons, (2) an object to be accomplished, (3) a meeting of the minds on the object or course of action, (4) one or more unlawful, overt acts, and (5) damages as a proximate result thereof."[52] In addition, Ms. Bright must prove an underlying tort."[53]

The court determines that Ms. Bright has satisfied Rule 9(c) because she has sufficiently identified the co-conspirators (the Sorensen Defendants and St. Mark's), the object to be accomplished (increasing income for the Sorensen Defendants and profits for St. Mark's by performing medically unnecessary surgeries), the meeting of the minds (discussing during hiring and credentialing how Dr. Sorensen would perform the closures and under what circumstances, ignoring complaints by other physicians, providing special treatment to Dr. Sorensen, and advertising and promoting Dr. Sorenson's closure practice), the unlawful, over acts (making

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[52] *Fid. Nat. Title Ins. Co.*, 2015 UT App at ¶ 16 (citing *Israel Pagan Estate v. Cannon*, 746 P.2d 785, 790 (Utah Ct.App.1987)).

[53] *Puttuck v. Gendron*, 2008 UT App 362, ¶ 21, 199 P.3d 971, 978.

fraudulent statements, performing medically unnecessary closures at St. Mark's, falsifying records), and the damages (undergoing and paying for a medically unnecessary surgery and follow-up treatment). Ms. Bright identifies the underlying tort as fraud.[54]

CONCLUSION

For the reasons set forth above, the Motions are granted in part and denied in part.

With respect to the Sorensen Defendants, their Motion is GRANTED as to (a) the Second Claim for Relief (Negligence) because it is duplicative of the First Claim for Relief (Negligence – Malpractice) and (b) the Fifth Claim for Relief (Fraudulent Non-Disclosure/Concealment) because it is subsumed within other claims and/or she has failed to plead it with the requisite specificity. The Motion is DENIED as to all other claims against the Sorensen Defendants.

With respect to St. Mark's, its Motion is GRANTED as to (a) the Second Claim for Relief (Negligence) because it is duplicative, (b) the Fourth Claim for Relief (Negligent Credentialing) because it is not recognized in Utah, and (c) the Third and Sixth Claims for Relief (Negligent Misrepresentation and Fraud) because Ms. Bright has not pled them with particularity. It is also GRANTED as to the Fifth Claim for Relief (Fraudulent Non-Disclosure/Concealment) because it is subsumed within other claims and/or she has failed to plead it with particularity. The Motion is DENIED as to all other claims against St. Mark's.

RULE 16 SCHEDULING CONFERENCE

At counsel's convenience, they should contact the court's judicial team to schedule a Rule 16 scheduling conference to discuss a scheduling order and the status of the other pending cases.

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[54] Although the court has dismissed the fraud claim against St. Mark's, this does not necessarily mean that a civil conspiracy claim based on a fraud also must be dismissed. *See, e.g., Israel Pagan Estate v. Cannon*, 746 P.2d 785, (because defendant did not, by its own actions, defraud plaintiff or authorize another to do so, defendant's liability can only be established by proving that it was engaged in a conspiracy to defraud).

SO ORDERED.

Dated this 20th day of June, 2018

Judge Laura S. Scott
Third Judicial District Court

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 170906790 by the method and on the date specified.

MANUAL EMAIL: KATHLEEN J ABKE kabke@strongandhanni.com
MANUAL EMAIL: TAWNI J ANDERSON tanderson@hpslaw.com
MANUAL EMAIL: NATHAN E DORSEY ndorsey@hpslaw.com
MANUAL EMAIL: DAVID HOBBS david_hobbs@fleming-law.com
MANUAL EMAIL: MICHAEL J MILLER mmiller@strongandhanni.com
MANUAL EMAIL: RAND PATRICK NOLEN rand_nolen@fleming-law.com
MANUAL EMAIL: ERIC P SCHOONVELD eric@hpslaw.com
MANUAL EMAIL: ANDREW A WARTH drew.warth@wallerlaw.com
MANUAL EMAIL: RHOME D ZABRISKIE rhomelawyer@yahoo.com

Date: 06/20/2018

/s/ EMILY AGUILAR-CUESTA

Deputy Court Clerk

SORENSEN'S ADDENDUM C

SORENSEN'S ADDENDUM C(1)

Rhome D. Zabriskie
ZABRISKIE LAW FIRM, LLC
899 North Freedom Blvd, Suite 200
Provo, Utah 84604
Tel: (801) 375-7680
Fax: (801) 375-7686
Email: rhomelawyer@yahoo.com

Counsel for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT – SALT LAKE CITY

SALT LAKE COUNTY, STATE OF UTAH

PIA MERLO-SCHMUCKER, Plaintiff, v. **SHERMAN SORENSEN, M.D.; SORENSEN CARDIOVASCULAR GROUP; AND ST. MARK'S HOSPITAL,** Defendants.	**FIRST AMENDED COMPLAINT** **(Tier 3 Filing)** **(Jury Demanded)** **Civil No. 170906130** **Judge Matthew Bates**

COMES NOW Plaintiff, by and through counsel, and hereby complain for causes of action against the above-captioned Defendants, alleging as follows:

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff Pia Merlo-Schmucker is, and at all relevant times has been, a resident of Davis County, State of Utah.

2. Defendant SHERMAN SORENSEN, M.D. was, at all relevant times, a licensed physician providing health care services in Salt Lake County, State of Utah.

3. Defendant SORENSEN CARDIOVASCULAR GROUP (SCG), was at all material times, a Utah professional corporation in the business of providing health care services to residents of Utah. Defendant SCG's principal place of business is located at 5169 Cottonwood Street, No. 610, Murray, Utah. Defendant Sherman Sorensen owned and operated SCG as his primary medical practice.

4. Defendant ST. MARK'S HOSPITAL. (St. Mark's) is a for-profit corporation based in Salt Lake City, Utah with its principal place of business and corporate office at 1200 E 3900 S Salt Lake City, UT 84124. St. Mark's Registered Agent for Service CT Corporation System, 1108 E South Union Ave., Midvale UT 84047.

5. Upon information and belief, at all material times, each of the Defendants were, or may have been, an agent, servant, employer, employee, joint venture, partner, and/or alter ego of one or more of each of the remaining Defendants, and were at all times acting within the purpose and scope of such agency, servitude, joint venture, alter ego, partnership, or employment, and with the authority, consent, approval, and/or ratification of each remaining Defendant.

6. At all material times, Defendants were health care providers within the meaning of the Utah Health Care Malpractice Act, Utah Code Ann. § 78B-3-401 et seq., and each Defendant provided health care services to Pia Merlo-Schmucker.

7. This Court has jurisdiction over this action pursuant to Utah Code Ann. § 78A-5-102.

8. Venue is proper in this Court pursuant to Utah Code Ann. § 78B-3-307.

9. In bringing this action, Plaintiff complied with all statutory requirements regarding pre-litigation review of this matter as set forth in the Utah Health Care Malpractice Act, Utah Code Ann. § 78B-3-416.

BACKGROUND

10. This case is one of more than a thousand cases that are presently working their way through the prelitigation process, which involve the medically unnecessary heart surgery by Dr. Sherman Sorensen related to two kinds of holes in the heart. One is called an atrial septal defect (ASD), and the other is a patent foramen ovale (PFO). Both are holes in the wall of tissue (septum) between the left and right upper chambers of the heart (atria). An ASD is considered a birth defect and is a failure of the septal tissue to form between the atria, PFOs can only occur after birth when the foramen ovale fails to close.[1]

11. Life threatening ASD's are generally discovered at birth and corrected immediately. However, there are billions of adults who have small openings between the left and right atriums of their hearts. The foramen ovale is an opening located in the wall separating the two upper chambers of the heart, the atrial septum, which is used during fetal circulation to redirect blood through the heart. In 75% of the population, the foramen ovale closes at birth when increased blood pressure on the left side of the heart forces the opening to close. In those cases, where the foramen ovale does not close at birth, a patent foramen ovale (PFO) results.

12. Approximately 25% of the healthy population have a PFO and will never require any treatment or evaluation. Apart from extremely rare cases, patients with a PFO remain completely unaware of the presence of the PFO because it's almost never associated with symptoms. Persistent patency of the foramen ovale is considered a normal anatomic variation.

[1] Dr. Sorensen at times earlier in his career referred to these two conditions interchangeably, but for insurance reimbursement purposes decided that all PFO's were ASD's later in his practice. Either way, and no matter what he called them, he closed holes indiscriminately and without medical justification on thousands of people, including the Plaintiff.

13. Only if a patient has a recurrence of cryptogenic (originating from unexplained causes) stroke or transient ischemic attack (TIA), likely due to paradoxical embolization through a PFO, and despite optimal medical therapy, may it be appropriate to close the PFO. Generally, this closure is performed through a percutaneous surgical procedure. In the percutaneous procedure, a patient undergoes a cardiac catheterization to determine the size and location of the PFO.

14. There has long been general agreement in the medical community—as far back as 2003—that PFO closure is not medically necessary, except in the limited circumstances where there is a confirmed diagnosis of a recurrent cryptogenic stroke or TIA, despite optimum medical management. At all material times, no widely accepted medical group specializing in cardiology in the United States has ever recommended, advised, or suggested that closure is appropriate for stroke or migraine prevention to patients that have not had recurrent crypotogenic strokes.

GENERAL ALLEGATIONS

15. The following general allegations are common to all claims alleged herein:

16. As noted, Defendant Dr. Sorensen is a cardiologist and was practicing interventional cardiology. He had privileges at Defendant St. Mark's and at other hospitals. From roughly 2002 to 2012, Defendant Sorensen performed more than 4,000 PFO and ASD closures, many of those at St. Mark's. Dr. Sorensen performed the procedures at a rate that dwarfed the rest of the country by a factor of ten-to-twenty fold, making him a true outlier.

17. The administration at St. Mark's was on notice because of the sheer volume of the procedures performed by Defendant Sorensen and because of complaints from other practitioners and employees that Defendant Sorensen was engaged in a practice of regularly performing

unnecessary, invasive cardiac procedures on his patients. St. Mark's ignored obvious warnings to halt these procedures so that it could secure and maintain a lucrative stream of income.

18. Further, during the hiring and credentialing process at St. Mark's, Sorensen advised St. Mark's representatives of how he would perform closures and under what conditions. And a result, St. Mark's was aware that he would be performing unnecessary closures on patients that did not have recurrent cryptogenic strokes.

19. Further, Sorensen's cardiac privileges at another hospital were suspended on or about June 27, 2011, following an internal investigation concluded that Sorensen had performed multiple, medically unnecessary PFO closures and that Sorensen represented a threat to the health and safety of the patients treated. And St. Mark's CEO Steve Bateman and physician liaison Nikki Gledhill were aware of Sorensen's suspension.

20. Defendants Sorensen and St. Mark's created false statements and documents to conceal the fact that Sorensen was performing medically unnecessary closures. These statements include documenting migraine or stroke history where none existed. For instance, Sorensen often created medical charts that falsely reflected that the patients had suffered from, or were at risk of suffering from, recurrent cryptogenic stroke in order to get insurance to pay for the procedure. The effort to disguise the true diagnosis and reason for the closures shows that Sorensen was always aware of and understood the true standard of care for these procedures.

21. Sorensen would routinely mislead his patients, who had no previous strokes or TIAs, into believing that they were at extreme risk of debilitating stroke because of their PFO or ASD. He would further mislead them that a closure procedure would be effective and was medically necessary in order to prevent strokes. These misrepresentations were made to the vast majority of his patients, including Plaintiff.

22. Despite the fact that St. Mark's knew that Sorensen was performing medically unnecessary closures, and knew that Sorensen had been suspended for performing medically unnecessary closures at another hospital, St. Mark's Hospital continued to court Sorensen's business, provide a platform and assistance to Sorensen, and advertise and promote Sorensen and closure practice to the public for its own financial gain.

23. In particular, the catheterization lab staff at St. Mark's became financially dependent on Sorensen's incredible volume. The majority of patients at St. Mark's cardiac catheterization laboratory came from Sorensen, dwarfing all other cardiology business at St. Mark's. As a result, St. Mark's provided special treatment to Sorensen with staffing and scheduling in its catheterization lab, often to the detriment of true cardiac patients and other cardiologists. St. Mark's also provided open access for PFO industry representatives to the lab and personnel. Industry provided order-in meals were available to those catheterization lab personnel that were willing to share in the largesse.

