

1978

Jeannette U. Swan v. Dr. Robert H. Lamb And Dr. Dennis D. Thoen : Petition For Rehearing

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

W. Eugene Hansen; Attorney for Appellant Ray Christensen; Attorney for Respondent Dr. Lamb Rex Hanson; Attorney for Respondent Dr. Thoen

Recommended Citation

Petition for Rehearing, *Swan v. Lamb*, No. 14823 (Utah Supreme Court, 1978).
https://digitalcommons.law.byu.edu/uofu_sc2/524

This Petition for Rehearing is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE

STATE OF UTAH

JEANNETTE U. SWAN,

Plaintiff and
Appellant,

vs.

DR. ROBERT H. LAMB and
DR. DENNIS D. THOEN,

Defendants and
Respondents.

Case No. 14823

PETITION FOR REHEARING

Appeal from a Judgment of the Third District Court of
Salt Lake County, Honorable Bryant H. Croft, Judge

REX HANSON, ESQ.

HANSON, RUSSON, HANSON & DUNN
Attorneys for Respondent Dr.
Thoen

702 Kearns Building
Salt Lake City, Utah 84101

RAY CHRISTENSEN, ESQ.

CHRISTENSEN, GARDINER, JENSEN
& EVANS

Attorneys for Respondent Dr.
Lamb

900 Kearns Building
Salt Lake City, Utah 84101

W. EUGENE HANSEN, ESQ.

HANSEN & ORTON

Attorneys for Appellant

2020 Beneficial Life Tower

36 South State Street

Salt Lake City, Utah 84111

FILED

SEP 15 1978

IN THE SUPREME COURT OF THE
STATE OF UTAH

JEANNETTE U. SWAN,)	
)	
Plaintiff and)	
Appellant,)	
)	
vs.)	Case No. 14823
)	
DR. ROBERT H. LAMB and)	
DR. DENNIS D. THOEN,)	
)	
Defendants and)	
Respondents.)	
)	

PETITION FOR REHEARING

Appeal from a Judgment of the Third District Court of
Salt Lake County, Honorable Bryant H. Croft, Judge

REX HANSON, ESQ.
HANSON, RUSSON, HANSON & DUNN
Attorneys for Respondent Dr.
Thoen
702 Kearns Building
Salt Lake City, Utah 84101

RAY CHRISTENSEN, ESQ.
CHRISTENSEN, GARDINER, JENSEN
& EVANS
Attorneys for Respondent Dr.
Lamb
900 Kearns Building
Salt Lake City, Utah 84101

W. EUGENE HANSEN, ESQ.
HANSEN & ORTON
Attorneys for Appellant
2020 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111

TABLE OF CONTENTS

	<u>Page</u>
Cases Cited.	ii
Other Authorities.	ii
DISPOSITION OF THE CASE.	1
RELIEF SOUGHT ON REHEARING	2
STATEMENT OF FACTS	2
ARGUMENT	2
POINT I: IT IS MANIFESTLY UNJUST TO APPLY THE NEW "SIMILAR LOCALITY" STANDARD TO THE DEFENDANTS IN THIS CASE AND TO ANY OTHER PARTIES RETROACTIVELY BECAUSE THIS COURT'S DECISION CHAN- GES A STANDARD OF CARE UPON WHICH THESE DEFENDANTS, DEFENDANTS IN OTHER PENDING LAWSUITS, AND DOCTORS NOT YET SUED HAVE BEEN ENTITLED TO RELY UPON	2
POINT II: THE RETROACTIVE APPLICATION OF THIS COURT'S DECISION OVERRULING THE "STRICT LOCALITY RULE" IS CON- TRARY TO THE PRINCIPLES ENUNCIA- TED IN PREVIOUS DECISIONS OF THIS COURT	9
CONCLUSION	12

