

2003

Jamie Medved v. C. Joseph Glenn and Estate of Blayne L. Hirsche : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Curtis J. Drake; Anne D. Armstrong; Snell and Wilmer; Dennis C. Ferguson; Williams and Hunt; Attorneys for Appellees.

James W. Gilson; Siegfried and Jensen; Attorney for Appellant.

Recommended Citation

Brief of Appellee, *Medved v. Glenn*, No. 20030338 (Utah Court of Appeals, 2003).

https://digitalcommons.law.byu.edu/byu_ca2/4308

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

JAMIE MEDVED,
Plaintiff/Appellant,

vs.

C. JOSEPH GLENN, M.D. AND ESTATE
OF BLAYNE L. HIRSCH, M.D.,

Defendants/Appellees.

: JOINT BRIEF OF
: APPELLEES ESTATE OF
: BLAYNE L. HIRSCH, M.D. and
: C. JOSEPH GLENN, M.D.

:
:
: Case No. 20030338-CA
:
:

APPEAL FROM A DECISION OF THE
FOURTH JUDICIAL DISTRICT COURT, UTAH COUNTY
HONORABLE LYNN W. DAVIS, DISTRICT JUDGE

James W. Gilson
SIEGFRIED & JENSEN
Attorneys for Plaintiff/Appellant
5664 S. Green Street
Murray, UT 84123
Telephone: 801-266-0999

Dennis C. Ferguson (A1061)
WILLIAMS & HUNT
Attorneys for Defendant/Appellee
Estate of Blayne L. Hirsch, M.D.
257 East 200 South, Suite 500
P. O. Box 45678
Salt Lake City, UT 84145-5678
Telephone: 801-521-5678

Curtis J. Drake
Anne D. Armstrong
SNELL & WILMER
Attorneys for Defendant/Appellee
C. Joseph Glenn, M.D.
15 W. South Temple, Suite 1200
Salt Lake City, UT 84101
Telephone: 801-257-1900

FILED
Utah Court of Appeals

DEC 17 2003

Paulette Staggs
Clerk of the Court

IN THE UTAH COURT OF APPEALS

JAMIE MEDVED,	:	JOINT BRIEF OF
	:	APPELLEES ESTATE OF
Plaintiff/Appellant,	:	BLAYNE L. HIRSCHKE, M.D. and
	:	C. JOSEPH GLENN, M.D.
vs.	:	
	:	
C. JOSEPH GLENN, M.D. AND ESTATE	:	
OF BLAYNE L. HIRSCHKE, M.D.,	:	Case No. 20030338-CA
	:	
Defendants/Appellees.	:	

APPEAL FROM A DECISION OF THE
FOURTH JUDICIAL DISTRICT COURT, UTAH COUNTY
HONORABLE LYNN W. DAVIS, DISTRICT JUDGE

James W. Gilson
SIEGFRIED & JENSEN
Attorneys for Plaintiff/Appellant
5664 S. Green Street
Murray, UT 84123
Telephone: 801-266-0999

Dennis C. Ferguson (A1061)
WILLIAMS & HUNT
Attorneys for Defendant/Appellee
Estate of Blayne L. Hirschke, M.D.
257 East 200 South, Suite 500
P. O. Box 45678
Salt Lake City, UT 84145-5678
Telephone: 801-521-5678

Curtis J. Drake
Anne D. Armstrong
SNELL & WILMER
Attorneys for Defendant/Appellee
C. Joseph Glenn, M.D.
15 W. South Temple, Suite 1200
Salt Lake City, UT 84101
Telephone: 801-257-1900

