

2004

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

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.

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**BRIEF OF APPELLEE
RICHARD A. IRION, M.D.**

Case No. 20040850-CA

**APPEAL FROM ORDER GRANTING MOTION TO DISMISS WITHOUT
PREJUDICE, ENTERED BY THE THIRD JUDICIAL DISTRICT COURT,
SALT LAKE COUNTY, THE HONORABLE GLENN K. IWASAKI,
PRESIDING**

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STATEMENT OF RELATED CASES

There are no prior or related appeals.

STATEMENT OF JURISDICTION

The Court of Appeals has appellate jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j) (2002).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

Issue Presented: The trial court correctly dismissed without prejudice the medical negligence claim of plaintiffs/appellants Roger and Marion Snow (“the Snows”) for failure to timely diagnose and treat Mrs. Snow’s ovarian cancer, when it is undisputed there has been no recurrence of cancer, under the established precedent of Seale v. Gowans, 923 P.2d 1361 (Utah 1996). This issue was raised in Dr. Irion’s Motion to Dismiss Without Prejudice. (R. at 24-35, 69-76.)

Standard of Review: The standard of review for this issue on appeal is correctness, granting no deference to the trial court’s conclusions. Foutz v. City of S. Jordan, 2004 UT 75, ¶ 8, 100 P.3d 1171. This Court may affirm on any ground available to the district court, even if it is not one relied upon below. Debry v. Noble, 889 P.2d 428, 444 (Utah 1995).

PROVISIONS OF CONSTITUTION, STATUTES, ORDINANCES AND RULES

There are no legislative provisions which are determinative of the issue presented.

STATEMENT OF THE CASE

A. Nature of the Case.

This is a medical negligence action commenced by the Snows against defendant/appellee Richard Irion, M.D. (“Dr. Irion”). (R. at 1-6.) On June 18, 2002,

Dr. Irion, a board-certified ob/gyn, performed a vaginal hysterectomy on Mrs. Snow for post-menopausal bleeding. (R. at 10.) During surgery he discovered a cyst on her left ovary, which ruptured upon removal. (R. at 10-11.) Intra-operative pathology identified the cyst as benign, and Dr. Irion completed the surgery without further exploration. The final pathology report, however, determined the cyst was cancerous. (R. at 11.) Dr. Irion thus referred Mrs. Snow to a gynecologic oncologist and Mrs. Snow underwent cancer treatment. (R. at 11.) Mrs. Snow's cancer has been successfully treated, and she has since been in remission, with no diagnosis of recurrent cancer. (R. at 11-12, 57.)

B. Course of Proceedings and Disposition in Trial Court.

The Snows commenced legal action against Dr. Irion on April 28, 2004, alleging that Dr. Irion failed to timely diagnose and treat Mrs. Snow's cancer and refer her to an oncologist. (R. at 1-6, 12-14.) The delay is alleged to have caused a statistically greater risk for return of ovarian cancer. (R. at 9-15.)

On June 15, 2004, Dr. Irion filed a Motion to Dismiss Without Prejudice because, under Seale v. Gowans, 923 P.2d 1361 (Utah 1996) and Medved v. Glenn, 2004 UT App. 161, 176, 92 P.3d 176, the Snows are unable as a matter of law to establish a legally cognizable injury to satisfy their *prima facie* claims of medical negligence against Dr. Irion. (R. at 24-35.) The trial court granted the Motion and entered its Order Granting Defendant's Motion to Dismiss Without Prejudice on September 27, 2004. (R. at 95-96.) The Snows now appeal from that Order of Dismissal. (R. at 101.)

C. Statement of Facts.¹

1. On June 18, 2002, Dr. Richard Irion performed a hysterectomy on 62-year old Marion Snow for post-menopausal bleeding. (R. at 10.)
2. During surgery, Dr. Irion observed a cyst on Mrs. Snow's ovary which ruptured when he attempted to remove it. (Id.)
3. The mass turned out to have malignant cells. (R. at 11.)
4. Mrs. Snow underwent cancer treatment. (Id.)
5. Mrs. Snow's cancer treatment has been successful. (R. at 11-12.)
6. The Snows have attested that "there has been no diagnosis of 'recurrent' cancer since Marion's second surgery on August 13, 2002."² (R. at 57.)
7. The Snows make no allegation of injury beyond their claim that there is a heightened risk that Mrs. Snow's cancer will return. (R. at 9-15.)

