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

JOSHUA SELENSKY-FOUST

Plaintiff/Appellant,

v.

JONATHAN F. MERCER, M.D.; PINTLER SURGICAL SPECIALISTS; AND COMMUNITY HOSPITAL OF ANACONDA,

Defendants/Appellees.

APPELLEES' RESPONSE BRIEF

On Appeal from the Third Judicial District Court,
Deer Lodge County, Montana
Cause No. DV-20-19
Honorable Ray J. Dayton

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I. STATEMENT OF ISSUES

A) Whether the gravamen of Plaintiff's claims alleging a failure of Community Hospital of Anaconda to provide indicated care are claims of medical malpractice.

B) Whether Plaintiff timely filed his Complaint within the statute of limitations applicable to his claims.

II. STATEMENT OF THE CASE

Plaintiff/Appellant Joshua Selensky-Foust appeals the decision of Montana's Third Judicial District Court, Deer Lodge County, granting the Motion to Dismiss filed by Defendants/Appellees, Community Hospital of Anaconda ("CHA") and Pintler Surgical Specialists ("Pintler") (collectively, the "Hospital Defendants"). The Hospital Defendants moved to dismiss Plaintiff's claims on the basis that Plaintiff failed to timely file his Amended Complaint against the Hospital Defendants and, consequently, his Amended Complaint failed to state a claim upon which relief could be granted. The District Court granted the Hospital Defendants' Motion to Dismiss on September 15, 2021. Plaintiff filed a Notice of Appeal with this Court on October 15, 2021, and he filed his Opening Brief on December 3, 2021.

III. STATEMENT OF FACTS

A. Pertinent Factual History

These facts are derived solely from Plaintiff's Amended Complaint and the Hospital Defendants present them as true only for the purpose of analyzing the issues currently on appeal.

Plaintiff first sought care with the Hospital Defendants on January 19, 2017, when he presented to discuss having a cyst removed from his left testicle with Dr. Mercer. (Doc. 16 ¶ 8.) Plaintiff scheduled a surgery for the removal of the cyst with Dr. Mercer to be performed in CHA's surgical clinic, Pintler, on January 25, 2017. Plaintiff underwent the surgery as scheduled. (Doc. 16 ¶ 9.) Immediately following the surgery, Plaintiff was experiencing swelling and bruising in his groin, along with significant discomfort in his stomach and back. (Doc. 16 ¶ 10.) He alerted Dr. Mercer to these issues and was provided pain medications. (Doc. 16 ¶ 10.) Plaintiff was supposed to have an ultrasound following the surgery before being discharged home. (Doc. 16 ¶ 11.) However, Plaintiff was "informed that there was no ultrasound available" and was discharged from CHA without having the ultrasound. (Doc. 16 ¶¶ 11-12.)

Plaintiff returned to see Dr. Mercer for a scheduled post-operative visit the next day, January 26, 2017. (Doc. 16 ¶ 13.) During this visit, Plaintiff advised Dr. Mercer that he was experiencing significant bruising, swelling, pain, and discomfort in his groin area, along with pain in his stomach and back that was making it difficult for him to walk. (Doc. 16 ¶ 14.) Plaintiff was again

prescribed pain medications. (Doc. 16 ¶ 14.) After returning home on January 26, 2017, Plaintiff continued to experience severe pain and called Dr. Mercer to discuss this complaint. Dr. Mercer advised Plaintiff to go to the emergency department at St. James Hospital in Butte, Montana, if the pain continued. (Doc. 16 ¶ 16.)

On January 27, 2017, Plaintiff went to the emergency department at St. James Hospital for complaints of pain and discomfort. (Doc. 16 ¶ 17.) Plaintiff was seen by Dr. Nathanial Readal. (Doc. 16 ¶ 18.) An ultrasound of Plaintiff's testicles indicated that there was no blood flow to his left testicle. (Doc. 16 ¶ 19.) Plaintiff was promptly admitted for a surgery to determine the cause of this issue. During surgery, Plaintiff's left testicle was determined to be necrotic and was removed as a consequence. (Doc. 16 ¶ 20.) Following his surgery, Plaintiff was told that his left testicle had been removed. (Doc. 16 ¶ 21.)

B. Pertinent Procedural History

Plaintiff brought his claims concerning the lack of an ultrasound against all Defendants, including the Hospital Defendants, to the Montana Medical Legal Panel ("MMLP"). (Doc. 16 ¶ 5.) Although Plaintiff advanced claims against all Defendants before the MMLP, Plaintiff's original complaint, filed on June 26, 2020, only named Dr. Mercer. (*See* Doc. 1 at 1.) Plaintiff did not file

his Amended Complaint for Damages and Demand for a Jury ("Amended Complaint") naming the Hospital Defendants until April 30, 2021, precisely 4 years and 94 days after his injury on January 27, 2017. (*See* Doc. 16 at 1.) Count I of Plaintiff's Amended Complaint advances claims against all Defendants for "Medical Negligence/Negligence."[1] (Doc. 16 ¶¶ 29-33.) Plaintiff alleges that Defendants failed "to exercise the appropriate standards of care when performing surgery, diagnosing, and treating Mr. Selensky-Foust" causing him damages. (Doc. 16 ¶ 31.) Count II of Plaintiff's Amended Complaint is for "Negligence" against the Hospital Defendants. (Doc. 16 ¶¶ 34-39.) Plaintiff claims that the Hospital Defendants breached a general "duty of care" by failing to have capable personnel on the premises at the time Plaintiff should have received an ultrasound on January 25, 2017. (Doc. 16 ¶¶ 35, 37.) Plaintiff also alleges that the Hospital Defendants breached a general "duty of care" owed to Plaintiff by "creating policies" which prevented Dr. Mercer from using the ultrasound equipment to perform an ultrasound on Plaintiff on January 25, 2017. (Doc. 16 ¶¶ 35-36.)

