IN THE SUPREME COURT OF THE STATE OF UTAH

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<tr><td>Johanna Bright,
Appellee,
v.
Sherman Sorensen, MD; Sorensen Cardiovascular Group, and St. Mark's Hospital,
Appellants.</td><td rowspan="3">REPLY BRIEF OF APPELLANT ST. MARK'S HOSPITAL

Case No. 20180528-SC</td></tr>
<tr><td>Pia Merlo-Schmucker,
Appellee,
v.
Sherman Sorensen, MD; Sorensen Cardiovascular Group, and St. Mark's Hospital,
Appellants.</td></tr>
<tr><td>Lisa Tapp,
Appellee,
v.
Sherman Sorensen, MD; Sorensen Cardiovascular Group, and IHC Health Services, Inc.,
Appellants.</td></tr>
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TABLE OF CONTENTS

ARGUMENT 1

I. The Patient's Proposed Pleading Standard Would Effectively Nullify the Statute of Repose 2

II. The Foreign Object Exception Does Not Apply to This Case 12

CONCLUSION 20

CERTIFICATE OF COMPLIANCE 21

TABLE OF AUTHORITIES

Cases

Bagley v. Bagley, 2016 UT 48, 387 P.3d 1000 14

Beatman v. Gates, 521 N.E.2d 521 18

Chambers v. Semmer, 197 S.W.3d 730 18

Chapman v. Primary Children's Hosp., 784 P.2d 1181 10

Christiansen v. Rees, 436 P.2d 435 15,17

Cornejo v. JPMorgan Chase Bank, No. CV 11-4119 CAS(VBKx),
2012 WL 628179 3

Day v. Meek, 1999 UT 28, 976 P.2d 1202 15

Hall v. Ervin, 642 S.W.2d 724 18

Hershley v. Brown, 655 S.W.2d 671 16,17

Jensen v. IHC Hosps., Inc., 944 P.2d 327 8,9

Norred v. Teaver, 740 S.E.2d 251 17

Republic Bank & Trust Co. v. Bear Stearns & Co., 683 F.3d 239, 255 3

Shah v. Intermountain Healthcare, Inc., 2013 UT App. 261 3

Turner v. Staker & Parson Companies, 2012 UT 30, 284 P.3d 600 13

Williams v. State Farm Ins. Co., 656 P.2d 966 3

Rules

Utah Code §78B-3-404 .... *passim*

Utah R. Civ. P. 9(c) 11

Other References

37 Am.Jur.2d *Fraud & Deceit* § 145 (1968) 9

Argument

Appellant St. Mark's Hospital respectfully submits this reply brief in support of its appeal in this consolidated case. As explained in its opening brief, these cases—and the thousand-plus essentially identical medical malpractice cases that are expected to follow—are all time-barred on their face, and the Appellees (the "Patients") have failed to plead sufficient facts to overcome the time bar.

In their response brief, the Patients attempt to lower their burden considerably, proposing a pleading standard that is essentially no standard at all. The Court should reverse the decisions of the district courts below, insofar as they rejected application of the four-year statute of repose to bar these claims, and should hold that the Patients have not met the well-established pleading standard to overcome the time bar in their facially stale cases.

This ruling will provide significant guidance in these three cases and the thousand-plus cases that are anticipated to follow. This Court's reversal of the district courts' rulings in these three cases will reaffirm the importance and strength of the statute of repose bar as a vital legal protection to the diligent and dedicated health care providers in Utah who deserve repose from potential claims that have long gone stale, particularly when the plaintiff can make no specific allegations that would support removing the time bar. Such a ruling would also

best comport with the plain language of the medical malpractice statute of repose and the Utah Legislature's intent in enacting that statute.

Further, to the extent the other appellants in this case advance additional or supplementary arguments that support St. Mark's claims for relief, St. Mark's adopts those arguments as though stated herein.