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF JURISDICTION	1
STATEMENT OF ISSUES AND STANDARD OF REVIEW	1
PROVISIONS OF CONSTITUTION, STATUTES, ORDINANCES AND RULES	1
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	3
SUMMARY OF ARGUMENT	5
ARGUMENT	5
POINT I	5
UTAH LAW DOES NOT RECOGNIZE LOSS OF CHANCE AS A LEGALLY COGNIZABLE INJURY	5
POINT II	10
PLAINTIFF FAILS TO DISTINGUISH HER INJURIES FROM THOSE HELD TO BE LEGALLY INSUFFICIENT IN <i>SEALE v. GOWANS</i>	10
POINT III	12
<i>SEALE</i> REQUIRES THAT ALL PLAINTIFF'S CLAIMS ARE PRESERVED AND MAY BE ASSERTED ONLY AT SUCH TIME AS THERE IS A RECURRENCE OF CANCER	12
CONCLUSION	16

TABLE OF AUTHORITIES

Cases

Andersen v Brigham Young University, 879 F. Supp. 1124 (D. Utah 1995)	8, 9
Foil v. Ballinger, 601 P.2d 144 (Utah 1979)	15
George v. LDS Hospital, 797 P.2d 1117 (Utah App. 1990)	5-9
Higgins v. Salt Lake County, 855 P.2d 231 (Utah 1995)	1
Johnson v. Mullee, 385 So.2d 1038 (Fla. 1980)	15
Seale v. Gowans, 923 P.2d 1361 (Utah 1996)	3-6, 10-17
Swain v. Curry, 595 So.2d 168 (Fla. 1992)	15, 16
White v. Deeselhorst, 879 P.2d 1371 (Utah 1994)	1

Statutes and Rules

Rule 12(b)(6), Utah Rules of Civil Procedure	1
Rule 56, Utah Rules of Civil Procedure	1, 3
Utah Code Ann. § 78-2a-3(2)(j)	1

STATEMENT OF JURISDICTION

The Court of Appeals has appellate jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j) granting jurisdiction over appeals transferred by the Supreme Court.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

1. Was the district court correct in dismissing plaintiff's medical negligence claim for failure to diagnose breast cancer, when it is undisputed that there has been no recurrence following her treatment?

The proper standard of review of this issue on appeal is correctness, granting no deference to the trial court's conclusions. White v. Deeselhorst, 879 P.2d 1371, 1373 (Utah 1994). This Court may affirm on any ground available to the district court, even if it is not one relied upon below. Higgins v. Salt Lake County, 855 P.2d 231, 234 (Utah 1993), rehearing denied June 28, 1993.

This issue was raised in Defendants' Joint Motion For Dismissal Without Prejudice, dated July 30, 2002. (R. at 00111.)

PROVISIONS OF CONSTITUTION, STATUTES, ORDINANCES AND RULES

Rules 12(b)(6) and 56, Utah Rules of Civil Procedure.

STATEMENT OF THE CASE

This is a medical negligence case brought by plaintiff/appellant Jamie Medved against C. Joseph Glenn, M.D. and the Estate of Blayne L. Hirsche, M.D.

Dr. Glenn was Mrs. Medved's obstetrician/gynecologist. (R. at 00006.)

Mrs. Medved claims that Dr. Glenn negligently failed to order diagnostic testing and

follow-up treatment after she presented to him in 1997 with a lump in her right breast. (R. at 00004.)

Mrs. Medved later saw Dr. Hirsche, a plastic surgeon, inquiring about breast augmentation. Because of her report of a lump in her right breast, Dr. Hirsche ordered a mammogram, which was performed on July 20, 1998, and was read as normal and showing that the lump was benign. On August 12, 1998, Dr. Hirsche performed a bilateral breast augmentation, at which time he also performed a needle aspiration of three suspected right breast nodules. Because there was insufficient fluid from the aspiration, no aspirate was sent for pathological examination. (R. at 00165.) Dr. Hirsche continued to clinically follow Mrs. Medved, and when the lumps persisted, he performed an excisional biopsy on December 16, 1998. Pathological examination of the biopsied tumors on December 16, 1998, revealed the presence of infiltrating ductal carcinoma. (R. at 00164.)