CASES CITED

	<u>Page</u>
<u>Brown v. Colm</u> , 522 P.2d 688 (Cal. 1974)	5
<u>Brunyer v. Salt Lake County</u> , 551 P.2d 521 (Utah 1976)	10
<u>Cascade Security Bank v. Butler</u> , 567 P.2d 631 (Wash. 1977)	8
<u>Draper v. Traveler's Insurance Co.</u> , 429 F.2d 434 (10th Cir. 1970)	10
<u>Great Northern Railway Company v. Sunburst Oil and Refining Company</u> , 287 U.S. 358, 364 (1932)	3, 9, 12
<u>In Re Bye</u> , 524 P.2d 854 (Cal. 1974)	4
<u>Moore v. State</u> , 553 P.2d 8 28 (Alaska 1976)	4
<u>Rubalcava v. Gissman</u> , 384 P.2d 389 (1963)	9
<u>Russell v. Blackwell</u> , 492 P.2d 953 (Haw. 1972)	4
<u>Stanton v. Stanton</u> , 564 P.2d 303 (1977)	11
<u>State v. Kelbach</u> , 565 P.2d 700 (1977)	11
<u>State v. Stenrud</u> , 553 P.2d 1201 (Ariz. 1976)	4
<u>State Farm Mutual Insurance Company v. Farmer's Insurance Exchange</u> , 493 P.2d 1002 (Utah 1972)	4, 10
<u>Williams v. Utah State Department of Finance</u> , 464 P.2d 596 (Utah 1970)	9
<u>Wood v. Morris</u> , 554 P.2d 1032 (Wash 1976)	4

OTHER AUTHORITIES

10 A.L.R.3d 1971, 1380	8
10 A.L.R.3d 1371-1447.	3
Section 78-14-4, U.C.A.	6

IN THE SUPREME COURT OF THE
STATE OF UTAH

JEANNETTE U. SWAN,)	
)	
Plaintiff and)	
Appellant,)	
)	
vs.)	Case No. 14823
)	
DR. ROBERT H. LAMB and)	
DR. DENNIS D. THOEN,)	
)	
Defendants and)	
Respondents.)	
)	

PETITION FOR REHEARING

Respondents respectfully petition this Court for a rehearing of the above-entitled matter pursuant to Rule 76(e) of the Utah Rules of Civil Procedure.

DISPOSITION OF THE CASE

This was an appeal from the Salt Lake District Court based upon the failure of the trial court to allow the testimony of an out-of-state expert who failed to qualify as being familiar with Salt Lake community medical standards.

On August 16, 1978 this Court reversed the trial court's decision and ordered a new trial. This Court held that a new "similar community" standard of care should be adopted in Utah and overruled the previous "strict locality" standard.

RELIEF SOUGHT ON REHEARING

Respondents respectfully request that a rehearing be held solely as to the issue of whether this Court's decision should be applied retroactively or prospectively.

STATEMENT OF FACTS

The only pertinent facts relevant to this rehearing are as follows: First, the alleged malpractice occurred in 1973. Second, the trial in this matter occurred in September of 1976. Finally, at both the time of the alleged malpractice and at the time of trial the "strict locality" standard, formulated by this Court in numerous decisions beginning from the time of statehood, was in effect.

ARGUMENT

POINT I

IT IS MANIFESTLY UNJUST TO APPLY THE NEW "SIMILAR LOCALITY" STANDARD TO THE DEFENDANTS IN THIS CASE AND TO ANY OTHER PARTIES RETROACTIVELY BECAUSE THIS COURT'S DECISION CHANGES A STANDARD OF CARE UPON WHICH THESE DEFENDANTS, DEFENDANTS IN OTHER PENDING LAWSUITS, AND DOCTORS NOT YET SUED HAVE BEEN ENTITLED TO RELY UPON.

A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law nonetheless for intermediate transactions. The choice for any state may be determined by the juristic philosophy of the jud-

ges of her courts, their conceptions of law, its origin and nature. Great Northern Railway Company v. Sunburst Oil and Refining Company, 287 U.S. 358, 364 (1932).

It is generally accepted that an appellate court, upon overruling a previous decision, has three choices as to how the overruling decision should be applied: First, the overruling decision can be given a purely prospective application where the new law declared will not even apply to the parties to the overruling case; second, the decision can be given a limited retroactive effect where the law declared will govern the rights of the parties to the overruling case but in all other cases will be applied prospectively; and finally, the decision can be given general retroactive effect where the law declared will govern the rights of the parties to the overruling case but in all other cases will be applied prospectively. See generally, Ann., "Prospective or Retroactive Operation of Overruling Decisions", 10 A.L.R.3d 1371-1447.

