

2004

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

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca2](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.

Elliot J. Williams, USB; Carolyn Steven Jensen, USB; Williams and Hunt; Attorneys for Defendant/Appellee Richard A. Irion, M.D..

Douglas G. Mortensen; Matheson, Mortensen, Olsen and Jeppson, P.C.; Attorneys for Plaintiffs/Appellants Marion Snow and Roger Snow.

---

## Recommended Citation

Brief of Appellant, *Snow v. Irion*, No. 20040850 (Utah Court of Appeals, 2004).  
[https://digitalcommons.law.byu.edu/byu\\_ca2/5268](https://digitalcommons.law.byu.edu/byu_ca2/5268)

This Brief of Appellant 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](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

---

IN THE UTAH COURT OF APPEALS

---

MARION SNOW and ROGER  
SNOW,

Plaintiffs/Appellants,

vs.

RICHARD A. IRION, M.D.,

Defendant/Appellee.

**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.

Elliott J. Williams, USB #A3483  
Carolyn Steven Jensen, USB #6338  
**WILLIAMS & HUNT**  
257 East 200 South, Suite 500  
P.O. Box 45678  
Salt Lake City, UT 84145-5678  
(801) 521-5678

Attorneys for Defendant/Appellee  
Richard A. Irion, M.D.

Douglas G. Mortensen, USB #2329  
**MATHESON, MORTENSEN, OLSEN  
& JEPPSON, P.C.**  
648 East 100 South  
Salt Lake City, Utah 84102  
(801) 363-2244

Attorneys for Plaintiffs/Appellants  
Marion Snow and Roger Snow

FILED  
UTAH APPELLATE COURTS  
MAR 21 2005

---

IN THE UTAH COURT OF APPEALS

---

MARION SNOW and ROGER  
SNOW,

Plaintiffs/Appellants,

vs.

RICHARD A. IRION, M.D.,

Defendant/Appellee.

**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.

Elliott J. Williams, USB #A3483  
Carolyn Steven Jensen, USB #6338  
**WILLIAMS & HUNT**  
257 East 200 South, Suite 500  
P.O. Box 45678  
Salt Lake City, UT 84145-5678  
(801) 521-5678

Attorneys for Defendant/Appellee  
Richard A. Irion, M.D.

Douglas G. Mortensen, USB #2329  
**MATHESON, MORTENSEN, OLSEN  
& JEPPSON, P.C.**  
648 East 100 South  
Salt Lake City, Utah 84102  
(801) 363-2244

Attorneys for Plaintiffs/Appellants  
Marion Snow and Roger Snow

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii
STATEMENT OF JURISDICTION .....	1
ISSUES PRESENTED FOR REVIEW .....	1
STATEMENT OF THE CASE .....	3
SUMMARY OF ARGUMENT .....	5
APPLICABLE STANDARD OF REVIEW .....	5
ARGUMENT .....	6
I. MRS. SNOW’S COMPLAINT AMPLY ALLEGES LEGALLY COGNIZABLE INJURIES SEPARATE FROM HER CLAIM OF HEIGHTENED RISK OF CANCER RECURRENCE. ....	6
II. THIS COURT’S <i>MEDVED</i> DECISION, AS APPLIED BY THE DISTRICT COURT, MISCONSTRUES AND IS AT VARIANCE WITH THE UTAH SUPREME COURT’S DECISION IN <i>SEALE V. GOWANS</i> . ....	8
III. DISMISSAL WITHOUT PREJUDICE WOULD HAVE BEEN FAIR IN THIS ACTION ONLY IF ACCOMPANIED BY AN EXPRESS JUDICIAL DECLARATION THAT THE SNOWS MAY REFILE THEIR ACTION AT ANY TIME, WHETHER OR NOT CANCER RECURS, WITHOUT BEING AT RISK FOR HAVING THEIR CLAIM DECLARED TIME- BARRED. ....	14
IV. THE FAIREST COURSE WOULD BE TO REVERSE THE DISTRICT COURT’S GRANT OF DISMISSAL AND TO ALLOW THE SNOWS TO PURSUE THEIR CLAIM AT A SPEED APPROPRIATE TO MRS. SNOW’S CONDITION. ....	16
CONCLUSION AND RELIEF REQUEST.. ....	18
ADDENDUM. ....	21

## **TABLE OF AUTHORITIES**

### **RULES**

Rule 26 of the Utah Rules of Civil Procedure

### **STATUTES**

UCA §78-2a-3(2)(j)

UCA §78-14-4(1)

### **CASE AUTHORITIES**

Architectural Commission v. Kabatznick, 949 P.2d 776, 777 (Utah App. 1997)