Mrs. Medved claims that it was negligent for Dr. Hirsche to proceed with her breast augmentation on August 12, 1998, and that he should, instead, have excised the breast lumps at that time when aspiration of the lumps did not produce sufficient fluid and/or tissue for pathological examination. Thus, she claims that Dr. Hirsche's diagnosis of breast cancer was delayed for four months. (R. at 00002.)

Mrs. Medved alleges that the delay of both defendant physicians in diagnosing her cancer caused her to undergo more extensive therapy for cancer than would have been necessary if a timely diagnosis had been made, i.e., a modified radical mastectomy rather than a lumpectomy. (R. at 00003, 00002.) She also claims that the delayed diagnosis and

treatment increased her risk of experiencing a recurrence of the cancer, although she has not had any such recurrence. (Id.)

Plaintiff filed her Complaint on March 5, 2001. (R. at 00007.) On July 30, 2002, defendants filed a Joint Motion For Dismissal Without Prejudice on the grounds that, under Seale v. Gowans, 923 P.2d 1361 (Utah 1996), no cognizable claim existed unless and until Mrs. Medved experiences a recurrence of her cancer. The Joint Motion to Dismiss focused solely on the issue of whether legal injury has occurred under Seale. Whether defendants' treatment of Mrs. Medved was negligent and whether the alleged delay has caused any decrease in her long-term prognosis were not issues before the Court on the Motion to Dismiss and remain in dispute. (R. at 00118 - 113.)

After full briefing and oral argument, the District Court Judge, Lynn W. Davis, ruled in favor of defendants and entered an Order Granting Defendants' Motion For Dismissal Without Prejudice on March 19, 2003. (R. at 00216 - 209.) Plaintiff now appeals from that Order of dismissal. (R. at 00218.)

STATEMENT OF FACTS

The following facts were presented to the district court in support of Defendants' Joint Motion For Dismissal. They were not disputed by Mrs. Medved.¹

¹ Because defendants cited deposition testimony and other evidence in the district court record, but beyond the allegations of the Complaint, the Court could have treated the Motion to Dismiss as a motion for summary judgment. It makes no difference at this point, because either way the standard of appellate review is correctness. Whether the issue is treated as a motion to dismiss or as a motion for summary judgment is also immaterial, because the dismissal sought and granted is without prejudice to re-file in the event of recurrence.

1. Plaintiff first saw Dr. Glenn as a patient in 1991. (R. at 00165.)
2. Plaintiff's last visit with Dr. Glenn was February 27, 1998. (Id.)
3. During the time plaintiff was a patient of Dr. Glenn, she was diagnosed with fibrocystic benign lumps in her breasts. (Id.)
4. Plaintiff first saw Dr. Hirsche as a patient on July 13, 1998. (Id.)
5. A mammogram, ordered by Dr. Hirsche and performed on July 20, 1998, revealed dense fibroglandular tissue bilaterally, no significant abnormality and no evidence of malignancy. (Id.)
6. On August 12, 1998, Dr. Hirsche performed bilateral breast augmentation and needle aspiration of three suspected right breast nodules. (Id.)
7. On December 16, 1998, Dr. Hirsche performed an excisional biopsy of three right breast nodules. (R. at 00164.)
8. The pathological examination associated with the December 16, 1998, excisional biopsy revealed the presence of differentiated infiltrating ductal carcinoma. (Id.)
9. On December 28, 1998, Steven J. Mintz, M.D. performed a right modified radical mastectomy. (Id.)
10. Plaintiff followed her surgical treatment with chemotherapy and radiation therapy and later had surgical breast reconstruction. (Id.)
11. Plaintiff has not had a recurrence of her cancer. (Id.)

SUMMARY OF ARGUMENT

Utah law precludes plaintiff from recovering for an increased future risk of cancer recurrence. In Seale v. Gowans, 923 P.2d 1361 (Utah 1996), the Utah Supreme Court held that “an alleged claim for enhanced risk is not adequate to sustain a cause of action for negligence.” Seale, 923 P.2d at 1365. This case is factually indistinguishable from Seale. Because plaintiff has not suffered a recurrence of cancer, she is unable to establish a legal injury to satisfy her prima facie claims of medical negligence against Drs. Glenn and Hirsche. The arguable fact that the alleged delay in diagnosis might have necessitated additional or more extensive treatment does not distinguish this case from Seale, as those same circumstances were present in Seale. The district court’s granting of Defendants’ Joint Motion For Dismissal Without Prejudice was correct and should be affirmed.

