

2004

Marion Snow and Roger Snow v. Richard A. Irion, M.D. : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MARION SNOW and ROGER
SNOW,

Plaintiffs/Appellants,

vs.

RICHARD A. IRION, M.D.,

Defendant/Appellee.

**REPLY BRIEF OF
APPELLANTS
MARION AND ROGER SNOW**

Case No.: 20040850-CA

Third Judicial District Court
Civil No.: 040908601
(Judge Glenn K. Iwasaki)

Appeal from Order Granting Defendant's Motion to Dismiss Without
Prejudice entered by the Third Judicial District Court per the Honorable Glenn K.
Iwasaki, District Court Judge, on September 27, 2004.

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Whipple v. American Fork Irrigation Co., 910 P.2d 1218, 1220 (Utah 1996)

REPLY TO DR. IRION'S "STATEMENT OF THE CASE"

Dismissal of a complaint, as occurred in the district court here, is justified only when the allegations of the complaint clearly demonstrate that the plaintiff does not have a claim. Whipple v. American Fork Irrigation Co., 910 P.2d 1218, 1220 (Utah 1996). In determining whether a trial court properly dismissed an action, a reviewing court assumes that the factual allegations in the complaint are true and draws all reasonable inferences in the light most favorable to the plaintiff. *Id.* at 1219. Therefore, for purposes of this appeal, the assertions set forth in the Snows' amended complaint must be accorded verity. In his "Statement of the Case," Dr. Irion fails to recognize this principle.

On pages 2 and 3 of his brief, Dr. Irion repeatedly refers to the malignant tumor on Mrs. Snow's ovary as a "cyst." The Snows' complaint identifies the

growth as a tumor. Even Dr. Irion's own answer identifies the tumor as a "mass."

Dr. Irion's attempt to transform the tumor into a mere cyst is inappropriate.

Dr. Irion asserts on page 2 of his brief that "Mrs. Snow's cancer has been successfully treated, and she has since been in remission, with no diagnosis of recurrent cancer." The affidavit of Mr. and Mrs. Snow which Dr. Irion cites actually states the facts as follows:

Although we understand there has been no diagnosis of "recurrent" cancer since Marion's second surgery on August 13, 2002, we have never been told by any physician that Marion is in remission or cured from her cancer.

(R. 57; see also Exhibit "A", attached to this reply brief).

Dr. Irion states that the Snows' complaint alleges he failed to timely diagnose and treat Mrs. Snow's cancer and timely refer her to an oncologist, causing "a statistically greater risk for return of ovarian cancer." This summary of the Snows' complaint inaccurately implies that it contains no claims other than a damage claim based on increased risk of cancer recurrence. The Snows' amended complaint very clearly sets forth a number of additional claims. For example, the Snows allege Dr. Irion actually caused the spread of her cancer and her need for further surgery and subsequent chemotherapy by rupturing the tumor as he inappropriately attempted to remove it vaginally. (See ¶20 of Amended Complaint, R.13). In addition, the Snows claim Dr. Irion directly injured

Mrs. Snow's bladder while attempting to perform his vaginal hysterectomy, which he could have avoided had he proceeded appropriately. (See ¶20 d of Amended Complaint, R. 12; see also Exhibit "B", attached).

On page 3 of his brief, Dr. Irion asserts: "The Snows make no allegation of injury beyond their claim that there is a heightened risk that Mrs. Snow's cancer will return." That assertion is simply inaccurate. (See e.g., ¶¶20 d and g, 21, 23, 24, 27, 28 and 29 of Plaintiff's Amended Complaint, R. 9-15; see also June 30, 2004 Joint Affidavit of Marion Snow and Roger Snow at R. 56-58).

ARGUMENT

I.

THIS COURT SHOULD NOT RULE ON THIS APPEAL UNTIL THE UTAH SUPREME COURT HAS DECIDED MEDVED V. GLENN (SC #20040492).

Dr. Irion contends the decision of the district court should be upheld because the district court correctly interpreted and applied this Court's decision in Medved v. Glenn, 2004 WL1065503 (Utah App) and Seale v Gowans, 923 P.2d 1361 (Utah 1996). After this Court issued its opinion in Medved v. Glenn, supra, the Utah Supreme Court granted Medved's petition for writ of certiorari. Medved v. Glenn currently pends before the Utah Supreme Court. That Court heard oral argument in the case on March 1, 2005. It is likely to issue an opinion in Medved

in the near future. The principle issue in Medved is identical to the principal issue raised in this appeal. The Supreme Court's decision in Medved is likely to be dispositive. It is also likely to clarify the holding of Seale v. Gowans, *supra*. This Court, therefore, should hold off ruling on this appeal until the Supreme Court has decided Medved.