[1] It should be noted that Plaintiff includes an allegation that the Hospital Defendants had a "common law standard of care with regard to the operation and staffing of the Hospital" in Count I. (Doc. 16 ¶ 30.) However, Count I does not allege a breach of this "common law standard." *(See* Doc. 16 ¶¶ 29-33.) Nonetheless, this allegation is redundant of the claims alleged in Count II and the Hospital Defendants accordingly treat this allegation as subsumed in Plaintiff's Count II for all purposes.

On April 26, 2021, Dr. Mercer filed a Motion for Summary Judgment on the running of the statute of limitations on the medical malpractice claims asserted against him. (Doc. 14.) The Hospital Defendants filed their Motion to Dismiss on the issue of the statute of limitations on July 28, 2021. (Doc. 30.) The district court granted both motions on September 15, 2021. (Doc. 37; Doc. 38.) The district court found that the medical malpractice claims against Dr. Mercer were barred by the two-year statute of limitations. (Doc. 38 at 3.) The district court further noted that Plaintiff had failed to submit his claims to the MMLP before the expiration of the two-year statute of limitations. (Doc. 38 at 3.) With regard to the Hospital Defendants, the district court found that the claims sounded in medical malpractice and were barred by the two-year statute of limitations. (Doc. 37 at 2-3.) Further, the district court found that Plaintiff's reliance on the tolling provision of Montana Code Annotated § 27-2-205(1) was misplaced. (Doc. 37 at 3.) Plaintiff has only appealed the district court's decision relating to the Hospital Defendants.

IV. STANDARD OF REVIEW

A district court's decision to grant a motion to dismiss under Montana Rule of Civil Procedure 12(b)(6) is reviewed *de novo*. *Barthel v. Barretts Minerals Inc.*, 2021 MT 232, ¶ 9, 405 Mont. 345, 496 P.3d 541 (citation omitted). A motion to dismiss made pursuant to Rule 12(b)(6) requires the

Court to "determine whether a claim has been adequately stated in the pleadings." *Woods v. Shannon*, 2015 MT 76, ¶ 9, 378 Mont. 365, 344 P.3d 413 (citation omitted). When considering a motion to dismiss, the Court construes the complaint "in the light most favorable to the plaintiff, and all allegations of fact contained therein are taken as true." *Meagher v. Butte-Silver Bow City-Cty.*, 2007 MT 129, ¶ 13, 337 Mont. 339, 160 P.3d 552 (citing *Plouffe v. State,* 2003 MT 62, ¶ 8, 314 Mont. 413, 66 P.3d 316). A claim has been inadequately stated if it "fails to state a cognizable legal theory for relief or states an otherwise valid legal claim but fails to state sufficient facts that, if true, would entitle the claimant to relief under that claim." *Puryer v. HSBC Bank USA, N.A.*, 2018 MT 124, ¶ 12, 391 Mont. 361, 419 P.3d 105 (citation omitted). For this reason, a "motion to dismiss for failure to state a claim on which relief can be granted will lie when the complaint on its face establishes that the claim is barred by the statute of limitations." *Beckman v. Chamberlain*, 673 P.2d 480, 482 (Mont. 1983); *Jones v. Bock*, 549 U.S. 199, 215 (2007) ("if the allegations . . . show that relief is barred by the applicable statute of limitations, the complaint is subject to dismissal for failure to state a claim.").

V. SUMMARY OF ARGUMENT

Plaintiff's claims against the Hospital Defendants are subject to the two-year statute of limitations applicable to medical negligence claims established

in Montana Code Annotated § 27-2-205(1). This conclusion is supported both by the plain language of § 27-2-205(1) and the gravamen of Plaintiff's claims. Plaintiff's claims are controlled by § 27-2-205(1) because the claims are (1) in tort, (2) for injury, (3) against a hospital, and (4) based upon alleged professional negligence or an "act, error, or omission," thus clearly tracing the definition of a claim to which this statute applies. Moreover, the gravamen of Plaintiff's claims are for medical malpractice as they allege a malpractice claim against a health care provider for treatment, a lack of treatment, or "other alleged departure from accepted standards of health care" that resulted in the loss of his testicle. *See* Mont. Code Ann. § 27-6-103(5).

The medical malpractice statute of limitations begins to run when plaintiff discovers, or through reasonable diligence should have discovered, both his injury and that the injury may have been caused by the defendant. For this reason, and, based solely on the allegations in his Amended Complaint, Plaintiff's statute of limitations began to run no later than January 27, 2017. By January 27, 2017, Plaintiff (1) had been informed he should have an ultrasound following his surgery on January 25, 2017, (2) knew he did not receive one, (3) had been informed he did not receive one because the ultrasound was unavailable, (4) had an ultrasound completed that immediately revealed a problem, and (5) had his testicle removed as a result of the lack of an earlier

ultrasound.[2] (Doc. 16 ¶¶ 11-21.) In short, Plaintiff had discovered both his injury and that it may have been caused by the Hospital Defendants by January 27, 2017. Consequently, his statute of limitations ran two years later, on January 27, 2019, over two years before Plaintiff eventually filed his claims against the Hospital Defendants. Plaintiff's claims are time-barred and his Amended Complaint should be dismissed with prejudice.

