IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 21-0515

JOSHUA SELENSKY-FOUST
Plaintiff/Appellant,
vs.
JONATHAN F. MERCER, M.D.; PINTLER SURGICAL SPECIALISTS; AND COMMUNITY HOSPITAL OF ANACONDA.
Defendants/Appellee.

Appeal from the Third Judicial District Court Deer Lodge County
District Court Case No.: DV-20-49
The Honorable Ray J. Dayton

APPELLANT'S OPENING BRIEF

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STATEMENT OF THE ISSUES

The issues raised by Appellant Joshua Selensky-Foust are:

1. Whether the District Court erred by finding Appellant's claim for negligence against Appellee Community Hospital of Anaconda was subject to the professional negligence two-year statute of limitations provided by Mont. Code Ann. § 27-2-205.
2. Whether the District Court erred by finding Appellant's claim for medical negligence was not tolled pursuant to Mont. Code Ann. § 27-2-205(1) as a result of Appellee Community Hospital of Anaconda failing to disclose its policy preventing the use of its ultrasound machine in Appellant's treatment.

STATEMENT OF THE CASE

This matter stems from the surgical procedure performed by Johnathan F. Mercer, M.D. ("Dr. Mercer") on January 27, 2017, at Appellee Anaconda Community Hospital ("CHA"). Appellant Joshua Selensky-Foust ("Mr. Selensky") appeared for a procedure to have a cyst removed from his left testicle. Dr. Mercer is not an employee of CHA, but instead has rights to perform surgical procedures at CHA. Prior to undergoing surgery at CHA, Mr. Selensky was not informed that CHA had a policy that only CHA employees could operate its ultrasound machine. Because Dr. Mercer is not a CHA employee, he is not

authorized to operate the CHA ultrasound machine. On the day of Mr. Selensky's surgery, and the day after, CHA did not have an employee available to operate the ultrasound machine; even though Mr. Selensky's symptoms and complaints required that an ultrasound be administered to determine whether he had suffered testicle torsion (twisting of the stem supplying blood to the testicle) as a result of the surgery.

Following surgery, Mr. Selensky made complaints of significant pain and discomfort to Dr. Mercer. Despite Mr. Selensky's continuous complaints over a period of two days, no ultrasound was performed at CHA. Eventually Mr. Selensky was referred to St. James Hospital ("St. James") in Butte, Montana where an ultrasound was immediately performed, which determined Mr. Selensky suffered testicle torsion during the surgery. It was determined that Mr. Selensky suffered a 360-degree twist as evidenced by the ultrasound being performed, and as a result of this condition not being immediately identified, the surgeon at St. James was forced to remove Mr. Selensky's testicle.

Mr. Selensky was able to find an expert witness, Peter Bretan, M.D., who offered the expert opinion that an ultrasound was required to determine whether testicle torsion occurred. Dr. Mercer agreed during his deposition, that performing an ultrasound would have been the easiest way to detect the lack of blood flow to the testicle, which would have allowed him to determine whether torsion had

occurred. At the time of Mr. Selensky's complaint, no CHA technician or radiologist was available to operate the ultrasound machine. CHA chose to open its hospital for treatment knowing Mr. Selensky was scheduled for surgery, and CHA failed to have the necessary staff available to administer the required ultrasound machine when an emergency arose. CHA's business decision not to have the necessary staff available for Mr. Selensky's treatment is the direct and proximate cause of Mr. Selensky's injury and damages.

CHA owes Mr. Selensky a duty of ordinary care to prevent foreseeable harm. It was foreseeable when CHA enacted its policy to only allow its employees to operate its ultrasound machine that the necessary staff must be available to operate the ultrasound when the treatment required. CHA breached its duty owed to Mr. Selensky by choosing to open its hospital and not have an employee available to operate the ultrasound machine when Mr. Selensky required an ultrasound. Mr. Selensky's negligence claim against CHA is based on a negligent business decision and not based on a breach of standard of care. CHA's policy is an administrative action, or a business decision, and does not relate to the practice of medicine or a particular corresponding standard of care for the surgery performed.

