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United States Court of Appeals
Tenth Circuit

July 19, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JEFFREY ROBERTSON and WANPHEN ROBERTSON,

Plaintiffs - Appellants,

v.

IHC HEALTH SERVICES, d/b/a Utah Valley Regional Medical Center; CRAIG S. COOK, MD PC; CRAIG S. COOK, M.D.; UTAH VALLEY SPECIALTY HOSPITAL,

Defendants - Appellees.

No. 22-4046
(D.C. No. 2:19-CV-00053-JNP)
(D. Utah)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, **MORITZ**, and **ROSSMAN**, Circuit Judges.

This appeal arises from a federal lawsuit filed in 2019 by Plaintiffs-Appellants Jeffrey and Wanphen Robertson under the Utah Health Care Malpractice Act (UHCMA). The Robertsons alleged Defendants-Appellees IHC Health Services, Inc. d/b/a Utah Valley Regional

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Medical Center; Craig S. Cook, M.D., P.C.; Craig S. Cook, M.D.; and Utah Valley Specialty Hospital, Inc. (collectively Providers) committed medical malpractice when treating Mr. Robertson in 2014 and 2015.[1] Providers moved for summary judgment, contending the UHCMA's two-year statute of limitations barred the Robertsons' claims. The district court agreed and granted the motions.

The Robertsons now appeal, raising several subsidiary arguments supporting two primary claims of reversible error. First, the Robertsons maintain the district court erroneously determined their UHCMA claims accrued on March 9, 2015. Second, the Robertsons insist that even if the accrual date is March 9, 2015, the district court erroneously concluded the statute of limitations expired no later than December 20, 2017. Exercising jurisdiction under 28 U.S.C. § 1291, we discern no error and affirm.

BACKGROUND

I. Factual History

On September 4, 2014, Mr. Robertson experienced severe abdominal pain and sought treatment at the Utah Valley Regional Medical Center's (UVRMC) emergency department. A CT scan revealed acute pancreatitis

[1] The Robertsons' complaint also named Samer A. Saleh, M.D.; Matthew B. Sperry, M.D.; Kurt O. Bodily, M.D.; Thomas A. Dickinson, M.D.; and Tala'at Al-Shuqairat, M.D. as defendants, but these defendants were voluntarily dismissed in the district court and are not parties to this appeal.

and gallstones. Mr. Robertson was admitted to the Intensive Care Unit (ICU). He remained at UVRMC for two months. Between September and October 2014, Dr. Craig Cook—a general surgeon—operated on Mr. Robertson multiple times to remove necrotic material and abscesses, and to place abdominal drains.

In late October 2014, UVRMC discharged Mr. Robertson to Appellee Utah Valley Specialty Hospital, Inc. He remained there for about five months. Dr. Cook and his team from UVRMC followed up with Mr. Robertson during his stay.

In early March 2015, Utah Valley Specialty Hospital discharged Mr. Robertson to Salt Lake Regional Medical Center (SLRMC) for inpatient rehabilitation. Soon after Mr. Robertson arrived at SLRMC, a nurse accidentally displaced his gastronomy tube, and a physician later observed discharge coming from the associated area. This prompted a CT scan, which revealed significant abscesses in Mr. Robertson's abdomen. Mr. Robertson was then admitted to the ICU at SLRMC.

On March 9, 2015—a key date at issue in this appeal—Dr. Legrand Belnap performed surgery on Mr. Robertson to remove the necrotic portion of Mr. Robertson's pancreas and to drain the abscesses. In their depositions, the Robertsons described their March 9 conversations with Dr. Belnap. *See* App. at 102, 112-13. According to Mrs. Robertson, on March 9, Dr. Belnap

said her husband needed another surgery and would likely die without it. According to Mr. Robertson, after the operation that same day, Dr. Belnap said the previous physicians had performed the wrong surgery on Mr. Robertson—they should have removed his entire pancreas, not just ten percent of it.

II. Procedural History

At all times relevant to the Robertsons' federal action, the UHCMA required plaintiffs to satisfy several conditions precedent to filing a malpractice claim against a health care provider. *See* Utah Code §§ 78B-3-401 to -426 (West 2010). Because those procedural steps, and the Robertsons' efforts to satisfy them, relate to the issues on appeal, we discuss the prerequisites in some detail at the outset.

The UHCMA requires claimants to give prospective defendants ninety days' notice of their intent to commence a malpractice action. *Id.* § 78B-3-412(1)(a). When the Robertsons filed this case, the UHCMA also required claimants to obtain a "certificate of compliance" from the Utah Division of Occupational and Professional Licensing (DOPL) before suing a health care provider under the statute. *Id.* § 78B-3-412(1)(b). A certificate of compliance served as "proof that the claimant has complied with all conditions precedent" of the UHCMA. *See id.* § 78B-3-418(1)(b). To obtain a certificate of compliance, a claimant had to present their case to a DOPL prelitigation

panel, which decided if their claims had "merit" or "no merit." *Id*. §§ 78B-3-416(2)(a), 418(2)(a)(i). The DOPL would issue a certificate of compliance if the prelitigation panel determined a claim had "merit" and the "conduct complained of resulted in harm to the claimant." *See id*. § 78B-3-418(2)(a), (3). But if the panel determined a claim had "no merit," a claimant needed to present an additional "affidavit of merit" from their attorney and a health care provider stating there is a reasonable and meritorious cause for filing a malpractice action. *Id*. § 78B-3-423(1)-(2). As we later discuss, Utah law no longer requires a certificate of compliance before a plaintiff can pursue medical malpractice claims under the UHCMA. *See infra* Section III.B.3 (discussing *Vega* v. *Jordan Valley Med. Ctr., LP,* 449 P.3d 31, 35 (Utah 2019)).