¹ In support of their appeal, the Snows have recited their allegations of negligence as set forth in the Amended Complaint. (Aplt. Br. at 3-4.) While Dr. Irion has reason to dispute all of these allegations against him, he did not do so in the context of the Motion to Dismiss and does not do so now, accepting all of the allegations of the Amended Complaint as true for the limited purpose of his Motion to Dismiss. However, the entirety of the factual allegations of the Complaint have no relevance to this Motion, which challenged the legal sufficiency of the Complaint due to lack of cognizable legal injury.

² The only evidence outside of the allegations of the Amended Complaint presented to the trial court was an Affidavit by the Snows, which they submitted in opposition to Dr. Irion's Motion to Dismiss. The trial court was entitled to consider this Affidavit regardless of how the Motion was styled. Utah R. Civ. P. 12(b). It makes no difference whether the trial court treated Dr. Irion's Motion as a Motion to Dismiss pursuant to Rule 12(b)(6), or as a Motion for Summary Judgment pursuant to Rule 56.

SUMMARY OF ARGUMENT

I. This case comes before the Court as a straightforward application of the definition of “legal injury” as set forth by Utah Supreme Court in Seale v. Gowans, 923 P.2d 1361 (Utah 1996). Seale is a policy-based decision holding that cancer patients seeking damages for a worse statistical prognosis of remaining cancer free because of a delay in diagnosis do not have a legal injury unless or until there is a recurrence of cancer. Seale prevents litigation over speculative claims that may never arise. It is undisputed that Mrs. Snow has not had a recurrence of cancer. Based on Seale, the trial court correctly dismissed the Snows’ claims without prejudice.

II. The Snows cannot circumvent Seale and proceed with a speculative claim for damages based on enhanced risk of future cancer because, like the plaintiff in Seale, there is no allegation of any current legal injury.

Moreover, even if the Snows had alleged actual injury (which they do not), dismissal is still appropriate under Medved v. Glenn, 2004 UT App. 161, 92 P.3d 176, which holds that a medical malpractice plaintiff cannot proceed with a claim for heightened risk of cancer recurrence simply because they concurrently allege actual damages.

III. The Snows’ contention of “unfairness” is both one-sided and insufficient to allow the trial court to ignore the binding Utah precedent articulated in Seale, which requires dismissal of the Snows’ loss of chance claims. The Snows’ requests to indefinitely suspend the statute of limitations, or in the alternative to indefinitely allow the case to

remain on file so they can pursue it if it ever ripens, are without basis in law and the trial court correctly denied them.

ARGUMENT

POINT I.

THE TRIAL COURT CORRECTLY DISMISSED THE SNOWS' CLAIMS WITHOUT PREJUDICE UNDER SEALE V. GOWANS.

In this medical malpractice lawsuit, the Snows claim Dr. Irion failed to properly diagnose and treat Mrs. Snow's ovarian cancer. (R. at 9-15.) The Snows seek damages for the heightened risk that Mrs. Snow's cancer will return and for the risk that she potentially has a shortened life expectancy. (R. at 11-13.) It is uncontroverted that Mrs. Snow's cancer treatment has been successful, (R. at 11), and "there has been no diagnosis of 'recurrent cancer' since Marion's second surgery on August 13, 2002." (R. at 57.) Given these facts, the sole question presented before the trial court and on appeal is whether the Snows' claim of increased risk is an actual present injury sufficient to sustain their claims of injury against Dr. Irion.³ Under Utah law, it is not.

Utah does not recognize loss of chance or statistically increased risk of injury as a basis for recovery. Seale v. Gowans, 923 P.2d 1361, 1364 (Utah 1996); see also Medved v. Glenn, 2004 UT App. 161, ¶ 5, 92 P.3d at 178;⁴ Andersen v. Brigham Young

³ Mr. Snow seeks loss of consortium damages, which is by statute a derivative claim subject to all of the same defenses as his wife's underlying negligence claim. Utah Code Ann. § 30-2-11 (1998).