I. The Patients' proposed pleading standard would effectively nullify the statute of repose.

In their opposition brief, the Patients appropriately recognize that they have a statutory obligation to allege certain facts in their operative Complaint(s) to enable this otherwise facially time-barred litigation to proceed.[1] The only issue remaining is what facts plaintiffs must allege when their claims are facially barred by the statute of repose. This is a critical question that bears directly on whether the healthcare malpractice statute of repose will have effectiveness in Utah going forward.

One way to approach the question of "what facts" must be pleaded is to ask: what pleading standard would be meaningful? What pleading standard would protect health care providers from being confronted with stale claims, as intended by the legislature, while also allowing diligent plaintiffs who were legitimately and fraudulently prevented by those providers from discovering their claims to

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[1] Br. of Appellees at 2 (stating "[a]s to the fraudulent concealment exception, the statute describes what allegations are necessary"); *see generally id.* at 29-35.

bring their claims? The Patients' proposed standard does not strike that balance. Their proposed standard would establish, in essence, that so long as a plaintiff recites "magic words", they are entitled to discovery. So long as they merely utter or write the words "affirmative acts" and "fraudulent concealment", they've done enough. But that is no meaningful standard at all, and it is not consistent with Utah Rule of Civil Procedure 9(c) and supporting case law, which require that fraud be pleaded with particularity in "all circumstances where the pleader alleges the kind of misrepresentations, omissions, or other deceptions covered by the term 'fraud' in its broadest dimension." *Williams v. State Farm Ins. Co.*, 656 P.2d 966, 967 (Utah 1982); *Shah v. Intermountain Healthcare, Inc.*, 2013 UT App. 261 at ¶¶10, 12 (in pleading fraud, a plaintiff must identify the "who, what, when, where and how" of the fraud).

The pleading standard of rule 9(c) is specifically designed to "deter filing exploratory suits with little information in the hopes that discovery will uncover information to support the allegations." *Id.* (citing *Republic Bank & Trust Co. v. Bear Stearns & Co.*, 683 F.3d 239, 255 (6th Cir. 2012) ("Rule 9[c] [of the Federal Rules of Civil Procedure] is designed, not only to put defendants on notice of alleged misconduct, but also to prevent fishing expeditions . . . ."); *Cornejo v. JPMorgan Chase Bank*, No. CV 11-4119 CAS(VBKx), 2012 WL 628179, at *4 (C.D. Cal. Feb. 27, 2012) ("Plaintiffs' assertion that they will 'not know until discovery' the specific

misrepresentations made is precisely what Rule 9[c] [of the Federal Rules of Civil Procedure] seeks to prevent.”)).

In addition to being completely inconsistent with rule 9(c), a magic words test does not protect any health care provider from defending stale claims, any more than would a pleading standard that does not require the plaintiff to allege anything at all. The standard proposed by the Patients does nothing but create a roadmap to rendering the statute of repose meaningless in every case.

But suppose the Patients are right that magic words and vague, conclusory allegations that simply track the bare language of the statute are all that is required. Even then, the Patients haven’t alleged—in any sensible fashion—that they were “prevented from discovering misconduct” because St. Mark’s “affirmatively acted to fraudulently conceal the alleged misconduct.” Utah Code Ann. §78B-3-404(2)(b). The statute *requires* that allegation, and the Patients’ Complaints create no connection or link between the alleged “affirmative acts” of “fraudulent concealment” and the “prevention of discovery” because they do not allege that any of these patients did anything to discover or investigate their injury or had any interaction with anyone at St. Mark’s subsequent to their septal defect closure procedures.

When convenient, the Patients claim they had no way to know their procedure was unnecessary before they saw lawyer advertising. But they also

allege in their Amended Complaints that it was well known that no one performed as many PFO procedures as Dr. Sorensen, and that the standard for PFO closure was well-established. (Br. of Appellees at 2-10.) If that were truly the case, it would not have been difficult for the Patients to investigate their claims if they had wanted to. Simply put, the Patients cannot allege "prevention of discovery" and therefore their claims fail.