The Robertsons twice attempted to obtain a certificate of compliance from DOPL. On August 18, 2016, the Robertsons, through prior counsel, filed a Notice of Intent to Commence Legal Action and a request for prelitigation panel review. App. at 82, 226. The DOPL issued an opinion of "no merit" on January 18, 2017 and notified the Robertsons' counsel to file affidavits of merit by March 30. *See id.* at 236. That same lawyer requested, and the DOPL granted, a 60-day extension. *See id.* at 237. The Robertsons did not meet that deadline and never filed the requisite affidavits. The

DOPL closed the matter on May 31, 2017, without issuing a certificate of compliance. *Id.* at 251.

On July 18, 2018, the Robertsons, represented by new counsel, sought to reopen the first prelitigation matter. *See id.* at 256-57. The DOPL refused but explained Mr. Robertson could restart the process. *See id.* at 248. On August 8, 2018, the Robertsons' counsel filed a second Notice of Intent to Commence Legal Action—this time with affidavits of merit. *Id.* at 258-80. About a week later, on August 16, counsel submitted a second request for a prelitigation review panel. *Id.* at 281-83. The DOPL then opened a new prelitigation matter. On November 28, the parties agreed to waive a prelitigation panel review hearing before the DOPL. *Id.* at 318-23. The DOPL issued a certificate of compliance on December 17, 2018.

On January 24, 2019, the Robertsons, invoking the diversity jurisdiction of the United States District Court for the District of Utah, sued Providers for medical malpractice under the UHCMA. The parties engaged in discovery for several years.

On January 19, 2022, Providers moved for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, arguing the UHCMA's two-year statute of limitations barred the Robertsons' medical malpractice action. App. at 80-92, 132-45. On May 6, after a hearing, the district court

granted summary judgment to Providers on all claims. *Id.* at 389-408 (the Order). This timely appeal followed.

DISCUSSION

The district court made two rulings particularly relevant to this appeal. First, the court found there was no genuine issue of material fact that the Robertsons' claims accrued (starting the two-year statute of limitations) on March 9, 2015. App. at 403. Second, after considering applicable tolling principles, the court concluded the two-year statute of limitations expired no later than December 20, 2017, making the Robertsons' federal action, filed on January 24, 2019, untimely. *See id.* at 407. The Robertsons challenge both rulings, contending their claims did not accrue on March 9, 2015, but even if they did, reversal is required because their federal lawsuit was timely filed. As we explain, the Robertsons' appellate arguments are unavailing.

I. Legal Standards

A. Standard of Review

"We review an order granting summary judgment de novo, giving no deference to the district court's decision and applying the same standards as the district court." *Carlile* v. *Reliance Standard Life Ins. Co.*, 988 F.3d 1217, 1221 (10th Cir. 2021). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and

the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). At the summary judgment stage, a district court must "view the evidence and make all reasonable inferences in the light most favorable to the nonmoving party." *N. Nat. Gas Co.* v. *Nash Oil & Gas, Inc.*, 526 F.3d 626, 629 (10th Cir. 2008).

A party moving for summary judgment—here, Providers—bears the initial burden of demonstrating the absence of a genuine dispute of material fact. *See Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323 (1986) ("Of course, a party seeking summary judgment always bears the initial responsibility of . . . identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file . . . which it believes demonstrate the absence of a genuine issue of material fact.") (quotation marks omitted). If a movant satisfies this burden, the nonmoving party—here, the Robertsons—"must set forth specific facts showing that there is a genuine issue for trial." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (internal quotation marks and citation omitted). "A fact is material if, under the governing law, it could have an effect on the outcome of the lawsuit. A dispute over a material fact is genuine if a rational jury could find in favor of the nonmoving party on the evidence presented." *Schneider* v. *City of Grand Junction Police Dep't*, 717 F.3d 760, 767 (10th Cir. 2013) (citation omitted).

B. The Utah Health Care Malpractice Act

The parties do not dispute the UHCMA is the state substantive law governing the Robertsons' malpractice claims. *See Elm Ridge Expl. Co.* v. *Engle*, 721 F.3d 1199, 1210 (10th Cir. 2013) ("A federal court sitting in diversity applies the substantive law of the state where it is located, including the state's statutes of limitations."). Two aspects of the UHCMA are at issue here—the statute of limitations and the statutory tolling provisions.

Under the UHCMA, a malpractice action must be "commenced within two years after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered the injury." Utah Code § 78B-3-404(1) (West 2010). According to the Utah Supreme Court, legal injury for purposes of the UHCMA refers to "(1) the physical injury, (2) the causal event of the injury, and (3) that negligence (a breach in the standard of care) caused the injury." *Jensen* v. *IHC Health Servs., Inc.*, 472 P.3d 935, 939 (Utah 2020). In other words, "legal injury" for UHCMA claims means "both 'discovery of injury and the negligence which resulted in the injury.'" *Id.* at 938 (quoting *Foil* v. *Ballinger*, 601 P.2d 144, 148 (Utah 1979)).

When it comes to what it means to become aware of a legal injury under the UHCMA, the Utah Supreme Court has set forth a kind of continuum, where "actual knowledge of negligence is not required," *Arnold*

v. *Grigsby*, 289 P.3d 449, 455 (Utah 2012), but "mere suspicion" of having received negligent medical treatment is not enough, *id.* at 454. Establishing a middle ground, the Utah Supreme Court has explained, "All that is necessary [for the statute of limitations to accrue] is that the plaintiff be aware of facts that would lead an ordinary person, using reasonable diligence, to conclude that a claim for negligence *may* exist." *Id.* at 455 (emphasis added); *see also Jensen*, 472 P.3d at 939 (explaining the UHCMA's statute of limitations begins to run "the moment when a patient first has knowledge or constructive knowledge of the facts underlying their malpractice claim—in other words, their legal injury").