II.

THE SNOWS HAVE ALREADY SUSTAINED ACTUAL INJURY AS A RESULT OF DR. IRION'S NEGLIGENCE.

Dr. Irion asserts: "The Snows fail to allege an actionable injury" (Appellee brief at p. 10) and "The Snows' allegations of damages do not qualify as an allegation of present actual injury." (*Id.* at 9). Finally, he states: "It must be remembered, Dr. Irion did not give Mrs. Snow cancer." (*Id.* at 10). According verity to the Snows' allegations, as this Court must, all of these assertions are inaccurate.

While it is true that Dr. Irion did not *create* the malignant tumor he found while undertaking to remove Mrs. Snow's uterus, he did *cause* the spread of cancer which necessitated her second surgery and subsequent treatment when he ruptured the tumor and allowed its malignant cells to seed throughout her body. In addition, he was responsible for the lengthy delay in the commencement

of treatment for the spread of the cancer. (See Amended Complaint at ¶¶10 - 15 and 17 -18, and 20 -29; R. 9-15). Also, he perforated Mrs. Snow's bladder during his surgery on her. (See Exhibit "B", attached and R. 12, ¶20 d)

In opposing Dr. Irion's motion to dismiss in the district court, Roger and Marion Snow signed an affidavit attached to their counsel's memorandum. As Dr. Irion concedes in footnote 2 of his appellee brief, that affidavit is appropriately a part of the record. It is found at R. 56-58. A copy is attached to this brief as Exhibit "A". For purposes of this appeal, this Court is bound to accept the following averments as true:¹

3. Because Marion was required to have two surgeries and chemotherapy treatment, she was required to use all of her family/home leave time from work and then lost her job and all related benefits, including health and life insurance coverage. She is no longer able to work.
4. Marion applied for and was granted Social Security Disability benefits on November 7, 2003 because of health issues related to the spread of her ovarian tumor, requiring chemotherapy treatment and a second surgery. The benefits were deemed retroactive to December of 2002, shortly after Marion's second surgery. The monthly payments made by Social Security are substantially less than Marion's income when she was able to work.
5. When Marion lost her job, we lost our group health insurance. We now have COBRA coverage, which is very costly, and which will expire in February 2005. At that point we will have no health insurance and Marion will still be too young for Medicare coverage. It is unlikely we will be able to

¹See. e.g., Whipple v. American Fork Irrigation Co., 910 P.2d 1218, 1220 (Utah 1996).

obtain other health insurance due to her "pre-existing" condition.

6. We have incurred medical bills in excess of \$140,000.00 which we believe are directly attributable to Dr. Irion's substandard care.
7. Marion is no longer able to perform many daily tasks she performed before Dr. Irion's surgery in June of 2002. We attribute her inability to perform many normal activities of daily living to Dr. Irion's substandard care. We believe that had Dr. Irion correctly diagnosed and removed Marion's ovarian tumor, there would have been no necessity for a second surgery to remove cancer resulting from seeding, and Marion would not have required the further treatment and surgery which have significantly reduced her ability to function.
8. Since Dr. Irion's negligent removal of Marion's ovarian tumor, we have suffered a profound diminution of our quality of life together and cannot participate in many of the activities we used to enjoy before her injuries.

(R. 57-58; see Exhibit "A", attached).

Clearly, the Snows have alleged significant and very real actual, present damage resulting from Dr. Irion's negligence. The injuries and damages described above are all actionable.

III.

**SEALE V. GOWANS DOES NOT HOLD THAT
A CLAIM FOR ENHANCED RISK OF CANCER
RECURRENCE IS INACTIONABLE NOR DOES IT
HOLD THAT A PERSON WITH A PRESENT HARM
MAY NOT ALSO CLAIM A FUTURE HARM.**

Dr. Irion sets forth on pages 6 and 7 of his brief the facts in Seale v. Gowans. That recitation reveals a key fact distinguishing that case from this one. In Gowans, no suit was filed until the cancer had recurred. There was no occasion for our Supreme Court to rule on whether an earlier filed complaint alleging both present and future damages would have been actionable. It is noteworthy that in Gowans, the party contending for the earlier existence of a legally cognizable injury was not the patient, but the defending doctor. He did so in the context of a statute of limitations defense. Our Supreme Court merely held that he “failed to meet [his] burden to prove that Ms. Seale suffered a legally cognizable injury when she discovered that the cancer had spread to her lymph nodes.” Our Court found that the doctor, not the patient, had “failed to argue or to produce evidence that in 1988, Ms. Seale could complain of any actual present damages.” (923 P.2d at 1364-65). Our Supreme Court’s conclusion in Gowans was merely this:

Defendants have failed to meet their burden of showing that Ms. Seale discovered any legally cognizable injury

in 1988 and was therefore barred by the statutory time period when she brought her action in 1991 when the cancer appeared in her hip.