24. Ultimately, St. Mark's made a deliberate and conscious decision not to inform patients that they may have had a medically unnecessary surgery, and chose not to reimburse Plaintiff, her insurance company, or any of its other patients who had procedures performed unnecessarily. Instead, St. Mark's kept the profits for itself.

PLAINTIFF'S CLOSURE AND INJURIES

25. On December 21, 2010, a transthoracic echocardiogram (TTE) was performed on Ms. Merlo-Schmucker in Dr. Sorensen's office. Medical records indicate that the patient was referred by Tyler Williams MD and that the indication is cognitive changes and a murmur. A transcranial doppler study (TCD) is performed as well. The echocardiogram was interpreted to

show "severe right to left shunt after valsalva." The TCD study was interpreted to show 5+/5 conductance with calibrated respiratory strain."

26. On December 28, 2010, a brain MRI was performed at Western Neurological Associates. This did not conclusively demonstrate evidence of a previous stroke. A "tiny nonspecific focus of flair sequence hyperintensity" is described. A differential diagnosis is given that includes "embolic disease." But the radiologist also dictates "imaging artifact is not entirely excluded."

27. On February 10, 2011, a percutaneous closure of a septal defect was accomplished using a 25 mm Gore HELEX ASD device. This was guided by intracardiac echo. Dr. Sorensen referred to the septal defect as an atrial septal defect. Following deployment of the device, color flow doppler showed no left to right flow and a contrast bubble study was negative for right to left shunting.

28. On February 11, 2011, prior to discharge from St. Mark's, a transthoracic echocardiogram was performed. The report states that color flow doppler "does not demonstrate a residual shunt," but a bubble study was not performed.

29. The accepted indications for closure of an atrial septal defect include right ventricular chamber enlargement, which was not seen on Ms. Merlo-Schmucker's echocardiograms, orthodeoxia-platypnea, which was not described by Dr. Sorensen, and paradoxical embolism.

30. In a patient with strong or definitive evidence for embolic stroke, the standard of care requires a comprehensive evaluation for all of the causes of embolic stroke. This was not performed by Dr. Sorensen in his care of Ms. Merlo-Schmucker. A comprehensive evaluation for causes of "cryptogenic" stroke includes an MRI of the brain (which was done in this case), imaging

of the extra cranial and intracranial cerebral arteries, 3-4 week rhythm monitoring to look for paroxysmal atrial fibrillation, imaging of the aorta to look for atherosclerotic disease, lower extremity venous doppler/ultrasound, MRV of the abdominal and pelvic veins, and a hyper coagulability workup. But Sorensen did not perform the required comprehensive evaluation.

31. To persuade Plaintiff to undergo closure, Defendant Sorensen represented to Plaintiff that she was at high risk of a debilitating stroke due to the presence of her PFO/ASD and that closure was medically necessary. In truth, the mere presence of the defect, without more, including a history of cryptogenic stroke, is not a significant risk factor for stroke. Further, Sorensen passed out a Patient Information Patent Foreman Ovale (PFO) handout to Plaintiff. Sorensen's patient literature contained fraudulent misrepresentations, unsupported data and statistics, outright falsehoods, and other misleading statements, such as the following:

- "Until recently, 40% of all strokes were unknown cause. We now know that most of these unexplained strokes may be caused by a PFO (Patent Foramen Ovale)"
- "Strokes resulting from septal defects have a 50% mortality rate."
- "PFO is diagnosed in 50-70% of patients with stroke of unknown cause"
- "Continued lifelong risk of stroke ranging from 2-9% each year."
- "Stroke reduction to less than 1%"
- "Septal Defect Closure Safety and Efficacy"
- "Our rigorous Program requirements assure that you are informed and receive the safest and most effective treatment"

In addition, to the handout Sorensen made other misrepresentations to Plaintiff both in orally and in writing. These misrepresentations include:

- "Our approach is a preventative strategy. It is scientifically based, but it is an aggressive strategy." In fact, Dr. Sorenson's method has never been accepted in any scientific journal, organization, been approved for a randomized clinical trial, and/or the peer review process for his data and proposed indication for PFO closure. "We, therefore follow a preventative strategy and risk stratify patients based on the studies…proposed by the American Academy of Neurology." That is false; the AAN did not recommend closure outside of clinical trials and encouraged patients to participate in research protocols.
- "8 studies demonstrate that very high flow is the main feature of stroke risk." In fact, the AAN Practice Parameter did not find an association, much less causation, of shunting and risk of stroke recurrence.
- "Randomized trials are not available currently." In reality, the Closure I trial was opened in Salt Lake City, Utah. It was halted due to Defendant Sorensen's medically unnecessary off-label PFO procedures of patients outside the trial.
- "Coumadin is considered to be unsafe and ineffective…based on studies." In fact, the SPIRIT, WASID and WARRS studies referenced by Sorensen showed no such thing.
- Defendant Sorenson certified that his echocardiography lab was certified by ICAEL (Intersocietal Commission for Accreditation Laboratories) using the ICAEL logo on his echochardiogram. In fact, his lab was never accredited by ICAEL and this was false.

These false statements were intended to and did in fact induce Plaintiff to undergo closure at St. Mark's by inducing fear of an imminent and debilitating stroke, downplaying safer and accepted treatment options, misrepresenting the indication for closure, and downplaying the risks of closure.

32. Despite St. Mark's awareness of Sorensen's fraudulent and/or negligent practices, it did nothing to notify Ms. Merlo-Schmucker. Instead, St. Mark's actively allowed Sorensen's practice to continue in order to profit from the thousands of unnecessary procedures performed on patients like Ms. Merlo-Schmucker. In fact, St. Mark's has to this day actively concealed its knowledge about Sorensen's rogue and fraudulent practices at its facility from patients, third party payers, and the public, and has retained the money earned off of Sorensen's medically unnecessary surgeries.

33. Plaintiff could not have known that the information provided by Defendants was false. Instead, she trusted that Defendants Sorensen and St. Mark's, as her health care providers, were being truthful. Further, even if she had been aware of some of the factual mischaracterizations, as a non-expert she could not have understood their implications as it relates the appropriateness of her medical treatment.

34. Because of Defendants' fraudulent statements and omissions, Plaintiff was until recently unaware of her cause of action. In fact, Plaintiff only learned of the Defendants' misconduct as a result lawyer advertising. Her diligent investigation resulted in the noticing and filing of this action within the statutory period.

35. Because of Defendants' conduct, Plaintiff suffered significant damages, including:

i. undergoing an unnecessary surgical procedure and hospital stay,

ii. paying significant medical expenses to Defendants,

iii. physical pain, and

emotional anguish as a result of being told she was at immediate risk of a debilitating or even deadly stroke.

FIRST CLAIM FOR RELIEF: NEGLIGENCE (HEALTH CARE MALPRACTICE)

36. Plaintiff refers to and incorporates the preceding paragraphs as if set forth fully herein.

37. Defendants, individually, collectively, and through the acts and omissions of their agents, servants, employees, physicians, nurses, therapists, and technologists (hereinafter collectively "Defendants") accepted Plaintiff as a patient, and thereby assumed various duties of care.

38. At all relevant times, Defendants held themselves out as being able to provide full care and treatment for patients requiring medical care of the type that Plaintiff required.

39. The degree of care and treatment provided to Plaintiff fell below the acceptable standards of care for the types of medical care and treatment required by Plaintiff and provided by Defendants.

40. Specifically, Defendants breached the applicable standards of care in multiple ways including, but not limited to:

a. Falsifying Plaintiff's medical records to indicate that Plaintiff was an appropriate candidate for closure;

b. Misleading Plaintiff regarding the risks and benefits associated with closure and regarding the necessity of treatment;

c. Failing to obtain an adequate history which resulted in an improper medical diagnosis that Plaintiff was an appropriate candidate for closure;

d. Failing to conduct an adequate physical and to obtain appropriate diagnostic testing, which resulted in an improper medical diagnosis that Plaintiff was an appropriate

candidate for PFO closure; Performing a medically unnecessary medical procedure with a device that was not FDA approved for this use; and

41. As a sole, proximate, and foreseeable result of Defendants' acts and omissions, Defendants caused Plaintiff to undergo unnecessary medical procedures, testing, and follow-up visits, incur unnecessary medical expenses, and experience physical injuries and emotional anguish.

42. As a sole, proximate, and foreseeable result of Defendants' acts and omissions, Plaintiff has suffered personal injuries, including by not limited to unnecessary medical procedures, testing, follow-up visits, medical expenses, and emotional anguish.

43. Plaintiff has therefore been injured and is entitled to recover general and special damages in an amount to be determined at trial.

SECOND CLAIM FOR RELIEF: NEGLIGENCE

44. Plaintiff refers to and incorporates the preceding paragraphs as if set forth fully herein.

45. At all relevant times, Defendants owed Plaintiff various duties of care, including but not limited to common law and statutory duties.

46. Defendants, individually and collectively, breached these duties of care.

47. As a sole, proximate, and foreseeable result of Defendants' acts and omission, Defendants caused personal and other injuries to Plaintiff.

48. Plaintiff has been injured and is entitled to recover general and special damages in amounts to be determined at trial.

THIRD CLAIM FOR RELIEF: NEGLIGENT MISREPRESENTATION

49. Plaintiff refers to and incorporates the preceding paragraphs as if set forth fully herein.

50. Defendants, individually and collectively, represented to Plaintiff that medical procedures, testing, and follow-up visits were medically necessary.

51. Defendants' representations that Plaintiff's medical procedures, testing, and follow-up visits were medically necessary was, in fact, not true.

52. Defendants failed to use reasonable care to determine whether the representations regarding the necessity of Plaintiff's medical care was true.

53. Defendants were in a better position than Plaintiff to know the true facts regarding Plaintiff's medical procedures, testing, and follow-up care.

54. Defendants had a financial interest in performing medically unnecessary procedures, testing, and follow-up care on Plaintiff.

55. Plaintiff relied on Defendants' representations, and it was reasonable for her to do so.

56. Plaintiff has therefore been injured as a result of relying on Defendants' representations and is entitled to recover general and special damages in an amount to be determined at trial.

FOURTH CLAIM FOR RELIEF: NEGLIGENT CREDENTIALING

57. Plaintiff refers to and incorporates the preceding paragraphs as if set forth fully herein.

58. Defendant St. Mark's owes a duty to patients to exercise reasonable care in the selection of its medical staff and in granting specialized privileges to them. It also has the duty to periodically monitor and review the qualifications and competency of its medical staff.

59. Defendant St. Mark's breached its duty to exercise reasonable care in its selection of its medical staff, and in granting specialized privileges to and periodically monitoring and reviewing the qualifications and competency of its medical staff.

60. As a sole, proximate, and foreseeable result of its breach, Defendant St. Mark's caused harm to Plaintiff.

61. Plaintiff has been injured and is entitled to recover general and special damages in an amount to be determined at trial.

FIFTH CLAIM FOR RELIEF: FRAUDULANT NON-DISCLOSURE/CONCEALMENT

62. Plaintiff refers to and incorporates the preceding paragraphs as if set forth fully herein.

63. Defendants owed a duty to Plaintiff to disclose important facts, such as the medical necessity of Plaintiff's medical care, to Plaintiff.

64. Defendants knew that the medical care Defendants provided to Plaintiff was not medically necessary, and failed to disclose this to Plaintiff.

65. Plaintiff did not know that the medical care provided by Defendants was not medically necessary.

66. Defendants' failure to disclose the fact that Plaintiff's medical care was not necessary was a substantial factor in causing Plaintiff's damages. Had Plaintiff known that her closure surgery was not necessary, Plaintiff would not have undergone the surgery.

67. Plaintiff has been injured and is entitled to recover general and special damages in an amount to be determined at trial.

SIXTH CLAIM FOR RELIEF: FRAUD

68. Plaintiff refers to and incorporates the preceding paragraphs as if set forth fully herein.

69. At all relevant times, Defendants had a duty and obligation to disclose to Plaintiff true facts concerning the medical care provided to Plaintiff by Defendants.

70. Defendants intentionally concealed material facts concerning Plaintiff's medical care from Plaintiff including, but not limited to the following:

a. Falsifying Plaintiff's medical records to indicate that she was an appropriate candidate for closure;

b. Performing medically unnecessary medical procedures with a device that was not FDA approved for this use; and

c. Concealing from Plaintiff that medical procedures, testing, and follow-up care was unnecessary.

71. Defendants made false statements and misrepresentations about important facts regarding Plaintiff's medical care.

72. Defendants made these false statements and misrepresentations described above knowing that the statements were false, or with reckless disregard for their truth.