The District Court dismissed Mr. Selensky's negligence claim against CHA finding that it related to professional services under MCA 27-2-205(1) and applied

the two-year medical negligence statute of limitations. The facts taken as true show the three-year negligence statute of limitations applies to his negligence claim against CHA. The District Court's order dismissing Mr. Selensky's negligence claim should be overturned and this matter remanded because the three-year general negligence statute applies under the facts of his complaint.

Alternatively, the two-year medical negligence should be tolled as a result of CHA's failure to disclose or concealment of its policy. Prior to undergoing surgery, and after the loss of his testicle, Mr. Selensky was never informed of CHA's policy resulting in his injury and damages. During the Montana Medical Legal Panel ("MMLP") proceedings prior to Mr. Selensky's lawsuit, CHA submitted a declaration and correspondence affirming that the ultrasound machine was available during Mr. Selensky's treatment. Dr. Mercer's testimony directly contradicts CHA's sworn statements. While the ultrasound machine may have been physically available, per the testimony of Dr. Mercer there was no CHA employee to operate the machine during Mr. Selensky's treatment. As a result of the failure of CHA to have an employee available to operate the ultrasound machine Mr. Selensky was injured, and the true cause of his injury was not disclosed or concealed by CHA.

The District Court committed err by finding the two-year medical negligence statute was not tolled as a result of CHA's failure to disclose its policy.

Mr. Selensky timely filed his complaint against CHA and went through the MMLP process as required. It was not until the deposition of Dr. Mercer was taken in the underlying lawsuit that Mr. Selensky discovered that while there may have been an ultrasound machine available, there was no CHA employee available to operate the ultrasound machine per CHA policy. The failure of CHA to disclose its policy prevented Mr. Selensky from discovering the true cause of his injury and loss. Therefore, the District Court should have found Mr. Selensky's medical negligence claim was tolled, and denied CHA's motion to dismiss.

Based on the above err committed by the District Court, the order dismissing Mr. Selensky's claims against CHA should be overturned and this matter remanded for litigation.

STATEMENT OF FACTS

On January 25, 2017, Mr. Selensky appeared at CHA to undergo a procedure to remove a cyst from his testicle. **(Dec. Roberts, Response to Mercer Summary Judgment, Ex. B, pp. 26-28).** Mr. Selensky continued to have pain following the procedure to remove the cyst from his testicle, and he made complaints of severe pain to Dr. Mercer. **(Dec. Selensky, Response to Mercer Summary Judgment, pp. 2).** When Mr. Selensky got home after undergoing the procedure, he was in tremendous pain that lasted throughout the night. **Id.** Mr. Selensky went to see Dr. Mercer the day after the surgery as a result of continued significant pain and

discomfort. **(Dec. Roberts, Response to Mercer Summary Judgment, Ex. B, pp. 29).** Despite severe pain, bruising and swelling, Mr. Selensky was never informed anything went wrong during the procedure. **(Dec. Selensky, Response to Mercer Summary Judgment, pp. 2).** When Mr. Selensky expressed severe pain and discomfort following the procedure, an ultrasound was never administered or recommended. **(Dec. Roberts, Response to Mercer Summary Judgment, Ex. B, pp. 29).**

On January 27, 2017, two days after surgery, Mr. Selensky went to St. James Hospital in Butte because of continuing severe pain and discomfort. **(Dec. Roberts, Response to Mercer Summary Judgment, Ex. B, pp. 41-47).** Dr. Readal at St. James immediately conducted an ultrasound, and as a result Mr. Selensky had to undergo emergency surgery to remove his left testicle because it was dead. **(Dec. Roberts, Response to Mercer Summary Judgment, Ex. B, pp. 41-47).** Mr. Selensky was unaware that the reason his testicle was removed was because he was not given an ultrasound following his surgery. **(Dec. Selensky, Response to Mercer Summary Judgment, pp. 2-5).**