(*Id.* at 1365) (emphasis added).

Our Supreme Court's "holding" in Seale v. Gowans is limited: "Damages in the form of an enhanced risk only are not sufficient to start the running of the statute of limitations." (*Id.*) Dr. Irion asks this Court to extend that holding and to assume our Supreme Court intended to rule that in no case could a patient herself pursue a claim where the only damage was heightened risk of cancer recurrence. Our Supreme Court has yet to make such a ruling. If it had, such a ruling would not justify dismissal of the Snows' claim because they claim very real and significant present damages resulting from Dr. Irion's negligence in addition to and wholly apart from Mrs. Snow's heightened risk of cancer recurrence.

Dr. Irion's suggestion that his own understanding and interpretation of Seale v. Gowans is universal and any other interpretation would upset the justified expectation of past litigants is demonstrably unsound. He contends: "Plaintiffs' lawyers in this state have relied on Seale and made informed decisions not to initiate litigation in cases involving delayed cancer diagnosis until there has been a recurrence of cancer" (Appellee brief at 8). Actually, any plaintiff's lawyer aware of present damages sustained as a result of a doctor's negligence pertaining to the diagnosis of cancer risks committing malpractice by not bringing

action immediately. The idea that combining such a claim with a claim for future loss is fatal to both claims did not gain notice (or notoriety) until this Court's decision in Medved v. Glenn.

IV.

CONTRARY TO DR. IRION'S SUGGESTION, UHCMA'S STATUTE OF LIMITATIONS AND STATUTE OF REPOSE ARE HIGHLY GERMANE TO THIS CONTROVERSY.

In his footnote 6 (Appellee brief at 8), Dr. Irion states

Neither the statute of limitations nor the statute of repose are issues in this case. Whether the statute of limitations or the statute of repose could or would preclude any of the Snows' claims is purely speculative. . . . These issues are unripe, were not decided by the trial court, and are not before this Court on appeal.

(Appellee brief, p. 8, fn. 6).

It is easy for Dr. Irion to discount concerns over the running of the Utah Health Care Malpractice Act's statute of limitations and statute of repose because those statutes can only benefit, not harm, him. Those statutes are of understandably major concern to litigants like the Snows. The Snows addressed both statutes in their memorandum to the district court (R. 50-51) and in their brief-in-chief to this Court. (Appellant brief pp.14-18). Dr. Irion argues: "If this Court affirms the trial court's dismissal . . ., the Snows will retain the right to file a

claim for full recovery if Mrs. Snow suffers a future recurrence.” This argument overlooks and trivializes the significant damage the Snows have already sustained and ignores the deprivation of access to the courts which occurs if Mrs. Snow does *not* suffer a future recurrence.

CONCLUSION

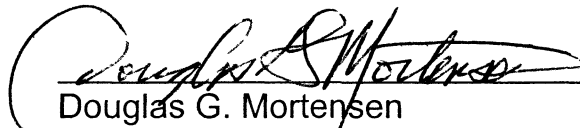
The Snows’ complaint alleges Dr. Irion’s surgical and post operative negligence caused them significant present, non speculative harms. Those harms include: perforation of Mrs. Snow’s bladder; the seeding and spread of cancer cells throughout Mrs. Snow’s peritoneal cavity; the incurrence of over \$140,000 in medical bills for cancer surgery and chemotherapy which would not have been necessary but for Dr. Irion’s negligence; loss of income, loss of job and consumption of employment benefits; impairment of earning capacity; loss of affordable insurance coverage; and quality of life damages.

There was no need to have dismissed the significant portions of the Snows’ claim seeking recovery for these harms merely because another portion of their claim (increased risk of cancer recurrence) was found to be inactionable.

Our Supreme Court is in process of deciding whether Seale v. Gowans, *supra*, really does preclude a plaintiff from alleging, proving and recovering damages for a heightened risk of cancer recurrence. Until it has decided that

question and has determined whether this Court's Medved decision needs modification, this Court should not affirm the district court's dismissal of the Snows' complaint.

Respectfully submitted this 13 day of May, 2005.