73. Defendants made the false statements and misrepresentations to Plaintiff, with the intent that Plaintiff would rely on the statements.

74. Plaintiff did reasonably rely on the false statements and misrepresentations made by Defendants.

75. As a sole, proximate, and foreseeable result of Defendants' false statements and misrepresentations, Plaintiff has suffered personal injuries, including but not limited to unnecessary medical procedures, testing, follow-up visits, medical expenses, and emotional anguish.

SEVENTH CLAIM FOR RELIEF: CIVIL CONSPIRACY

76. Plaintiff refers to and incorporates the preceding paragraphs as if set forth fully herein.

77. Defendants were acting in a conspiracy to commit fraud, thereby increasing their profits through the performance of medically unnecessary procedures on patients, including Plaintiff.

78. There was an agreement and meeting of the minds among Defendant Sorensen, Defendant SCG, and Defendant St. Mark's to misrepresent the need for and induce patients, including Plaintiff, into undergoing medically unnecessary procedures, testing, and follow-up. Defendants agreed to act in concert in making these misrepresentations about the necessity of medical procedures to Plaintiff.

79. There were multiple unlawful, overt acts by Defendant Sorensen, Defendant SCG, and Defendant St. Mark's in furtherance of their scheme, including without limitation, Defendants' fraud.

80. As a result of this conspiracy, Defendant Sorensen, Defendant SCG, and Defendant St. Mark's, should be held jointly and severally liable for the conduct of the other co-conspirators and the damages that Plaintiff sustained as a proximate result thereof, including without limitation personal injuries and other injuries.

81. Plaintiff would further show that Defendant Sorensen and Defendant SCG were operating as alter egos for the purpose of perpetrating the above described conspiracy. There was such a unity of interest and ownership that the separate personalities of the company and the individual did not exist. Observing the corporate form will sanction this conspiracy, promote injustice, and allow an inequitable result.

EQUITABLE TOLLING/FRAUDULENT CONCEALMENT

82. Plaintiff refers to and incorporates the preceding paragraphs as if set forth fully herein.

83. Because of Defendants' concealment of material facts and misleading conduct, Plaintiff was not aware of her causes of action.

84. Defendants took affirmative steps to conceal Plaintiff's cause of action. Given Defendants' concealment and misleading conduct, a reasonable plaintiff would not have discovered the cause of action earlier.

85. Neither Sorenson, nor St. Mark's ever notified Plaintiff that she had received an unnecessary procedure, that she was never indicated for the surgery to begin with, that the device implanted into Plaintiff was never medically necessary, was retained in her body for no medical purpose, and that the informed consent contained fraudulent, misleading, and/or incomplete statements. Neither Sorenson, nor St. Mark's, ever compensated Plaintiff for the unnecessary medical surgery she underwent by reimbursing the costs of the procedure.

86. Neither Sorensen, nor St. Mark's, ever made a public statement, sent a letter, made a public announcement, or issued a press release to inform patients, such as Plaintiff, that they may have had medically unnecessary closures.

87. Defendants' misrepresentations and misleading conduct constitutes fraudulent concealment that tolls any proffered statute of limitation that may otherwise bar the recovery sought by Plaintiff.

88. Plaintiff did not know, nor should have known, of the causes of action against Defendants prior to being put on notice of Defendants' potential liability recently. She neither discovered, nor reasonably should have discovered, the facts underlying her causes of action before any proffered statute of limitations period expired.

89. As a result of Defendants' concealment of the true character, quality and nature of their conduct, they are estopped from relying on any statute of limitations defense. 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. Such conduct tolls the limitations pursuant to the Utah Health Care Malpractice Act 78B-3-404(b).

90. Defendants' conduct, because it was purposely committed, was known or should have been known by them to be dangerous, heedless, reckless, and without regard to the consequences or the rights and safety of Plaintiff.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for a judgment (under URCP: Tier 3) against Defendants in an amount to be determined by the trier of fact for the following damages:

a. For special damages in an amount to be determined at trial;

b. For general damages in an amount to be determined at trial;

c. For pre and post judgment interest on all special damages pursuant to Utah law;

d. For costs and attorney fees to the extent allowed by law; and

e. For such other relief as the Court deems appropriate.

RESPECTFULLY SUBMITTED this 14th day of December 2017.

/s/ Rhome D. Zabriskie
Rhome D. Zabriskie
ZABRISKIE LAW FIRM, LLC
899 North Freedom Blvd, Suite 200
Provo, Utah 84604
Tel: (801) 375-7680
Fax: (801) 375-7686
Email: rhomelawyer@yahoo.com

FLEMING, NOLEN & JEZ, LLP
Rand P. Nolen (Pro Hac Vice submission in progress)
David L. Hobbs (Pro Hac Vice submission in progress)
2800 Post Oak Blvd., Suite 4000
Houston, TX 77056-6109
Telephone: (713) 621-7944
Facsimile: (713) 621-9638
Email: rand_nolen@fleming-law.com
Email: david_hobbs@fleming-law.com

Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that that a true and exact copy of the foregoing has been served on the following via the Court's ECF filing system and/or Email on 14th day of December, 2017:

Eric P. Schoonveld
Tawni J. Anderson
Nathan E. Dorsey
Hall Prangle & Schoonveld, LLC
111 East Broadway, Suite 700
Salt Lake City, UT 84111
Phone: 801-320-0900
Fax: 801-320-0896
eric@hpslaw.com
tanderson@hpslaw.com
ndorsey@hpslaw.com

Attorneys for St. Mark's Hospital

Michael J. Miller

Strong & Hanni
102 South 200 East, Suite 800
Salt Lake City, UT 84111
mmiller@strongandhanni.com

Attorney for Defendants Sherman Sorensen, M.D. and Sorensen Cardiovascular Group

/s/ Rhome D. Zabriskie
Rhome D. Zabriskie

SORENSEN'S ADDENDUM C(2)

The Order of the Court is stated below:
Dated: June 28, 2018 12:58:05 PM
/s/ PATRICK CORUM
District Court Judge

Rhome D. Zabriskie

ZABRISKIE LAW FIRM, LLC

899 North Freedom Blvd, Suite 200

Provo, Utah 84604

Tel: (801) 375-7680

Fax: (801) 375-7686

Email: rhomelawyer@yahoo.com

Counsel for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT – SALT LAKE CITY

SALT LAKE COUNTY, STATE OF UTAH

PIA MERLO-SCHMUCKER,	)	**ORDER**
	)	
	)	Case No. 170906130
Plaintiff,	)	**Judge Patrick Corum**
	)	
v.	)	
	)	
SHERMAN SORENSEN, M.D.;		

SORENSEN CARDIOVASCULAR GROUP; AND ST. MARK'S HOSPITAL,

Defendants.

Following full briefing, this matter came before the Court for hearing and argument on May 1, 2018. On May 18, 2018, Rand Nolen, David Hobbs, and Rhome Zabriskie appeared on behalf of Plaintiff Pia Merlo-Schmucker; Eric Schoonveld and Drew Warth appeared on behalf of Defendant St. Mark's Hospital ("St. Mark's"); and Michael Miller and Kathleen Abke appeared on behalf of Defendants Sherman Sorensen and Sorensen Cardiovascular Group ("Sorensen Defendants") for a telephonic ruling, which is reduced to writing here and is the Order of the Court.

The matters before the Court are St. Mark's Motion to Dismiss Plaintiffs' Amended Complaint and the Sorensen Defendants' Motion to Dismiss Plaintiffs' Amended Complaint. St. Mark's Motion to Dismiss will be GRANTED IN PART AND DENIED IN PART, and the Sorensen Defendants' Motion to Dismiss will be DENIED.

Both St. Mark's and the Sorensen Defendants moved to dismiss all claims in the Amended Complaint under Rule 12(b) on the grounds that all claims therein were barred by the four-year statute of repose found in 78B-3-404(1) and (2) of Utah's Medical Malpractice Act. Those provisions require that claims be brought within four-years of the date of the alleged act,

omission, neglect, or occurrence unless 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.

It is not clear from the Amended Complaint whether any Defendant acted affirmatively within the meaning of the statute to fraudulently conceal anything. The word "affirmatively" was presumably and advisedly put into the statute—78B-3-404(1)—with meaning, and it appears to have a meaning different from the common law. Under the statute, some affirmative act of concealment is necessary to maintain an otherwise time-barred action. Defendants' argument that inaction or omission by a defendant is not sufficient to overcome the time bar appears to be well taken.

That being said the Court is not convinced this issue is procedurally ripe at the Rule 12(b) stage and questions whether the Plaintiff is obligated to combat an affirmative defense, however likely or inevitably it is to be raised, in its initial pleading.

The Defendants have presented cases that clearly indicate that the Court has discretion to address these issues under a 12(b) motion, however those cases are distinguishable in the Court's view. *Roth v. Pederson* was a judgment on the pleadings so the procedural context is similar, but, based on what the Court can tell from the opinion, the relevant allegations in the *Roth* complaint regarding fraudulent concealment were extremely sparse and entirely conclusory. 2009 UT App 313, 2009 WL 3490974 (unpublished). That is not the case here; the allegations have more detail and more substance than what was apparently pled in *Roth. Tucker v. State Farm Mut. Auto. Ins. Co.* is more on point than *Roth* as it was a Rule 12(b) motion, converted into a Rule 56 Motion. *Tucker* clearly gives a court discretion to entertain statute of limitations defenses in a motion to

dismiss but did so under limited circumstances, which are not present here. 2002 UT 54, ¶ 8, 53 P.3d 947. In *Tucker* the plaintiff did not appear to offer any argument to counter the application of the statute of limitations and there did not appear to be any dispute as to whether it would have in fact barred the action, the plaintiff only argued that issue should not have be decided at that stage. It is a close call, but the Court feels the Plaintiff in this case has done enough to move her case into the next stage. Accordingly, the Court **DENIES** Defendants' Motions on the statute of limitations/repose issue.

Defendants also seek dismissal of Plaintiff's fraud-based claims for failure to allege them with particularity as required by Rule 9(c). First, as to Plaintiff's claim for negligent misrepresentation, the Court finds the Amended Complaint contains no particular allegations as to misrepresentations made by St. Mark's Hospital. Similarly, Plaintiff's fraud and fraudulent concealment claims (as opposed to the exception to the statute of repose) also fail as to St. Mark's for failing to satisfy Rule 9(c). Accordingly, the Court **GRANTS** St. Mark's Hospital's motion and **DISMISSES** the negligent misrepresentation (Count III), fraudulent concealment (Count V), and fraud (Count VI) claims as to St. Mark's Hospital. As to the Sorensen Defendants, the Court finds the Amended Complaint alleges with particularity the fraud-based claims. Accordingly, the Court **DENIES** the motions to dismiss the negligent misrepresentation, fraudulent concealment, and fraud claims as to the Sorensen Defendants. Further, the Court finds the Amended Complaint adequately alleges civil conspiracy and therefore **DENIES** the motions to dismiss the civil conspiracy (Count VII) claims as to all Defendants.

The Sorensen Defendants further argue that all of Plaintiff's claims should be dismissed under the doctrine of claim preclusion due to the dismissal of the separate *qui tam* action, which

involved claims by a relator under the federal False Claims Act. That dismissal is currently on appeal with the Tenth Circuit. I find that the issues in the *qui tam* and this action are not identical. Further, the parties are not identical, the parties are not in privity, and there has not been a final judgment in the *qui tam* action. Accordingly, the Court **DENIES** the Sorensen Defendants' motion to dismiss all claims under the doctrine of claim preclusion.

Finally, the Sorensen Defendants argue that Plaintiff's claims for negligence, negligent misrepresentation, fraud, and civil conspiracy are not cognizable as claims distinct from Plaintiff's medical negligence claim. While the Utah Health Care Malpractice Act does define a malpractice action to include any action against a health care provider, whether in contract, tort, breach of warranty, wrongful death, or otherwise, based upon alleged personal injuries relating to or arising out of health care rendered or which should have been rendered by the health care provider, it does so to identify the causes of action governed by the Act. But the Act does not foreclose a plaintiff from pleading different causes of action or create one omnibus cause of action. Accordingly, the Court **DENIES** the Sorensen Defendants' motion. The Court's signature appears at the top of the first page of this order.