Although the Patients claim that all they need to do is allege the magic words to be entitled to discovery, they also say they have gone beyond that minimum requirement by alleging "specific" affirmative acts of fraudulent concealment. That is, they claim in their brief that they allege that Dr. Sorensen and St. Mark's "falsified records" and doctored charts, and then concealed that conduct from the plaintiffs.[2] (Br. of Appellees at 8-12, 30-35.) But because there are no allegations that St. Mark's *ever* interacted with the Patients regarding their procedures, the generalized and vague allegation that St. Mark's (somehow) doctored records of some patients is not an affirmative act that would prevent the

[2] In fact, the complaints really only make a broad, conclusory allegation that "Sorensen and St. Mark's created false statements and documents to conceal the fact that Sorensen was performing medically unnecessary closures", but then specify *nothing* as to St. Mark's. Instead, the complaints state only that "[f]or 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" and that 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." (Bright R. 86, Merlo-Schmucker R. 100 (emphasis added).) But in spite of this lack of specificity in the pleadings, their brief on appeal frames these allegations as being fully directed towards both Dr. Sorenson and St. Mark's.

plaintiff from discovering the injury.[3] Utah Code Ann. §78B-3-404(2)(c). And, of course, none of these alleged "affirmative acts" or "fraudulent acts" of fraudulent concealment are stated with particularity, because they do not allege the required "who, what, when, where, and how" of the alleged fraudulent concealment. There are no allegations as to who at St. Mark's doctored any charts or records, which patients' records were doctored (let alone alleging that *these* patients' records were doctored), or when, where, or how that occurred.

The Patients seek to take a narrow exception to the statute of repose and dramatically expand it, such that the statue of repose would be essentially rendered meaningless. The Patients, of course, must take this position because their cases are plainly time-barred, and a logical application of the statute of repose and its narrow exceptions does not help them at all. A logical application of the exception found in section 78B-3-404(2)(c) indicates that the exception would apply only in a situation where the defendant did something *directly to the plaintiff* that prevented her from discovering the alleged malpractice. That is, if the Patients, within four years of their surgical procedures, went to an administrator at St. Mark's and said "I read these PFO closures are rarely performed, and only when there are multiple strokes. I didn't have multiple strokes. What's going

[3] There are no facts alleged that would support the allegation that St. Mark's doctored the specific Patients' records that would be at issue in this case.

on?" And then the hospital administrator said "oh, you did actually have multiple strokes" or "that data is all wrong and your surgery was fine."[4] The Patients did not—and never could—allege anything of the sort, and thus their claims cannot seek a common-sense or appropriate application of the exception.

While vaguely alleging record falsification, the Patients repeatedly claim that any evidence of fraudulent concealment is exclusively in St. Mark's possession, and therefore they cannot meet a heightened pleading standard and are entitled to conduct discovery. (Br. of Appellees at 51.) Again, this argument suffers from a logical deficit that shows how far removed it is from the common-sense application of the exception. If there had been any *affirmative act* of fraudulent concealment by anyone with St. Mark's that prevented the Patients from discovering their alleged injuries, the Patients themselves would know about it because they would have had the memorable experience of interacting with someone at St. Mark's regarding their procedure, and they could allege that.

The Patients' argument that "silence" is somehow equivalent to affirmative fraudulent concealment in this context is yet a further effort to greatly weaken the statute of repose. (Br. of Appellees at 30-35.) Specifically, the Patients argue that the defendants "decided to modify the medical charts and conceal from rather

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[4] Of course, because St. Mark's merely provided a cath lab as the location for the surgeries, and the physician defendant was not an agent or employee of St. Mark's, no administrator or other staff of St. Mark's would be able to respond to any such inquiries.

than inform any of the patients who had received [a PFO or ASD closure surgery].” (Br. of Appellees at 31.) In making this argument, the Patients rely on *Jensen I* for the proposition that “silence under the circumstances” can “amount to an affirmation that a state of things exists which does not exist.” (*Id.* at 32 (quoting *Jensen v. IHC Hosps., Inc.*, 944 P.2d 327 (Utah 1997) (“Jensen I”)).