Billings v. Union Bankers Ins. Co., 918 P.2d 461, 464 (Utah 1966)

Broad Water v. Old Republic Sur., 854 P.2d 857, 834 N.3 (Utah 1993)

Drake v. Industrial Commission, 939 P.2d 177, 181 (Utah 1997)

Gideon v. Johns-Manville Sales Corp., 761 F.2d 1120, 1136-37 (5<sup>th</sup> Cir. 1985)

Jackson v. Johns-Manville Sales Corp., 781 F.2d 394, 412 (5<sup>th</sup> Cir. 1986)

Klinger v. Kightly, 791 P.2d 868, 870 (Utah 1990)

Medved v. Glenn, 2004 WL1065503 (Utah App.)

Orton v. Carton, 970 P.2d 1254, 1256 (Utah 1998)

Roarke v. Crabtree, 893 P.2d 1058, 1061 (Utah 1995)

Seale v. Gowans, 923 P.2d 1361 (Utah 1996)

Sorensen v. Kennecott-Utah Copper Corp., 873 P.2d 1141, 1144 (Utah App. 1994)

State v. Montoya, 887 P.2d 857, 858 (Utah 1994)

Swain v. Curry, 595 S.2d 168 (Dist. Ct. App. 1992)

Trujillo v. Jenkins, 840 P.2d 777-778-79 (Utah 1992)

White v. Deeselhurst, 879 P.2d 1371, 1373 (Utah 1994)

Wilson v. Johns-Manville Sales Corp., 684 F.2d 111, 119 (DC Cir. 1982)

#### **OTHER AUTHORITIES**

MUJI Instruction 27.2, 27.3 and 27.5

Restatement (Second), of Torts §912 cmt. e (1979)

## **STATEMENT OF JURISDICTION**

UCA § 78-2a-3(2)(j) confers jurisdiction on this Court to decide this appeal.

## **ISSUES PRESENTED FOR REVIEW**

1. Did the district court correctly construe, interpret and apply the Utah Court of Appeals' decision in Medved v. Glenn, 2004 WL1065503 (Utah App.)?

This is a question of law, reviewable for "correctness." Drake v. Industrial Commission, 939 P.2d 177, 181 (Utah 1997); Trujillo v. Jenkins, 840 P.2d 777-778-79 (Utah 1992); State v. Montoya, 887 P.2d 857, 858 (Utah 1994); Billings v. Union Bankers Ins. Co., 918 P.2d 461, 464 (Utah 1996).

2. Did the Utah Court of Appeals in Medved v. Glenn, *supra*, correctly interpret, construe and apply the Utah Supreme Court's decision in Seale v. Gowans, 923 P.2d 1361 (Utah 1996)?

This is a question of law, reviewable for "correctness." Drake, *id.* ; Trujillo, *id.*, State, *id.*

**3. In Utah may a plaintiff maintain an action for increased risk of cancer recurrence when combined with a claim for actual present damages resulting from substandard medical care?**

This too is a question of law, reviewable for “correctness.” Sorensen v. Kennecott-Utah Copper Corp., 873 P.2d 1141, 1144 (Utah App. 1994); Broad Water v. Old Republic Sur., 854 P.2d 857, 834 N.3 (Utah 1993); Architectural Commission v. Kabatznick, 949 P.2d 776, 777 (Utah App. 1997); Roarke v. Crabtree, 893 P.2d 1058, 1061 (Utah 1995).

**4. Is an increased risk of recurrence of cancer actionable in Utah, regardless of whether combined with a claim of actual, present damage resulting from substandard medical care? If so, when does the statute of limitations begin to run on such a claim?**

This too is a question of law, reviewable for “correctness.”

Orton v. Carton, 970 P.2d 1254, 1256 (Utah 1998); Klinger v. Kightly, 791 P.2d 868, 870 (Utah 1990).



## **STATEMENT OF THE CASE<sup>1</sup>**

This is an appeal from the district court's grant of the defendant's motion to dismiss.

On June 18, 2002, Richard Irion, M.D. undertook to perform a vaginal hysterectomy on 62 year-old Marion Snow due to post-menopausal bleeding. (R.10) No ultrasound was performed prior to this surgery. (R.10). However, an ultrasound performed approximately two years earlier revealed an apparent cyst and endometrial thickening. (R.10). During the June 18, 2002 surgery, Dr. Irion came upon a large tumor which he mistook for a yellow mass. In attempting to remove it, he ruptured the tumor, spilling its contents into Mrs. Snow's peritoneal cavity. (R.10).