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

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

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 18th day of June 2018, and was approved to form by all parties via electronic mail on that date:

Eric P. Schoonveld
Tawni J. Anderson
Nathan E. Dorsey
Hall Prangle & Schoonveld, LLC
111 East Broadway, Suite 700
Salt Lake City, UT 84111
Phone: 801-320-0900
Fax: 801-320-0896
eric@hpslaw.com
tanderson@hpslaw.com
ndorsey@hpslaw.com

Andrew A. Warth
Waller Lansden Dortch & Davis
511 Union St, Suite 2700
Nashville, TN 37219
Phone: 615-850-8874
Fax: 615-244-6804
Drew.warth@wallerlaw.com

Attorneys for St. Mark's Hospital

Michael J. Miller
Strong & Hanni
102 South 200 East, Suite 800
Salt Lake City, UT 84111
mmiller@strongandhanni.com

Attorney for Defendants Sherman Sorensen, M.D. and Sorensen Cardiovascular Group

/s/ David Hobbs
David Hobbs

SORENSEN'S ADDENDUM D

SORENSEN'S ADDENDUM D(1)

Rhome D. Zabriskie
ZABRISKIE LAW FIRM, LLC
899 North Freedom Blvd, Suite 200
Provo, Utah 84604
Tel: (801) 375-7680
Fax: (801) 375-7686
Email: rhomelawyer@yahoo.com

Counsel for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT – SALT LAKE CITY

SALT LAKE COUNTY, STATE OF UTAH

LISA TAPP, Plaintiff, v. **SHERMAN SORENSEN, M.D.; SORENSEN CARDIOVASCULAR GROUP; AND IHC HEALTH SERVICES, INC.,** Defendants.	**FIRST AMENDED COMPLAINT** **(Tier 3 Filing)** **(Jury Demanded)** Case No. 170904956 **Judge Barry Lawrence**

COMES NOW Plaintiff, by and through counsel, and hereby complain for causes of action against the above-captioned Defendants, alleging as follows:

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff Lisa Tapp is, and at all relevant times has been, a resident of Salt Lake County, State of Utah.

2. Defendant SHERMAN SORENSEN, M.D. was, at all relevant times, a licensed physician providing health care services in Salt Lake County, State of Utah.

3. Defendant SORENSEN CARDIOVASCULAR GROUP (SCG), was at all material times, a Utah professional corporation in the business of providing health care services to residents of Utah. Defendant SCG's principal place of business is located at 5169 Cottonwood Street, No. 610, Murray, Utah. Defendant Sherman Sorensen owned and operated SCG as his primary medical practice.

4. Defendant IHC Health Services, Inc. (IHC) is a not-for-profit corporation based in Salt Lake City, Utah with its principal place of business and corporate office at 36 S. State Street Salt Lake City, UT 84111. IHC operates several healthcare facilities under d/b/a's, including Intermountain Medical Center, which has its principal place of business and corporate office at 5100 South State Street, Murray, Utah. IHC's Registered Agent for Service is Anne D. Armstrong, 36 South State St. Suite 2200, Salt Lake City, UT 84111.

5. Upon information and belief, at all material times, each of the Defendants were, or may have been, an agent, servant, employer, employee, joint venture, partner, and/or alter ego of one or more of each of the remaining Defendants, and were at all times acting within the purpose and scope of such agency, servitude, joint venture, alter ego, partnership, or employment, and with the authority, consent, approval, and/or ratification of each remaining Defendant.

6. At all material times, Defendants were health care providers within the meaning of the Utah Health Care Malpractice Act, Utah Code Ann. § 78B-3-401 et seq., and each Defendant provided health care services to Lisa Tapp.

7. This Court has jurisdiction over this action pursuant to Utah Code Ann. § 78A-5-102.

8. Venue is proper in this Court pursuant to Utah Code Ann. § 78B-3-307.

9. In bringing this action, Plaintiff complied with all statutory requirements regarding pre-litigation review of this matter as set forth in the Utah Health Care Malpractice Act, Utah Code Ann. § 78B-3-416.

BACKGROUND

10. This case is one of more than a thousand cases that are presently working their way through the prelitigation process, which involve the medically unnecessary heart surgery by Dr. Sherman Sorensen related to two kinds of holes in the heart. One is called an atrial septal defect (ASD), and the other is a patent foramen ovale (PFO). Both are holes in the wall of tissue (septum) between the left and right upper chambers of the heart (atria). An ASD is considered a birth defect and is a failure of the septal tissue to form between the atria, PFO's can only occur after birth when the foramen ovale fails to close.[1]

11. Life threatening ASD's are generally discovered at birth and corrected immediately. However, there are billions of adults who have small openings between the left and right atriums of their hearts.[2] The foramen ovale is an opening located in the wall separating the two upper chambers of the heart, the atrial septum, which is used during fetal circulation to redirect blood through the heart. In 75% of the population, the foramen ovale closes at birth when increased blood pressure on the left side of the heart forces the opening to close. In those cases, where the foramen ovale does not close at birth, a patent foramen ovale (PFO) results.

[1] Dr. Sorensen at times earlier in his career referred to these two conditions interchangeably, but for insurance reimbursement purposes decided that all PFO's were ASD's later in his practice. Either way, and no matter what he called them, he closed holes indiscriminately and without medical justification on thousands of people including the Plaintiff.

12. Approximately 25% of the healthy population have a PFO and will never require any treatment or evaluation. Apart from extremely rare cases, patients with a PFO remain completely unaware of the presence of the PFO because it's almost never associated with symptoms. Persistent patency of the foramen ovale is considered a normal anatomic variation.

13. Only if a patient has a recurrence of cryptogenic (originating from unexplained causes) stroke or transient ischemic attack (TIA), likely due to paradoxical embolization through a PFO, and despite optimal medical therapy, may it be appropriate to close the PFO. Generally, this closure is performed through a percutaneous surgical procedure. In the percutaneous procedure, a patient undergoes a cardiac catheterization to determine the size and location of the PFO.

14. There has long been general agreement in the medical community—as far back as 2003—that PFO closure is not medically necessary, except in the limited circumstances where there is a confirmed diagnosis of a recurrent cryptogenic stroke or TIA, despite optimum medical management. At all material times, no widely accepted medical group specializing in cardiology in the United States has ever recommended, advised, or suggested that closure is appropriate for stroke or migraine prevention to patients that have not had recurrent crypotogenic strokes.

15. In 2011, Defendant IHC adopted internal Guidelines for Percutaneous Closure of Septal Defects of the Atrium that mirrored those promulgated by the American Heart Association/American Stroke Association (AHA/ASA). The Guidelines state that "PFO closure may be considered for patients with recurrent cryptogenic stroke (CS) despite optimal medical therapy." The IHC Guidelines note that PFO closure is only appropriate for "recurrent, confirmed, clinical cryptogenic TIA or stroke."

16. PFO could also, under Defendant IHC's Guidelines, be considered for "patients with a single well-documented significant stroke or systemic emboli in a high-risk patient who has been comprehensively evaluated for alternative cause of embolic stroke." Under either circumstance, the Guidelines require that the cardiologists ensure that the diagnosis of PFO and cryptogenic stroke or embolism is confirmed by an independent neurology consult or a brain CT or MRI, a MRA of the head and neck, an ambulatory telemetry monitor for atrial fibrillation, and a TTE with bubbles to confirm the diagnosis. Defendant IHC's Guidelines make clear that PFO closure is never indicated for migraine headaches.

17. Defendant IHC's Guidelines are clear that PFO closure for migraine can only be performed in the clinical trial setting and that there is currently "no RCT [randomized clinical trials] to support use of PFO closure in the treatment of migraine headaches or asymptomatic white-matter lesions." These latter two categories of symptoms are precisely what Defendant Sorensen treated Plaintiff for with a PFO closure.

18. Defendant Sorensen frequently touted his excessive volume, touting that he has more than a "10 year/3000 device history" of utilizing various devices (*i.e.* Amplatzer and Gore) to perform PFO and ASD closures. Defendant Sorensen often referred patients to his "research" and "data" for PFO and ASD closures at www.sorensenmd.com.

GENERAL ALLEGATIONS

19. The following general allegations are common to all claims alleged herein:

20. As noted, Defendant Dr. Sorensen is a cardiologist and was practicing interventional cardiology. He had privileges at Defendant IHC and at other hospitals. From roughly 2002 to 2012, Defendant Sorensen performed more than 4,000 PFO and ASD closures, the majority of those at IHC. The administration at IHC was on notice because of the sheer volume

of the procedures performed by Defendant Sorensen and because of complaints from other practitioners and employees that Defendant Sorensen was engaged in a practice of regularly performing unnecessary, invasive cardiac procedures on his patients. Defendants enriched themselves by submitting false and fraudulent medical billing to insurance companies, including Plaintiff's, for medically unnecessary procedures.

21. During the hiring and credentialing process at IHC, Sorensen advised IHC representatives of the medical treatment he was qualified to perform, and specifically informed IHC how he would perform PFO closures. These procedures would include performing PFO and ASD closures on patients that did not have recurrent cryptogenic strokes. Despite this, Defendant IHC gave Sorensen hospital privileges, hired and paid him, and allowed him to utilize their catheterization laboratory to perform these PFO procedures.

22. Sorensen's cardiac privileges at IHC were suspended on or about June 27, 2011, following an internal investigation concluded that Sorensen had performed multiple, medically unnecessary PFO closures and that Sorensen represented a threat to the health and safety of the patients treated at IHC.

23. The letter from IHC to Defendant Sorensen informing him in writing of his suspension (effective June 27, 2011 through July 11, 2011), stated that the suspension was "taken in good faith to prevent a threat to the health or safety of patients" at IHC and to "provide the Medical Executive Committee the opportunity to further evaluate the patient care you have provided, your professional conduct within the hospital and [to] determine if additional action regarding your membership and privileges should be taken beyond the 14 day suspension."

24. Dr. Sorensen's suspension was the direct result of the IHC's acknowledgement of what it had known for years, that Sorensen had performed thousands of medically unnecessary

PFO closures at IHC. The suspension was a reversal of sorts for IHC because it had long encouraged, profited, and provided a haven for Defendant Sorensen's practice.

25. Further, Defendant Sorensen and IHC created false statements and documents to conceal the fact that Sorensen was performing medically unnecessary closures. These statements include documenting migraine or stroke history where none existed, such as Plaintiff's case.

26. Defendant IHC supplied Sorensen with its catheterization lab facilities, hospital staff such as nurses, administrative, and other support staff, and privileges to perform these procedures whenever he saw fit, including for Plaintiff Lisa Tapp's PFO procedure in October 2008. For example, the Patient Information pamphlet passed on to Plaintiff (and many other patients) touts "a dedicated, specialized team of echo, nursing, catheterization laboratory, and physician members" as "Why Our Program May Be Right For You" (Slide 30).

27. Sorensen would routinely mislead his patients, who had no previous strokes or TIAs, into believing that they were at extreme risk of debilitating stroke because of their PFO or ASD. He would further mislead them that a closure procedure would be effective and was medically necessary in order to prevent strokes. These misrepresentations were made to the vast majority of his patients, including Plaintiff.

28. Despite his representations to his patients, Sorensen often created medical charts that falsely reflected that the patients had suffered from, or were at risk of suffering from, recurrent cryptogenic stroke in order to get insurance to pay for the procedure. The effort to disguise the true diagnosis and reason for the closures shows that Sorensen was always aware of and understood the true standard of care for these procedures. IHC knew or should have known through a cursory review of the patients' files that they did not meet the closure indications in the standard of care.

IHC, SCG, and Sorensen engaged in a conspiracy and/or concert of action, with each other to profit from the perpetuation of Sorensen's medically unnecessary closures.

29. In a report released to the entire Department of Cardiology at IHC, it reported that the study showed that "compliance with the guidelines for performing PFO closures" at IHC was "less than ideal." The review showed that the Guidelines had been violated in many of the cases reviewed.

30. Even though it did not issue these Guidelines until 2011, at all times relevant to this case, IHC knew that septal closures were rarely indicated. For years IHC ignored the loud objections from its own medical staff and leadership, including the Director of the Catheterization Laboratory, Dr. Revenaugh, and the Medical Director for Cardiovascular Services at Intermountain Healthcare, Dr. Donald L. Lappe, as well as written warnings and complaints from Professor Andrew Michaels of the University of Utah. Further, IHC was informed by Dr. Nancy Futrell, a neurologist who was a co-investigator with Defendant Sorensen on a trial performed at IHC for the closure devices used by Defendant Sorensen, that Defendant Sorensen was performing unnecessary closures outside of the criteria set by the trials. She spoke with several individuals associated with IHC regarding Dr. Sorensen, including Dr. Lappe, chief of cardiology; William Hamilton, medical director; Jeffrey Anderson, associate chief of cardiology; and Liz Hammond.