In deciding the effect an overruling decision should be given it is recognized that three separate factors should be considered:

[T]he decision "must establish a new principle of law, even by overruling clear past precedent in which litigants may have relied, or

by deciding an issue of first impression whose resolution was not clearly foreshadowed". Second, we must evaluate the merit of retroactive or prospective application of the rule in light of prior history, purpose and effect. Third, we must weight the hardship and injustice of applying the rule to the litigants in the instant case. Moore v. State, 553 P.2d 828 (Alaska 1976). (Emphasis added).

See also State Farm Mutual Insurance Company v. Farmer's Insurance Exchange, 493 P.2d 1002 (Utah 1972); State v. Stenrud, 553 P.2d 1201 (Ariz. 1976); In Re Bye, 524 P.2d 854 (Cal. 1974); Russell v. Blackwell, 492 P.2d 953 (Haw. 1972); and Wood v. Morris, 554 P.2d 1032 (Wash. 1976).

In applying these standards to the case at bar, it can readily be seen that substantial justice will be served only by the prospective application of this Court's decision.

First, there can be no doubt that this Court's decision established a new principle of law in that it overruled the medical malpractice standard which has been utilized in the State of Utah since its statehood. It is elementary that proof of a standard of skill required of a physician is essential for a plaintiff to prevail in a malpractice action. The standard establishes the duty owed by the physician to the patient and thus is an essential element of a plaintiff's case.

Second, the prior history, purpose, and effect of the strict locality rule was to provide a workable standard for the medical community by requiring each practitioner to be as competent as other practitioners in the same community. This rule

protected a physician from meeting a higher standard found in other communities which may have resulted from better medical facilities and opportunities for training. It protected the physician from being subjected to a standard which he could not meet under the circumstances existing at that time. Likewise, the patient only had to prove that the physician breached a standard held within the same community regardless of whether it was higher or lower than surrounding communities.

Third, it is obvious that retroactive application of this Court's decision in the instant case will cause great hardship and injustice not only to defendants in this instant case but to all physicians who have practiced up until the date of this Court's decision.

The standard to be applied in a malpractice case should be at the time the malpractice occurred--not in retrospect at the time of trial. In Brown v. Colm, 522 P.2d 688 (Cal. 1974) a suit was commenced in 1968 alleging malpractice in 1949. The court in that case held it was error to exclude the testimony of an expert witness who was not personally acquainted with the medical standard in the year 1949 but who had studied the standard which existed at that time in a similar community. The court, in reversing the lower court decision, stated that it was essential for the plaintiff to prove the standard existing at the time of the alleged malpractice in order to determine what degree of skill, knowledge and care was required by the physician

at the time of the occurrence.

Section 78-14-4, U.C.A. provides as follows:

No malpractice action against a health care provider may be brought unless it is commenced within two years after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered the injury, whichever first occurs, but not to exceed four years after the date of the alleged act, omission, neglect, or occurrence, except that: (In an action where a foreign object has been left in the body the claim must be commenced within one year after the patient discovers or should have discovered it) and (if a patient has been prevented from discovering misconduct by fraud it must be brought within one year after the patient discovers or should have discovered the fraudulent concealment).

Thus, under the Statute of Limitations physicians can be liable for a period of two-to-four years after the occurrence giving rise to the alleged malpractice and in certain instances can be liable for many years beyond that period if the patient fails to discover a foreign object or a fraudulent concealment.

A retroactive application of this Court's decision substantially affects three classifications of physicians: first, it affects the defendants in the instant case who performed the surgery in 1973; second, it affects those physicians who were sued prior to this Court's decision in the instant case but who had not yet had a final judgment; and finally, it affects those physicians who may be sued in the future for alleged malpractice events which occurred prior to this Court's decision.