Dr. Irion failed to perform a wash of Mrs. Snow's peritoneal cavity to clean the area in which the ruptured tumor contents had spilled. (R.10-11). Following the surgery, he informed Mr. and Mrs. Snow that the tumor was benign. (R.11). That information was incorrect. Within two days of the surgery, Dr. Irion had learned from a pathology report that the tumor contained malignant cells. Although Dr. Irion knew the tumor contained malignant cells, he did not inform Mr. and Mrs. Snow of the cancerous nature of the tumor nor of the dangers incident to the spread of its malignant cells in her

---

<sup>1</sup> All references to the district court record shall be cited as "R. \_\_\_\_." Plaintiffs shall be referred to sometimes collectively as "Mrs. Snow" and sometimes as "the Snows." Defendant shall be referred to as "Dr. Irion."

body. (R.11). Due to the delay in the Snows' receiving word of the malignancy of the tumor, Mrs. Snow did not begin chemotherapy until over 90 days after the surgery in which the tumor was discovered. (R.11).

Following the cancer diagnosis, Mrs. Snow underwent extensive cancer treatment, including radiation and chemotherapy. (R.11). The oncological therapy has been accompanied by considerable trauma, illness and expense. Although the therapy appears to have been successful, Mrs. Snow remains at heightened risk of the cancer. (R.11).

The Snows' complaint alleges that their damages include the incurrence of significant medical and medical-related expenses, a loss of income, an impairment of earning capacity and a loss of consortium. The complaint also alleges a likelihood of cancer recurrence in Mrs. Snow, resulting in additional damages and a shortened life-span. (R.13-14).

Dr. Irion filed a Motion to Dismiss asserting that because Mrs. Snow has not yet suffered a recurrence of the cancer, she and her husband 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.28).

Based on its reading of the Court of Appeals' decision in Medved, the district court concluded that:

the Snows cannot pursue their possible later-developing damages, nor may they split their claims as they are seeking to do. Accordingly, dismissal, without prejudice is appropriate. Consequently, defendant's motion to dismiss is granted.

(R.92).

### **SUMMARY OF ARGUMENT**

This Court's Medved decision misconstrues and is at variance with the Utah Supreme Court's decision in Seale v. Gowans, 923 P.2d 1361 (Utah 1996). Applying the Medved holding as interpreted by the district court to this case would work an unconscionable, unsupportable injustice. For the Medved decision to have any fairness in this case, it would have to be applied in a way that expressly allows the Snows to re-file at *any* time up to 2 years after Mrs. Snow's death regardless of whether her cancer recurs and/or kills her.

### **APPLICABLE STANDARD OF REVIEW**

The district court's decision to grant dismissal of Mrs. Snow's complaint without prejudice and all of its conclusions supporting that decision constitute rulings of law. The proper standard of review of those issues is "correctness,"

granting no deference to the district court's conclusions. See **ISSUES PRESENTED**, *supra*, and cases cited therein (pp. 1-2 , *supra*); See also White v. Deeselhurst, 879 P.2d 1371, 1373 (Utah 1994).

## **ARGUMENT**

### **I.**

#### **MRS. SNOW'S COMPLAINT AMPLY ALLEGES LEGALLY COGNIZABLE INJURIES SEPARATE FROM HER CLAIM OF HEIGHTENED RISK OF CANCER RECURRENCE.**

Dr. Irion declared in writing to the district court that: "the sole question before this Court is . . . whether plaintiffs' claim of increased risk is an actual present injury sufficient to sustain their claims of injury against Dr. Irion." (R.30). This is incorrect. The Snows' complaint alleges significant damages separate and apart from Mrs. Snow's claim of increased risk for cancer recurrence. It asserts, for example, that Dr. Irion's substandard medical care has already caused them: (a) loss of income and an impairment of earning capacity (R.14); (b) the incurrence of significant costs for medical care and related needs (R.14); and (c) "pain, grief, mental anguish, depression, emotional distress and loss of enjoyment of life" (R.13). Additional present damages not founded exclusively

upon Mrs. Snow's heightened risk of cancer recurrence are alleged in ¶¶27-29 of the Snows' Amended Complaint:

27. Plaintiff Marion Snow has suffered a significant permanent injury that has substantially changed her lifestyle, including incapacitating her to perform the types of activities and other functions which she performed before she was injured as a result of defendant's substandard medical care.
28. The activities and functions plaintiff Marion Snow can no longer perform or can no longer perform in the manner she previously performed them include, but are not limited to, household duties and spousal activities.
29. Plaintiffs have suffered a profound diminution in their quality of life. The injury to plaintiff Marion Snow complained of herein has significantly impacted her husband, plaintiff Roger Snow in varied and significant ways. Plaintiff Roger Snow is entitled, therefore, to recover loss of consortium damages as provided by Utah law.