But the actions that constituted affirmative fraudulent concealment in *Jensen I* are entirely distinguishable from the *lack* of action alleged in these cases.[5] In *Jensen I*, the patient, Shelly Hipwell, had been treated by a Dr. Healy. After Hipwell suffered a complication and was in a coma, Dr. Healy talked to his brother, attorney Healy, and encouraged attorney Healy to have the Healys’ sister, DeVries, contact Shelly’s family to suggest that they retain attorney Sharp. *Jensen I*, 944 P.2d at 329. DeVries was also Dr. Healy’s file clerk. *Id.*

Shelley’s family then retained attorney Sharp, as suggested by attorney Healy. *Id.* Attorney Healy and attorney Sharp had correspondence that “ma[de] clear that attorney Healy was communicating with Dr. Healy about attorney Sharp’s investigation and impl[ied] that attorney Sharp’s investigation of Dr. Healy’s treatment was to be minimal.” *Id.* Moreover, when attorney Sharp asked Dr. Healy for all of Shelly’s medical records, “Dr. Healy did not produce a copy of

[5] The Patients’ reliance on *Jensen I* is also misplaced because in that case, the statute of repose had not expired.

all medical records, but instead produced a selective set of documents that he personally reviewed." *Id.*

Years later, when Shelly's family brought suit, the various defendants—including Dr. Healy—moved for summary judgment, arguing that the suit was barred by the statute of limitations. *Id.* at 333. In response, Shelly's family argued that the fraudulent concealment exception operated to save their claim from dismissal. *Id.* Under those facts, this Court concluded that there was a genuine dispute of material fact as to whether "Dr. Healy's fraudulent concealment somehow prevented Shelley's family" from timely filing suit, and therefore the trial court's grant of summary judgment was reversed and remanded. *Id.* at 335.

In the setting of those facts, this Court conducted an "in-depth discussion of the complex law of fraudulent concealment." *Id.* at 333. It was in that discussion that this Court observed that remaining silent or otherwise acting to conceal material facts may sometimes amount to fraudulent concealment, but "[t]he party's silence must amount to fraud, i.e., silence under the circumstances must amount to an affirmation that a state of things exists which does not exist, and the uninformed party must be deprived to the same extent as if a positive assertion had been made." *Id.* (citing 37 Am.Jur.2d *Fraud & Deceit* § 145 (1968)).

In *Jensen I*, though, Dr. Healy took multiple *affirmative* actions to divert attention away from his care and to deceive Shelly's family: he contacted his

brother, attorney Healy, to orchestrate the family's retention of a friendly attorney who would steer the focus away from Dr. Healy's care. He engaged in continuing communications with attorney Healy about the suit. He responded only selectively to attorney Sharp's request for all of Shelly's records, personally reviewing her entire chart to select which records would be produced. Although Dr. Healy may not have directly communicated to Shelley's family some misrepresentation that would lull them into inaction, the steps he took were nonetheless affirmative actions that may have caused the family to delay filing suit against Dr. Healy.

In contrast, here the Patients' only allegations against St. Mark's are truly in the nature of inaction or omission.[6] The Patients argue that St. Mark's had "actual knowledge" of the supposedly clear standard for performing PFO closures and that Dr. Sorensen's surgeries violated that clear standard, and then the hospital had to "decide whether to disclose it"—*this* was the "affirmative act" by St. Mark's. (Br. of Appellees at 32.) The hospital's thought process or decision-making process—followed by no affirmative steps—simply cannot be an affirmative action. *See Chapman v. Primary Children's Hosp.*, 784 P.2d 1181, 1186 (Utah 1989).