VI. ARGUMENT

A. All of Plaintiff's claims against the Hospital Defendants sound in medical malpractice.[3]

1. The plain language of the medical malpractice statute of limitations makes clear that it applies to Plaintiff's claims and the gravamen of Plaintiff's claims are for medical malpractice.

Despite the fact that Plaintiff's Amended Complaint asserts claims against the Hospital Defendants that are nominally titled "medical

[2] Again, Hospital Defendants accept these facts as true only for purposes of the argument on appeal.

[3] At the outset, the Hospital Defendants wish to lodge their objection to the following unsupported and misleading assertions that have permeated all of Plaintiff's filings in this case: 1) the Hospital Defendants have a "policy" that prevented Plaintiff from receiving indicated care, 2) the Hospital Defendants have made false statements, concealed information, or otherwise failed to disclose information to Plaintiff concerning the facts of his case, and 3) the documents Plaintiff cites as evidence for these claims support his assertions. Plaintiff consistently overemphasizes these conclusions throughout his briefing despite the fact that, as will be discussed in more detail below, they are untrue and irrelevant to the determination of whether he timely filed his Amended Complaint.

negligence/negligence" and "negligence," these are all claims of medical malpractice. "The applicable period of limitations for medical negligence claims is codified at [Montana Code Annotated] § 27-2-205." *Blackburn v. Blue Mt. Women's Clinic*, 286 Mont. 60, 71, 951 P.2d 1, 7 (1997). In relevant part, this statute states:

> Action in tort or contract for injury or death against . . . a licensed hospital or long-term care facility, or licensed medical professional corporation, 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.

Mont. Code Ann. § 27-2-205(1). The plain language of this statute clearly identifies the types of claims which are subject to its two-year statute of limitations.

Applying the plain language of § 27-2-205(1) to Plaintiff's allegations against the Hospital Defendants in the Amended Complaint establishes that Plaintiff's claims are subject to this statute of limitations. Plaintiff's causes of action against the Hospital Defendants allege tort liability for personal injury—specifically, negligence causing the loss of a testicle. It has not been disputed that the Hospital Defendants are a licensed hospital for purposes of this statute. Plaintiff's first claim against the Hospital Defendants is that they breached a

duty "to exercise the degree of care, skill and learning expected of a reasonably prudent healthcare provider[ ] required in the State of Montana" causing him injuries. (Doc. 16 ¶ 30.) This is a claim "based upon alleged professional negligence." Mont. Code Ann. § 27-2-205(1). The allegations in Count II stem from the assertions that the Hospital Defendants had an obligation to have a qualified sonographer at CHA at all times and did not have a qualified sonographer at CHA the moment an ultrasound was indicated for Plaintiff, and that the Hospital Defendants breached a duty of care by "creating policies" that prevented Dr. Mercer from providing an ultrasound to Plaintiff himself. (Doc. 16 ¶¶ 34-39.) Plaintiff's claim that the Hospital Defendants failed to adequately staff the hospital to provide indicated care is a claim based upon an omission. Plaintiff's claim that the Hospital Defendants negligently "created policies" that prevented Dr. Mercer from providing indicated care is a claim based upon an act. For these reasons, Plaintiff's causes of action clearly trace the definition of a medical malpractice claim provided in § 27-2-205(1) and are thus subject to the two-year statute of limitations established by this statute.

In addition to the application of the plain language of § 27-2-205(1), the gravamen of Plaintiff's claims against the Hospital Defendants demonstrates that his claims are for medical malpractice. Montana courts consider the "gravamen" of a complaint when determining the law governing the plaintiff's

claims. *See, e.g.*, *Saucier v. McDonald's Rests. of Mont., Inc.*, 2008 MT 63, ¶¶ 46-58, 342 Mont. 29, 179 P.3d 481 (discussing gravamen analysis in MHRA context); *Lay v. St. Dep't of Military Affs.*, 2015 MT 158, ¶ 15, 379 Mont. 365, 351 P.3d 672 (compiling cases). "The gravamen of the claim, not the label attached, controls the limitations period to be applied to th[e] claim." *Erickson v. Croft*, 233 Mont. 146, 153, 760 P.2d 706, 710 (1988) (citations omitted). This Court "consistently look[s] to the nature of the acts alleged by the plaintiff, as opposed to the manner in which the complaint is framed, to determine the 'gravamen' of the complaint." *Saucier*, ¶ 56. This analysis is made "irrespective of the manner in which the complaint is framed because we realize that litigants can frequently employ . . . terminology to improperly re-characterize" their claims. *Saucier*, ¶ 56 (internal quotes and quotations omitted).

Here, the gravamen of Plaintiff's claims against the Hospital Defendants, despite his attempts to frame them in the context of ordinary negligence, are for medical malpractice as that claim is defined by § 27-2-205(1), as discussed above, and by Montana Code Annotated § 27-6-103. Section 27-6-103 defines a "Malpractice claim" as a claim against a "health care provider," which is defined to include a "health care facility," for treatment, a lack of treatment, or another alleged departure from "accepted standards of health care that

proximately results in damage to the claimant," whether sounding in tort or contract. Mont. Code Ann. § 27-6-103(3), (5). A "health care facility" is defined to include facilities licensed as a health care facility under Title 50, Chapter 5, which, in turn, defines "health care facility" as "all or a portion of an institution, building, or agency, private or public . . . that is used, operated, or designed to provide health services [or] medical treatment." Mont. Code Ann. § 50-5-101(26)(a). It also explicitly includes hospitals, critical access hospitals, and outpatient centers for surgical services. Mont. Code Ann. § 50- 5- 101(26)(a).