(R.14-15).

In our system of pleading, it is the prerogative of the plaintiff, not the defendant, to declare what her claims and damages are. Here, the Snows claim Dr. Irion's substandard care has already caused them significant harm apart from Mrs. Snow's heightened risk of being further debilitated or killed by the cancer Dr. Irion caused to be spread in her body. They should not be precluded from

proving what they have pled.<sup>2</sup>

## II.

### **THIS COURT'S *MEDVED* DECISION, AS APPLIED BY THE DISTRICT COURT, MISCONSTRUES AND IS AT VARIANCE WITH THE UTAH SUPREME COURT'S DECISION IN *SEALE V. GOWANS* .**

In its memorandum decision herein, the district court quoted from this Court's *Medved* opinion and then stated: "Based upon the foregoing, it is clear that under the current state of the law, the Snows cannot pursue their possible later-developing damages. . . ." (R. 92). This conclusion is simply erroneous.

In *Seale*, our Supreme Court acknowledged that when a person suffers physical harm caused by another's negligence, she is entitled to recover

---

<sup>2</sup>In support of his motion to dismiss before the district court, Dr. Irion declared "the gravamen of plaintiff's claim . . . is that Dr. Irion failed to properly diagnose and advise Mrs. Snow of her cancer, and to refer her to an oncologist." (R.29). Dr. Irion's written argument to the district court then undertakes to instruct that court that "Dr. Irion did not cause Mrs. Snow's cancer." (R.30). Those assertions were both gratuitous and at variance with assertions plainly set forth in the Snows' operative pleading. The Snows' Complaint asserts that although Dr. Irion did not cause Mrs. Snow's tumor, he did cause the spread of its malignant cells throughout her body when he ruptured it, spilled its malignant cells into her peritoneal cavity and failed to perform an immediate wash of the area. (See ¶¶ 10 and 11 of Amended Complaint; (R.10-11).

damages not only for the harm already suffered, but also for that which will probably result in the future:

General tort law recognizes that when a person has suffered physical harm caused by the negligence of another, “he is entitled to recover damages not only for harm already suffered, but also for the which will probably result in the future.” Restatement (Second), of Torts §912 cmt. e (1979); Jackson v. Johns-Manville Sales Corp., 781 F.2d 394, 412 (5<sup>th</sup> Cir. 1986). Indeed, most courts follow the general rule that once some injury become actionable, a plaintiff *must* plead all damages, both present and future, and cannot thereafter bring another action once future harm occurs. Gideon v. Johns-Manville Sales Corp., 761 F.2d 1120, 1136-37 (5<sup>th</sup> Cir. 1985). . . .

(923 P.2d at 1364).

The district court apparently accepted Dr. Irion’s contention that this Court’s recent decision in Medved v. Glenn, 2004 WL 1065503 (Utah App.) holds that a plaintiff may not maintain an action to recover damages when part of the claim is an enhanced risk of cancer recurrence. To the extent this Court’s Medved decision so holds, it is in error and inconsistent with the actual holding of the Utah Supreme Court in Seale v. Gowans, 923 P.2d 1361 (Utah 1996).

The distinguishing fact in Seale v. Gowans was the apparent absence of an

allegation of present damage apart from a fear of cancer recurrence.<sup>3</sup> The simple holding in *Seale* was that “damages in the form of an enhanced risk only are not sufficient to start the running the statute of limitations.” (*Id.* at 1365). The Supreme Court considered several cases from other jurisdictions and found them distinguishable because in them “the plaintiffs had suffered actual damages in conjunction with the increased risk of the cancer’s recurrence.” (*Id.* at 1365). Our Supreme Court did *not* declare in *Seale* that a plaintiff may not recover damages for enhanced risk of cancer recurrence. It merely declared that if one has no damages until the recurrence of cancer, the statute does not begin to run against that claimant until the cancer recurs. There is nothing in *Seale* suggesting a claimant who has sustained an actual injury may not simultaneously pursue a claim for enhanced risk of future harm. On the contrary, our Supreme Court noted:

[C]urrent recovery for future harm is “based upon the probability that harm of one sort or another will ensue and upon its probable seriousness if it should ensue.”

---

<sup>3</sup> In the *Medved* case, the record shows (at R.179 -180 therein) that Mrs. Seale’s complaint in *Seale v. Gowans* sought damages for injuries likely to occur in the future. Her cancer did recur after she filed her complaint. Our Supreme Court in *Seale* actually found that the statute of limitations did not begin to run on Ms. Seale because of *the defendant’s* failure to prove “that in 1988 Ms. Seale could complain of any actual or present damages.” *Seale*, *id.* at 1364-65.