ARGUMENT

POINT I

UTAH LAW DOES NOT RECOGNIZE LOSS OF CHANCE AS A LEGALLY COGNIZABLE INJURY.

Plaintiff introduces her argument on appeal by contending that Utah courts recognize a cause of action where negligence increases a person’s risk of harm. According to plaintiff, the “right” to pursue an action for increased risk of harm was established by this Court in George v LDS Hospital, 797 P.2d 1117 (Utah App. 1990). Plaintiff further argues that the Utah Supreme Court, in Seale, limited the ability to impose liability for increasing a party’s risk of harm to cases in which the increased risk of harm is accompanied by actual damages.

These basic premises of plaintiff's entire argument are flawed in several respects. First, plaintiff's contentions imply that there were no actual damages suffered by the plaintiff in George. However, George was a wrongful death suit in which plaintiff alleged that his decedent's death from sepsis was, in part, due to the negligent failure of LDS Hospital staff to take measures which might have reversed her condition. Additionally, plaintiff presumes that the George court recognized that an increased risk of harm caused by negligence constitutes an injury under Utah law. An examination of the facts and analysis contained in the opinion however, reveals that the George court determined that an increased risk of harm due to negligent actions or omissions can, in some instances, establish *proximate cause* of a resulting injury. In the George case, death, not increased risk, was the actual injury. Finally, the Utah Supreme Court in Seale did not, as plaintiff contends, confirm that increased risk of future harm is itself an injury, compensable under Utah law. Moreover, the Seale Court expressly rejected the notion that an action could be brought for negligent harm to one's chance of disease free survival absent proof of actual loss. "[E]ven though there exists a possibility, even a probability, of future harm, it is not enough to sustain a claim, and a plaintiff must wait until some harm manifests itself." Seale, 923 P.2d at 1364 (citing Prosser and Keeton on Torts, ' 30, at 165).

George involved a wrongful death claim grounded in allegations of medical malpractice related to the treatment of Mrs. Betty George by LDS Hospital. Mrs. George died as a result of a sepsis-induced cardiac arrest several days after a seemingly uncomplicated hysterectomy. The factual evidence presented at trial showed that hospital

nurses were aware that Mrs. George's condition was deteriorating for a period of several hours but failed to inform her physicians of abnormal signs and symptoms. The jury found that, although the nurses' failure to inform the physicians constituted negligence, it was not a proximate cause of the patient's death. On appeal, plaintiff argued that jury instructions improperly implied that there could be only one proximate cause of injury, thereby preventing the jury from finding that the nurses' failure to act was a contributing and proximate cause of Mrs. George's death. The issue on appeal was one of negligence and proximate cause, namely whether a negligent act which merely contributes to injury, but is not the sole cause of injury, constitutes proximate cause. This Court, finding that a jury could have reasonably concluded that the nurses' failure to notify physicians of Mrs. George's deteriorating condition was a proximate cause of her death, and that the trial court's jury instructions were therefore improper, reversed and remanded for a new trial. George, 797 P.2d at 1122.

In its analysis, the George court found that facts presented at trial supported the plaintiff's position that the nurses' negligence was a contributing cause of Mrs. George's death. In so doing, the court found that, if the nurses had notified physicians of Mrs. George's symptoms, they may have taken measures to treat the sepsis before the ultimately fatal cardiac arrest. Their failure to act therefore, operated to reduce the patient's chances for recovery. Id. It is this characterization of the mechanism of causation which is sometimes erroneously interpreted as establishing a loss of chance cause of action. As has been explained however, the reduced chance of recovery and increased risk of harm

described in George are identified as the possible contributing cause of injury, not the injury itself. “A jury could have reasonably concluded that the failure of the nurses to notify Dr. Lloyd or Dr. Lahey of Mrs. George’s change in condition prevented them from diagnosing, treating, and possibly saving her life and that this failure therefore was a *proximate cause* of her worsened condition and ensuing death.” Id. (Emphasis added.) The holding in George simply does not support plaintiff’s argument that decreased chance for recovery constitutes an injury under Utah law.