Again, the claims Plaintiff pled as ordinary negligence against the Hospital Defendants allege that the Hospital Defendants failed to have a sonographer present to perform indicated care and created policies that kept Plaintiff from receiving indicated care, thus preventing Plaintiff from receiving indicated medical treatment to his detriment. (Doc. 16 ¶¶ 34-39.) Again, it has not been disputed that the Hospital Defendants are a "health care provider" as the term has been defined by statute. Consequently, Plaintiff's claims against the Hospital Defendants are claims against a "health care provider" for a "lack of medical . . . treatment . . . that proximately result[ed] in damage." Mont. Code Ann. § 27-6-103(5). As such, the gravamen of Plaintiff's claims are for medical malpractice and they are subject to the two-year statute of limitations.

Plaintiff did not put forth any argument to rebut the Hospital Defendants' foregoing arguments before the district court. On appeal, Plaintiff does no more than argue that "the plain language" of § 27-2-205(1) "is not meant to apply to negligence claims falling outside of the professional services performed by hospitals and physicians." App. Opening Brief at 13, Dec. 3, 2021 ("Opening Br."). Plaintiff provides no authority or analysis of the plain language to support this conclusory position. Indeed, as discussed above, the plain language demonstrates the opposite. The statute makes clear that it applies to claims "based upon alleged professional negligence *or* for rendering professional services without consent *or* for an act, error, or omission" of a health care provider. Mont. Code Ann. § 27-2-205(1) (emphasis added). The legislature's use of the word "or" defeats plaintiff's unsupported argument. Moreover, Plaintiff's contention that his claims "fall[ ] outside of the professional services performed by hospitals and physicians" is incredible. Opening Br. at 13. His claims allege that the Hospital Defendants acts and omissions prevented him from receiving indicated medical care—*i.e.*, that the Hospital Defendants conduct prevented him from receiving necessary professional services. Again, the plain language of § 27-2-205(1) establishes that it applies to Plaintiff's claims against the Hospital Defendants.

Further evidence of the gravamen of Plaintiff's claims is provided by the fact that Plaintiff has not attempted to articulate the "duty of ordinary care" with regard to his claims. *See* Opening Br. at 15. Plaintiff simply ascribes negligence for opening a hospital without a sonographer and having a policy that impacted his care on the basis that the harm was "foreseeable." Opening Br. at 15. However, "whether a legal duty exists is a question of law to be determined by the court." *Romans v. Lusin*, 2000 MT 84, ¶ 35, 299 Mont. 182, 997 P.2d 114. In *Romans*, this Court rejected the plaintiff's argument that he did not need an expert to establish the applicable standard of care because his claims were for "ordinary negligence." *Romans,* ¶¶ 15-23. In doing so, the Court found the question of whether the allegedly negligent conduct was "outside the common experience and knowledge of lay people" determinative. *Romans*, ¶ 18. Here, the question of whether the Hospital Defendants had a duty to ensure a sonographer was on staff at all times, or to ensure a sonographer was available whenever a patient appeared to have a testicular cyst addressed is a question "outside the common experience and knowledge of lay people" and requires expert testimony. *Romans*, ¶ 18. The same is true for determining the duty pertaining to a hospital's acts of drafting and adopting policies to govern the training and qualifications it will require for the administration of specific medical treatments or procedures such as a diagnostic

ultrasound. As in *Romans*, Plaintiff's claims in this case are not for ordinary negligence because they implicate conduct and duties outside the ken of common knowledge.

It should be noted that Plaintiff cites *Romans* for the proposition that the "duty of ordinary care applies to medical professionals and to businesses." Opening Br. at 14. Plaintiff undertakes no analysis to support his assertion. Consequently, it is unclear what Plaintiff's argument is in this regard. Plaintiff cites to that portion of the Court's decision in *Romans* wherein this Court established that "[b]ased on the standard of ordinary care set forth in § 27-1-701, MCA, we conclude[ ] that a duty is imposed on a physician 'to exercise the level of care required by the examiner's professional training and experience.'" *Romans*, ¶ 16, (quoting *Webb v. T.D.*, 287 Mont 68, 77, 951 P.2d 1008, 1014 (1997)). As discussed above, the Court in *Romans* made this statement while rejecting the plaintiff's argument that his claims against his physical therapist were for ordinary negligence, not medical malpractice. *Romans*, ¶¶ 15-23. Ultimately, the Court went on to determine that the applicable duty of care in *Romans* needed to be established by expert testimony because it was outside the knowledge of the lay juror. *Romans,* ¶¶ 18, 23. Plaintiff appears to have admired the use of the term "ordinary care" without appreciating the ends for which the term was employed by the Court—namely, that the duty owed by the

health care professional is established by her professional training and experience as well as the circumstances. Plaintiff's unsupported assertions concerning the applicable duty of care do not change the nature of his claims for medical malpractice.

2. *Brookins v. Mote* does not support Plaintiff's argument concerning the classification of his claims for medical malpractice.

Plaintiff also argues, for the first time on appeal, that his claims against the Hospital Defendants are for breach of the standard of ordinary care because they relate to alleged "business decisions" by the Hospital Defendants. Opening Br. at 13-14. Plaintiff cites *Brookins v. Mote*, 2012 MT 283, 367 Mont. 193, 292 P.3d 347, for the proposition that there is a "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." Opening Br. at 13. Without analysis, Plaintiff asserts that this Court in *Brookins* established a claim for ordinary negligence against a hospital when the alleged conduct relates to the entrepreneurial, commercial, or business aspects of running a hospital. Opening Br. at 13-14. Again without analysis, Plaintiff asserts that the Hospital Defendants' staffing decisions and creation of policies concerning the qualifications of who can operate equipment are mere business decisions subject to the duty of ordinary

care. Plaintiff proceeds to conclude that this means the three-year statute of limitations established in Montana Code Annotated § 27-2-204(1) applies to his claims against the Hospital Defendants.