The UHCMA's two-year statute of limitations is subject to statutory tolling. Recall, when the Robertsons were pursuing their malpractice action, the UHCMA still had a "certificate of compliance" requirement. *See* §§ 78B-3-412(1)(b), 416(2)(a). Under that procedure, filing a request for prelitigation panel review—the first step in obtaining a certification of compliance—tolled the two-year statute of limitations for filing a lawsuit until the later of:

- 60 days following the issuance of a certificate of compliance,
- 60 days following an opinion by the prelitigation panel, or
- 180 days after the filing of the request for prelitigation panel review.

See id. § 78B-3-416(3).

II. The District Court Correctly Determined the Robertsons' UHCMA Action Accrued on March 9, 2015.

The Robertsons make two arguments challenging the district court's conclusion that their UHCMA claims accrued on March 9, 2015. First, they insist a genuine dispute of material fact exists about when they discovered their legal injury. Second, they claim for the first time on appeal that, even if March 9 is the correct accrual date, the two-year limitations period should have been tolled under Utah's mental incapacity statute, Utah Code § 78B-2-108 (West 2010). We discern no error.

A. There is no genuine dispute of material fact about when the Robertsons' cause of action accrued; it was March 9, 2015.

The district court concluded Providers "marshal[ed] significant evidence that [the Robertsons] became aware of their legal injury . . . during their conversation with Dr. Belnap on March 9, 2015." App. at 397. Explaining its reasoning, the court pointed to deposition testimony in the summary judgment record from Mr. Robertson, Mrs. Robertson, and Steven Clarke, a witness designated by the Robertsons. *See id.* at 397-99. The district court concluded,

> First, the Robertsons knew of Mr. Robertson's physical injury because Dr. Belnap informed him that he faced likely death if Dr. Belnap hadn't repaired the injury. Second, the Robertsons knew that Mr. Robertson's care at Utah Valley Regional Medical Center and Utah Valley Specialty Hospital caused the injury because Dr. Belnap inquired as to who had performed the prior surgeries on Mr. Robertson and indicated that Mr. Robertson's prior improper care caused the injury. Third, the Robertsons knew that negligence may have caused the injury based on Dr. Belnap's statement that

> the doctors at Utah Valley Specialty Hospital performed the wrong surgery.

Id. at 398-99. The court then considered, and rejected, the Robertsons' arguments that: (1) Providers mischaracterized deposition testimony about when the Robertsons discovered their legal injury, and (2) the Robertsons' sworn declarations created a genuine dispute of material fact about whether they discovered their legal injury on March 9. *See id*. at 399-403.

On appeal, the Robertsons insist the district court erred because "there are a significant number of genuine issues of material fact which remain unknown and undetermined, all of which are critical for any determination that Plaintiffs' legal malpractice claim accrued such that the statute of limitations expired prior to [January 24, 2019]." Aplt. Br. at 25. To that end, the Robertsons assert seven alleged factual disputes:

1. When the Robertsons learned of their legal injury (separate and distinct from Mr. Robertson's need for additional surgery);
2. When Dr. Belnap formed his opinion that Mr. Robertson's prior surgeon performed the wrong surgery;
3. When Dr. Belnap told Mr. Robertson that his prior physicians performed the wrong surgery;
4. When Mr. Robertson was sent home from the hospital;
5. When Mr. Robertson resumed conversations with Mr. Clarke;
6. When Mr. Clarke learned that Mr. Robertson's original physician failed to follow the standard operating procedure; and
7. When Mr. Robertson "was looking into filing a case."

Id.

The Robertsons' appellate arguments focus on two categories of evidence—deposition testimony and their declarations—which they claim show summary judgment was granted to Providers in error. *See id.* at 24-33.[2] We are not persuaded. On the evidence presented, Providers carried their burden on summary judgment to show there is no genuine dispute of material fact that March 9, 2015, was the accrual date for the Robertsons' UHCMA claim.

1. The evidence presented at summary judgment fails to show a genuine issue of material fact about when the Robertsons discovered their legal injury.

On de novo review, we are convinced the district court correctly determined—primarily based on the Robertsons' own deposition testimony—the Robertsons discovered their legal injury on March 9, 2015—the day Dr. Belnap performed emergency surgery on Mr. Robertson. In their depositions, the Robertsons described conversations with Dr. Belnap on that date. Mrs. Robertson testified she spoke with Dr. Belnap before Mr.

[2] We note the Robertsons do not contend on appeal that the district court employed an erroneous understanding of what constitutes legal injury under Utah law. Nor would such an argument be successful. The district court correctly concluded the two-year statute of limitations for a medical malpractice claim under the UHCMA begins once a plaintiff has discovered their "legal injury," meaning when they become "aware of facts that would lead an ordinary person, using reasonable diligence, to conclude that a claim for negligence may exist." App. at 396-97 (quoting *Jensen*, 472 P.3d at 939, and *Arnold*, 289 P.3d at 455).

Robertson's surgery, and he "explained to me that we need to give him another surgery because, if we don't, he will die within one week, because they did not get rid of his pancreas, and the pancreas is eating itself right now." App. at 112. Mrs. Robertson further testified she and Mr. Robertson then discussed Dr. Belnap's comments "for almost an hour" while Dr. Belnap prepared the surgery room and "then we agreed to have [the] surgery." *Id.*

In his deposition, Mr. Robertson testified that on March 9—after the surgery—Dr. Belnap told him that his prior surgeon "performed the wrong surgery and he said that[] '[i]f this surgery didn't happen today, you would have been deceased today.'" *Id.* at 102. According to Mr. Robertson, Dr. Belnap told him that his prior providers "should have removed the entire pancreas, not [only] ten percent." *Id.* at 103. Mr. Robertson recalled that on March 9, when he told Dr. Belnap the name of the surgeon who had operated on him the first time, "[Dr. Belnap] shook his head and was disgusted and left the room." *Id.* at 102. Mrs. Robertson likewise testified she understood from conversations with Dr. Belnap on March 9 that he "was critical or unhappy with the prior care that [Mr. Robertson] had received." *Id.* at 112-13. Mr. Robertson testified, "You can't take those things out of my mind." *Id.* at 102.