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[6] The *Merlo-Schmucker* court appropriately recognized that "[i]t is not clear from the Amended Complaint whether any Defendant acted affirmatively within the meaning of the statute to fraudulently conceal anything." (Merlo R. 402.) That court also commented that "Defendants' argument that inaction or omission by a defendant is not sufficient to overcome the time bar appears to be well taken." (*Id.*)

It is undisputed that because the Patients' claims arise from health care provided to them by the appellants, the claims are subject to the four-year statute of repose found in section 78B-3-404. The parties (and the district courts) all further acknowledge that Patients' claims arose more than four years before suit was filed; that section 78B-3-404 applies to the Patients' claims; and that to avoid being time-barred, the delay in bringing their claims must have been due to St. Mark's affirmative fraudulent concealment of their claims.

But as the repose statute makes clear, the Patients' claims can be saved from the statute of repose only if their complaints include allegations of affirmative, fraudulent concealment that prevented discovery of the malpractice. Utah Rule of Civil Procedure 9 and a long-settled body of dispositive case law make clear that "in alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." (Utah R. Civ. P. 9(c) (emphasis added).) In this case, the Patients' attempts to plead around the statute of repose did not contain the "who, what, when, where, and how" of the alleged fraudulent concealment by St. Mark's. In fact, even after amending their complaints, the Patients made no allegations of affirmative fraudulent concealment *by St. Mark's*, let alone *particularized* allegations. Accordingly, the district courts erred in failing to dismiss the Patients' complaints in their entirety because absent allegations of particularized facts establishing St. Mark's affirmative fraudulent concealment,

their complaints failed to satisfy rule 9(c) and were barred by section 78B-3-404(2)(b).

The Patients' proposed pleading standard would eliminate any teeth to the statute of repose; as the *Bright* court noted at oral argument, the Patients' argument "turn[s] the statute of repose on its head", and if the "failure to speak can be the affirmative act to fraudulently conceal . . . when would you ever have a claim barred under the statute of repose?" (Bright R. 688-89.) In the Patients' view, vague and non-specific allegations of record falsification not tied to a specific patient in this case—or a specific defendant—plus silence to the patient population at large somehow equals "affirmative fraudulent concealment" sufficient to prevent a specific patient, who has demonstrated no interest in discovering a cause of action, from discovering that claim. Again, this is trying to create a roadmap to beating the statute of repose in every case, and would effectively eliminate the statute of repose altogether.

II. The Foreign Object Exception Does Not Apply to This Case.

The Patients' brief devotes considerable energy to arguing that the district court's order can be affirmed under the "foreign object" exception to the statute of repose found in Utah Code Ann. §78B-3-404(2)(a) because, in their view, that exception applies whenever "a foreign object is wrongfully left in a patient's body," regardless of whether the patient was aware of its existence at the time of

the underlying procedure.[7] (Br. of Appellees at 52.) The *Tapp* court[8] sensibly recognized that the foreign object "exception *does not* apply on its face" because "the 'device' that was placed into [the Patients] was the precise device that was contemplated for the surgery[.] . . . It would be non-sensical to apply this statute to medical devices that were the very object of a patient's surgery." (Tapp R. 750 (emphasis in original).)

Specifically, the Patients focus on the term "wrongfully" to suggest that Utah's repose statute is more broadly written than those of many states that have rejected this argument, and that the legislature's use of "wrongfully" changes the outcome because that word "encompasses both negligent and intentional wrongdoing." (Br. of Appellees at 56.) This interpretation should be rejected because it improperly seeks to define the legislature's intent solely through the term "wrongfully" while ignoring or rendering inoperative the remaining parts and words in the statute.