Brookins establishes the opposite of what Plaintiff represents. As this Court is aware, *Brookins* is the seminal case wherein the Court established the tort of negligent credentialing and also established that a claim for violation of the Montana Consumer Protection Act could lie against a hospital for conduct undertaken in the "entrepreneurial, commercial, or business aspects of running a hospital" but not for claims arising out of the "'actual practice' of the profession." *Brookins*, ¶ 54. The Court did *not* establish that a negligence claim targeting the entrepreneurial, commercial, or business aspects of running a hospital should be evaluated by applying a duty of ordinary care.

Moreover, the Court's analysis in reaching its decision in *Brookins* supports the conclusion that the types of conduct Plaintiff baldly describes as "business decisions" in this case would be considered "conduct by health-care providers in the 'actual practice' of the profession." *Brookins*, ¶ 54. The Court relied upon *Haynes v. Yale-New Haven Hosp.*, 243 Conn. 17, 37, 699 A.2d 964, 974 (Conn. 1997), to support a distinction between claims targeting the "entrepreneurial or business aspect of the provision of services" and claims for "medical malpractice based on the adequacy of staffing, training, equipment or

support personnel." *Brookins,* ¶ 53. Here, Plaintiff's claim that the Hospital Defendants "made a business decision to open its hospital without having the necessary staff available to administer the ultrasound machine" when it was indicated for him is clearly a claim for medical malpractice based on the adequacy of staffing, equipment, or support personnel. Opening Br. at 14.

The Court also noted that claims concerning a hospital's practices and policies relating to credentialing and privileging a physician to use hospital facilities concerned the "'actual practice' of medicine" and did not fall within the "entrepreneurial, commercial, or business aspect of providing healthcare, such as the practice of billing patients, advertising, etc." *Brookins*, ¶ 55. Again, Plaintiff's claim that the Hospital Defendants "made a business decision to enact a policy to only allow its employees to use its ultrasound machine" clearly implicates the actual practice of medicine rather than the business aspects of running a hospital, such as billing patients or advertising. Opening Br. at 14. Plaintiff has not and cannot credibly explain how the formation and adoption of policies concerning the training or qualifications a hospital requires for the administration of certain treatments relates to the business aspect of running a hospital rather than the actual practice of medicine as would be required to support his strained argument.

In short, *Brookins* did not establish a "distinction in the type of negligence claim" against a hospital and, even if a "business decision" exception was established in *Brookins*, it would not apply to the alleged conduct targeted by Plaintiff concerning the actual practice of medicine. Opening Br. at 13. Plaintiff's claims against the Hospital Defendants are for medical malpractice as defined by statute.

B. Plaintiff's claims are barred by the applicable statute of limitations.

1. Plaintiff's claims are barred by the two-year statute of limitations applicable to medical malpractice claims.

Typically, a cause of action "accrues when all elements of the claim or cause exist or have occurred, the right to maintain an action on the claim or cause is complete, and a court or other agency is authorized to accept jurisdiction of the action." Mont. Code Ann. § 27-2-102(1)(a). An action is commenced upon the filing of the complaint. Mont. Code Ann. § 27- 2- 102(1)(b). Section 27-2-102(2) provides that "[u]nless otherwise provided by statute, the period of limitation begins when the claim or cause of action accrues. Lack of knowledge of the claim or cause of action, or of its accrual, by the party to whom it has accrued does not postpone the beginning of the period of limitation." However, with regard to medical malpractice claims in particular, the statute of limitations provides that it does not begin to run until "the date of injury" or the date "the plaintiff discovers or through the use of

reasonable diligence should have discovered the injury, whichever occurs last." Mont. Code Ann. § 27-2-205(1).

This Court has explained that the two-year statute of limitations for malpractice claims "begins to run when a plaintiff discovers or through reasonable diligence should have discovered both (1) the injury; and (2) that the injury 'may have been caused' by the defendant medical provider." *Wilson v. Brandt*, 2017 MT 290, ¶ 19, 389 Mont. 387, 406 P.3d 452 (quoting *Wisher v. Higgs*, 257 Mont. 132, 144, 849 P.2d 152, 159 (1993) *overruled on other grounds by Blackburn*, 951 P.2d 1). Nonetheless, this Court has cautioned that the statute is "not tolled until a plaintiff discovers her legal right to bring an action for known injuries" or until such time as "a plaintiff 'learns the facts out of which a known cause of action arose.'" *Wilson,* ¶ 19 (quoting *Wisher*, 849 P.2d at 157). Montana courts look to the specific facts presented in each case when determining whether the discovery doctrine serves to postpone the running of the statute of limitations in medical malpractice cases. *Wilson*, ¶ 23.

Plaintiff's Amended Complaint leaves no mystery as to when he was injured or when he discovered his injury. Plaintiff underwent a surgery to remove a cyst from his left testicle on January 25, 2017. Plaintiff experienced "significant" pain following the surgery. (Doc. 16 ¶ 10.) By January 27, 2017, Plaintiff was experiencing enough pain that he sought help at an emergency

department where it was determined that there was no blood flowing to his left testicle and he was consequently rushed into a surgery wherein that testicle was removed. (Doc. 16 ¶¶ 16-17.) To remove all doubt as to when Plaintiff discovered his injury, Plaintiff admits that he was told his left testicle was removed after the surgery on January 27, 2017. (Doc. 16 ¶ 21.)