⁴ The Snows seek reversal of the trial court's decision on the contention that Medved is unfair, erroneous and inconsistent with Seale v. Gowans, 923 P.2d 1361 (Utah

University, 879 F. Supp. 1124, 1129-30 (D. Utah 1995), aff'd, 89 F.3d 849 (10th Cir. 1996). The Utah Supreme Court has made clear that “an alleged claim for enhanced risk is not adequate to sustain a cause of action for negligence.” Seale, 923 P.2d at 1365.

More specifically,

the law does not recognize an inchoate wrong, and therefore, until there is “actual loss or damage resulting to the interests of another,” a claim for negligence is not actionable.

Id. at 1364.

In this case, the trial court correctly dismissed the Snows’ claims without prejudice under Seale v. Gowans. In Seale, the plaintiff had a mammogram in August 1987, which was read as negative by a radiologist, defendant Dr. Gowans. In May of 1988, the plaintiff had another mammogram which revealed a breast mass. A needle biopsy of the mass disclosed that it was cancerous. A retrospective review of the 1987 mammogram indicated evidence of the breast tumor. The plaintiff had a radical mastectomy and pathological studies revealed a second malignant tumor and cancer in her lymph nodes. All of the cancer was removed and Ms. Seale remained cancer free until August 1991 at which time a bone scan revealed cancer in her left hip. Id. at 1362.

The plaintiff immediately commenced litigation against Dr. Gowans and Holy Cross Hospital, alleging that negligent delay in diagnosing her cancer had allowed the

1996). (Aplt. Br. at 8-9.) The Utah Supreme Court granted certiorari on the Medved decision in August 2004. Oral argument was held March 1, 2005. No decision has yet been issued. The outcome of the Supreme Court’s review of Medved is, however, not dispositive of this appeal, as Seale alone supports the trial court’s dismissal in this case.

cancer to spread to her hip. The defendants sought and were awarded summary judgment on the basis that Ms. Seale had failed to commence her action within two years from the date she discovered negligence by Dr. Gowans and the hospital. The Utah Supreme Court reversed this ruling, holding that Ms. Seale had suffered no injury until she discovered the recurrence of cancer in her hip in August of 1991. Id. at 1364.

In the context of the statute of limitations argument, the Seale court held that until there is a recurrence of cancer, there is no legally cognizable injury. Id. at 1365. Clearly, if there is no legal injury sufficient to start the running of the statute of limitation until there has been a recurrence, there can be no legal injury sufficient to support a medical negligence claim absent a recurrence. The language in Seale is unambiguous on this point:

[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. The only evidence that defendants produced regarding the harmful consequence of the cancer's spread was that it increased the risk that the cancer would recur. They failed to argue or to produce evidence that in 1988, Ms. Seale could complain of any actual present damages. Although we agree that the cancer's spread resulted in a dramatic increase in Ms. Seale's chance of survival, we conclude that without proof of actual damages, an alleged claim for enhanced risk is not adequate to sustain a cause of action for negligence.

Id. at 1364-65 (emphasis added). Further, "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." Id. at 1364.

In this case, the Snows cannot establish they have suffered a legally cognizable injury giving rise to a claim. Fortunately, Mrs. Snow's cancer remains in remission and

she has not suffered a recurrence. (R. at 11 & 57.) Even if there is, for the sake of argument, a statistical possibility or even probability of recurrence, enhanced risk is insufficient to sustain a claim at this point. Seale, 923 P.2d at 1364.⁵ As with the plaintiff in Seale, Mrs. Snow “must wait until some harm manifests itself.” Id. Until then, the Snows’ claims are premature and legally insufficient to establish a claim of medical negligence.⁶ Their action was thus correctly dismissed without prejudice. Any other ruling would have been directly contrary to established Utah law.

Indeed, carving an exception into Seale to save the Snows’ claims in this case would have a far-reaching impact and would obviate medical negligence claims of other would-be plaintiffs. Seale has been controlling law in Utah for eight years. 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, and trial courts have relied on Seale to dismiss cases alleging damages for increased risk. If Seale were now interpreted to mean that there is cognizable legal injury before a recurrence,

⁵ See also Andersen, 879 F. Supp. 1124 (plaintiff diagnosed with Hodgkin’s Disease asserted 6-month delay in diagnosis caused reduction in his chance of survival, and the federal district court concluded Utah law “has not adopted a separate cause of action permitting recovering for the reduction of a statistical chance of long-term survival”)