Based on the Robertsons' deposition testimony, the district court correctly determined Providers demonstrated there was no genuine dispute that, on March 9, 2015, the Robertsons discovered their legal injury—that is, they had been made "aware of facts that would lead an ordinary person, using reasonable diligence, to conclude that a claim for negligence *may* exist." *Arnold*, 289 P.3d at 455 (emphasis added). The summary judgment burden then shifted to the Robertsons, as nonmovants, to "set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 248. The Robertsons failed to meet this burden.

"A dispute over a material fact is genuine if a rational jury could find in favor of the nonmoving party on the evidence presented." *Schneider*, 717 F.3d at 767 (citation omitted). On this score, the Robertsons fail to "identify specific facts that show the existence of a genuine issue of material fact"—in other words, evidence in the record to support a finding they did not discover their legal injury on March 9. *GeoMetWatch Corp.* v. *Behunin*, 38 F.4th 1183, 1220 (10th Cir. 2022) (emphasis omitted) (quoting *Clinger* v. *N.M. Highlands Univ., Bd. of Regents*, 215 F.3d 1162, 1165 (10th Cir. 2000)). The Robertsons argue "on March 9, 2015, Mrs. Robertson did not learn of any legal injury from Dr. Belnap" and "[t]here is no evidence in the record that Dr. Belnap addressed any of Mr. Robertson's prior care or surgery on March 9." Aplt. Br. at 28, 29. But their own depositions show

otherwise. The Robertsons' deposition testimony confirms Dr. Belnap told the Robertsons on March 9 that Mr. Robertson needed potentially life-saving surgery because of mistakes allegedly made by his previous medical provider. *See* App. at 102, 112. Naked contradictions of unchallenged deposition testimony—what the Robertsons advance here—will not carry the non-movant's burden on summary judgment. *See Genzer* v. *James River Ins. Co.*, 934 F.3d 1156, 1160 (10th Cir. 2019) ("The nonmovant, however, cannot defeat summary judgment by relying on 'ignorance of the facts, on speculation, or on suspicion.'" (quoting *Conaway* v. *Smith*, 853 F.2d 789, 794 (10th Cir. 1988))).

Contrary to the Robertsons' assertions, Mr. Clarke's deposition testimony does not create a genuine issue of material fact about the accrual date. *See* Aplt. Br. at 25, 33. Mr. Clarke testified he conversed with Mr. Robertson about the medical care provided to him. The record confirms Mr. Clarke spoke with Mr. Robertson sometime after the surgery on March 9. According to the Robertsons, however, the record fails to establish exactly *when* those conversations occurred. Those factual issues—even if disputed—are not material. "An issue of fact is 'material' if under the substantive law it is essential to the proper disposition of the claim." *Adler* v. *Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998) (citing *Anderson*, 477 U.S. at 248). Here, Mr. Clarke's testimony does not call into

question that the Robertsons *already discovered* their legal injury on March 9.

2. The Robertsons' declarations do not show a genuine issue of material fact about when they discovered their legal injury.

The Robertsons each submitted a declaration stating they were unaware of any legal claim for medical malpractice under Utah law until August 18, 2016. *See* App. at 178, 182. The district court explained it did not view the Robertsons' declarations as creating a genuine issue of material fact about when they discovered their legal injury. *See id.* at 401-02. The district court reasoned "[t]he declarations only swear that the Robertsons discovered their legal claim—not the facts underlying their legal claim—[on August 18, 2016]." *Id.* at 402. The district court also found the declarations "fail under the sham affidavit doctrine" and disregarded them "as sham affidavits, submitted solely for the purpose of attempting to establish genuine issues of material fact as to when Plaintiffs discovered their legal injury." *Id.* at 401, 403. We agree with the district court's conclusion the Robertsons' declarations do not create a genuine issue of material fact about the date they discovered their legal injury.[3]

[3] As a general matter, "[w]e review the district court's decision to exclude affidavits at the summary judgment stage for abuse of discretion." *Law Co.* v. *Mohawk Constr. & Supply Co.*, 577 F.3d 1164, 1169 (10th Cir. 2009). To determine whether an affidavit or declaration creates a sham issue of fact, courts must consider whether

The UHCMA's statutory discovery rule is triggered when a plaintiff first has actual or constructive knowledge of the relevant facts supporting their cause of action. *See Arnold*, 289 P.3d at 455. The summary judgment record does not support a conclusion—or justify a reasonable inference—that the Robertsons discovered the relevant facts underlying their medical malpractice action on August 18, 2016, the date their counsel filed and served a Notice of Intent to Commence a legal malpractice action and a request for prelitigation panel review to the DOPL. On this record, the date of filing cannot also be the date of discovery. As the district court correctly pointed out, "Plaintiffs' counsel offered no affidavits or other evidence indicating when the Robertsons became aware of the facts underlying their legal claim, if not during the conversation with Dr. Belnap." App. at 399 n.5.

> (1) the affiant was cross-examined during his earlier testimony; (2) the affiant had access to the pertinent evidence at the time of his earlier testimony or whether the affidavit was based on newly discovered evidence; and (3) the earlier testimony reflects confusion which the affidavit attempts to explain.

Id. (quoting *Ralston* v. *Smith & Nephew Richards, Inc.*, 275 F.3d 965, 973 (10th Cir. 2001)). Because we conclude the Robertsons' declarations, even if legitimate, fail to establish a genuine issue of material fact, we need not also determine if the district court abused its discretion by excluding them under the sham affidavit doctrine.