In Andersen v Brigham Young University, 879 F. Supp. 1124 (D. Utah 1995), the United States District Court had occasion to interpret George when it was presented in essentially the same manner as plaintiff attempts to use it here. Andersen, a diversity action, involved a medical malpractice claim brought by a BYU student against the BYU McDonald Health Center. The plaintiff alleged that physicians at the health center failed to timely diagnose his Hodgkin’s Disease. He sought recovery for a reduced chance of survival and intentional infliction of emotional distress. Finding that Utah law does not recognize a loss of chance cause of action, the court granted BYU’s motion for summary judgment on the claim for reduced chance of survival. In so doing, the court explained that George does not recognize a cause of action for loss of chance.

The [George] court cited Hicks and other loss of chance cases for the proposition that where the chances of saving a life would be increased absent negligence or malpractice, a jury could find such negligence or malpractice to be a proximate cause of subsequent injury or death. George is distinguishable from the facts in this case, however. In George, there was an actual injury suffered because the patient died. George *does not*

purport to recognize or create a new cause of action for mere reduction of statistical chances for survival.

Andersen, 879 F. Supp. at 1129. (Emphasis added.)

As the Andersen opinion demonstrates, the holding in George does not establish a cause of action for reduced chance of recovery or increased risk of harm. Language in George regarding increased risk of harm and reduced chance of recovery describes a potential mechanism for establishing proximate cause of subsequent injury. We respectfully submit that the Andersen opinion provides a well-reasoned explanation of this Court's holding in George and accurately describes the status of Utah law with respect to the loss of chance doctrine. "This Court is satisfied that Utah has not adopted a separate cause of action permitting recovery for the reduction of a statistical chance of long-term survival." Andersen, 879 F. Supp. at 1130.

Admittedly, under George, acts or omissions which increase the risk of cancer recurrence could be shown, in certain circumstances, to be a proximate cause of an actual recurrence of cancer. However, a legally cognizable injury will not exist, and plaintiff's cause of action will not accrue, unless and until the disease recurs. Further, it is Seale, not George, which, under facts virtually identical to the instant case, addresses the issue of whether Utah law permits recovery for a reduced chance of recurrence of cancer. Right now, Ms. Medved has the best result possible (the absence of cancer), regardless of when her cancer was diagnosed. This is the clear rationale expressed in Seale for finding no legal injury has yet occurred.

POINT II

PLAINTIFF FAILS TO DISTINGUISH HER INJURIES FROM THOSE HELD TO BE LEGALLY INSUFFICIENT IN *SEALE v. GOWANS*.

The only facts necessary to support the district court's ruling in favor of defendants are: (1) plaintiff is attempting to assert a claim for alleged negligent delay in diagnosis of breast cancer; and (2) since her treatment for the cancer she has had no recurrence. These facts alone mandate dismissal under controlling Utah law. The question before the district court was purely a question of law turning on the interpretation of the Utah Supreme Court's ruling in Seale.

The essence of Seale is that no claim can be brought for a delay or failure to diagnose cancer, until such time as the cancer recurs. It is that simple:

As a result, even though there exists a possibility, even a probability, of future harm, it is not enough to sustain a claim, and a plaintiff must wait until some harm manifests itself.

Seale, 923 P.2d at 1364.

[W]e find that defendants failed to prove that Ms. Seale suffered a legally cognizable injury when she discovered that the cancer had spread to her lymph nodes.

Id.

As discussed hereafter, if Ms. Seale's cancer had not recurred, she could not have recovered for an enhanced risk of the cancer's recurrence.