Nor does Plaintiff's Amended Complaint leave any question as to when Plaintiff discovered or through reasonable diligence should have discovered that the injury "may have been caused" by the Hospital Defendants. Immediately following the surgery on January 25, 2017, Plaintiff was aware he "was supposed to have an ultrasound" before "being released to go home." (Doc. 16 ¶ 11.) Plaintiff did not have the ultrasound before discharge. (Doc. 16 ¶ 12.) Plaintiff was told he did not have the ultrasound because "there was no ultrasound available." (Doc. 16 ¶ 11.) Two days later, Plaintiff received an ultrasound. (Doc. 16 ¶ 19.) The ultrasound showed a significant complication requiring immediate surgery. (Doc. 16 ¶ 19.) As a result, Plaintiff immediately underwent surgery wherein his testicle was both discovered to be necrotic and was removed. (Doc. 16 ¶¶ 19-20); Opening Br. at 2.

This is not a case in which Plaintiff can credibly argue that his injury was concealed or that he was unaware of how he was injured. Taking all of Plaintiff's factual allegations as true, Plaintiff knew he was injured no later than

January 27, 2017, when he was told his testicle had been removed. Thus, he discovered his injury no later than January 27, 2017. Immediately following the surgery on January 25, 2017, Plaintiff knew he was not provided an ultrasound despite the fact that he was supposed to have one and also knew that he was experiencing significant pain. Two days later, Plaintiff knew that an ultrasound had revealed that there was no blood flow to his left testicle and precipitated a surgery that discovered his testicle had torsed, resulting in the necrosis of his testicle by January 27, 2017. In his Opening Brief, Plaintiff goes so far as to acknowledge that, while at St. James Hospital, it was "determined" that his testicle needed to be removed "as a result of this condition not being immediately identified." Opening Br. at 2. In other words, by January 27, 2017, Plaintiff discovered or through the use of reasonable diligence should have discovered that his injury may have been caused by the unavailability of an ultrasound at CHA on January 25, 2017.

Instead of disputing any of this, Plaintiff appears to assert that the statute of limitations didn't begin to run because the Hospital Defendants (1) did not tell him he had been injured in the course of his surgery and (2) did not tell him about their internal policies. Opening Br. at 8. Plaintiff claims that he could not have discovered "the true cause of his injury" until he learned of a CHA "policy" that prevented Dr. Mercer from completing the ultrasound himself.

Plaintiff's argument misapplies Montana law. The statute of limitations began to run when Plaintiff discovered or should have discovered that his testicle had been removed and that the removal "may have been caused" by the lack of an ultrasound at CHA. *Wilson*, ¶ 19. It does not begin to run at such time as Plaintiff "'learns the facts out of which a known cause of action arose."' *Wilson*, ¶ 19 (quoting *Wisher*, 849 P.2d at 157). Under Montana law, Plaintiff did not need to discover the "true cause of his injury" for the statute to begin to run, the statute began to run when he should have discovered that his injury *may have been caused* by the Hospital Defendants. Therefore, Plaintiff's claims accrued on January 27, 2017.

There is no stronger evidence that Plaintiff knew his injury "may have been caused" by the Hospital Defendants than the fact that he submitted claims against both the Hospital Defendants and Dr. Mercer to the MMLP. (Doc. 16 ¶ 5); Opening Br. at 17-18. Plaintiff necessarily submitted these claims prior to discovery in his case against Dr. Mercer—wherein he alleges he "discovered" a "policy" at CHA during the deposition of Dr. Mercer. Opening Br. at 17-18. Plaintiff's actions belie his assertions.

None of Plaintiff's arguments support a finding that his claims accrued any later than January 27, 2017. Consequently, Plaintiff's statute of limitations ran two years later, on January 27, 2019. Plaintiff did not file his Amended

Complaint naming the Hospital Defendants until April 30, 2021, some 824 days after the statute had run. Plaintiff's claims against the Hospital Defendants are consequently time-barred and should be dismissed with prejudice.[4]

2. The "failure to disclose" provision of Montana Code Annotated § 27-2-205(1) is not applicable.

Montana Code Annotated § 27-2-205(1), which provides for an extended statute of repose in the event of a failure to disclose, is inapplicable in this case. After establishing the statute of limitations and statute of repose applicable in medical malpractice claims, § 27-2-205(1) provides:

> [T]his 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.

[4] It should be noted that the Hospital Defendants presented evidence outside the pleadings in support of their Motion to Dismiss before the district court. (Doc. 31 at 3-6, 13-15.) The Hospital Defendants submitted documents showing the dates Plaintiff's claims against the Hospital Defendants were pending before the MMLP in anticipation of Plaintiff arguing that the tolling provision of Montana Code Annotated § 27-6-702 applied to save his claims from the statute of limitations. (Doc. 31 at 13-15.) However, Plaintiff did not dispute that the tolling provision of § 27-6-702 does not apply to the statute of limitations issues in this case before the district court and has not presented any argument on this issue in his Opening Brief. Consequently, the Hospital Defendants do not believe the consideration of evidence outside the pleadings is necessary for purposes of determining whether Plaintiff's claim is barred by the two-year statute of limitations applicable to medical malpractice claims.