Douglas G. Mortensen

MATHESON, MORTENSEN, OLSEN & JEPPSON

Attorneys for Plaintiffs/Appellants

CERTIFICATE OF SERVICE

I certify that on the 16 day of May, 2005, I delivered via the method indicated two (2) copies of the foregoing to the following:

Elliott J. Williams
Carol Stevens Jensen
Williams & Hunt
257 East 200 South, Suite 500
P.O. Box 45678
Salt Lake City, UT 84145-5678

<input checked="" type="checkbox"/>	U.S. Mail
<input type="checkbox"/>	Facsimile
<input type="checkbox"/>	Hand-Delivered
<input type="checkbox"/>	Federal Express



Attorneys for Plaintiffs

MARION SNOW and ROGER SNOW,
Plaintiffs,
vs.
RICHARD A. IRION, M.D.,
Defendant.

Judge Glenn K. Iwasaki

1. We had two post-operative appointments with Dr. Irion following Marion's hysterectomy surgery on June 18, 2002. Dr. Irion never personally informed either one of us at any time during those appointments that the tumor he removed from Marion during the June 18, 2002 surgery was cancerous. Dr. Irion made us an appointment with an

oncologist, Dr. Christopher Jolles, who told us about the cancer.

2. Although we understand there has been no diagnosis of “recurrent” cancer since Marion’s second surgery on August 13, 2002, we have never been told by any physician that Marion is in remission or cured from her cancer.

3. Because Marion was required to have two surgeries and chemotherapy treatment, she was required to use all of her family/home leave time from work and then lost her job and all related benefits, including health and life insurance coverage. She is no longer able to work.

4. Marion applied for and was granted Social Security Disability benefits on November 7, 2003 because of health issues related to the spread of her ovarian tumor, requiring chemotherapy treatment and a second surgery. The benefits were deemed retroactive to December of 2002, shortly after Marion’s second surgery. The monthly payments made by Social Security are substantially less than Marion’s income when she was able to work.

5. When Marion lost her job, we lost our group health insurance. We now have COBRA coverage, which is very costly, and which will expire in February 2005. At that point we will have no health insurance and Marion will still be too young for Medicare coverage. It is unlikely we will be able to obtain other health insurance due to her “pre-existing” condition.

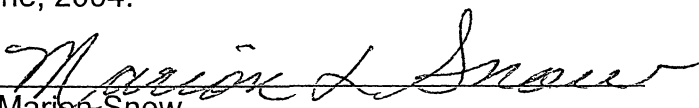
6. We have incurred medical bills in excess of \$140,000.00 which we believe

are directly attributable to Dr. Irion's substandard care.

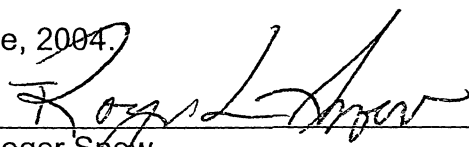
7. Marion is no longer able to perform many daily tasks she performed before Dr. Irion's surgery in June of 2002. We attribute her inability to perform many normal activities of daily living to Dr. Irion's substandard care. We believe that had Dr. Irion correctly diagnosed and removed Marion's ovarian tumor, there would have been no necessity for a second surgery to remove cancer resulting from seeding, and Marion would not have required the further treatment and surgery which have significantly reduced her ability to function.

8. Since Dr. Irion's negligent removal of Marion's ovarian tumor, we have suffered a profound diminution of our quality of life together and cannot participate in many of the activities we used to enjoy before her injuries.


DATED this 30th day of June, 2004.

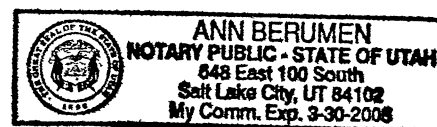

Marion Snow

DATED this 30th day of June, 2004.


Roger Snow

SUBSCRIBED AND SWORN to before me this 30th day of June, 2004.


Notary Public



SURGEON: David A. Kimball, M.D.

ASSISTANT:

PREOPERATIVE DIAGNOSIS:

POSTOPERATIVE DIAGNOSIS:

OPERATION PERFORMED:

ANESTHESIA:

HISTORY: This patient is a 61 year old white female who is being operated on by Dr. Irion for a hysterectomy. I was asked to see the patient during the surgery because of a perforation of the bladder. Dr. Irion and I discussed the case. The patient's bladder had been entered and we talked about closure of the bladder. Once this was accomplished, I came back and did a cystoscopy on the patient. The indigo was injected intravenously and could be seen to exude from the ureters bilaterally.

PROCEDURE:

DAVID A. KIMBALL, M.D.

PAT: SNOW, MARION DIC: David A. Kimball, M.D.
EVD: / / D: 07/07/2002 T: 07/08/2002
C: 89425565 2435 3 - DMAQVS132H
TYPIST: 438 JOB # 22233 BATCH: 26393