Id. at 1362, n.2.

Just as she argued below, plaintiff's argument to this Court is entirely based on an unsuccessful attempt to distinguish this case from Seale. Mrs. Medved claims that her case is unlike Seale because she has suffered actual present damages in the form of more extensive surgery which would not have been necessary if the defendants had diagnosed her cancer earlier. (Appellant's Brf. at 12.) The attempt to distinguish this case from Seale is, however, without basis. In fact, Ms. Seale had similar "actual" damages when she received the correct diagnosis and subsequent treatment more than two years prior to commencement of her lawsuit. In May 1988, approximately one year after Dr. Gowans' alleged failure to detect the breast cancer, Ms. Seale obtained a correct diagnosis and underwent a radical mastectomy, followed by radiation and hormone treatment. At the time of the surgery, it was also discovered that she had developed a second malignant tumor and the cancer had spread to eight of her lymph nodes. Seale, 923 P.2d at 1362.

In the present case, Mrs. Medved also had positive lymph nodes by the time her cancer was diagnosed. (R. at 00164; Appellant's Brf., at 4.) In Seale, the Court noted evidence that "women who have small tumors with no positive nodes have long-term survival in excess of 85 percent, 90 percent. When the lymph nodes are involved, it drops significantly, to slightly under 50 percent, and the more lymph nodes that are involved the higher the probabilities are that we're dealing with systemic disease." Seale, at 1364, n.6.

The "actual" injuries alleged by Mrs. Medved are legally no different in nature than those actual injuries suffered by Ms. Seale. Both women presented evidence that they had

undergone more extensive surgery and/or therapy than they would have had if the cancer had been diagnosed earlier by the defendant physicians.

In Seale, the very same argument now made by Mrs. Medved was, in fact, presented to the Utah Supreme Court and rejected. Dr. Gowans argued in his Petition for Rehearing that the record demonstrated that Ms. Seale had not only knowledge of injury in the form of an increased risk of recurrence of cancer, but she also had knowledge of “actual present damage” in the form of past radiation and hormone therapy--“additional treatment that would not have been necessary had the cancer been detected earlier.” See Petition pp. 2-7, R. at 00149 - 142.) The Supreme Court rejected this argument, denying the Petition For Rehearing on October 2, 1996. (R. at 00136.) The Utah Supreme Court plainly did not consider such damages sufficient to support a claim in a case for failed or delayed diagnosis of cancer. This is because of the basic policy premise of the Seale opinion.

Because there is no question that the same argument and facts were presented to the Supreme Court in Seale, the district court was constrained to follow the controlling law and outcome in that case. Seale remains the most recent controlling law directly on point and plaintiff has failed to present any argument or rationale for changing this controlling law.

POINT III

**SEALE REQUIRES THAT ALL PLAINTIFF'S CLAIMS
ARE PRESERVED AND MAY BE ASSERTED ONLY
AT SUCH TIME AS THERE IS A RECURRENCE OF
CANCER.**

The essence of plaintiff's argument is that Seale suggests that the one action rule allows her to maintain her claim for damages based on enhanced risk of future cancer as

long as she can identify any type of present injury, such as having received more extensive treatment. This argument turns Seale on its head, again ignoring both the underlying facts in Seale and the basic premise of the Court's opinion.

The Supreme Court in Seale did state that the one action rule precludes splitting causes of action and the filing of multiple lawsuits arising out of the same alleged wrongful act. What plaintiff misses is the fact that the Court made a policy-based decision that the one action rule should be applied to avoid the assertion of speculative claims and to preserve all claims until such time as there is a recurrence of cancer. Only by such a ruling could the Court assure that a plaintiff would not be forced to file a premature lawsuit on the chance that her cancer might recur, while still protecting a plaintiff from the argument that awareness of speculative or minor injury would start the statute running and preclude a later claim when the recurrence manifested a real and substantial injury. The Court noted:

[M]any of these plaintiffs will be unable to produce the necessary evidence to show that the future harm is more likely to occur than not. Yet if the harm, such as the recurrence of cancer, actually later occurs, the plaintiff would be precluded from any recovery for devastating injuries by reason of having acquired an earlier claim for purely speculative ones. We believe that the better approach is to wait until the potential harm manifests itself, allowing for more certain proof and fewer speculative lawsuits.