During his treatment at CHA, Mr. Selensky was unaware CHA's ultrasound machine was unavailable for use in his treatment. **(Dec. Selensky, Response to Mercer Summary Judgment, pp. 3).** At the time of the procedure Mr. Selensky understood CHA had an ultrasound machine, and that it would be used if necessary

to treat him. **Id.** However, unbeknownst to Mr. Selensky, CHA made a business decision to enact a policy to only allow its employees to operate its ultrasound machine. **(Dec. Roberts, Response to Mercer Summary Judgment, Ex. A, pp. 9-15).** At the time of Mr. Selensky's treatment there was no CHA employee available to operate the ultrasound machine, despite it being necessary to determine whether Mr. Selensky suffered testicle torsion following surgery. **Id.**

In August of 2019, Mr. Selensky was able to obtain an expert opinion, which opined that he needed to have an ultrasound based on his complaints of pain and discomfort following the surgery performed by Dr. Mercer. **(Dec. Selensky, Response to Mercer Summary Judgment, Ex. A, pp. 9).**

During the MMLP process that occurred prior to Mr. Selensky filing his lawsuit, CHA provided an answer and signed declaration supporting that an ultrasound machine was present and available during the time Mr. Selensky was treated in January of 2017. **(Dec. Selensky, Response to Mercer Summary Judgment, Ex. B, pp. 12-20).** Mr. Selensky relied upon the affirmative representations by CHA during the MMLP proceedings and did not initially pursue his claims against CHA in the underlying lawsuit. Mr. Selensky did not discover the CHA policy to only allow its employees to operate the ultrasound machine until the deposition of Dr. Mercer in the underlying lawsuit. **(Dec. Selensky, Response to Mercer Summary Judgment, pp. 3).** The deposition of Dr. Mercer revealed that while

there was an ultrasound machine at CHA during Mr. Selensky's surgery and subsequent complaints of pain, there was no CHA employee available to conduct an ultrasound on Mr. Selensky. **(Dec. Roberts, Response to Mercer Summary Judgment, Ex. A, pp. 9-15).** Because there was no employed technician available by CHA during the time Mr. Selensky was treated, an ultrasound was never performed. As a result of the CHA policy, there was no process to obtain an ultrasound in Mr. Selensky's emergency situation. **Id. at 13.**

Mr. Selensky could not have discovered CHA's policy, which was the true cause of his injury. **(Dec. Selensky, Response to Mercer Summary Judgment, pp. 4-5).** CHA failed to disclose and/or that prevented an ultrasound machine from being performed during Mr. Selensky's treatment. **(Dec. Selensky, Response to Mercer Summary Judgment, Ex. B, pp. 12-20).** Mr. Selensky had no means to discover on his own the cause of his testicle being lost, as none of the medical records indicate anything went wrong and no physician informed him that anything went amiss during the surgery. **(Dec. Selensky, Response to Mercer Summary Judgment, pp. 5-6).** No one ever informed Mr. Selensky that the CHA policy was the true cause of his injury and damages. **Id.**

The District Court dismissed Mr. Selensky's claims against CHA because it found that all claims were professional negligence subject to the two-year statute of limitations, and the facts and evidence did not support a tolling of the statute of

limitations. (Order Granting Motion to Dismiss, September 15, 2021). The District Court's dismissal of Mr. Selensky's lawsuit against CHA should be overturned and this matter remanded for litigation.

SUMMARY OF ARGUMENT

The District Court committed err when it dismissed Mr. Selensky's claims finding the two-year medical negligence statute, MCA 27-2-205, rather than the three-year negligence statute provided in MCA 27-2-204. The facts and evidence show that CHA made a business decision to enact a policy to only allow its employees to operate its ultrasound machine. CHA then chose to open its hospital and allow Mr. Selensky to undergo surgery when no CHA employee was available to operate the ultrasound machine, despite Mr. Selensky requiring an immediate ultrasound following surgery. CHA owes Mr. Selensky a duty of ordinary care not to cause him foreseeable harm. It is foreseeable that CHA not ensuring its employees were available to operate its ultrasound during Mr. Selensky's treatment would cause harm. CHA policy is negligent, and resulted in a breach of its duty of ordinary care owed to Mr. Selensky.