31. After Sorensen's 14-day suspension, he returned to work at IHC on or about July 12, 2011. It immediately became apparent that Sorensen had no intention of complying with the IHC Guidelines for PFO closures, and that he would continue to perform medically unnecessary procedures on patients not suffering from recurrent cryptogenic stroke despite optimal medical therapy. Because Sorensen refused to comply with the Guidelines and represented an immediate threat of harm to his patients, IHC moved to suspend Sorensen from practice in September 2011.

Sorensen and IHC entered a Settlement Agreement, which was designed to prevent his permanent suspension. However, within days of entering the Agreement, Sorensen was notified by IHC that he was in violation of the Agreement. IHC threatened to take immediate action to suspend him, and to report his misconduct to the National Practitioner Database. Sorensen promptly resigned to avoid these adverse consequences.

32. In Fall 2011/Winter 2012, Dr. James L. Orford, listed in the Cardiology Department at Intermountain Health Center, authored an article "Understanding the Heart Defect – Patent Foramen Ovale" in The Classroom on Intermountain's website. This publication lists "Intermountain Medical Group" with a link at the bottom.

33. Speaking on behalf of Intermountain, Dr. Orford states the following:

- "Because PFO is very common and never causes any problems in most patients, undergoing surgery to possibly prevent migraines and/or stroke usually isn't worth the risk."
- "It has been noted that PFO is more common in patients who experience migraine with aura, but may patients with a PFO do not have migraine headaches and many migraine patients do not have a PFO."
- "Furthermore, there is no conclusive evidence that fixing a PFO will benefit migraines."
- "In a few cases, where patients have already suffered a confirmed cryptogenic stroke without any possible cause, closing a PFO may be a viable option to prevent future strokes."
- "However, it is important to consult with a neurologist and a cardiologist to determine all of your options and whether surgical closure is recommended."

- "Patients are also encouraged to enroll in a clinical trial so their response to treatments can be studied, allowing scientists to learn more about this condition."
- "As leaders in cardiology, Intermountain Healthcare is always very conscientious regarding how new technology is applied. For this reason, the Intermountain Medical Group instituted specific "Guidelines for Percutaneous Closure of Septal Defects" throughout all our hospitals and clinics."
- "We believe it is important to have clear, positive evidence for both the short-term and long-term consequences of any procedure."

Despite this publication and clear recognition, IHC did nothing to alert patients, including Lisa Tapp, that no "clear, positive" evidence existed that PFO closure was effective for stroke prevention in absence of a history of cryptogenic strokes or for migraine headache prevention.

34. Defendant IHC also published "Fact Sheet for Patients and Families – PFO and ASD Closure in the Cath Lab" with a publication range of 2011-2016. Among the recognized risks of a PFO or ASD Closure include: temporary leg numbness or weakness in the first few hours, bruising, bleeding, infection, or blood vessel damage whether cathether(s) were inserted, damage to the heart muscle that may require open heart surgery, abnormal heart rhythm, blood clots, heart attack or stroke, negative reaction to anesthetic or dye, and unforeseen complications. While these risks are "uncommon" they are present for PFO and ASD Closures. The Fact Sheet for Patients and Families also states the following:

- **"Why Might I need a PFO or ASD Closure?** You might need a PFO closure if you've had a stroke that is related to PFO."

- "What are the benefits of a PFO or ASD closure procedure? PFO Closure has not been found to reliably reduce migraines. Also, it is not indicated unless you've had a previous TIA or stroke."

35. Despite the results of this audit, patient literature representations, stated opinion of IHC cardiologists, and ample evidence that Defendant Sorensen had performed thousands of PFO closures, Defendant IHC deliberately and consciously chose not to expand its audit to other PFO closure patients from past years, including Plaintiff Lisa Tapp Defendant IHC never released information to the public that Sorensen had performed medically unnecessary PFO procedures, as this information was kept internal.

36. IHC made a deliberate and conscious decision not to inform patients that they may have had a medically unnecessary surgery, and chose not to reimburse Plaintiff Lisa Tapp, her insurance company, (or any patients) who had procedures performed unnecessarily. Instead, IHC kept the profits for itself.

PLAINTIFF LISA TAPP'S PFO CLOSURE AND INJURIES

37. Plaintiff Lisa Tapp was 43 years old when she underwent the percutaneous closure of a patent foramen oval at Intermountain Medical Center in Salt Lake County on September 18, 2008. The procedure was performed by Defendant Sherman Sorensen, M.D. using an 18 millimeter Amplatzer septal occlude device—a device not approved by the FDA for use in this manner. The safety and efficacy for using the Amplatzer device in a PFO closure to prevent strokes on patients without recurrent cryptogenic stroke has never been established, even to this day.

38. In fact, at all material times the Amplatzer septal occcluder has been indicated for patients with "echocardiographic evidence of ostium secundum atrial septal defect." The

Amplatzer instructions for use unequivocally state, "The use of this device has not been studied in patients with patent foreman ovale."

39. Prior to Lisa's percutaneous closure, she underwent a neurological history and physical by Walter Reichert M.D. on August 15, 2008. The patient described a two-month history of continuous paresthesias in the back of the neck and head. She also described "mild numbness in her right thumb and hand while she is seated." Importantly, a detailed neurological exam did not show any abnormalities; specifically, there were no motor/strength deficits and no sensory deficits.

40. On August 20, 2008, a brain MRI, MRA of the intracranial arteries and an MRI of the cervical spine were performed at Western Neurological Associates, where Dr. Reichert practiced. The brain MRI was interpreted to show about fifteen bilateral non-specific white matter lesions. A differential diagnosis is given for this finding: "includes demyelinating disease, migraine headaches, vasculitis/inflammatory disease, chronic microvascular ischemic disease, hypertension and post-traumatic sequela." The differential diagnosis did not include embolic strokes or events.

41. On September 2, 2008, Lisa received a transthoracic echocardiogram and transcranial doppler study in Defendant Sorensen's office, SCG. The transthoracic echo is interpreted to show an abnormal bubble study consistent with a right to left shunt across the atrial septum and the transcranial doppler study is interpreted to show 5/5 conductance with a valsalva maneuver. The 5/5 conductance is used to place the patient at "high risk stratification for stroke."

42. On this same day, Defendant Sorensen performed a history and physical on Lisa. Among Defendant Sorensen's findings, he concluded that Lisa did not have hyper coagulability (despite a lack of testing for this), that she developed "well-defined symptoms of hemisensory"

(despite no evidence of this in Lisa's neurological exam), and that she had a history of migraines (despite Lisa's own claims to the contrary). Defendant Sorensen went on to state that Lisa had "a change in her level of consciousness" and that her "right-sided weakness has been persistent." None of these findings were reflected in Lisa's neurological exam. Defendant Sorensen claims the non-specific white matter lesions seen on Lisa's brain MRI "are, therefore, most likely embolic." Defendant Sorensen made this diagnosis with virtually no medical support.

43. To persuade Plaintiff to undergo a PFO closure, Defendant Sorensen represented to Plaintiff that she was at high risk of a debilitating stroke due to the presence of her PFO/ASD. In truth, the mere presence of the defect, without more, including a history of cryptogenic stroke, is not a significant risk factor for stroke. Further, Sorensen passed out a Patient Information Patent Foreman Ovale (PFO) handout to Plaintiff. Sorensen's patient literature contained fraudulent misrepresentations, unsupported data and statistics, outright falsehoods, and other misleading statements, such as the following:

- "Until recently, 40% of all strokes were unknown cause. We now know that most of these unexplained strokes may be caused by a PFO (Patent Foramen Ovale)" (Stroke and PFO Slide 2).
- "Strokes resulting from septal defects have a 50% mortality rate."
- "PFO is diagnosed in 50-70% of patients with stroke of unknown cause" (What is Known About PFO and Stroke Slide 12).
- "Continued lifelong risk of stroke ranging from 2-9% each year." (PFO Treatment Options Aspirin/Plavix/Coumadin Slide 17).
- "Stroke reduction to less than 1%" (PFO Treatment Options Catheter Closure of PFO).
- "Septal Defect Closure Safety and Efficacy" (Slide 28).

- "Our rigorous Program requirements assure that you are informed and receive the safest and most effective treatment" (Why Our Program Might Be Right For You Slide 30).

These statements induced and persuaded Plaintiff to undergo a PFO closure at IHC by inducing fear of an imminent and debilitating stroke, downplaying safer and accepted treatment options, misrepresenting the indication for PFO in the medical community, and downplaying the risks of PFO closure.

44. Further, Plaintiff's medical records authorized by Defendant Sorensen are replete with fraudulent misrepresentations, falsehoods, and other misleading statements containing information presented to Plaintiff to induce her to have the closure procedure. These statements include:

- "Our approach is a preventative strategy. It is scientifically based, but it is an aggressive strategy." In fact, Dr. Sorenson's method has never been accepted in any scientific journal, organization, been approved for a randomized clinical trial, and/or the peer review process for his data and proposed indication for PFO closure. "We, therefore follow a preventative strategy and risk stratify patients based on the studies…proposed by the American Academy of Neurology." That is false; the AAN did not recommend closure outside of clinical trials and encouraged patients to participate in research protocols.
- "8 studies demonstrate that very high flow is the main feature of stroke risk." In fact, the AAN Practice Parameter did not find an association, much less causation, of shunting and risk of stroke recurrence.

- "Randomized trials are not available currently." In reality, the Closure I trial was opened in Salt Lake City, Utah. It was halted due to Defendant Sorensen's medically unnecessary off-label PFO procedures of patients outside the trial.
- "Coumadin is considered to be unsafe and ineffective…based on studies." In fact, the SPIRIT, WASID and WARRS studies showed no such thing.
- Within Plaintiff's medical records, Sorenson noted that Ms. Tapp had a history of migraine. That too was false, misleading, and inaccurate. Dr. Sorenson made this notation without any objective evidence.
- Defendant Sorenson certified that his echocardiography lab was certified by ICAEL (Intersocietal Commission for Accreditation Laboratories) using the ICAEL logo on his echochardiogram. In fact, his lab was never accredited by ICAEL and this was false.

Plaintiff was unaware of the misrepresentations and falsehoods in her medical records and instead trusted what the Defendants had told her during her of treatment. Further, and even if she had been aware of some the factual mischaracterizations, as non-expert she could not have understood their implications as it relates the appropriateness of her medical treatment.

45. Ultimately, Defendant Sorensen performed the percutaneous closure on September 18, 2008, at Defendant IHC's Cardiac Catheterization Laboratory. The following day, a transthoracic echocardiogram was performed at Defendant IHC on Lisa prior to discharge. A color-flow doppler test was not performed to evaluate the atrial septum for a residual shunt, which was ostensibly one of the reasons for closing Lisa's PFO.

46. In a patient with strong or definitive evidence for embolic stroke, the standard of care requires a comprehensive evaluation for all of the causes of embolic stroke. This was not

performed by Dr. Sorensen in his care of Plaintiff. A comprehensive evaluation for causes of "cryptogenic" stroke includes an MRI of the brain (which was done in this case), imaging of the extra cranial and intracranial cerebral arteries, 3-4 week rhythm monitoring to look for paroxysmal atrial fibrillation, imaging of the aorta to look for atherosclerotic disease, lower extremity venous doppler/ultrasound, MRV of the abdominal and pelvic veins, and a hyper coagulability workup. Sorensen did not conduct this evaluation on Plaintiff.

47. Defendant IHC was aware that this type of off-label medically unnecessary PFO closure was being performed on hundreds of patients, including Plaintiff, during this time of October 2008 as Defendant Sorensen had informed Defendant IHC he would perform the procedure in this manner.

48. On October 15, 2008, Lisa Tapp was seen by Defendant Sorensen for a follow-up visit. Lisa complained of palpitations and a rapid heart rate. Defendant Sorensen did not screen Lisa for atrial fibrillation, which carries with it the risk of stroke.

49. Because of Defendants' conduct, Lisa suffered damages, including undergoing an unnecessary surgical procedure and hospital stay, as well as medical expenses, physical pain, and emotional anguish.

50. Despite IHC's awareness of Sorensen's fraudulent and/or negligent practices, it did nothing to notify Plaintiff. Instead, IHC actively allowed Sorensen's practice to continue in order to profit from the thousands of unnecessary procedures performed on patients like Plaintiff. In fact, IHC has to this day actively concealed its knowledge about Sorensen's rogue and fraudulent practices at its facility from patients, third party payers, and the public, and has retained the money earned off of Sorensen's medically unnecessary surgeries.