Restatement (Second) of Torts §912, cmt. e (1979). Many courts, following the Restatement approach, have adopted a “reasonable certain” standard, requiring that the plaintiffs prove that it is more likely than not that the projected consequence will occur. See Wilson v. Johns-Manville Sales Corp., 684 F.2d 111, 119 (DC Cir. 1982). *Id.* at 1365.

Our Court then went on to note unfairness would result if

Plaintiffs who are not exhibiting any actual physical harm but are facing the running of the limitations period [were] forced to bring an action for injuries that may or may not occur in the future.

*Id.* at 1366. Our Court then noted in passing that “many of these plaintiffs will be unable to produce the necessary evidence to show that the future harm is more likely to occur than not.” *Id.* at 1366. This passing comment should not be interpreted as precedent for the proposition that a claim for enhanced risk of cancer recurrence is not actionable in Utah. On the contrary, it merely suggests that a claim for enhanced risk of cancer recurrence is sometimes difficult for plaintiffs to prove.

Seale does appear to support the proposition that if a man had been exposed to a toxic chemical which has been shown to cause cancer but has suffered no ill effects from the exposure, he could not bring a cause of action for enhanced risk of cancer. Under Seale, he would have to have actually

contracted cancer before the claim would arise. If, however, as a result of exposure to the toxic chemical, the man became ill, lost work and/or required significant medical treatment and expenditure, then he could seek his actual damages for his current illness and also seek damages for his enhanced risk of cancer if he could prove it was “more likely than not” to manifest itself.

Nothing in our Supreme Court’s opinion in Seale v. Gowans, *supra*, is inconsistent with preexisting law that if one pleads an actual, present injury, one may also plead future damages that are reasonably probable to occur. In *Seale*, our Court expressly stated “once some harm is manifest, the limitations period begins to run on all claims, present and future.” *Id.* at 923 P.2d at 1364. There, unlike here, Ms. Seale claimed no injury until cancer recurred in her hip. Our Court found that the last event necessary to complete the cause of action was the recurrence of cancer and, therefore, it was that event that initiated the running of the statute of limitations.

Utah’s legislature has included in our Health Care Malpractice Act a four-year statute of repose, along with a two-year statute of limitations. In Utah, no cause of action for medical malpractice can be entertained more than 4 years after the date of the alleged malpractice. UCA §78-14-4(1). If a woman who has

had to endure extensive cancer treatment for the spread of a malignancy which could have been prevented by appropriate medical treatment has to wait until she suffers recurrence of cancer before she may file suit, the recurrence may recur more than 4 years after the original negligence. She would be prevented from bringing an action. That would be a travesty of justice. Under that circumstance, her claim would be time-barred and she would be afforded no relief whatsoever.

An “enhanced risk” of future harm may be considered “speculative” in the absence of actual present harm or injury, but that does not render a claim for future damages arising out of such enhanced risk inactionable when there has been actual injury. Our Supreme Court has never declared that a person with a present harm may not also claim a future harm.

In Utah, juries are instructed all the time that they may assess future damages. See, e.g., MUJI Instruction 27.2, 27.3 and 27.5 <sup>4</sup>

The chance of recurrence is a question of probability. A jury is provided statistical information from which it may make an informed decision. Jurors routinely are asked to decide whether an automobile collision victim’s orthopedic injury will result in arthritis in the future. They frequently make decisions based

---

<sup>4</sup> These instructions are attached as Exhibit “5.”

on competent medical testimony and generally accepted statistical probability. Though cancer is far more serious than arthritis, juries are competent to assess the probability of future harm in such cases just as they do in orthopedic injury cases.

In short, the Utah Supreme Court's decision in Seale v. Gowans was misunderstood and misapplied by this Court in Medved and by the district court in this case.

### III.

**DISMISSAL WITHOUT PREJUDICE WOULD HAVE BEEN FAIR IN THIS ACTION ONLY IF ACCOMPANIED BY AN EXPRESS JUDICIAL DECLARATION THAT THE SNOWS MAY REFILE THEIR ACTION AT ANY TIME, WHETHER OR NOT CANCER RECURS, WITHOUT BEING AT RISK FOR HAVING THEIR CLAIM DECLARED TIME-BARRED.**

A claim for actual, already sustained damages resulting from the negligence of another may not be rendered inactionable by its joinder with a claim for enhanced risk of sustaining future damages. *Even if* under Medved a claim for heightened risk of cancer recurrence *were* no longer *ever* actionable in Utah, a plaintiff still has a right to pursue a claim for present damages independent of the heightened risk of cancer recurrence. To hold otherwise would be contrary to

our rules of pleadings.