CHA's policy is a business decision not related to providing medical care under the required standard of care. Mr. Selensky's negligence claim against CHA results from CHA operating its business and making business decisions as opposed to performing medical treatment. Therefore, the three-year negligence statute of

limitations applies rather than the two-year medical negligence statute of limitations. The District Court erred by finding Mr. Selensky's claims arose from professional medical negligence and not as the result of direct negligence resulting in the dismissal of Mr. Selensky's negligence claim. The District Court's decision fails to recognize the distinction between acts by CHA purely as a business as opposed to providing medical services. Therefore, the District Court's decision should be overturned, and this matter remanded for litigation.

Alternatively, the facts and evidence show that CHA never disclosed its policy prior to, or after, Mr. Selensky's treatment. It was never disclosed to Mr. Selensky that no CHA employee was available to operate the ultrasound machine when his symptoms and complaints required an ultrasound be performed. When given the opportunity to disclose its policy, CHA chose to submit a declaration and signed correspondence indicating that an ultrasound was available during Mr. Selensky's treatment. It was not until Dr. Mercer was deposed in the underlying lawsuit that Mr. Selensky discovered for the first time the true cause of his injury and damages. Mr. Selensky's injuries were caused as a result of CHA's policy and CHA not having the appropriate staff available to operate the ultrasound machine.

The District Court erred by not tolling the two-year medical negligence statute when the facts, taken as true on the motion to dismiss, showed CHA concealed its policy, or at the very least failed to disclose the policy to Mr.

Selensky. MCA 27-2-205(1) allows the two-year statute of limitations to be tolled when there is a failure to disclose any act, error or omission upon which the action is based. Mr. Selensky's medical negligence claim is based upon CHA's failure to have an employee available to operate the ultrasound machine when his treatment required it. Therefore, the District Court's decision to not toll the two-year medical negligence statute should be overturned and this matter remanded.

STANDARD OF REVIEW

A motion to dismiss under Rule 12(b)(6) asks the Court to examine whether a claim has been adequately stated by a plaintiff. Meagher v. Butte-Silver Bow County, 337 Mont. 339, 160 P.3d 552 (2007). The District Court's inquiry is limited only to the content of the complaint. Gebhardt v. D.A. Davidson & Co., 203 Mont. 384, 389, 661 P.2d 855 (1983). "*Such a motion has the effect of admitting all the well pleaded allegations of a complaint, and the general rule is that a complaint should not be dismissed unless it appears beyond a reasonable doubt that the plaintiff can prove no set of facts which would entitle him to relief.*" Id. The Court must take all facts as true and view the facts in the light most favorable to the plaintiff, drawing all reasonable inferences therefrom. Anderson v. Recon Trust Company, N.A., 390 Mont. 12, 15, 407 P.3d 692 (2017).

The Court has the discretion to consider matters presented outside the pleadings, however, if the Court choses to consider matters outside of the pleadings

the motion must be converted to a summary judgment motion, provide notice to the parties of the intent to treat the motion as a summary judgment motion, and allow the parties a reasonable opportunity to present all material pertinent to the motion. Gebhardt v. D.A. Davidson & Co., 203 Mont. at 390.

ARGUMENT

A. The District Court Erred When it Determined the Two-Year Medical Negligence Statute Applied Rather than the Three-Year Negligence Statute Resulting in the Dismissal of the Appellant's Lawsuit.

In dismissing Mr. Selensky's claims against CHA, the District Court relied upon MCA § 27-6-103(3) & (5) to determine the two-year medical negligence statute limitations applied instead of the three-year statute of limitations for a general negligence claim. **Order Granting Motion to Dismiss, September 15, 20201, pp. 2-3.** The District Court reasoned that because CHA is a "Health Care Facility" that Mr. Selensky's negligence claim against CHA arose from its role as a health care facility, and is therefore a professional negligence claim falling within the two-year statute of limitations stated in MCA 27-2-205. **Id.** However, Mr. Selensky's claim against CHA is not based upon professional negligence as contemplated within MCA 27-2-205(1). Mr. Selensky's negligence claim against CHA is based upon the breach of duty of ordinary care owed resulting from the enactment of a hospital policy to only allow CHA employees to operate its ultrasound machine and then made the business decision not to have a CHA

employee available to administer an ultrasound when it was required. Mr. Selensky's negligence claim is subject to the three-year statute of limitations stated in MCA 27-2-204.