51. The FDA issued a warning about serious erosion events with Amplatzer Septal Occluder devices in October 2013. Although erosion events are not currently an issue for Lisa Tapp, the Amplatzer Septal Occluder device is permanently implanted and carries this risk.

52. IHC sent a letter to patients around February 2014 alerting patients who had an Amplatzer Septal Occluder device implanted about the FDA's findings with a link to the FDA announcement and St. Jude patient advisory. The letter sent to patients did not mention anything about Dr. Sorensen, the PFO closure procedure itself, or that medical malpractice may have occurred. Nor did the letter inform patients, including Lisa Tapp, that the PFO closure was medically unnecessary to begin with, that the use of this device for PFO closure had not been studied, accepted, and/or approved in the medical community, and that Defendant Sorensen had asserted misrepresentations, falsehoods, half-truths, and engaged in other deceptive acts.

FIRST CLAIM FOR RELIEF: NEGLIGENCE (HEALTH CARE MALPRACTICE)

53. Plaintiff refers to and incorporates the preceding paragraphs as if set forth fully herein.

54. Defendants, individually, collectively, and through the acts and omissions of their agents, servants, employees, physicians, nurses, therapists, and technologists (hereinafter collectively "Defendants") accepted Plaintiff as a patient, and thereby assumed various duties of care.

55. At all relevant times, Defendants held themselves out as being able to provide full care and treatment for patients requiring medical care of the type that Plaintiff required, including, but not limited to, paresthesias in the back of the neck and head and non-specific white matter lesions, among other things.

56. The degree of care and treatment provided to Plaintiff fell below the acceptable standards of care for the types of medical care and treatment required by Plaintiff and provided by Defendants.

57. Specifically, Defendants breached the applicable standards of care in multiple ways including, but not limited to:

a. Falsifying Plaintiff's medical records to indicate that Plaintiff was an appropriate candidate for closure;

b. Misleading Plaintiff regarding the risks and benefits associated with closure and regarding the necessity of treatment;

c. Failing to obtain an adequate history which resulted in an improper medical diagnosis that Plaintiff was an appropriate candidate for closure;

d. Failing to conduct an adequate physical and to obtain appropriate diagnostic testing, which resulted in an improper medical diagnosis that Plaintiff was an appropriate candidate for PFO closure; Performing a medically unnecessary medical procedure with a device that was not FDA approved for this use;

e. Failing to test for residual shunting after performing the PFO closure; and

f. Failing to screen Plaintiff for atrial fibrillation when she presented with palpitations and a rapid heart rate.

58. As a sole, proximate, and foreseeable result of Defendants' acts and omissions, Defendants caused Plaintiff to undergo unnecessary medical procedures, testing, and follow-up visits, incur unnecessary medical expenses, and experience physical injuries and emotional anguish.

59. As a sole, proximate, and foreseeable result of Defendants' acts and omissions, Plaintiff has suffered personal injuries, including by not limited to unnecessary medical procedures, testing, follow-up visits, medical expenses, and emotional anguish.

60. Plaintiff has therefore been injured and is entitled to recover general and special damages in an amount to be determined at trial.

SECOND CLAIM FOR RELIEF: NEGLIGENCE

61. Plaintiff refers to and incorporates the preceding paragraphs as if set forth fully herein.

62. At all relevant times, Defendants owed Plaintiff various duties of care, including but not limited to common law and statutory duties.

63. Defendants, individually and collectively, breached these duties of care.

64. As a sole, proximate, and foreseeable result of Defendants' acts and omission, Defendants caused personal and other injuries to Plaintiff.

65. Plaintiff has been injured and is entitled to recover general and special damages in amounts to be determined at trial.

THIRD CLAIM FOR RELIEF: NEGLIGENT MISREPRESENTATION

66. Plaintiff refers to and incorporates the preceding paragraphs as if set forth fully herein.

67. Defendants, individually and collectively, represented to Plaintiff that medical procedures, testing, and follow-up visits were medically necessary.

68. Defendants' representations that Plaintiff's medical procedures, testing, and follow-up visits were medically necessary was, in fact, not true.

69. Defendants failed to use reasonable care to determine whether the representations regarding the necessity of Plaintiff's medical care was true.

70. Defendants were in a better position than Plaintiff to know the true facts regarding Plaintiff's medical procedures, testing, and follow-up care.

71. Defendants had a financial interest in performing medically unnecessary procedures, testing, and follow-up care on Plaintiff.

72. Plaintiff relied on Defendants' representations, and it was reasonable for her to do so.

73. Plaintiff has therefore been injured as a result of relying on Defendants' representations and is entitled to recover general and special damages in an amount to be determined at trial.

FOURTH CLAIM FOR RELIEF: NEGLIGENT CREDENTIALING

74. Plaintiff refers to and incorporates the preceding paragraphs as if set forth fully herein.

75. Defendant IHC owes a duty to patients to exercise reasonable care in the selection of its medical staff and in granting specialized privileges to them. It also has the duty to periodically monitor and review the qualifications and competency of its medical staff.

76. Defendant IHC breached its duty to exercise reasonable care in its selection of its medical staff, and in granting specialized privileges to and periodically monitoring and reviewing the qualifications and competency of its medical staff.

77. As a sole, proximate, and foreseeable result of its breach, Defendant IHC caused harm to Plaintiff.

78. Plaintiff has been injured and is entitled to recover general and special damages in an amount to be determined at trial.

FIFTH CLAIM FOR RELIEF: FRAUDULANT NON-DISCLOSURE/CONCEALMENT

79. Plaintiff refers to and incorporates the preceding paragraphs as if set forth fully herein.

80. Defendants owed a duty to Plaintiff to disclose important facts, such as the medical necessity of Plaintiff's medical care, to Plaintiff.

81. Defendants knew that the medical care Defendants provided to Plaintiff was not medically necessary, and failed to disclose this to Plaintiff.

82. Plaintiff did not know that the medical care provided by Defendants was not medically necessary.

83. Defendants' failure to disclose the fact that Plaintiff's medical care was not necessary was a substantial factor in causing Plaintiff's damages. Had Plaintiff known that her closure surgery was not necessary, Plaintiff would not have undergone the surgery.

84. Plaintiff has been injured and is entitled to recover general and special damages in an amount to be determined at trial.

SIXTH CLAIM FOR RELIEF: FRAUD

85. Plaintiff refers to and incorporates the preceding paragraphs as if set forth fully herein.

86. At all relevant times, Defendants had a duty and obligation to disclose to Plaintiff true facts concerning the medical care provided to Plaintiff by Defendants.

87. Defendants intentionally concealed material facts concerning Plaintiff's medical care from Plaintiff including, but not limited to the following:

a. Falsifying Plaintiff's medical records to indicate that she was an appropriate candidate for closure;

b. Performing medically unnecessary medical procedures with a device that was not FDA approved for this use; and

c. Concealing from Plaintiff that medical procedures, testing, and follow-up care was unnecessary.

88. Defendants made false statements and misrepresentations about important facts regarding Plaintiff's medical care.

89. Defendants made these false statements and misrepresentations described above knowing that the statements were false, or with reckless disregard for their truth.

90. Defendants made the false statements and misrepresentations to Plaintiff, with the intent that Plaintiff would rely on the statements.

91. Plaintiff did reasonably rely on the false statements and misrepresentations made by Defendants.

92. As a sole, proximate, and foreseeable result of Defendants' false statements and misrepresentations, Plaintiff has suffered personal injuries, including but not limited to unnecessary medical procedures, testing, follow-up visits, medical expenses, and emotional anguish.

SEVENTH CLAIM FOR RELIEF: CIVIL CONSPIRACY

93. Plaintiff refers to and incorporates the preceding paragraphs as if set forth fully herein.

94. Defendants were acting in a conspiracy to commit fraud, thereby increasing their profits through the performance of medically unnecessary procedures on patients, including Plaintiff.

95. There was an agreement and meeting of the minds among Defendant Sorensen, Defendant SCG, and Defendant IHC to misrepresent the need for and induce patients, including Plaintiff, into undergoing medically unnecessary procedures, testing, and follow-up. Defendants agreed to act in concert in making these misrepresentations about the necessity of medical procedures to Plaintiff.

96. There were multiple unlawful, overt acts by Defendant Sorensen, Defendant SCG, and Defendant IHC in furtherance of their scheme, including without limitation, Defendants' fraud.

97. As a result of this conspiracy, Defendant Sorensen, Defendant SCG, and Defendant IHC, should be held jointly and severally liable for the conduct of the other co-conspirators and the damages that Plaintiff sustained as a proximate result thereof, including without limitation personal injuries and other injuries.

98. Plaintiff would further show that Defendant Sorensen and Defendant SCG were operating as alter egos for the purpose of perpetrating the above described conspiracy. There was such a unity of interest and ownership that the separate personalities of the company and the individual did not exist. Observing the corporate form will sanction this conspiracy, promote injustice, and allow an inequitable result.

EQUITABLE TOLLING/FRAUDULENT CONCEALMENT

99. Plaintiff refers to and incorporates the preceding paragraphs as if set forth fully herein.

100. Because of Defendants' concealment of material facts and misleading conduct, Plaintiff was not aware of her causes of action.

101. Plaintiff found out about her cause of action only after learning of Defendants' conduct through lawyer advertising in 2017.

102. Defendants took affirmative steps to conceal Plaintiff's cause of action. Given Defendants' concealment and misleading conduct, a reasonable plaintiff would not have discovered the cause of action earlier.

103. IHC, through its employees, physicians, internal audit, and Sorensen's own representations was well aware that Sorensen had performed medically unnecessary PFO and ASD closures on patients such as Plaintiff, but chose not to conduct a more expansive audit and/or inform patients that had an unnecessary surgery.

104. Neither Sorenson, nor IHC ever notified Plaintiff that she had received an unnecessary procedure, that she was never indicated for the surgery to begin with, that the device implanted into Plaintiff was never medically necessary, was retained in her body for no medical purpose, and that the informed consent contained fraudulent, misleading, and/or incomplete statements. Neither Sorenson, nor IHC, ever compensated Plaintiff for the unnecessary medical surgery she underwent by reimbursing the costs of the procedure.

105. Neither Sorensen, nor IHC, ever made a public statement, sent a letter, made a public announcement, or issued a press release to inform patients, such as Plaintiff Lisa Tapp, may have had a medically unnecessary PFO closure at IHC at any time.

106. Defendants' misrepresentations and misleading conduct constitutes fraudulent concealment that equitably tolls any proffered statute of limitation that may otherwise bar the recovery sought by Plaintiff.

107. Plaintiff did not know, nor should have known, of the causes of action against Defendants prior to being put on notice of Defendants' potential liability in 2017. She neither discovered, nor reasonably should have discovered, the facts underlying her causes of action before any proffered statute of limitations period expired.

108. As a result of Defendants' concealment of the true character, quality and nature of their conduct, they are estopped from relying on any statute of limitations defense. 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).

109. Defendants' conduct, because it was purposely committed, was known or should have been known by them to be dangerous, heedless, reckless, and without regard to the consequences or the rights and safety of Plaintiff.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for a judgment (under URCP: Tier 3) against Defendants in an amount to be determined by the trier of fact for the following damages:

a. For special damages in an amount to be determined at trial;

b. For general damages in an amount to be determined at trial;

c. For pre and post judgment interest on all special damages pursuant to Utah law;

d. For costs and attorney fees to the extent allowed by law; and

e. For such other relief as the Court deems appropriate.

RESPECTFULLY SUBMITTED this 21st day of November 2017.

/s/ Rhome D. Zabriskie
Rhome D. Zabriskie
ZABRISKIE LAW FIRM, LLC
899 North Freedom Blvd, Suite 200
Provo, Utah 84604
Tel: (801) 375-7680
Fax: (801) 375-7686
Email: rhomelawyer@yahoo.com

FLEMING, NOLEN & JEZ, LLP
Rand P. Nolen (Pro Hac Vice submission in progress)
David L. Hobbs (Pro Hac Vice submission in progress)
2800 Post Oak Blvd., Suite 4000
Houston, TX 77056-6109
Telephone: (713) 621-7944
Facsimile: (713) 621-9638
Email: rand_nolen@fleming-law.com
Email: david_hobbs@fleming-law.com

Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that that a true and exact copy of the foregoing has been served on the following via the Court's ECF filing system and/or Email on 21ST day of November, 2017:

Alan C. Bradshaw
Sammi V. Anderson
John (Jack) T. Nelson
Mitch M. Longson
Manning, Curtis, Bradshaw & Bednar PLLC
136 East South Temple, Suite 1300
Salt Lake City, UT 84111
Phone: 801-363-5678
Fax: 801-364-5678
abradshaw@mc2b.com
sanderson@mc2b.com
jnelson@mc2b.com
mlongson@mc2b.com

Attorneys for IHC Health Services, Inc.