In each instance, the physicians in question relied upon the local community standard as the duty owed to their patients at the time the alleged malpractices occurred. As pointed out extensively in respondents' brief in chief there are numerous differences in opinions concerning a variety of medical operations and procedures and a physician is under a much greater liability if he is subjected to a "similar community standard" in which the practice or procedure is not accepted in the community in which he practices. It cannot be assumed, for example, that one procedure used to remove a kidney is of lesser quality than a different procedure used by doctors in another community. However, a physician knowing that he may have to justify his procedure as compared with the other will have to more carefully evaluate which procedure is most generally accepted in "similar communities" if he is to avoid groundless lawsuits.

If a physician is to be judged by a similar community standard then it is only equitable that he knows this at the time he is performing the medical care so that he has the choice of deciding whether to undertake a given procedure or whether such procedure may be too controversial or unproven in light of differing community standards.

Respondents submit, therefore, that this Court's decision should be given a strict prospective application including the plaintiff in the instant case since defendants at the time of

the operation relied upon the local community standard which had existed in this state for over 100 years.

And while it is commendable for a plaintiff to seek change in an existing rule of law this benefit must not be outweighed by the reliance and injustice which will occur to the defendant. As stated by one authority concerning this problem of retroactive application of a decision and its effect upon the plaintiff and defendant:

[I]nsofar as the need for incentive to have outmoded or unjust rules overturned is concerned, it may be urged that if a party who seeks to have an old rule overturned has reason to believe that he can show that reliance interests are not justifiable or sufficiently strong, he has adequate incentive to request the overruling of the earlier case in such a manner that the overruling decision can be applied retroactively not only to the parties similarly situated, for example, to others who have commenced or are about to commence litigation; but it would appear only fair that the party seeking to have an old rule overturned must take the risk that if the opposing party had strong and justifiable reliance interests which are entitled to protection, the overruling decision will be given prospective effect only, so as not to apply in the overruling case itself. (Emphasis added). Annot., 10 A.L.R.3d 1971, 1380.

In cases such as this where a long established standard has been abruptly overturned there must necessarily be severe hardship and injustice which require prospective application of the decision. Cascade Security Bank v. Butler, 567 P.2d 631 (Wash. 1977).

POINT II

THE RETROACTIVE APPLICATION OF THIS COURT'S DECISION OVERRULING THE "STRICT LOCALITY RULE" IS CONTRARY TO THE PRINCIPLES ENUNCIATED IN PREVIOUS DECISIONS OF THIS COURT.

This Court in numerous decisions has consistently held that rights, duties, and privileges should generally be changed only by the legislature or in rare instances by this Court but that in every case fair notice must be given to those who relied upon the previous law.

In Rubalcava v. Gissman, 384 P.2d 389 (1963) this Court held that a wife could not maintain a tort action against her husband or his estate. Justice Crockett in stating why the rule should not be modified stated the following:

It has always been the law of our state, insofar as we have been able to ascertain, that a suit of this character could not be maintained. It is inevitable that this has been assumed to be the law and has been depended upon in the formation of existing contracts. We are of the opinion that under these circumstances, in fairness to those who have relied thereon, and in proper deference to the solidarity of the law, any change could be justified only to correct patent error, (Footnote citing Great Northern Railway Co. v. Sunburst Oil Company as allowing prospective effect of decisions) otherwise it should be made by the legislature, plainly so declaring, so that all may be advised what the change is and when it will be effective. Id. at 393.

In Williams v. Utah State Department of Finance, 464 P.2d 596 (Utah 1970) this Court held that a prior decision overruling established law concerning the right to attorney's fees would

not be applied retroactively and that the Court would not indulge in the fiction that the previous controlling law never existed. See also Draper v. Traveler's Insurance Co., 429 F.2d 434 (10th Cir. 1970) (Applying Utah law prospectively).

In State Farm Mutual Insurance Company v. Farmer's Insurance Exchange, 493 P.2d 1002 (Utah 1972) this Court declined to apply an overruled decision prospectively on the basis that there was no showing "that any considerable number of persons or corporations will be affected by letting the decision apply retroactively." The Court also stated "There is no showing that injustice would result or that administration of justice would in any way be affected." Id. at 1003. In this case, however, there is obviously a large number of persons affected by the change in standard which will result in great injustice and will severely restrict the administration of justice.