It is within the province of a plaintiff to declare what her claim is. Neither the district court nor this Court has the right to preclude Mrs. Snow from pursuing an action to recover damages for present and past injury merely because she also seeks damages for a heightened risk of future injury.

In ¶10 of the *Medved* decision, this Court declares:

***Seale* preserves plaintiff's claim for actual damages until speculative damages become actual damages.**

(2004 WL 1065503 at p.4, ¶10). Unless this assertion is given full, liberal interpretation, the rest of the *Medved* decision could work a terrible injustice. Assume, for example, this Court dismissed the pending court case without prejudice. Assume further that five years go by without a manifestation of any further cancer symptoms in Mrs. Snow. Assume that the Snows, believing the chances of further cancer troubles have diminished, decide then to proceed with their claim for the damages they have already sustained as a result of Dr. Irion's negligence. Will the new complaint they file at that time be actionable? Without this court expressly declaring now that the statute of limitations is indefinitely suspended, any dismissal without prejudice will be potentially illusory. A truly non prejudicial dismissal requires a concomitant express suspension of both the

two year statute of limitations and the four year statute of repose<sup>5</sup> pertaining to the Snows' claims<sup>6</sup>.

#### IV.

#### **THE FAIREST COURSE WOULD BE TO REVERSE THE DISTRICT COURT'S GRANT OF DISMISSAL AND TO ALLOW THE SNOWS TO PURSUE THEIR CLAIM AT A SPEED APPROPRIATE TO MRS. SNOW'S CONDITION.**

If this Court were to affirm dismissal of the Snows' complaint without prejudice and the Snows were to thereafter file a new action seeking all of their damages except those directly relating to the heightened risk of cancer recurrence, dismissal of the new action would likely be sought on the ground that the limitations period had run. As of now, over two years have elapsed since Mr. and Mrs. Snow discovered Dr. Irion's negligence and harm flowing from it.

---

<sup>5</sup> UCA §78-14-4 (1)

<sup>6</sup> The *Medved* decision highlights but only partially addresses the troublesome problem facing claimants who have sustained both actual and "speculative" damages in a case involving risk of cancer recurrence. *Medved* seems to suggest a plaintiff having both actual and "speculative" damages may safely hold her claim for actual damages in abeyance without fear of the statute of limitations running against her until the feared cancer recurs. If the feared cancer does not recur, however, it is not clear whether her present claim for actual damages will be barred if she holds off filing it longer than two years.

Bringing a new action for past harm might well be viewed as violating the statute of limitations.

Dismissing a newly-filed action on statute of limitations grounds under such circumstances would clearly be unfair. So too is it unfair to tell the Snows, in effect: “even though you have already sustained harm, you may not maintain a claim to recover for that harm at this time because you are also claiming future harm based on your fear of the cancer reappearing. Instead, you must wait until that fear is realized.” It would be far fairer to reverse the district court’s dismissal of Mrs. Snow’s claim and to allow the Snows to continue to pursue this action at a speed appropriate to Mrs. Snow’s condition, even if that means the case moves slower than suggested by the Rule 26 guidelines.

Dr. Irion may argue the pendency of an unresolved action against him causes him harm. This may be true but such harm, if any, is small<sup>7</sup> in comparison to the harm and prejudice the Snows will experience if they are not

---

<sup>7</sup> Until this case is resolved, no money judgment will be entered against Dr. Irion. Dr. Irion will not sustain any greater “injury” than what he has already sustained by having been named as a defendant in a medical malpractice action. The costs and fees he may incur will increase only if and when the Snows move forward with their claim. Whatever delay occurs may actually benefit rather than harm Dr. Irion. As long as nothing happens in the case, Dr. Irion is free from a “bad” result.

allowed to pursue *any* claim. Neither the judicial system nor the district court's individual docket will be appreciably harmed by allowing the Snows to move their claim forward against Dr. Irion at a speed appropriate to her condition. The circumstances of this case justify an exception to the normal scheduling routine contemplated by Rule 26 of the Utah Rules of Civil Procedure.

### **CONCLUSION AND RELIEF REQUEST**

Mrs. Snow's complaint amply alleges present, legally cognizable injuries and harm separate from and in addition to her claim for future harm based upon her heightened risk for cancer recurrence. The allegations of her complaint render inappropriate as a matter of law the district court's dismissal of her entire suit.

This Court's Medved decision, as applied by the district court, misconstrues and is at variance with the Utah Supreme Court's decision in Seale v. Gowans. Applying the alleged *Medved* holding to this case would work an unconscionable, unsupportable injustice.