Throughout his Opening Brief, Plaintiff over-emphasizes and misconstrues this sentence of the statute to claim that the statute of limitations was tolled during a period when CHA allegedly failed to disclose a purported "policy" concerning the use of its ultrasound equipment. *See, e.g.*, Opening Br. at 16-17. However, as has been repeatedly held by the Montana Supreme Court, this sentence of § 27-2-205(1) does not apply to toll the statute of limitations and *only* applies to toll the five-year statute of repose. *Blackburn*, 951 P.2d at 9 ("Basic statutory construction and a plain reading of the statute compel the conclusion that the subsequent phrase 'this time limitation,' refers to and modifies the immediately preceding five-year" statute of repose.).

In *Runstrom v. Allen*, 2008 MT 281, ¶¶ 42-46, 345 Mont. 314, 191 P.3d 410, this Court addressed a similar argument by the plaintiff that the "failure to disclose" provision applied to toll the statute of limitations. This Court disagreed with the plaintiff's argument, reiterating that this provision applied only to toll the statute of repose. *Runstrom*, ¶ 46 (citing *Blackburn*, 951 P.2d at 7). The Court explained that the provision would only apply in a situation where a claim was filed more than 5 years after the injury "if the plaintiff could not through reasonable diligence have earlier discovered the injury and its cause *and* the defendant failed to disclose an act, error or omission upon which the action is based." *Runstrom*, ¶ 43 (emphasis in original). Because the statute of

repose was not implicated, the Court did not address the plaintiff's allegation that a "failure to disclose" had occurred. *Runstrom*, ¶ 46. Here, the statute of repose is not at issue and the Court similarly need not address Plaintiff's assertion that a "failure to disclose" has occurred in this case.

For this same reason, the Court need not address Plaintiff's arguments premised on *Wisher* or *Blackburn*. Plaintiff quotes *Wisher* as providing that "[a] 'failure to disclose facts, as opposed to affirmative, fraudulent concealment, is sufficient to toll the statute.'" Opening Br. at 18 (quoting *Wisher*, 849 P.2d at 160). Plaintiff fails to appreciate that this Court in *Blackburn* explicitly overruled this exact statement in *Wisher* to the extent it had been applied to an argument concerning the statute of limitations. The Court stated:

> By its express terms, however, the second sentence of § 27-2-205(1), MCA, tempers the doctrine of fraudulent concealment and states that a failure to disclose certain facts may be sufficient to toll the five-year statute of repose. Indeed, in *Wisher v. Higgs*, we clarified that, pursuant to the specific terms of § 27-2-205(1), MCA, simple "failure to disclose facts, as opposed to affirmative, fraudulent concealment, is sufficient to toll the statute." Therefore, both *Major* [*v. North Valley Hospital*, 233 Mont. 25, 759 P.2d 153 (1988),] and *Monroe* [*v. Harper*, 164 Mont. 23, 518 P.2d 788 (1974),] are overruled insofar as they suggest that an affirmative act by a health care provider is required to trigger the tolling provision of § 27-2-205(1), MCA.
>
> We also note that in both *Major* and *Monroe*, as well as in *Wisher*, this Court *inappropriately evaluated the tolling provision contained in the second sentence of § 27-2-205(1), MCA, in*

> *discussions regarding the statute of limitations in medical malpractice cases*. Having held in the present case that the second sentence of § 27-2-205(1), MCA, applies *exclusively* to toll the five-year statute of repose under certain limited circumstances, *we additionally overrule Major, Monroe, and Wisher, to the extent they suggest that the statutory provision may apply to toll the statute of limitations in medical malpractice cases*.

Blackburn, 951 P.2d at 10 (emphasis added) (internal citation omitted). Despite this unambiguous holding, Plaintiff cites *Blackburn* for the proposition that he "is not required to show an affirmative act by CHA to conceal its policy, he only has to show a failure to disclose facts" in order for the second sentence of § 27-2-205(1) to apply to toll the statute of limitations in his case. Opening Br. at 18. The above authority explicitly establishes that Plaintiff's "failure to disclose" argument has no bearing on the question squarely before this Court on appeal—whether Plaintiff filed his medical malpractice claim within the statute of limitations.

Before concluding this point, it must be noted that there has been no concealment or failure to disclose in this case. Although none of this evidence need be considered when deciding the issues on appeal, Plaintiff's evidence does not stand for the proposition for which he has introduced it—that CHA concealed or failed to disclose a policy concerning the operation of the ultrasound equipment.

First, Plaintiff claims that the Hospital Defendants submitted a "misleading" affidavit from JoEllen Villa, Chief Executive Officer of CHA, concerning the availability of the ultrasound machine. Opening Br. at 17. Although Plaintiff does not cite to the affidavit on appeal (instead citing to Dr. Mercer's deposition that does not discuss the affidavit), Plaintiff provided the affidavit in support of his opposition to the Hospital Defendants' Motion before the district court. (*See* Doc. 34 at 1-2, 24-32.) The affidavit establishes that a certified ultrasound technician and a board-certified radiologist were available to perform an ultrasound at CHA on January 25-26, 2017, provides the times each were available, describes how an ultrasound could be ordered, and describes how an ultrasound could be obtained at any time that either the certified ultrasound technician or the board-certified radiologist were not physically at CHA. (Doc. 34 at 27-30, 32.) The only misleading statements relating to the affidavit are Plaintiff's descriptions of its content.

Second, Plaintiff claims that Dr. Mercer established that CHA has a "policy" that prohibited him from providing an ultrasound. Plaintiff cites to various places in Dr. Mercer's deposition testimony to support this statement. Opening Br. at 17-18. However, the deposition transcript establishes no more than that Dr. Mercer "think[s]" CHA had a "policy" requiring a "technician" to operate the ultrasound, but that "[i]t depends on who you ask[ ]." (Doc. 23

at 10; Doc. 34 at 8.) Dr. Mercer, who is not a CHA employee, did not establish the existence of any "policy" at CHA in his deposition.