In Brunyer v. Salt Lake County, 551 P.2d 521 (Utah 1976) this Court declined to apply retroactively Section 78-27-39, U.C.A. which allowed for the contribution of joint tortfeasors. This Court stated: "The contribution statute established a primary right and duty which was not in existence at the time the injuries in this case arose." Id. at 542. The "duty" in a medical malpractice case is dependent upon the standard utilized by the plaintiff and such duties will necessarily arise from comparisons of medical standard in other states where no

such duties existed under local standards.

In Stanton v. Stanton, 564 P.2d 303 (1977), as supplemented, 567 P.2d 625 (1977) Justice Crockett stated the reasoning of this Court as to why the lower court's decision raising the minority age of females from 18 to 21 was erroneous as to a divorce decree which had been entered many years before. Justice Crockett stated the following:

I reiterate with the firmest possible conviction that in my judgment it would be wholly discordant to principles of equity and justice to impose such an unexpected and unplanned for burden upon the defendant by an ex post facto change of the rules after the entry of the decree. Id. at 305.

Finally, in this Court's recent decision of State v. Kelbach, 565 P.2d 700 (1977) this Court stated in great detail the purpose of applying overruled decisions prospectively: Justice Crockett wrote:

As a general proposition the law as established should remain so until change by the legislature, whose prerogative it is to make and change the law. This does not mean to say that where there is judge-made law which is later observed to be clearly in error, that such error should be so set in cement that it cannot be remedied. In such circumstances the court undoubtedly can and should correct it.

That more important than any of the above is the oft proclaimed salutary principle: that ours is a government of laws and not of men. Accordingly, the law should not be changed simply because of the will or desire of judges as to what the law is or ought to be. Much less so, should it be so changed during

the course of a particular proceeding to have a retroactive effect thereon. Notwithstanding the fact that the change the state advocates would vindicate the position taken in the dissent referred to, to so hold in this case retroactively would violate what we regard as a higher principle: that of honoring the established law. If there is to be such a change in the law, whether by legislative act or by judicial decision, it seems that it should have only prospective effect and that fairness and good conscience requires that it should not be applied retroactively to adversely affect rights as they existed at the time the particular controversy arose. (Citation to Great Northern Railway Co. v. Sunburst Oil Company). Id. at 702.

This long line of cases clearly shows this Court's concern that the law be a reliable monument upon which a party can rely--not a shifting mound of sand. If the law is to be changed it should only be done after notice of such change has been given to all concerned and not, as Justice Crockett stated in the Stan-
ton opinion, after the ballgame has already begun.

CONCLUSION

The decision in the instant case is an extremely important one not only to the present litigants but to hundreds of litigants in the future years. It establishes what standard will be used to judge physicians in this state and presumably can logically be extended to all professionals.

The change to the "similar locality rule" is a drastic one in that it overrules a standard which has existed for over 100 years. It is unjust to apply this new standard with all of

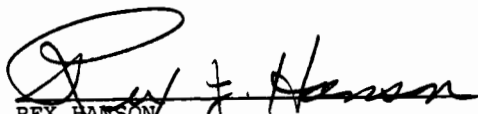
its consequences and ramifications to these defendants and to other physicians who in good faith attempted to meet the local community standard existing at the time the alleged malpractices occurred.

Such unfairness affects the defendants in the instant case, all the physicians presently in litigation, and all future physicians or professionals whose actions occurred prior to this Court's decision.

For these reasons, respondents respectfully request that a rehearing be granted as to the issue of prospective application of this Court's decision in order that this important and far-reaching aspect of the case may be fully argued by the parties.

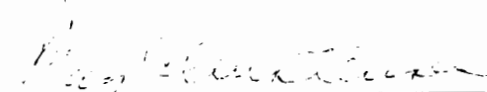
Respectfully submitted,

HANSON, RUSSON, HANSON & DUNN



REX HANSON
Attorney for Respondent Dr. Thoen
702 Kearns Building
Salt Lake City, Utah 84101

CHRISTENSEN, GARDINER, JENSEN &
EVANS



RAY CHRISTENSEN
Attorney for Respondent Dr. Lamb
900 Kearns Building
Salt Lake City, Utah 84101