Michael J. Miller
Strong & Hanni
102 South 200 East, Suite 800
Salt Lake City, UT 84111
mmiller@strongandhanni.com

Attorney for Defendants Sherman Sorensen, M.D. and Sorensen Cardiovascular Group

/s/ Rhome D. Zabriskie
Rhome D. Zabriskie

SORENSEN'S ADDENDUM D(2)

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

ZABRISKIE LAW FIRM, LLC

899 North Freedom Blvd, Suite 200

Provo, Utah 84604

Tel: (801) 375-7680

Fax: (801) 375-7686

Email: rhomelawyer@yahoo.com

Counsel for Plaintiff

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

Attorneys for Plaintiff

MANNING CURTIS BRADSHAW & BEDNAR

/s/ Jack T. Nelson
Alan C. Bradshaw
John T. (Jack) Nelson
Attorneys for IHC Health Services, Inc.

STRONG & HANNI

/s/ Jack T. Nelson (signed with permission on behalf of Michael J. Miller)
Michael J. Miller
Attorneys for Sorensen Defendants

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:

David Hobbs
ZABRISKIE LAW FIRM, LLC

899 North Freedom Blvd, Suite 200

Provo, Utah 84604

Attorneys for Plaintiff

Alan C. Bradshaw
John (Jack) T. Nelson
Manning, Curtis, Bradshaw & Bednar PLLC
136 East South Temple, Suite 1300
Salt Lake City, UT 84111
Phone: 801-363-5678
Fax: 801-364-5678
abradshaw@mc2b.com
jnelson@mc2b.com

Attorneys for IHC Health Services, Inc.

Michael J. Miller
Strong & Hanni
102 South 200 East, Suite 800
Salt Lake City, UT 84111
mmiller@strongandhanni.com

Attorney for Defendants Sherman Sorensen, M.D. and Sorensen Cardiovascular Group

/s/ Jack T. Nelson

SORENSEN'S ADDENDUM D(3)

IN THE THIRD JUDICIAL DISTRICT COURT - SALT LAKE

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

LISA TAPP, Plaintiff, VS. SHERMAN MD SORENSEN, Defendant.	CASE NO. 170904956 APPELLATE 20180690

BEFORE THE HONORABLE BARRY LAWRENCE

THIRD DISTRICT COURT

450 SOUTH STATE STREET

SALT LAKE CITY, UTAH 84114

REPORTER'S TRANSCRIPT OF PROCEEDINGS

TELEPHONE CONFERENCE

MAY 25, 2018

JEFF S. EATON
124 Tamari Drive, Buffalo, Wyoming 82834
(801) 360-7905 Voice, bolojse@gmail.com

Transcribed by: Jeff S. Eaton, RPR/CSR

A P P E A R A N C E S

FOR THE PLAINTIFF:

DAVID HOBBS
RAND PATRICK NOLEN
RHOME D. ZABRISKIE
Fleming Nolen Jez, L.L.P.
299 S. Main Street, Floor 13
Salt Lake City, Utah 84111

FOR THE DEFENDANT:

ALAN C. BRADSHAW
JOHN T. NELSON
136 E S Temple, Ste. 1300
Salt Lake City, Utah 84111

MICHAEL J. MILLER
Strong & Hanni
102 South 200 East, Suite 800
Salt Lake City, Utah 84111

P R O C E E D I N G S

A VOICE: Welcome to CenturyLink Conferencing. Please enter your passcode followed by the pound or hash key, and I'll connect you.

Please hold while I confirm your passcode.

Thank you. Your passcode is confirmed. When you hear the tone, you will be the 8th person to join the meeting.

THE COURT: All right. Good morning, everybody. This is Judge Lawrence. Who do we have on the line. Why don't we start with the plaintiffs and then go to Dr. Sorensen's lawyers and then IHC.

MR. NOLEN: Your Honor, Rand Nolen and David Hobbs for Dr.-- for the Plaintiff.

MR. ZABRISKIE: And also for the Plaintiff, Rhone Zabriskie is present on the line.

MR. MILLER: Michael Miller on behalf of Dr. Sorensen and Sorensen Cardiovascular Group, and I think Kathleen Abke is on the line too.

MR. BRADSHAW: This is Allen Bradshaw and Jack Nelson for IHC Health Services.

THE COURT: Okay. All right.

MR. WARDS: Your Honor, this is -- Your Honor, this is Drew Wards.

I represent St. Mark's in some of these related cases, and they said we could listen in.

THE COURT: All right. Anybody object?

MR. NOLEN: Plaintiffs do not object, Your Honor.

THE COURT: Okay. All right.

MR. BRADSHAW: No objection.

THE COURT: All right. Thanks for your patience on this.

So I'm prepared to rule on the motion to dismiss. And then perhaps, more important than that, I was hoping we'd have a conversation about where we go from here.

Let me tell you the way I ruled. Then I will go through my ruling. And then, as I said, we'll talk about the process going forward.

I am granting IHC's motion as to the fraud claims against IHC, and I'm also granting the --

Did somebody just join us? Can everybody hear me?

MR. NOLEN: Yes.

THE COURT: So I'm going to -- I'm going to dismiss the fraud claims against IHC, and I'm going to dismiss the conspiracy claim. Other than that, I'm going to deny the motion, so it will basically leave negligence claims against Dr. Sorensen, negligence claims against IHC, and fraud claims against Dr. Sorensen.

So let me go through my analysis.

All right. First, with respect to the statute of limitations, and a lot of this is pretty similar to my ruling

on the futility motion.

The question of statute of limitations, basically the first -- the issue is can I rule on the statute of limitations defense based on the pleadings, and I conclude the answer is no.

And, again, I concluded that the Plaintiff did not have an obligation to plead with particularity facts in response to the statute of limitation defense in their complaint.

As I have said previously, the Plaintiff is not obligated to meet a heightened pleading requirement relating to facts that would serve to defeat an impending defense.

I, again, reiterate the Zuma Dacus case at 2005, Utah Appellate 325, where they said, quote, "The burden of pleading the inapplicability of, in that case, the defense of privilege is not initially on the Plaintiff, and it is not incumbent on the party filing the complaint to anticipate an affirmative defense which the answer may disclose."

I am not persuaded by the defendant's argument to the contrary in that there's a distinction for cases where the complaint is, quote, "facially invalid or untimely."

I've read those cases, and I think those cases stand for the proposition that when all the facts necessary to determine an affirmative defense are stated in the complaint, then it can be ruled -- resolved in a Rule 12 motion.

That is obviously not the case here where the facts of fraudulent concealment are not in the complaint and can't be unless the -- the issue isn't before the Court in full.

Let me just mention a couple of the cases that the defendants raised. First was the Tucker case.

Give me a second.

Oh, in there, 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 limitations, and so it was not inappropriate for the Court to rule, though I do note that they went beyond the complaint and treated it as a Rule 56 motion.

Again, it appears to me that all facts necessary to decide the Rule 12 motion were in the complaint which, again, is a far cry from this case.

Similarly, some of the cases that Tucker was cited for stand for that same proposition, and I'm not persuaded that they lead to some sort of a distinction between facially and -- valid and invalid defenses.

I note specifically the Vandergriff case, which was cited 2013, Utah 11.

That claim was dismissed on immunity grounds because there is immunity for claims that arise based on fraud, and the complaint alleged facts of fraud. Very different than the -- the issue here.

In Bivens, in fact, I think actually the Court stated just the opposite. That was 2017, Utah 67. First of all, that was an exhaustion issue, which is a jurisdictional issue, and the Court made clear that there was -- the complaint made clear that they hadn't exhausted.

I do note that footnote 6 in that case said, quote, "We do not hold today that a plaintiff's complaint must affirmatively plead exhaustion of legal remedies."

Also, I just wanted to mention the Larry case 2004, Utah Appellate 182, where 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.

So none of those cases, in my view, 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 with any -- at all, let alone a degree of particularity.

So that being the case, the issue of whether the plaintiff can prove fraudulent concealment required under code 78B-3-404 will have to be based upon what -- what we learn factually in discovery and to be decided at a summary judgment or at trial.

Accordingly, all of the statute of limitations arguments raised by either IHC or Dr. Sorensen are denied and

that issue will go forward.

Now, the issues relating to the interpretation of that statute are thus not pertinent to this ruling. I will address them in a little while though after I conclude this ruling, because, obviously, those are important issues that we need to make -- to determine before we figure out where we're going in the next step of the process.

So the statute of limitations defense is -- is rejected, and all motions in that regard are denied.

Now, with respect to the miscellaneous arguments:

First Dr. Sorensen argues that all of the claims should be consolidated into one medical malpractice claim relying on 78B-3-403(17).

While the Medical Malpractice Act does have a broad definition of what a malpractice claim is for purposes -- for procedural purposes, I'm not aware of any authority that would prevent a plaintiff in a lawsuit from asserting alternate facts of fraud or negligence against Dr. Sorensen, and the elements of each would have to be proven at trial.

However, I would note that it appears that there are multiple claims of negligence and multiple claims of fraud, and I'm not going to dismiss those at this time.

The Plaintiff is certainly entitled to pursue its -- its claims, but ultimately, when we get to trial, there will be one negligence claim and there will be one fraud claim, and,

you know, frankly it -- in a negligence claim, it's all going to be based on a breach of a standard of care, and if that standard of care encompasses various things, that's fine. Those aren't separate claims though.

But as I said, I'm not going to dismiss any claims at this time, but the Plaintiff needs to be mindful that as we work towards trial, that if we get to trial, there aren't going to be a number of negligence claims. There's going to be one, and it can have subparts, but there will be one negligence claim.

Now, as I mentioned, with IHC's motion to dismiss the fraud claim, that motion is granted.

Now, it's important to note that there's 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 limitations.

The allegations of IHC's fraud in inducing Ms. Tapp to have this surgery are nonexistent. There is nothing but conclusory statements where the Plaintiff lumps the, quote, defendants in together in asserting some of these claims, but there is not one fact in the complaint that would support that IHC was somehow involved in a fraud in 2008.

There are ample facts supporting alleged fraudulent inducement by Dr. Sorensen and so, obviously, those claims will proceed. But there is no fact stated in the complaint that I

found that -- that even alleges, let alone with any degree of particularity, that IHC was involved in the fraud allegedly perpetuated on Ms. Tapp in 2008.

So that claim is dismissed.

Similarly -- give me one second while I look at my notes.

Finally, Sorensen has filed a motion to dismiss the fraud and conspiracy claims. As I said, the fraud claim against Dr. Sorensen will survive.

There's ample allegations of fact supporting this fraudulent inducement theory in 2008.

However, as there is absolutely nothing demonstrating any fraud by IHC or any sort of illegal or wrong conduct by IHC, I don't believe that -- that the predicate for a conspiracy claim has been proven, so the conspiracy claim is denied as well.

And let me make very clear that, in looking at the complaint, the fraud and conspiracy claims I am dismissing have to do with any alleged fraud or conspiracy at the time this surgery was done in 2008. That is what the complaint alleges. There are no facts supporting that, and that's why those claims will be dismissed.

And let me just also say that the conspiracy claim, like the fraud claim, is also governed by Rule 9. Rule 9, it appears to me, does, in Utah, require the similar showing of

particularity. I'll just throw out a couple of cases that I saw that supported that.

The Williams v. State Farm case, 656 P.2d 966, the Corollas case, 2003 Utah Appellate 339, and the Fidelity case, 2015 Utah Appellate 19.

So having dismissed IHC's fraud claim. I believe I am compelled to dismiss the conspiracy claim between these parties as well.

So, again, going forward, we have three areas of claims. First are the negligence claims against IHC relating to the surgery, second are the negligence claims against Dr. Sorensen relating to the surgery, third are the fraud claims against Dr. Sorensen relating to the surgery.

So that is the end of the order.

Do I have any volunteer to go through -- to get a copy of the transcript and draft an order for me reflecting that ruling?

MR. NOLEN: Your Honor, plaintiffs will be happy to do it.