B. The Robertsons have not shown reversible error based on alleged mental incompetence.

Even if March 9, 2015 is the correct date of accrual, the Robertsons maintain "the statute of limitations had to be tolled until Mr. Robertson was mentally competent to actually comprehend his legal rights and act on them." Aplt. Br. at 33-34. The Robertsons claim the district court erred by "finding Mr. Robertson was actually capable of comprehending and acting on his legal rights on March 9, 2015." *Id.* at 34. They insist tolling was required under Utah Code § 78B-2-108, which says a statute of limitations "may not run" while an individual is mentally incompetent. We are not persuaded.

Providers contend the Robertsons' § 78B-2-108 tolling argument is subject to plain error review. We agree. Nowhere in their Opening Brief do the Robertsons "cite the precise references in the record where" an argument for mental incompetency tolling under § 78B-2-108 "was raised and ruled on." *See* 10th Cir. R. 28.1(A). Nor could we locate anything in the record to suggest the Robertsons advanced an argument for tolling under § 78B-2-108 in the district court. This argument is therefore forfeited. *See Richison* v. *Ernest Grp., Inc.*, 634 F.3d 1123, 11228 (10th Cir. 2011) (explaining where a "theory simply wasn't raised before the district court, we usually hold it forfeited" and while we will entertain forfeited theories

on appeal, we will only reverse on that basis if the party seeking review can show plain error).

To show plain error, the Robertsons "must establish the presence of (1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Hayes* v. *SkyWest Airlines, Inc.*, 12 F.4th 1186, 1201 (10th Cir. 2021) (citation omitted). "The burden of establishing plain error lies with the appellant." *Somerlott* v. *Cherokee Nation Distribs., Inc.*, 686 F.3d 1144, 1151 (10th Cir. 2012).

An error is plain when it is "clear or obvious" under "well-settled law." *United States* v. *Trujillo-Terrazas*, 405 F.3d 814, 818 (10th Cir. 2005) (quoting *United States* v. *Whitney*, 229 F.3d 1296, 1309 (10th Cir. 2000)). Under Utah law, "[a]n individual may not bring a cause of action while the individual is: (a) under 18 years old; or (b) mentally incompetent without a legal guardian." Utah Code § 78B-2-108(1) (West 2023). "During the time that an individual is underage or mentally incompetent, the statute of limitations for a cause of action . . . may not run." *Id.* § 78B-2-108(2). The Utah Supreme Court "has held that section 78B-2-108 is intended 'to relieve from the strict time restrictions people who are unable to protect their legal rights because of an *overall* inability to function in society.'" *Martinez* v. *Dale*, 476 P.3d 136, 143 (Utah Ct. App. 2020) (quoting

O'Neal v. *Div. of Family Servs.*, 821 P.2d 1139, 1142 (Utah 1991)). Demonstrating mental incompetence under § 78B-2-108 requires establishing the individual could not manage their business affairs or estate, or comprehend their legal rights or liabilities. *See id.*

Nothing in § 78B-2-108 says a district court has an obligation to invoke mental incapacity tolling *sua sponte*. And the Robertsons have pointed us to no authority imposing such a duty. The case the Robertsons primarily rely on, *Martinez*, suggests the burden is on the party seeking tolling to offer some evidence demonstrating mental incompetence. *See id.* (finding plaintiff's affidavit filed in support of her mental incompetence-based tolling argument was "sufficient to establish a genuine issue of material fact" about whether § 78B-2-108 tolling applied to plaintiff's limitations period) (citation omitted). Under the circumstances, we discern no error—let alone a plain error—in the district court's failure to invoke § 78B-2-108. *Trujillo-Terrazas*, 405 F.3d at 818; *see United States* v. *Gantt*, 679 F.3d 1240, 1246 (10th Cir. 2012) ("Because all four requirements [of plain error] must be met, the failure of any one will foreclose relief and the others need not be addressed.").

To the extent the Robertsons preserved an argument for reversal based on Mr. Robertson's alleged mental incompetence on March 9, 2015, we reject it. In its Order, the district court observed, "[a]lthough not

included in their briefing," the Robertsons' counsel raised arguments at the summary judgment hearing about their clients' ability to comprehend Dr. Belnap on March 9, 2015. *See* App. at 399 n.5. According to the district court, counsel had "pointed out that the conversations with Dr. Belnap happened during a highly stressful moment, just before and after Mr. Robertson's surgery. . . . [and] argued that both Mr. and Ms. Robertson were unlikely to be in a clear state of mind at the time." *Id.* The district court was unpersuaded, however, because "Plaintiffs offered no evidence that the Robertsons were unable to comprehend the views expressed by Dr. Belnap during their conversations with him." *Id.* We agree.

Like the district court, we "recognize[] the difficult situation faced by the Robertsons" on March 9. *Id.* But, under the circumstances, the district court correctly concluded there is "no genuine dispute of material fact as to whether the Robertsons understood Dr. Belnap" on March 9, so as to toll the statute of limitations. *Id.* The nonmovant must "set forth specific facts showing that there is a genuine issue for trial" to survive summary judgment. *Anderson*, 477 U.S. at 248. Here, the Robertsons did not carry their burden. The summary judgment record contains no evidence that, on

March 9, Mr. Robertson could not comprehend Dr. Belnap or otherwise understand his legal rights.[4]

Accordingly, as the district court correctly concluded, there is no genuine issue of material fact that the Robertsons' UHCMA claims accrued on March 9, 2015—the date they discovered their legal injury.

III. The District Court Correctly Determined the Two-Year Statute of Limitations Expired Before The Robertsons Filed Their Federal Complaint on January 24, 2019.

The Robertsons next contend, even if the two-year statute of limitations began to run on March 9, 2015, it did not expire before they filed their federal complaint on January 24, 2019. We begin by describing the district court's decision, which considered the effect of the UHCMA's statutory tolling provisions on calculating the Robertsons' two-year limitations period. We then discuss, and reject, the Robertsons' arguments for reversal.