⁶ The Snows contend that if the trial court is affirmed and their causes of action remain dismissed without prejudice, the statute of limitations and the statute of repose jeopardize their claims. (Aplt. Br. at 15-17.) 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. Dr. Irion did not argue either of these statutes as a basis for his Motion to Dismiss. Additionally, if there is no recurrence, there can be no claim that could be subject to either the statute of limitations or the statute of repose. These issues are unripe, were not decided by the trial court, and are not before this Court on appeal.

thus allowing plaintiffs to proceed with claims of heightened risk prior to a recurrence, then the claims of many of the plaintiffs who either conscientiously forewent commencing suit, or whose claims were dismissed by the court, would be lost as time-barred. There is no justification to upset the carefully balanced precedent of Seale and to prove those potential plaintiffs, their lawyers and the courts wrong, simply to create the exception which the Snows seek.

POINT II.

UTAH LAW DOES NOT ALLOW THE SNOWS TO PROCEED ON THEIR SPECULATIVE DAMAGE CLAIM SIMPLY BECAUSE THEY ALSO CLAIM TO ALLEGE ACTUAL DAMAGES.

The Snows contend they should be permitted to proceed because, in addition to their claim of damage for a heightened risk of cancer recurrence, they also allege actual injury. (Aplt. Br. at 4 & 6-7.) The “actual injury” claimed by the Snows in this case is: loss of income, impairment of earning capacity, medical costs, “pain, grief, mental anguish, depression, emotional distress and loss of enjoyment of life,” “permanent injury that has substantially changed her lifestyle,” inability to perform household and spousal activities, and a diminution of their quality of life. (Id.)

A. THE SNOWS DO NOT ALLEGE ACTUAL INJURY.

Foremost, the Snows’ allegations of damages do not qualify as an allegation of present actual injury. Utah courts have required plaintiffs asserting a claim of medical malpractice to prove:

1) the standard of care required of physicians under similar circumstances practicing in the same field or specialty, (2) that the applicable standard of care was breached, (3) that the injury to the plaintiff was proximately caused by the defendant's negligence, and (4) that damages occurred as a result of defendant's breach of duty.

Kent v. Pioneer Valley Hosp. 930 P.2d 904, 906 (Utah Ct. App. 1997) (emphasis added). Allegations of “injury”⁷ and “damages” are thus separately required.

Here, the Snows fail to allege an actionable injury.⁸ The gravamen of the negligent conduct alleged is that Dr. Irion failed to timely diagnose the presence of the cyst preoperatively, ruptured Mrs. Snow’s cyst during surgery and thereby “seeded” cancer cells in her abdomen, and failed to timely inform Mrs. Snow regarding the cancer. (R. at 13.) None of these things, however, caused Mrs. Snow actual injury because she is in remission. Thus, substantively at issue is the Snows’ claim that these things caused Mrs. Snow a heightened risk of recurrence. (R. at 11-13.)

It must be remembered, Dr. Irion did not give Mrs. Snow cancer. Mrs. Snow needed treatment for her cancer irrespective of Dr. Irion’s care, and all of the “actual damages” sought in this lawsuit are attendant to her cancer treatment. The Snows have not alleged any different treatment, or additional injury, due to Dr. Irion’s allegedly

⁷ “Personal injury” is defined as “a hurt or damage done to a man’s person, such as a cut or bruise, a broken limb, or the like” Black’s Law Dictionary 402 (6th ed. 1990).

⁸ In this respect, this case is analogous to Seale. Like the present case, the Seale plaintiff did not allege actual injury. Seale, 923 P.2d at 1365. Thus, even if the Utah Supreme Court were to remand the Medved decision, this Court need not reverse in this case as it is well-supported by Seale.

substandard care. There is no allegation that Mrs. Snow suffered physical detriment, was required to undergo more invasive treatment, or had any other actual injury other than the alleged decreased risk of long term survival, because of Dr. Irion's alleged negligence.

The so-called "injuries" claimed by the Snows, i.e., loss of income, impairment of earning capacity, medical costs, pain, emotional distress, inability to perform household and spousal activities, etc., are not actual injuries due to allegedly substandard care by Dr. Irion.⁹ Evaluation of the substance of these allegations demonstrate they are really a measure of damages flowing from Mrs. Snow's cancer treatment generally, and the Snows' claimed heightened risk of recurrence.