Dismissal without prejudice could be fair in this action only if accompanied by an express judicial declaration that the Snows may refile their action at any



time, regardless of whether cancer recurs, without being at risk for having their claim declared time-barred.

This Court should reverse the district court's decision, reinstate the Snows' complaint and allow them to pursue their claim for both present harms and future harms. The Snows should be allowed the opportunity to prove in this present action that they will likely suffer future harm because cancer is more likely to recur in Mrs. Snow as a result of Dr. Irion's negligence.

Respectfully submitted this 21 day of March, 2005.

A handwritten signature in black ink, appearing to read "Douglas G. Mortensen", written over a horizontal line.

Douglas G. Mortensen

**MATHESON, MORTENSEN, OLSEN & JEPPSON**  
Attorneys for Plaintiffs/Appellants

### CERTIFICATE OF SERVICE

I certify that on the 21 day of March, 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



U.S. Mail



Facsimile



Hand-Delivered



Federal Express

Ann Berenson

## **ADDENDUM EXHIBITS**

1. District Court's September 17, 2004 Memorandum Decision.
2. District Court's September 27, 2004 formal Order Granting Defendant's Motion to Dismiss Without Prejudice.
3. Utah Supreme Court's Opinion in *Seale v. Gowans*, 923 P.2d 1361 (Utah 1996).
4. Court of Appeals Decision in *Medved v. Glenn*, 2004 WL 1065503.
5. MUJI 27.2, 27.3 and 27.5.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

MARION SNOW and ROGER SNOW,

Plaintiffs,

vs.

RICHARD A IRION, M.D.,

Defendant.

MEMORANDUM DECISION

Case No. 040908601

Honorable GLENN K. IWASAKI

Court Clerk: J. [Signature] **FILED DISTRICT COURT**  
Third Judicial District

SEP 17 2004

By [Signature] SALT LAKE COUNTY  
Deputy Clerk

The above-entitled matter comes before the Court pursuant to Defendant's Motion to Dismiss. The Court heard oral argument with respect to the motion on September 13, 2004. Following the hearing, the matter was taken under advisement. The Court having considered the motion and memoranda and for the good cause shown, hereby enters the following ruling.

On June 18, 2002, defendant Richard A. Irion, M.D., performed a vaginal hysterectomy on Mrs. Snow, for post-menopausal bleeding. During the surgery, Dr. Irion observed and removed a mass on Mrs. Snow's ovary. With this Complaint, plaintiffs allege that in attempting to remove the mass, Dr. Irion ruptured the tumor, spilling its contents into Mrs. Snow's body. It is plaintiffs' position the presence of the tumor should have been discovered in advance, which would have

permitted excision of the tumor abdominally and avoided the injury which occurred in this case. Plaintiffs are alleging present damages as well as damages based upon Mrs. Snow's heightened risk of cancer recurrence.

With this motion, defendant asserts that because Mrs. Snow has not suffered a recurrence of the cancer, plaintiffs 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. See *Medved v. Glenn et al.*, 2004 WL 1065503 (Utah Ct. App. 2004; see also *Seale v. Gowans*, 823 P.2d 1361 (Utah 1996)).

Plaintiffs oppose the motion arguing they have amply alleged legally cognizable injuries separate and apart from, and in addition to, Mrs. Snow's heightened risk for cancer, and even if under *Medved* the claim for heightened risk for cancer is not actionable, plaintiffs still have a right to pursue a claim for present damages, independently. Moreover, it is plaintiffs' position dismissal without prejudice could be fair only if accompanied by an express judicial declaration that plaintiffs may re-file their action at any time, whether or not the cancer recurs, without being at risk for having their claim declared time-barred. Finally, it is plaintiffs' position the most reasonable course would be to deny the motion to dismiss and


allow them to pursue their claim at a speed appropriate to Mrs. Snow's condition.

Referring to *Seale*, the *Medved* court stated the following:

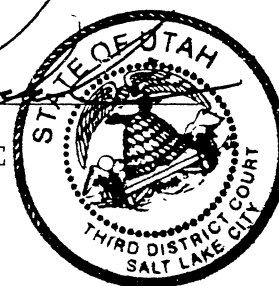
The supreme court held that the statute of limitation did not begin to run on the plaintiff's claim until she discovered the recurrence of cancer because, under Utah law, claims cannot be split by plaintiffs. See [*Seale* 923 P.2d at 1364] (noting parenthetically that "[o]nce injury results, there is but a single tort and not a series of separate torts. . . . [A] plaintiff may not split a cause of action by seeking damages for some of his injuries in one suit and for later-developing injuries in another (first and third alterations in original) (citation omitted). Accordingly, the statute of limitations begins to run on all present and future claims once harm is discovered. See *id.* In *Seale*, the claimed harm was the recurrence of the cancer, and since it did not manifest itself until three years after the plaintiff's radical mastectomy, the statute of limitation began running when the plaintiff discovered the recurrence. See *id.* at 1365-66. To hold otherwise would allow statutes of limitation to run on negligence claims that had yet to occur. See *id.* at 1364.