Seale, 923 P.2d at 1366.

Seale poses problems for both plaintiffs and defendants in cancer diagnosis cases. A plaintiff might argue that it is unfair to prevent her from a present recovery of existing damages for having undergone more extensive surgery or cancer treatment. She is,

however, insulated from the running of the statute of limitations and assured that she will not be without a remedy if the worst (recurrence of the cancer) occurs in the future. In short, premature and relatively minor damage cases are precluded (or delayed) in favor of preserving full rights to a remedy for the devastating and non-speculative damage cases. A defendant physician might argue that the effect of Seale is unfair because it prevents the running of the statute of limitations indefinitely, even where the plaintiff is aware of a misdiagnosis. Seale, however, protects the physician from speculative claims and multiple lawsuits arising from the same treatment.²

The Utah Supreme Court balanced these different interests in Seale and made a sound decision that there shall be only one cause of action in these cases and it will not accrue until such time as there is a recurrence of the cancer. Ms. Medved may not like this outcome now, but it affords her future protection in the event the worst happens, and it is the controlling law in this State.

² The policy decision announced in Seale is sound. It must be remembered that when a physician speaks to a cancer patient about prognosis for future recurrence, it is in the context of statistical possibilities that cannot be applied to an individual case. Accordingly, if a breast cancer patient is told that she has an 85 percent chance of no recurrence in ten years, she also has a 15 percent chance of recurrence. There is no way to know, unless there is a recurrence, which statistical possibility will come to fruition in any individual case. Thus, there will be breast cancer patients who are diagnosed early with stage one cancer who receive appropriate treatment and who will, nevertheless, have a recurrence; and there will be breast cancer patients--and Mrs. Medved may be one--who are diagnosed for the first time when their cancer is stage two, who will never have a recurrence. The holding in Seale avoids burdening courts with the trial of hypothetical injury cases, while at the same time preserving a plaintiff's potential claim until such time as an actual injury occurs.

As she did below, plaintiff again mistakenly relies on Swain v. Curry, 595 So.2d 168 (Fla. Dist. Ct. App. 1992), review denied, 601 So.2d 551 (Fla. 1992). The defendants, who did not prevail in Seale, also cited Swain in support of their argument. The Supreme Court, expressly declined to follow Swain and rejected defendants' argument. Swain was distinguishable not only on the facts, but also on the law. An important consideration in Swain was the Florida statute of limitations for medical malpractice claims, which commences to run when a patient knows of either a breach of the standard of care or a physical injury. Swain, at 171 and n.4. Thus, in Swain the Florida court had to be concerned with the possibility of the statute of limitations running to preclude a misdiagnosis case even where there was no injury.³ The Court solved the problem by allowing the patient to proceed with a claim for possible recurrence of cancer. In Utah, the state Supreme Court is faced with a different statute of limitations standard which requires knowledge of both the physical injury and the possibility that it was caused by medical negligence before the statute will commence to run.⁴ The Utah Supreme Court has thus

³ In Seale, the Court also took note of another Florida case, Johnson v. Mullee, 385 So.2d 1038 (Fla. Dist. Ct. App. 1980), review denied, 392 So.2d 1377 (Fla. 1981). In that case, however, the Florida Court of Appeal found under similar circumstances that the plaintiff had no cause of action until there was a recurrence or metastatic spread of the cancer. Notably, Johnson was decided under an earlier version of Florida's statute of limitations, one which was different from that considered in Swain.