It is well-established that when interpreting statutory language, this Court's "primary task is to give effect to the intent of the legislature." *Turner v. Staker & Parson Companies,* 2012 UT 30, ¶12, 284 P.3d 600, 603. To do so, this Court will "look

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[7]The Patients did not plead this exception in their complaints or their amended complaints, nor did they raise this in opposition to their motions to dismiss. *See* Merlo-Schmucker R. 243-283 and Bright R. 255-281 (plaintiffs' briefs in opposition to motions to dismiss amended complaints).

[8] The *Bright* and *Merlo-Schmucker* courts did not address the Patients' "foreign object" arguments in their written rulings, perhaps because the exception so obviously did not apply.

first to the plain language of the statute and 'presume that the legislature used each word advisedly and read each term according to its ordinary and accepted meaning.'" *Id.* Furthermore, "[w]herever possible, [this Court] [will] give effect to every word of a statute," and will "avoid[]'[a]ny interpretation which renders parts or words in a statute inoperative or superfluous.'" *Id.* And when the Court can "ascertain the intent of the legislature from the statutory terms alone, 'no other interpretive tools are needed,' and [the] task of statutory construction is typically at an end." *Bagley v. Bagley*, 2016 UT 48, ¶10, 387 P.3d 1000, 1005.

The foreign object exception to section 78B-3-404(2)(a) states in pertinent part:

> (a) "In an action where the allegation against the health care provider is that a foreign object has been wrongfully left within the 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*."

Id. (emphasis added). By its plain language, the only reasonable interpretation of the statute is that it is meant to apply to those narrow sets of claims where a patient subsequently discovers, years later, "the existence" of an unanticipated, unplanned "foreign object" that was never intended to be left in the patient's body at the conclusion of their prior medical care or surgical procedure.

This interpretation is consistent with previous decisions of this Court over the course of the past half century. In *Christiansen v. Rees,* 436 P.2d 435 (Utah 1968), this Court described the types of facts that would give rise to the application of the foreign object exception to an otherwise time-barred claim, noting both the physician's "negligence" in leaving a broken surgical needle in the patient's body and the patient's "ignorance" of that fact following the conclusion of the surgery. Specifically, and consistent with the plain language of the exception when read as a whole, this Court held that

> "where a foreign object *is negligently left in the body of a patient during an operation and the patient is ignorant of the fact,* and consequently of his right of action for malpractice, the cause of action does not accrue *until the patient learned of the presence of such foreign object in his body*."

Id. (emphasis added); *see also Day v. Meek,* 1999 UT 28, ¶21, 976 P.2d 1202, 1208 (describing claims eligible for application of the foreign object exception as those where healthcare providers "negligently *leave* [a] foreign object inside patients" whose presence was "not discovered for extended periods of time"). Thus, as these cases demonstrate, it is clear that the legislature intentionally sought to limit this exception to only those claims involving unknown objects negligently left and subsequently discovered in the patient's body rather than to claims, like those asserted here, where a plaintiff who underwent a procedure that she knew

involved the insertion of a foreign object later asserts that that procedure should never have been performed in the first place.

Nonetheless, in an effort to shoehorn their claims into this exception, the Patients argue that the use of the term "wrongfully" indicates that the Utah Legislature intended the exception to apply *whenever* a foreign object was left in a patient's body, regardless of whether it was intentionally or unintentionally left there by the defendant healthcare provider, and regardless of whether the patient knew at the time of the procedure that it would be permanently implanted. (Br. of Appellees at 52, 54-57.) But this interpretation necessarily ignores the legislature's use of plain and specific terms relating to the patient's "discovery" of "the existence of the foreign object" that was "wrongfully *left*" in the patient's body. Utah Code Ann. §78B-3-404(2)(a).