Thus, like Seale, the Snows have failed to allege actual present damages, Seale, 923 P.2d at 1365, and their lawsuit was appropriately dismissed. If a plaintiff were permitted to avoid the substantive effects of Seale simply by denominating damages as legal injury, the Seale holding would become a nullity. Indeed, the result would be the very thing which the Seale court sought to avoid: (1) ambiguity in determining whether and when a cause of action arises, and (2) increasing speculative lawsuits. Seale, 923 P.2d at 1366.

⁹ Indeed, in Seale, Ms. Seale would have had all of the same "general damages" alleged here by the Snows, yet the Utah Supreme Court did not deem them to constitute a legal injury sufficient to start the running of the statute of limitations. Indeed, the Seale court held that the spread of cancer to Ms. Seale's lymph nodes did not even amount to "a legally cognizable injury." Seale, 923 P.2d at 1364-65.

B. EVEN IF THE SNOWS HAD ALLEGED ACTUAL INJURY, UTAH LAW WOULD STILL NOT ALLOW THEM TO PROCEED WITH THEIR SPECULATIVE CLAIM FOR HEIGHTENED RISK.

Even if the Snows had alleged an actual current legal injury, their argument that this should allow them to assert a speculative claim for enhanced risk of future cancer still fails. It violates the well-established prohibition on splitting actual and speculative claims, and is directly contrary to the holdings in both Seale and Medved. Under Utah law, “claims cannot be split by plaintiffs.” Seale, 923 P.2d at 1364. The Utah Supreme Court has made clear:

[o]nce injury results there is but a single tort and not a series of separate torts [A] plaintiff may not split this cause of action by seeking damages for some of his injuries in one suit and for later-developing injuries in another.

Seale, 923 P.2d at 1364.

Requiring plaintiffs to bring all claims relating to medical negligence in one suit has sound basis in policy. It assures plaintiffs are not forced to file premature lawsuits on the chance of a recurrence of cancer, while still protecting plaintiffs from the argument that awareness of speculative or minor injury starts the statute running and precludes a later claim when the recurrence manifests a real and substantial injury. The Seale court stated:

[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, 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.

In Medved, this Court examined Seale and the prohibition on claim-splitting, and expressly precluded the plaintiff from pursuing her speculative damage claim of heightened risk even though she also alleged actual injury. The Medved plaintiff alleged both actual and speculative damages arising from a single claim of medical malpractice. Medved, 2004 UT App. 161, ¶ 3, 92 P.3d at 178. Specifically, the Medved plaintiff alleged that her delayed cancer diagnoses “caused her to undergo more extensive treatment than necessary” (actual injury), and also “left her with an increased risk of cancer recurrence.”

Id.

Just as the Snows do here, the Medved plaintiff “point[ed] to language from Seale for the proposition that she may maintain a claim for the risk of cancer recurrence if she also presently claims actual damage.” Medved, 2004 UT App. 161, ¶ 8, 92 P.3d at 179. The Medved Court expressly rejected this contention, stating: “Plaintiff’s reliance upon Seale for [this] position is misplaced. Seale clearly stands for the proposition that speculative claims are not allowed under Utah law.” Id. The Medved court held:

Because both actual and speculative claims arising from a single tort cannot be split, we conclude that the trial court correctly dismissed Plaintiff’s action without prejudice.

Medved, 2004 UT App. 161, ¶ 12, 92 P.3d at 180. The Medved court further concluded that Seale does not stand for the proposition that a plaintiff “should be allowed

to pursue her claim for speculative damages so long as she simultaneously pursues her claim for actual damage.” Medved, 2004 UT App. 161, ¶ 10, 92 P.3d at 179. Instead, “Seale preserves Plaintiff’s claim for actual damages until speculative damages become actual damages.” Id.

Thus, even if the Snows had alleged an actual current legal injury, their argument that this Court should allow them to assert a speculative claim for enhanced risk of future cancer still fails under both Seale and Medved.

POINT III.

THE SNOWS’ CLAIMS OF UNFAIRNESS ARE INCORRECT.