⁴ In Utah, the two-year period for bringing a medical negligence claim "does not start to run until the injured person knew or should have known that he had sustained an injury and that the injury was caused by negligence." Seale, at 1363 (citing Foil v. Ballinger, 601 P.2d 144, 148 (Utah 1979).)

been able to protect plaintiffs in delayed diagnosis of cancer cases by ruling that, until there is a recurrence, there is no injury and the statute will not run.

Most importantly, the Utah Supreme Court has addressed the problem of the statute of limitations and the one action rule in a way that provides far more protection to plaintiffs who ultimately suffer a recurrence, than the Florida Court did in Swain. Rather than forcing plaintiffs into premature speculative lawsuits, which preclude them from filing an action upon discovery of the ultimate injury, the Utah Supreme Court has, under its statute of limitations, extended to plaintiffs the opportunity in every such case to wait and obtain full compensation for the ultimate devastating injury. Seale v. Gowans is the controlling law in this case and, as noted above, the facts are indistinguishable. Only one claim may be brought for injuries arising from the alleged delayed diagnosis of cancer, and regardless of the existence of some actual injury in the form of more extensive therapy, the claim cannot be brought until such time as there is a recurrence of cancer. In the meantime, the plaintiff is protected, for the statute of limitations will not run.

CONCLUSION

Fortunately, Mrs. Medved has been in remission since completion of her therapy. Any statistical possibility or even probability of recurrence is insufficient to sustain a claim under Seale. The presence of allegations, or even evidence, of more extensive medical treatment being caused by a delayed diagnosis, even if true, does not alter the outcome.

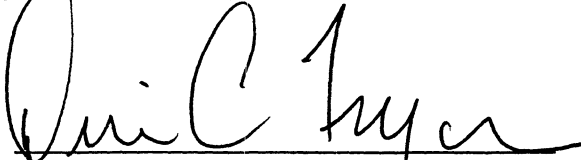
If this Court affirms the district court's Order of Dismissal Without Prejudice, for the reason that no actionable claim presently exists, plaintiff will have lost comparatively

little. If she does suffer a future recurrence, she will retain the right to file a claim for full recovery at that time. Only if this Court declines to follow Seale and reverses the district court, will plaintiff lose the right to file a claim if her cancer recurs in the future.

For the foregoing reasons, defendants/appellees respectfully request that this Court affirm the district court's sound ruling.

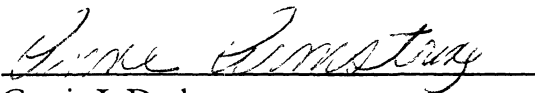
DATED this 17 day of December, 2003.

WILLIAMS & HUNT

By 

Dennis C. Ferguson
Attorneys for Defendant/Appellee
Estate of Blayne L. Hirsche, M.D.

SNELL & WILMER

By 

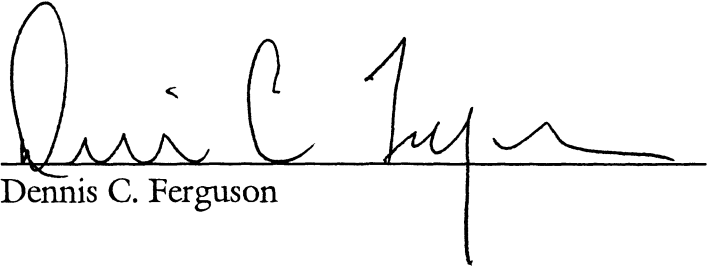
Curtis J. Drake
Anne D. Armstrong
Attorneys for Defendant/Appellee
C. Joseph Glenn, M.D.

CERTIFICATE OF SERVICE

I hereby certify that on the 17 day of December, 2003, two (2) true and correct copies of the foregoing **Joint Brief of Appellees Estate of Blayne L. Hirsche, M.D. and C. Joseph Glenn, M.D.** were mailed postage prepaid thereon, by first class mail in the United States mail, to:

Attorneys for Appellant

James W. Gilson
SIEGFRIED & JENSEN
5664 S. Greet Street
Murray, UT 84123


Dennis C. Ferguson

109378.2