Actions for medical malpractice are governed by MCA 27-2-205 and states:

> **(1) Action in tort or contract for injury or death against...a licensed hospital...based upon alleged professional negligence or for rendering professional services without consent or for an act, error, or omission, must...be commenced within 2 years after the date of injury or within 2 years after the plaintiff discovers or through the use of reasonable diligence should have discovered the injury, whichever occurs last, but in no case may an action be commenced after 5 years from the date of injury.**

MCA 27-2-205(1). The above statute applies to professional negligence claims, which in this context equates to medical malpractice claims. The plain language of MCA 27-2-205(1) is not meant to apply to negligence claims falling outside of the professional services performed by hospitals and physicians.

In the context of a Consumer Protection Claim, the Montana Supreme Court recognized the distinction between acts and practices performed in the entrepreneurial, commercial, and business contexts as opposed to professional services performed within the scope of patient care and treatment. Brookins v. Mote, 367 Mont. 193, 210, 292 P.3d 347, 359-360. There is a distinction in the type of negligence claim; one claim relating to the duty of ordinary care owed and the other claim being related to a breach of standard of care for treatment of a patient. The duty of ordinary care is codified at MCA § 27-1-701, and makes each

person responsible for injury caused by the want of ordinary care. The duty of ordinary care applies to medical professionals and to businesses. Romans v. Lusin, 299 Mont. 182, 185-186, 997 P.2d 114 (2000). CHA made a business decision to enact a policy to only allow its employees to use its ultrasound machine. CHA then made a business decision to open its hospital without having the necessary staff available to administer the ultrasound machine when Mr. Selensky required an ultrasound. CHA's business decision was the direct and proximate cause of Mr. Selensky's injury and damages. The same way a hospital would be held liable under a premise liability for failing to ensure the necessary staff was available after a snowstorm to maintain its sidewalks for its invitees. The District Court erred by determining that all negligence claims asserted against a hospital are the result of professional services subject to the two-year statute of limitations. Mr. Selensky's negligence claim against CHA is not the result of professional services, but the result of a negligent business decision.

The statute of limitations for a negligence claim in Montana is three years. MCA § 27-2-204(1). The four elements required to prove negligence are: "*(1) duty; (2) breach of duty; (3) causation; and (4) damages.*" Dulaney v. State Farm and Cas. Ins. Co., 375 Mont. 117, 121, 324 P.3d 1211 (2014). "*As a general rule, negligence claims are not susceptible to summary judgment determinations because they are fact driven.*" Id. Apart from duties of care imposed by statutes

and common law, "*all individuals generally have a common law duty to use reasonable care under the circumstances to avoid reasonably foreseeable risks of harm to the person or property of others.*" Maryland Casualty Co. v. Asbestos Claims Court, 399 Mont. 279, 298, 460 P.3d 882 (2020). "*Under this standard, harm may be reasonably foreseeable regardless of the foreseeability of the precise harm, injured party, or mechanism or sequence of injury that actually occurred.*" Id.

Under the facts and circumstances of this case, CHA owed Mr. Selensky a duty of ordinary care as a matter of law. Mr. Selensky's negligence claim against CHA is based on CHA's breach of the duty of ordinary care, which requires CHA to "*avoid reasonably foreseeable risks of harm to the person or property of others.*" Maryland Casualty Co. v. Asbestos Claims Court, 399 Mont. 279, 298, 460 P.3d 882 (2020). When CHA implemented its policy to only allow its employees to use its ultrasound machine, it was foreseeable that CHA must have employees available to operate the ultrasound machine when a patient, such as Mr. Selensky, required the ultrasound as part of his treatment.