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[4] We observe the Robertsons' opening brief frames their argument for mental incompetence tolling only with regard to Mr. Robertson. *See* Aplt. Br. at 33 (arguing the statute of limitations was "Tolled Until Mr. Robertson was Mentally Competent to Comprehend his Legal Rights"). In the reply brief, the Robertsons also suggest Mrs. Robertson had "limited ability to understand and communicate with Dr. Belnap" because Mrs. Robertson is a native Thai speaker. *See* Reply Br. at 14. We decline to consider any argument for tolling based on *Mrs. Robertson's* mental competence because it was not raised in the opening brief. *See, e.g.*, *Tran* v. *Trs. of State Colls. in Colo.*, 355 F.3d 1263, 1266 (10th Cir. 2004) ("Issues not raised in the opening brief are deemed abandoned or waived.") (citation omitted).

A. Additional Factual Background

Using the March 9, 2015 date of accrual, the district court considered the Robertsons' arguments that "the proper application of various tolling statutes renders their January 24, 2019 complaint timely." *See* App. at 403-04. The district court began by observing that, absent any tolling, the Robertsons' two-year statute of limitations would have run on March 9, 2017—731 days after the date of discovery.[5] *Id.* at 404. On August 18, 2016, the Robertsons filed for prelitigation review to the DOPL, and the district court determined this request tolled the running of their two-year statute of limitations under Utah Code § 78B-3-416(3)(a). *See id.* According to the district court, when statutory tolling kicked in on this date, 528 days of the Robertsons' 731-day limitations period had already run. *Id.* This meant the Robertsons had 203 days remaining in which to commence their medical malpractice action under the UHCMA—unless they took some other action to further toll the statute of limitations.

The district court then considered the three tolling scenarios outlined in the UHCMA relating to prelitigation procedures.[6] The court determined the

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[5] The district court noted that, in this case, "two years is equivalent to 731 days because 2016 was a leap year." App. at 404 n.8.

[6] Recall, § 78B-3-416(3)(a) outlines three tolling scenarios, depending on how prelitigation proceedings unfold before the DOPL. Under § 78B-3-416(3)(a) in effect at the time relevant to this action, filing a request for prelitigation panel review tolled the UHCMA's two-year limitations period until the later of either: 60 days following the issuance of a certificate of

latest date on which the statutory tolling period could end—thus triggering the running of the Robertsons' remaining 203 days—was March 19, 2017. *Id.* at 405. However, the court also considered an even later date—when DOPL closed the case—to assess the timeliness of the Robertsons' federal complaint. The court explained, "even if the court construes the facts generously for the Plaintiffs and extends the tolling until May 31, 2017—the date on which DOPL declined to issue a certificate of compliance and closed the case—Plaintiffs' claims still fail."[7] *Id.* The Robertsons needed to have filed their lawsuit or have taken some action to further toll the statute of limitations by December 20, 2017 (203 days after May 31, 2017). *See id.* The Robertsons took no such action. Accordingly, the district court determined the UHCMA's two-year statute of limitations barred the Robertsons' lawsuit, which was not filed until January 24, 2019. *See id.* at 407.

The district court observed that after the two-year statute of limitations expired, the Robertsons "retained new counsel[who] made a valiant effort to revive the Robertsons' claims." *Id.* at 406. The Robertsons' new counsel filed a

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compliance, 60 days following an opinion by the prelitigation panel, or 180 days after the filing of the request for prelitigation panel review. *See* Utah Code § 78B-3-416(3)(a)(i)-(ii) (West 2010).

[7] For purposes of our review, we consider statutory tolling to have ended on May 31, 2017 (rather than March 19, 2017) because that date is more favorable to the Robertsons.

second Notice of Intent to Commence Action on August 8, 2018, and a new request for prelitigation panel review to the DOPL on August 16, 2018. *Id.* As a general matter, a request for prelitigation panel review qualifies as an event which tolls the running of the UHCMA's two-year statute of limitations. But in this case, as the district court explained, it was too little, too late. By the time new counsel filed their second prelitigation panel request in August 2018, the applicable limitations period had already expired.

B. Analysis

The Robertsons advance several arguments challenging the district court's application of the UHCMA's two-year statute of limitations and tolling provisions. First, Providers waived their statute of limitations defense. Second, certain prelitigation proceedings before the DOPL either restarted or further tolled their applicable limitations period. Third, the Utah Supreme Court's decision in *Vega* v. *Jordan Valley Medical Center*, 449 P.3d 31 (Utah 2019)—which found unconstitutional the UHCMA's certificate of compliance requirement—applies retroactively to save their claims. We address, and reject, each argument.

1. The district court correctly concluded Providers did not waive their statute of limitations defense.

The Robertsons argue Providers waived their statute of limitations defense because they a) failed to assert it during the prelitigation process;

b) stipulated to dismissing a prelitigation panel review hearing; and c) litigated in the district court for three years before claiming the statute of limitations had run.

a. Providers did not waive their statute of limitations defense by failing to assert it before the DOPL.

On appeal, the Robertsons contend a party may waive their right to pursue a statute of limitations defense by failing to assert it during prelitigation proceedings before the DOPL. Aplt. Br. at 46-47 (citing *Gygi* v. *St. George Surgical & Med. Ctr.*, No. 2:05CV505DAK, 2005 WL 3536275, at *10 (D. Utah Dec. 22, 2005)). The district court rejected this argument, and so do we.

The Robertsons fail to identify, nor have we found, any authority to suggest a party waives a statute of limitations defense in federal litigation unless it is advanced in the prelitigation process before the DOPL. As the district court correctly explained, the prelitigation process before the DOPL focuses only on the *substance* of a prospective plaintiff's malpractice claims to determine whether they have merit and caused harm to the claimant. *See* App. at 396 n.4 (citing Utah Admin Code r. 156-78B-14(1)). The DOPL is not tasked with determining the potential applicability of any statute of limitations.