In support of their position, Patients principally rely on cases from other jurisdictions interpreting those states' repose statutes and foreign object exceptions. But these cases either support St. Mark's position or are readily distinguishable. For example, in *Hershley v. Brown,* 655 S.W.2d 671, 675 (Mo. Ct. App. 1983), the Missouri Court of Appeals explicitly recognized the critical distinction—for purposes of applying the foreign object exception—between claims arising from a *unknown* foreign object *negligently* left within a patient's body, and claims arising from allegations where a *known* "foreign object" was

intentionally left behind during an underlying procedure that was alleged to have been negligently performed. The *Hershley* court explained, consistent with prior holdings of this Court, that

> "[t]o fall within this [foreign object] tolling provision, the petition must allege that the object was introduced and negligently permitted to remain in the body. This situation is *distinguished from one in which the foreign object is intentionally introduced in the body and is intended to remain there,* although the procedure itself is performed in a negligent manner. Negligence of the latter type does not fall within the [foreign object] tolling provision of § 516.105."

Id. (emphasis added).

The other cases cited in the Patients' brief are similarly distinguishable. In *Norred v. Teaver,* 740 S.E.2d 251 (Ga. Ct. App. 2013), unlike the case at bar, the foreign object exception applied because the patient did not discover that her physician had negligently left a cotton pellet in her body after performing a root canal, until she developed a subsequent infection requiring additional surgery. *Id.* at 251-52. In contrast to the cases before this Court, in *Norred* the plaintiff did not allege that the cotton pellet was intended to remain in the tooth socket after a permanent crown was placed. *Id.* at 509. Instead, in that case the cotton pellet was more like the broken surgical needle in *Christiansen* or the retained surgical sponge in *Day*.

Similarly, *Beatman v. Gates,* 521 N.E.2d 521 (Ohio Ct. App. 1987), is distinguishable. *Beatman* involved a claim where the intentionally-implanted IUD had subsequently been found to have been dislodged from what was believed to be its original location. The court found that the foreign object exception applied because the device was no longer serving its intended purpose and no longer belonged in the patient's body. *Id.* at 523.

In *Chambers v. Semmer,* 197 S.W.3d 730, 734-35 (Tenn. 2006), the Tennessee Supreme Court explicitly distinguished its case, involving a hemoclip negligently left within the patient's body without her knowledge, from claims such as this one, where the patient *knew* about the foreign object intentionally placed within her body. *Id.* at 734 (citing *Hall v. Ervin,* 642 S.W.2d 724 (Tenn. 1982), wherein the same court found that the foreign object exception did not apply to claims arising out of placement of IUD because the patient knew about the device, it was not inadvertently inserted, and the defendants' negligence was instead based on the way the procedure was performed)).

Thus, if any case from Tennessee is instructive here, it is *Hall* because at its core, Patients' claims are not that the PFO closure devices were allowed to remain within their bodies when they should have been removed prior to the completion of the surgery, but rather that the procedures themselves—the underlying closure surgeries—should never have been performed at all.

Ultimately, this Court need look no further than the plain language of Utah's foreign object exception to find that it was clearly intended to be applied only to those narrow sets of cases where a patient subsequently discovers the existence of an unanticipated, unplanned foreign object that was never intended to be left in the patient's body at the conclusion of a prior surgical procedure. The exception was never intended to apply to the alleged discovery that it was wrongful that the device was left. These Patients all obviously knew that the device was left in them; that was the exact point of the procedure, to fix the septal defect with a closure device. The Patients' interpretation would eliminate the statue of repose any time anything was placed in someone for medical benefit, such as stents in arteries, metal plates, artificial hip joints, and the like, because the plaintiff could simply allege it was "wrongfully" done and avoid the clear repose bar.

The foreign object argument is yet another example of the Patients—faced with an obviously time-barred case—attempting to dramatically expand a statute of repose exception, in order to allow a thousand-plus additional medical malpractice cases to proceed into discovery, at enormous cost to the parties in this case and with grave consequences to medical providers in Utah. Just as the *Tapp* court did, this Court should find that section 78B-3-404(2)(b) does not apply to this case.