A claim for medical malpractice differs from general negligence in that it requires a breach of the accepted standard of care. MCA 27-2-205(1). General negligence requires a breach of the duty of ordinary care. MCA § 27-1-701. There is no standard of care at issue. Mr. Selensky was injured and suffered damages as

a direct result of CHA's business decision to only allow its employees to operate its ultrasound machine and then not ensuring the necessary staff was available when Mr. Selensky required an ultrasound.

Taking all of the facts as true, and all reasonable inferences in favor of Mr. Selensky, the District Court erred by determining the two-year medical negligence statute applied instead of the three-year negligence statute. Anderson v. Recon Trust Company, N.A., 390 Mont. 12, 15, 407 P.3d 692 (2017). Therefore, the District Court's decision to dismiss Mr. Selensky's negligence claim against CHA should be overturned and this matter remanded back to the District Court.

B. The District Court Erred by Determining Appellant's Medical Negligence Claim Was Not Tolled as a Result of CHA's Failure to Disclose Its Policy Preventing Dr. Mercer from Using the CHA Ultrasound Machine.

MCA § 27-2-205 provides the statute of limitations for medical malpractice claims:

> ***(1) Action in tort or contract for injury or death against a physician ...based upon alleged professional negligence or for rendering professional services without consent or for an act, error, or omission, must, except as provided in subsection (2), be commenced within 2 years after the date of injury or within 2 years after the plaintiff discovers or through the use of reasonable diligence should have discovered the injury, whichever occurs last, but in no case may an action be commenced after 5 years from the date of injury. However, this time limitation is tolled for any period during which there has been a failure to disclose any act, error, or omission upon which an action is based and that is known to the defendant or through the use of reasonable diligence subsequent to the act, error, or omission would have been known to the defendant.***

Mont. Code Ann. § 27-2-205(1)(emphasis added). The statute of limitations is tolled for any period where there is a failure to disclose any act, error or omission upon which the action is based that is known to the defendant or should have been known to the defendant. Id.

The true cause of Mr. Selensky's injury was the CHA policy to only allow its employees to operate the ultrasound machine and then not ensuring a CHA employee was available to administer the ultrasound during Mr. Selensky's treatment. Dr. Mercer was aware that the standard of care required the use of the ultrasound machine, and which is supported by Mr. Selensky's expert witness Dr. Bretan. **Dec. Roberts, Ex. A., Depo. Mercer, pp. 54, ln. 9-17.** At no time prior to, or after, Mr. Selensky's surgery was the CHA policy made know to Mr. Selensky.

Mr. Selensky filed his claims against CHA and Dr. Mercer, and went through the required MMLP process. During the MMLP process CHA affirmatively concealed its policy by submitting a signed declaration and correspondence by its CEO asserting that at all times during Mr. Selensky's treatment an ultrasound machine and CHA employees were available. **(Dec. Selensky, Response to Mercer Summary Judgment, Ex. B, pp. 12-20).** These statements were directly contradicted by Dr. Mercer in his deposition where he testified that he was prevented from using the CHA ultrasound machine because

there was no CHA employee available to administer the ultrasound per CHA policy. **(Dec. Roberts, Response to Mercer Summary Judgment, Ex. A, pp. 9-15).**

A "*failure to disclose facts, as opposed to affirmative, fraudulent concealment, is sufficient to toll the statute.*" Wisher v. Higgs, 257 Mont. 132, 145, 849 P.2d 152, 160 (1999). An affirmative act by a healthcare provider is not required to trigger the tolling provision of MCA § 27-2-205(1). Blackburn v. Blue Mountain Women's Clinic, 286 Mont. 60, 75, 951 P.2d 1, 10 (1997). Prior case law requiring an affirmative act of a health care provider to show concealment was overruled by the Montana Supreme Court. Id. Taking the facts alleged by Mr. Selensky as true, and considering the supporting evidence, CHA concealed its policy that prevented the use of the ultrasound machine; even in the event of an emergent situation as occurred with Mr. Selensky.