A. SEALE AND MEDVED ARE POLICY-BASED DECISIONS THAT BALANCE THE INTERESTS POSED IN CANCER DIAGNOSIS CASES.

Despite the precedent of the Seale decision, the Snows nevertheless contend that the trial court should have declined to dismiss their claim because it would be “unfair” to them. (Aplt. Br. at 14-19.) Not only would this be in direct contravention of well-established Utah law, but the Snows’ claims of one-sided unfairness are incorrect.

The Seale decision poses fairness problems for both plaintiffs and defendants in cancer diagnosis cases. While a plaintiff may contend 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 recurrence occurs in the future. In

short, premature damage cases are precluded (or delayed) in favor of preserving full rights to a remedy for the devastating and non-speculative damage cases.

Conversely, the effect of Seale is arguably unfair to a defendant physician because it prevents the running of the statute of limitations indefinitely, even when the plaintiff is aware of a negligent act. The physician, however, is protected by Seale from speculative claims and multiple lawsuits arising from the same treatment.

In Seale, the Utah Supreme Court has balanced these different interests 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. The Snows may not like this outcome now, but it affords them future protection in the event the worst happens, and it is the controlling law in this State. The trial court correctly applied this law and dismissed the Snows case without prejudice, allowing them the opportunity to re-file the lawsuit if and when there is a recurrence.

B. THE EXTRAORDINARY INTERVENTIONS REQUESTED BY THE SNOWS ARE UNSUPPORTABLE IN UTAH LAW.

To avoid perceived unfairness issues, the Snows ask this Court to “expressly declare[] the statute of limitations suspended indefinitely.” (Aplt. Br. at 14.) Such an extraordinary declaration would be purely anticipatory, since there is no argument before this Court, or before the trial court, that the limitations period on the Snows’ claims has or will expire. Significantly, under Seale, there is no legal injury sufficient to start the running of the statute of limitations until there has been a recurrence. Seale, 923 P.2d at 1364-1366. The Snows conspicuously fail to cite to any legal basis that would allow this

Court to indefinitely suspend a limitations period that has been statutorily established by the Utah Legislature, before it has even started to run. That is because there is none.

Nor is there any authority that would permit this Court to reverse the trial court's dismissal and "allow the Snows to pursue their claim at a speed appropriate to Mrs. Snow's condition," as they request. (Aplt. Br. at 16.) In so arguing, the Snows are asking this Court to allow them to indefinitely keep on file a Complaint that fails to state a claim upon which can be granted. Again, the Snows cite to no authority to support such an usual intervention, or to impose such an onerous burden on Dr. Irion.

Allowing the Snows to simply leave a deficient Complaint on file would unfairly require Dr. Irion to incur the time, expense and burden of monitoring an unripe case against him for an unlimited period of time, just in case the Snows' claims accrue. This would be contrary, the stated purpose of the Utah Rules of Civil Procedure, which is "to secure the just, speedy and inexpensive determination of every action." Utah R. Civ. P. 1(a). It would, additionally, set precedent in other cases, creating an unworkable situation and bogging down the Courts to the disadvantage of all litigants.

CONCLUSION

Fortunately, Mrs. Snow has been in remission since completion of her cancer treatment. Under Seale, any statistical possibility or even probability of recurrence is insufficient to sustain a claim. The trial court thus correctly dismissed the Snows' lawsuit without prejudice. If this Court affirms the trial court's dismissal for the reason that no actionable injury presently exists, the Snows will retain the right to file a claim for full

recovery if Mrs. Snow suffers a future recurrence. Only if this Court declines to follow Seale, and reverses the trial court, will the Snows lose their right to file a claim if Mrs. Snow's cancer recurs in the future.

For the foregoing reasons, Dr. Irion respectfully request that this Court affirm the trial court's sound ruling.

DATED this 20th day of April, 2005.

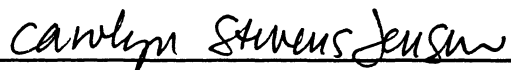
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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of April, 2005, two (2) true and correct copies of the foregoing Brief of Defendant/Appellee Richard A. Irion, M.D. were mailed postage prepaid thereon, by first class mail in the United State mail, to Douglas G. Mortensen, MATHESON, MORTENSEN, OLSEN & JEPPSON, P.C., 648 East 100 South, Salt Lake City, Utah 84102.



Elliott J. Williams
Carolyn Stevens Jensen