The Robertsons' reliance on *Gygi*, an unpublished case from the District of Utah, is inapposite. *Gygi* simply stands for the proposition—irrelevant here—that a party's participation in prelitigation proceedings with the DOPL demonstrates an intent by that party to waive their contractual right to arbitrate a dispute. *See, e.g.*, *Gygi*, 2005 WL 3536275, at *4 (holding that a party "waived his right to invoke the [arbitration clause in an agreement] by fully participating in the pre-litigation hearing before moving to compel arbitration").

The Robertsons also argue an affirmative defense may be waived even when a defendant has properly pleaded the defense in their answer.[8] Aplt. Br. at 47 (citing *Cortez* v. *Wal-Mart Stores, Inc.*, 460 F.3d 1268, 1276 (10th Cir. 2006)). In support, the Robertsons rely on *Cortez*, where a panel of this court held a defense preserved in a litigant's answer may yet still be waived in later litigation under the final pretrial order rule reflected in Federal Rule of Civil Procedure 16(e). *Cortez*, 460 F.3d at 1276-77 (explaining "issues not contained in the resulting pretrial order were not part of the case before the district court," even where a party raised the issue in their

[8] The Robertsons did not advance this contention in the district court. Providers do not argue forfeiture on appeal and respond on the merits, so we exercise our discretion to consider the argument.

earlier answer to a complaint). There was never a final pretrial conference or pretrial order in the district court, so *Cortez* has no relevance here.

b. Providers did not intentionally relinquish their statute of limitations defense.

After the Robertsons filed their second request for prelitigation panel review in August 2018, the parties agreed by written stipulation to waive a pre-litigation hearing panel before the DOPL, as permitted by Utah law and administrative rules.[9] *See* App. at 318-23. According to the Robertsons, this waiver means Providers gave up their right to later pursue their statute of limitations defense in federal court. *See* Aplt. Br. at 47-48. There is no merit to the Robertsons' position.[10]

The Robertsons acknowledge "[a] waiver is an 'intentional relinquishment or abandonment of a known right,'" yet they fail to identify where the referenced stipulations state or even suggest Providers intended to waive their statute of limitations defense by foregoing a pre-litigation hearing

[9] *See* § 78B-3-416(3)(e)(i) ("The claimant and any respondent may agree by written stipulation that no useful purpose would be served by convening a prelitigation panel under this section."); Utah Admin. Code r. 156-78B-13(1) (2023) ("A full prelitigation panel hearing is not required if the parties enter into a stipulation that no useful purpose would be served by convening a panel hearing as to any or all respondents . . . .").

[10] Again, we do not see where the Robertsons made this argument in the district court. Providers do not argue forfeiture and, instead, respond on the merits. Even if the Robertsons had preserved the argument, it is unavailing, as we explain.

panel before the DOPL. *See* Aplt. Br. at 46 (citing *State* v. *Williams*, 462 P.3d 832, 840 (Utah Ct. App. 2020)). Nor do we see any language in the stipulations that might support the Robertsons' waiver argument. *See* App. at 318-23.

c. Providers did not waive their limitations defense through their litigation conduct.

Finally, the Robertsons insist Providers should be estopped from prevailing on a statute of limitations defense because Providers "prejudiced Plaintiffs" by "engag[ing] in active litigation for over three years" before ever contending the malpractice action was time barred. *See* Aplt. Br. at 48. We are not persuaded.

Equitable estoppel "prevent[s] a party from taking a legal position inconsistent with an earlier statement or action that places his adversary at a disadvantage." *Spaulding* v. *United Transp. Union*, 279 F.3d 901, 909 (10th Cir. 2002) (alteration in original) (quoting *Penny* v. *Giuffrida*, 897 F.2d 1543, 1545 (10th Cir. 1990)). We perceive no basis to apply this principle here. Providers' answers to the Robertsons' underlying complaint asserted affirmative defenses based on the UHCMA's statute of limitations, as required by Federal Rule of Civil Procedure 8(c)(1).[11] None of the cases cited by the

[11] *See* App. at 37 (reflecting Appellee UVRMC including a limitations affirmative defense in its answer); *see also id.* at 51 (same with respect to Appellee Utah Valley Specialty Hospital); *id.* at 75 (same with respect to Appellees Craig S. Cook, M.D., P.C. and Craig S. Cook M.D.).

Robertsons suggest anything more was required for Providers to move for summary judgment on statute of limitations grounds.[12]

2. The district court correctly concluded the Robertsons' second effort in August 2018 to obtain a certificate of compliance from the DOPL did not trigger a new two-year statute of limitations period.

The Robertsons urge reversal "for the simple reason that DOPL made the determination in 2018 that the Plaintiffs' second Notice of Intent was timely filed." Aplt. Br. at 43. The Robertsons point to a letter dated August 20, 2018, from the DOPL that approved Mr. Robertson's second request for prelitigation panel review. *Id.* at 45 (citing App. at 285). In the referenced letter, DOPL informed Mr. Robertson his request for prelitigation panel review had been accepted, and the request operated to toll applicable statutes of limitations under the UHCMA. *See* App. at 285 ("The Request tolls the applicable statute of limitations until 60 days after the [DOPL] issues the opinion of the pre-litigation panel."). The Robertsons contend they relied on the DOPL's representation about tolling, and the district court should have

[12] The Robertsons cite *Kimball Glassco Residential Center, Inc.* v. *Shanks*, where the Mississippi Supreme Court rejected a plaintiff's attempt to equitably estop defendants from relying on a statute of limitations defense where the defendants gave plaintiff notice of the defense and acted reasonably to pursue it. 64 So. 3d 941, 947-48 (Miss. 2011). The Robertsons also cite *Central Florida Investments, Inc.* v. *Parkwest Associates*, where the Utah Supreme Court addressed when a party's substantial participation in litigation may waive that party's contractual right to compel arbitration. 40 P.3d 599 (Utah 2002). Neither authority supports reversible error here.

assessed the timeliness of their complaint accordingly. *See* Aplt. Br. at 43-46. Like the district court, we reject the Robertsons' arguments.