Mr. Selensky is not required to show an affirmative act by CHA to conceal its policy, he only has to show a failure to disclose facts. Blackburn, 286 Mont. at 75. In this instance, the facts and evidence, taken as true, show that CHA affirmatively concealed its policy by providing a signed declaration and correspondence by its CEO. **(Dec. Selensky, Response to Mercer Summary Judgment, Ex. B, pp. 12-20).** CHA's submissions were misleading and a failure to disclose relevant facts because CHA left out the most relevant fact that Dr.

Mercer was not permitted to use the available ultrasound machine to treat Mr. Selensky. **Id.**

When considering a motion to dismiss, the District Court is required to take all facts alleged as true and consider all reasonable inferences from the facts in favor of Mr. Selensky. Anderson v. Recon Trust Company, N.A., 390 Mont. 12, 15, 407 P.3d 692 (2017). Mr. Selensky's claims against CHA should not be dismissed "*unless it appears beyond a reasonable doubt that the plaintiff can prove no set of facts which would entitle him to relief.* Gebhardt v. D.A. Davidson & Co., 203 Mont. 384, 389, 661 P.2d 855 (1983). Taking the facts alleged as true, CHA either concealed or failed to disclose its policy, which was the true cause of Mr. Selensky's injury and damages. The record before the District Court, considering the applicable standard of review, required a denial of CHA's motion to dismiss.

CHA prevented Mr. Selensky from discovering its policy, and Mr. Selensky could not have discovered CHA's policy until the deposition of Dr. Mercer. The District Court's decision to dismiss Mr. Selensky's medical negligence claim for not being brought within 2-years from the date of injury should be reversed and this matter remanded for litigation.

CONCLUSION AND RELIEF REQUESTED

The standard on a motion to dismiss requires the District Court to take all facts as true, and all reasonable inferences in favor of Mr. Selensky. The facts in

the record, taken as true, show CHA made a business decision that caused injury and damages to Mr. Selensky. CHA made a business decision to enact a negligent policy resulting in a foreseeable injury. CHA's business decision and policy is distinct from medical negligence, as not all acts by CHA are the performance of professional medical services. Therefore, Mr. Selensky timely filed his negligence claim within three-years against CHA, and the District Court's order dismissing the negligence claims should be reversed and this matter remanded.

Alternatively, CHA's failed to disclose or concealed its policy that was the true cause of Mr. Selensky's injury and basis of his medical negligence claim against CHA. The facts, taken as true, show the two-year medical negligence statute of limitation should be tolled until Mr. Selensky discovered the CHA policy, the cause of his injury, during the deposition of Dr. Mercer. The District Court decision should be overturned, and this matter remanded.

DATED this 3rd day of December, 2021.

ROBERTS|FREEBOURN, PLLC

By_____
Kevin Roberts, MSB #11444
Attorney for Plaintiff/Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(a)(e) of the Montana Rules of Appellate Procedure, I certify that this Motion is printed with a proportionally spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word for Office 365 is not more than 10,000 words (5,000 for reply), not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

DATED this 3rd day of December, 2021.

ROBERTS|FREEBOURN, PLLC

By_____
Kevin Roberts, MSB #11444
Attorney for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I hereby certify that I have filed a true and accurate copy of the foregoing APPELLANT'S OPENING BRIEF with the Clerk of the Montana Supreme Court; and that I have served true and accurate copies of the foregoing APPELLANT'S OPENING BRIEF, to each attorney of record, and each party not represented by an attorney in the above-referenced District Court action, as follows:

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☒ EMAIL
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Dated this 3rd day of December, 2021.