Based solely on the above, Plaintiff claims the Hospital Defendants failed to disclose or otherwise concealed information that was necessary for him to ascertain that he was injured as a result of the lack of an ultrasound following his surgery. Plaintiff's "discovery" of the "policy" at CHA does not change the date that his claim accrued because he knew he did not receive an indicated ultrasound on January 25, 2017, was informed this was because it was unavailable, and knew that this failure could have caused his injury no later than January 27, 2017. Moreover, even if Plaintiff's assertions were factually correct, they would be irrelevant to this appeal because the "failure to disclose" provision of § 27-2-205(1) does not apply to the statute of limitations issue before the Court.

3. Even if Plaintiff's claims sound in ordinary negligence, they are barred by the three-year statute of limitations applicable to such claims.

Plaintiff's argument that he timely filed his claims under the statute of limitations applicable to ordinary negligence claims is similarly unavailing. The statute of limitations on a negligence claim is three years. *See*, Mont. Code Ann. § 27-2-204(1). The statute of limitations on a negligence claim begins to run when all elements of the cause of action are in existence. *Kitchen Krafters*

v. Eastside Bank, 242 Mont. 155, 161-62, 789 P.2d 567, 571 (1990) *overruled on other grounds by Busta v. Columbus Hosp.*, 276 Mont. 342, 916 P.2d 122 (1996). A plaintiff in a negligence action must prove the existence of a duty, breach of that duty, causation, and damages. *Kitchen Krafters*, 789 P.2d at 571. Here, taking the facts of the Amended Complaint as true for the purposes of this Motion, Hospital Defendants owed Plaintiff a duty to provide an ultrasound to him on January 25, 2017, Hospital Defendants breached that duty to Plaintiff on January 25, 2017, and the breach caused Plaintiff to lose a testicle on January 27, 2017. As a result, all elements of Plaintiff's claim were in existence no later than January 27, 2017, and his cause of action accrued on that date. Therefore, the statute of limitations ran three years later on January 27, 2020, over one year and three months before Plaintiff filed his Amended Complaint on April 30, 2021.

Further, the discovery doctrine applicable to the three-year statute of limitations would not toll the running of the statute in Plaintiff's case. The discovery doctrine applicable to the three-year statute of limitations is codified by Montana Code Annotated § 27-2-102(3), which provides that:

> The period of limitation does not begin on any claim or cause of action for an injury to person or property until the facts constituting the claim have been discovered or, in the exercise of due diligence, should have been discovered by the injury party *if*: (a) the facts constituting the claim are by their nature concealed or self-concealing; or

> (b) before, during, or after the act causing the injury, the defendant has taken action which prevents the injured party from discovering the injury or its cause.

(emphasis added). To avail himself of the tolling provisions of this statute, Plaintiff needed to allege that the facts of his claims were concealed or self-concealing, or that Hospital Defendants took affirmative actions to prevent him from discovering his injury or its cause. *See*, *Hartford v. GMC*, 2003 MT 156N, ¶¶ 9-11 (affirming summary judgment when plaintiff failed to alleged latent injury and further failed to alleged fraudulent concealment).

Here, the facts of Plaintiff's claims are not concealed or self-concealing. As discussed above, Plaintiff's Amended Complaint explicitly establishes that he knew the facts of his claim no later than January 27, 2017. Plaintiff's Amended Complaint establishes: (1) he was told he should have an ultrasound following his surgery on January 25, 2017, (2) he knew he did not receive one, (3) he was told he did not receive one because the ultrasound was unavailable, (4) an ultrasound completed on January 27, 2017, revealed his injury, and (5) his testicle was removed on January 27, 2017. (Doc. 16 ¶¶ 11-21.) For this reason, the statute of limitations would not be tolled by operation of § 27-2-102(3)(a).

Additionally, Plaintiff has not argued that the Hospital Defendants have taken any action to prevent him from discovering the above facts constituting

his claims such that the statute of limitations would be tolled by operation of § 27-2-102(3)(b). Although Plaintiff alleges "concealment" by CHA, he does not claim that there has been any concealment of the above-listed facts of his claims. Instead, he has ultimately alleged no more than that CHA did not tell him that it had a "policy" that was the reason he did not receive an ultrasound on January 25, 2017. Even if CHA failed to disclose a "policy," this would not amount to an action preventing Plaintiff from discovering that the cause of his injury was the lack of an ultrasound on January 25, 2017. Plaintiff has failed to allege that the Hospital Defendants took steps to ensure he did not discover the facts of his claims such that the statute would be tolled by § 27-2-102(3)(b). Because the discovery doctrine applicable to ordinary negligence claims does not apply, Plaintiff's claims are similarly barred by the three-year statute of limitations.[5]

VII. CONCLUSION

For the foregoing reasons, the Court should affirm the district court dismissing Plaintiff's Amended Complaint with prejudice.

[5] Again, the Hospital Defendants have omitted reference to the MMLP documents establishing the dates Plaintiff's claims were tolled by operation of § 27-6-702 because Plaintiff has presented no argument that this tolling provision would save his claims from dismissal.

DATED this 1st day of February, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11(4)(e), I certify that this Brief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count, calculated by Microsoft Office 365 is 7,352 words, excluding Certificate of Service and Certificate of Compliance.

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I, Elijah Laurel Inabnit, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 02-01-2022:

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