To be sure, the UHCMA provides for statutory tolling after a party has filed a request for prelitigation panel review. But the Robertsons advance no legal support for the argument that their already-expired statute of limitations was revived because they initiated a second round of prelitigation proceedings in the DOPL. As the district court explained:

> Consider the implications. Plaintiffs' position would allow a lawyer to refile a closed medical malpractice case any time after DOPL closed the prelitigation proceedings without issuing a certificate of compliance (even if several years had passed), obtain a certificate of compliance, and claim that the statute of limitations did not restart until sixty days following that certificate of compliance. Such a position runs entirely counter to the purposes of the Utah Health Care Malpractice Law, which include "provid[ing] a reasonable time in which actions may be commenced against health care providers while limiting that time to a specific period for which professional liability insurance premiums can be reasonably and accurately calculated." Utah Code § 78B-3-402(3).

App. at 406-07. We endorse the district court's sound analysis. By the time the Robertsons filed their second request for prelitigation panel review on August 16, 2018, the statute of limitations on their claim had already expired, and any new efforts before the DOPL did not revive the already-expired statute of limitations.

3. The Robertsons waived their argument that the district court should have applied the *Vega* decision retroactively to their UHCMA claims.

The Robertsons contend the district court erred by not giving retroactive effect to the Utah Supreme Court's decision in *Vega*, 449 P.3d 31. According to the Robertsons, this error led to the court's mistaken conclusion that the statute of limitations on their claims expired no later than December 20, 2017. Providers urge affirmance, contending *Vega* has no application to the Robertsons' claims and does not apply retroactively.

In *Vega*, the Utah Supreme Court found the UHCMA's certificate of compliance requirement unconstitutional because it required the DOPL to exercise a core judicial function. *See id.* at 35, 39 (concluding §§ 78B-3-412(1)(b) and 78B-3-423 are facially unconstitutional). The Utah Supreme Court struck down the UHCMA sections requiring a plaintiff to obtain a certificate of compliance before filing a medical malpractice action. *See id.* at 39. In adjudicating Providers' motions for summary judgment, the district court observed that, when the Robertsons filed their federal complaint, the UHCMA still required plaintiffs to obtain a certificate of compliance from the DOPL, but after *Vega*, plaintiffs were no longer required to do so. *See* App. at 392 & n.2.

In deciding Providers' motions for summary judgment, the district court rejected the Robertsons' argument that *Vega* rendered their UHCMA

claims timely. The district court explained "[a]t oral argument, Plaintiffs' counsel suggested that the fact that the Utah Supreme Court later struck down the certificate of compliance requirement rendered it unfair for the court to apply the statute of limitations to the Robertsons." *Id.* at n.2. Rejecting the Robertsons' argument, the district court found "*Vega* does not control the outcome here" for two reasons. *See id.* First, the court reasoned it "cannot ignore the statute of limitations based on a holding—which the Utah Supreme Court did not apply retroactively—made after the statute of limitations had run." *Id.* Second, the court explained "the Robertsons had the opportunity to obtain a certificate of compliance within the statute of limitations by submitting the required affidavits of merit. The Robertsons simply failed to do so." *Id.*

On appeal, the Robertsons ask this court to apply the *Vega* ruling retroactively and to find they commenced their federal action on November 16, 2016, for statute of limitations purposes. Aplt. Br. at 52. The Robertsons argue:

> Applying the *Vega* ruling retroactively to where a Certificate of Compliance was not required, Plaintiffs could have commenced a lawsuit on November 16, 2016, 90 days following the Plaintiffs' First Notice of Intent to Commence Legal Action that was filed and served on August 1[8], 201[6]. Accordingly, this Court should find that Plaintiffs "commenced" the action on November 16, 2016, for determining when an action "commenced" for statute of limitations purposes.

Id. We decline the invitation.

Arguments "intentionally relinquished or abandoned in the district court" are deemed waived on appeal. *Richison*, 634 F.3d at 1127; *cf. United States* v. *Carrasco-Salazar*, 494 F.3d 1270, 1272 (10th Cir. 2007) ("[W]aiver is accomplished by intent, [but] forfeiture comes about through neglect." (second alteration in original) (quoting *United States* v. *Staples*, 202 F.3d 992, 995 (7th Cir. 2000))). Here, the Robertsons' brief opposing summary judgment alerted the district court to the *Vega* decision. But the Robertsons never argued, as they do for the first time on appeal, that *Vega* applied retroactively to their claims. *See* App. at 146-168. Just the opposite. At the summary judgment hearing, the Robertsons' counsel suggested she was *not* asking the court to apply *Vega* retroactively:

> **COURT**: Well, I think what you're asking me to do is to make the *Vega* ruling retroactive when the Utah Supreme Court didn't do that.
>
> **COUNSEL**: No. I'm actually asking the Court to conclude that the statute of limitations was tolled in between, because Mr. and Mrs. Robertson did ultimately receive a certificate of compliance from DOPL.
>
> . . .
>
> So I'm asking the Court for a broad reading of the tolling to include all of the DOPL proceedings in light of the fact that DOPL allowed for the Robertsons to reopen their file.

Id. at 465-66. Based on the Robertsons' representations to the district court, we conclude the Robertsons have waived any appellate argument that the *Vega* decision should have been applied retroactively to their claims.

CONCLUSION

We **AFFIRM** the district court's grant of summary judgment to Providers.

ENTERED FOR THE COURT

Veronica S. Rossman
Circuit Judge