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APPENDIX A

Montana's Third Judicial District
Deer Lodge County

JOSHUA SELENSKY-FOUST, Plaintiff, v. JONATHAN F. MERCER, M.D., PINTLER SURGICAL SPECIALISTS; and COMMUNITY HOSPITAL OF ANACONDA, Defendants.	Cause No. DV 20-49 **ORDER GRANTING MOTION TO DISMISS** Hon. Ray J. Dayton

Order Granting Motion to Dismiss

Pending before the Court is the Defendant's Motion to Dismiss. Plaintiff Joshua Selensky-Foust (Selensky-Foust) filed a medical negligence claim against Defendant Dr. Jonathan Mercer (Dr. Mercer), and an amended complaint including a general negligence claim against Defendant Community Hospital of Anaconda (CHA). CHA has filed a Motion to Dismiss contending that Selensky-Foust's allegations are grounded in medical negligence rather than general negligence and should be subject to the medical negligence two-year statute of limitations under MCA § 27-2-205(1). Selensky-Foust argues the facts and circumstances of the dispute fall under a general negligence claim and further asserts that, even if the action fell under a medical negligence claim, CHA's alleged concealment of hospital policy tolled the statute of limitations until Selensky-Foust was made aware of the alleged negligence through Dr. Mercer's deposition. The matter is fully briefed and the Motion to Dismiss is GRANTED.

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Brief Statement of Facts

On January 25, 2017, Dr Mercer performed surgery to remove a cyst from Selensky-Foust's left testicle at Community Hospital of Anaconda. After surgery, Selensky-Foust reported notable pain and discomfort to the nurses and Dr. Mercer. Selensky-Foust was discharged without obtaining an ultrasound and without much improvement to his pain and discomfort. Selensky-Foust returned to Dr. Mercer's office on January 26, 2017 for a follow-up appointment where he reported increased swelling and discomfort and Dr. Mercer recommended additional pain medication. On January 27, 2017, Selensky-Foust reached out to Dr. Mercer about his ongoing pain and Dr. Mercer advised him to go to the emergency room. Immediately after the phone call, Selensky-Foust sought medical care from the St. James Emergency Department in Butte and was diagnosed with a torsed or twisted left testicle with compromised blood supply. Surgeons removed Selensky-Foust's left testicle that same day. Selensky-Foust filed a claim with the Montana Medical Legal Panel on January 16, 2020. Selensky-Foust then filed a lawsuit against Dr. Mercer on June 26, 2020 claiming medical negligence and later amended the complaint on April, 30, 2021 to include CHA as an additional party. The amended complaint outlined a general negligence claim against CHA based on its purported failure to adequately staff an ultrasound technician and allegedly creating policies that prevented Dr. Mercer from using an ultrasound machine.

Discussion

A malpractice claim includes claims against licensed healthcare facilities for treatment, lack of treatment or departures from accepted standards of health care that result in tort damage to the claimant. Mont. Code Ann. § 27-6-103 (3), (5). A tort action against a licensed hospital based on alleged professional negligence must be brought within two years after the plaintiff

discovers the injury, but a plaintiff may not commence an action after five years from the date of injury. § 27-2-205. The two-year statute of limitations begins to run when a plaintiff discovered or should have discovered both the injury and that the injury may have been caused by the defendant. *Wisher v. Higgs*, 257 Mont. 132, 144, 849 P.2d 152, 159 (1993). Montana law provides for a toll of the time limitation during any period where there has been a failure to disclose any act or omission upon which the action is based. § 27-2-205. The Montana Supreme Court has previously held that a toll of the time limitation for a failure to disclose applies only to the five-year statute of repose. *Runstrom v. Allen*, 2008 MT 281, ¶¶ 41-44, 345 Mont. 314, 191 P.3d 410.

The Court finds that Selensky-Foust's negligence claim against CHA arises from actions within the scope of CHA's role as a healthcare facility and is therefore a professional negligence claim subject to the two-year statute of limitations. The Court finds that Selensky-Foust was aware of the injury and that the injury may have been caused by both Dr. Mercer and CHA on January 27, 2017. The Court finds the statute of limitations has not been tolled. As neither a claim to the Montana Medical Legal Panel was filed nor was a suit filed to the Court by Selensky-Foust within the two-year statute of limitations, the Court finds Selensky-Foust's claim against CHA is time barred.

Therefore, the Motion to Dismiss is hereby GRANTED.

Wednesday, September 15, 2021.

Hon. Ray J. Dayton
District Court Judge

CERTIFICATE OF SERVICE

I, Kevin William Roberts, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 12-03-2021:

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Dated: 12-03-2021