THE COURT: All right. I would ask you to get the transcript. Go as close as you can so that there's not much of a dispute between the parties on that.

Having ruled that way, the defendant -- defendants are going to be required to answer, let's say by June 8th, that will be the date by which the parties should file their answer.

Now --

MR. NOLEN: Your Honor, we've -- we have already -- when we -- when you ruled previously --

THE COURT: Oh, okay.

MR. NOLEN: -- you instructed us to answer as well as file the motion to dismiss.

THE COURT: Okay. Good. Thank you. Good.

All right. So, now the only thing else that I have to say is not related to this motion and in dicta and take it for however you like it.

It seems to me that we now, by the motions to dismiss, by ruling the way I did, I didn't need to get to the statute. As I see it, that statute and the interpretation of that statute will govern the way in which we proceed in this case, most notably discovery.

It seems to me that if IHC is correct in their interpretation of that statute, then discovery will be fairly limited and would not encompass a huge sort of undertaking regarding what happened between Sorensen and IHC and all of that stuff. Whereas, if the Plaintiffs are correct, they would be, as they requested it at the last hearing, asking for a full-blown discovery that, frankly, I thought sounded like a fishing expedition.

I am trying to figure out what the best way to proceed is. Let me give you my -- sort of a proposal, and then

I'd like to hear from you folks and tell me what you think.

My thought is to have you meet and confer and see if you can come up with some sort of a discovery plan. If you can't, what I'm wondering is whether -- and I'm frankly not optimistic you're going to reach an agreement on that. What I'm wondering about is whether each side can submit some sort of a -- sort of discovery plan on what the parameters of discovery are, and perhaps it would be -- you would submit them to me, and at that time I could perhaps enter an order where I've gone through what the statute means and limit discovery accordingly.

At that point, you guys could determine whether you want to go ahead with discovery or wanting to perhaps take it in interlocutory appeal.

I am mindful of the fact that at some point the determination of what that statute means is going to have to be addressed upstairs. And I'm wondering if that is the first opportunity at which that can happen.

If not, then we're going to have to complete discovery and have an evidentiary hearing. And I will tell you, I am very compelled to believe that a bifurcation pursuant to 78B-2-114 is required in this case, not legally required, but required for the issue of judicial economy, one, and number two, it would be, I think, unfair and prejudicial to the defendants in what might just be a negligence claim, and

certainly is as to IHC, to hear facts of a potential fraudulent scheme later that is not -- that's not relevant to the merits but would be relevant to statute of limitations.

So I am mindful of the fact that you guys need a ruling from me on what that statute means, and -- and I'm trying to figure out the best way to give that to you so that we are -- are as economic as we can in moving through this case.

So let me hear from you first, Mr. Nolen. Do you have any thoughts on how to proceed at this point?

MR. NOLEN: Your Honor, I would, having heard the Court's thoughts, actually think that we might could tailor something through a meet and confer. And once we had that meet and confer, if we -- if we can't agree for some reason, and actually, as a -- as a group, we've actually been fairly cooperative with each other, but if we can't agree on a discovery -- a discovery plan that is acceptable to us, we would just simply advise the Court in writing, just jointly, and then within ten days or 14 days, whatever the Court prefers, submit our own separate discovery plans.

THE COURT: Okay. Mr. Bradshaw, let me hear from you next. Any thoughts?

MR. BRADSHAW: Yes, Your Honor. Thank you.

We -- we certainly are willing to sit down and discuss a discovery plan, and I would agree with the notion

that discovery related to the affirmative fraudulent concealment issue would be extremely limited. I -- I think that the biggest limiting factor is, is that under that statute there has to be some reliance by the Plaintiff on the conduct, so we're really talking about interactions between either Sorensen and --

THE COURT: I am fully along -- along that position on this statute. You don't need to reargue it, but I am mindful of that.

MR. BRADSHAW: That's fine, Your Honor. So -- so that's one thing.

I would like to introduce one other thought with respect to this, which I think you're right that we're going to need an interpretation of the statute, and I would suggest that the procedural portion of the Court's ruling where I think we have some disagreement would also be critical, because this case is obviously setting the landscape with respect to 800 cases.

And let me just articulate what I think that issue is. As I understand the Court's ruling, the Court is recognizing that, under this line of cases where there is a -- an affirmative defense that appears on the face of the complaint, our argument was obviously that there is one fact and one fact alone, which is that when the medical care occurred, because this is a statute of repose.

As I understand the Court's ruling, what the Court is saying is the cases we're citing are distinguishable because the issue that would have to have been pled in the complaint is affirmative fraudulent concealment and all of those facts. And I think that guidance from the appellate court with respect to the way I read all of these cases, including the federal cases and the state cases, is is that there is only one fact that makes the complaint facially untimely, which is the date of the medical care. And so that's where this is -- is either throwing us into this context of discovery or we're into the fact that they have not pled affirmative conduct that would resurrect their claim.

I think that if we get to the point that we have to have this statute interpreted and this procedural issue becomes absolutely critical, and I think it's a really discreet issue for which the appellate court can answer that question and guide all of these cases.

THE COURT: Well, I -- I respectively just totally disagree with your position on this, and I've said it three times. You guys can -- frankly, you know, what I thought, what I was wondering about was whether there should be sort of a compendium order from me. Perhaps we wait on the order grant -- or denying the motions to dismiss, and if you guys can't agree on discovery, I issue one big order where it includes the motion to dismiss and it includes the -- the

statutory interpretation arguments. And if all of this is going to be interlocutory, I don't think you have a matter of right on any of this stuff, but perhaps, at that point, if there's just one order that addresses both the motion to dismiss and the statute, perhaps -- perhaps that might be something that everybody would agree that needs to be taken up on an interlock. And maybe -- maybe that's the way that we should think about doing this.

MR. BRADSHAW: That -- that's what I'm suggesting, Your Honor. I always get nervous when you say you disagree. I -- that's what I was trying to suggest. I don't think I articulated it very well.

THE COURT: I -- I personally don't have a problem with that. And I will tell you all, I've -- you know, we have been at CLEs with appellate judges, and I have specifically asked, if I have an issue and I think that, you know, it would really help if you guys decided it on an interlocutory basis, would it help if I chimed in, and the answer was, yes. And I would certainly at -- so we are, you know, through phase one of this process with the motions to dismiss. Once we get through phase 2 and we're talking about the interpretation of the statute, I would certainly be willing to include language in that order to the effect that, given the enormity of the number of cases, the importance of this issue, that this really is something that they need to take a look at sooner rather than

later.

I think that makes sense. But, you know, once again, it's -- it's still not a matter of right. So I guess we'd have to just hope that they take it now. I think that would make a lot of sense from a judicial economy standpoint.

Mr. Miller, I guess I skipped over you. What -- do you have any thoughts on this?

MR. MILLER: Your Honor, I think Mr. Nolen stated it succinctly, and I think that that's appropriate, yes. I think a meet and confer, as Your Honor suggested, would be very appropriate to see if we can come up with a plan, and if we cannot, then submit separate sides.

And it may be that we can agree on, you know, 50, 60, 70 percent, whatever the number is, and then submit the rest for the Court's ruling. I think that would be great.

THE COURT: Okay. Why don't we -- how quickly can you guys have your meet and confer?

MR. NOLEN: Your Honor, I'm sure I can do it next week. I don't know what the other side's schedule is, but I certainly can do it next week.

THE COURT: What if I just said within two weeks the parties are going to meet and confer. So that would be by June 8th, the parties will meet and confer and try to submit a stipulated discovery plan.

I'm not going to hold my breath, but have at it. And

then if you can't, how about within -- within two weeks after that, by June 22nd, each party submits their discovery plan, their proposal.

You really -- you -- it doesn't need to in-depth refer to the statute and the statutory interpretation. I've got all of that that I need. But it probably would be helpful to simply say, from the IHC's perspective, based upon the arguments we've submitted, we think that, you know, discovery should be limited in the following regards, or whatever.

So don't make it too long. Just tell me what discovery you want. I'm talking timelines. I'm talking amounts of discovery. I'm talking, you know, precisely what vehicles and mechanisms of discovery. And -- and -- and I think this probably will apply to the Plaintiff and not the Defendant, you're going to have to demonstrate some sort of proportionality issue here.

Rule 26 in Utah is governed by principals of proportionality, and I realize in one sense there are lots of cases and this is a biggie and -- if you look at it in the totality. But this case in and of itself, you know, not so much. It is a tier three case and tier three does state some limits.

But I -- I do want you -- the Plaintiff to address the issue of proportionality, if what you're going to be requesting, and I think it is, a fairly broad examination of --

of lots of things involving IHC and Dr. Sorensen.

Does that timeline make sense?

MR. NOLEN: It's fine with Plaintiff, Your Honor.

MR. MILLER: Yes. This is Mike Miller, I agree.

MR. BRADSHAW: Your Honor, this is Mr. Bradshaw. I -- that -- I -- I agree with that timeline. I'm a little bit confused by is this to the exclusion of preparing an order with respect to the Court's ruling today --

THE COURT: No.

MR. BRADSHAW: -- if I have [inaudible].

THE COURT: Let's have that done on a parallel basis. And then what I will do is I will just -- I think what I'll do is I will not sign any order on this motion until I sign the other order. So it will be signed the same day.

So they -- that's -- I'm thinking that that might work.

If we just sort of do that parallel and I sign them both on the same day, it will have the same effect.

Does anybody see a problem with that?

MR. NOLEN: Plaintiffs does not, Your Honor. No, that's fine.

THE COURT: All right. So -- so let me -- let's reiterate.

So Mr. Nolen is going to prepare the order relating to the motion to dismiss. See if you can reach an agreement on

that and then submit it to the Court.

I'm not going to sign that just yet.

In the meantime, by June 8th, the parties will meet and confer to try to agree to a discovery plan. If they can't agree, then by June 22nd the parties will each submit their own -- all three parties will submit their own request for a discovery plan.

At that point, the matter will be -- it's -- I'm sure I will remember, but would somebody file a request to submit after both -- after all three of those plans or two of those plans, however you guys divide them up, are done.

At that point, I will shortly thereafter issue an order where I go through the interpretation of that statute and then make conclusions about the limits on discovery.

And I -- you know, I will tell you, I don't think, frankly, that I -- I have looked at this again pretty intently after our last hearing, and I -- I still believe, I think, that the fraud at the outset that is alleged of Dr. Sorensen, is -- is not precluded by the statute. Frankly, that affects only Dr. Sorensen. I don't think that affects IHC.

Number one.

Number two, I firmly believe that the term "affirmative act of fraudulent concealment" has meaning. And, you know, if you look at the cases, I -- I -- I have to ascribe some meaning to that. And so keep those two things in mind.

I will -- you know, I'm still sort of going through the cases and making sure that I feel comfortable with this. But I just wanted to let you know, there's nothing that I've seen this time around that changes very materially what I -- what I thought I read, what I thought I concluded on the futility motion.

So for whatever that's worth.

So I will look forward to hearing from you folks, assuming that the matter is submitted to me on June 22nd. I'm -- I would hope that within the next few weeks after that, frankly, that I have an order from you on the interpretation of the statute and therefore the parameters of discovery.

So we'll just have to take this one step at a time, but I think that makes sense.

Does anybody have any comments they'd like to say before we close here?

MR. NOLEN: Plaintiffs do not, Your Honor.

MR. MILLER: Nothing further. Mike Miller. Thank you.

MR. BRADSHAW: Nothing further.

THE COURT: All right, everybody. Have a good extended weekend, and we will talk to you soon.

MR. NOLEN: Thank you.

MR. BRADSHAW: Thank you.

MR. MILLER: Thank you.

MS. ABKE: Thank you.

THE COURT: Bye.

(PROCEEDINGS IN THE ABOVE-ENTITLED MATTER WERE CONCLUDED.)

TRANSCRIBER'S CERTIFICATE

STATE OF UTAH)
: SS.
COUNTY OF UTAH)

I, Jeff S. Eaton, do certify that I am an Official Transcriber in and for the State of Utah.

That as such transcriber, I transcribed the occasion of the proceedings of the above-entitled matter at the aforesaid time and place.

That the proceeding was transcribed by me using computer-aided transcription consisting of pages 3 through 23 inclusive;

That the same constitutes a true and correct transcription of the said proceedings;

That I am not of kin or otherwise associated with any of the parties herein or their counsel, and that I am not interested in the events thereof.

WITNESS my hand at Provo, Utah, this 14th day of December, 2018.

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Jeff S. Eaton, RPR, CSR