Based upon the forgoing, it is clear that under the current state of the law, the Snows cannot pursue their possible later-developing damages, nor may they split their claims as they are seeking to do. Accordingly, dismissal, without prejudice is appropriate. Consequently, Defendant's Motion to Dismiss is granted.

DATED this 17 day of September, 2004.



GLENN K. IWASAKI  
DISTRICT COURT JUDGE




CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 040908601 by the method and on the date specified.

METHOD NAME

Mail	CAROLYN STEVENS JENSEN ATTORNEY DEF 257 EAST 200 SOUTH SUITE 500, PO BOX 45678 SALT LAKE CITY, UT 84145-5678
Mail	DOUGLAS G MORTENSEN ATTORNEY PLA 648 E 100 S SALT LAKE CITY UT 84102

Dated this 17<sup>th</sup> day of Sept, 2004.

  
\_\_\_\_\_  
Deputy Court Clerk



ELLIOTT J. WILLIAMS (A3483)  
CAROLYN STEVENS JENSEN (6338)  
**WILLIAMS & HUNT**  
Attorneys for Defendant, Richard A. Irion, M.D.  
257 East 200 South, Suite 500  
Post Office Box 45678  
Salt Lake City, Utah 84145-5678  
Phone (801) 521-5678  
Facsimile (801) 364.4500

**FILED DISTRICT COURT**  
Third Judicial District

SEP 27 2004  
SALT LAKE COUNTY  
By [Signature] Deputy Clerk

---

**IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY**

**STATE OF UTAH**

---

MARION SNOW and ROGER SNOW,

Plaintiffs,

v.

RICHARD A. IRION, M.D.

Defendant.

:  
:  
: **ORDER GRANTING DEFENDANT'S**  
: **MOTION TO DISMISS WITHOUT**  
: **PREJUDICE**

:  
:  
: Civil No: 040908601  
: Judge Glenn K. Iwasaki  
:  
:  
:

---

The above-entitled matter came on for hearing before the Honorable Glenn K. Iwasaki on September 13, 2004 at the hour of 11:00 a.m. on Dr. Irion's Motion to Dismiss without Prejudice. Douglas G. Mortensen, of Matheson, Mortensen, Olsen & Jeppson, appeared on behalf of plaintiffs Marion and Roger Snow, and Carolyn Stevens Jensen, of Williams & Hunt, appeared on behalf of defendant Dr. Richard A. Irion.

The Court, having heard the arguments of counsel and having considered the pleadings, memoranda, affidavits and exhibits that have been filed by the parties, and being fully advised, hereby

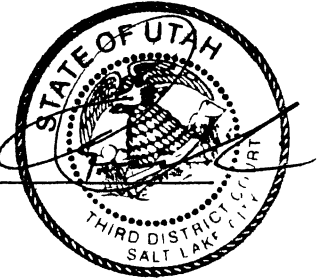
ORDERS, ADJUDGES AND DECREES that defendant's Motion to Dismiss is Granted, and the above-captioned action and the plaintiff's Complaint, be and the same are hereby dismissed without prejudice as to defendant Richard A. Irion, M.D., the parties to bear their own respective costs and attorney fees.

DATED this 27 Day of SEPT., 2004.

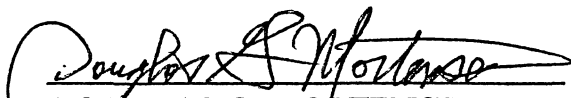
BY THE COURT



Glenn K. Iwasaki  
District Court Judge



APPROVAL AS TO FORM:



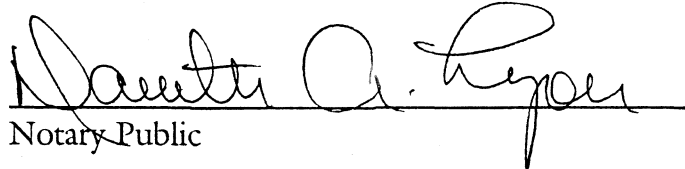
DOUGLAS G. MORTENSEN  
Attorneys for Plaintiffs

STATE OF UTAH )  
 : ss.  
COUNTY OF SALT LAKE )

Counsel for Plaintiffs  
Douglas G. Mortensen  
MATHESON, MORTENSEN, OLSEN & JEPPSON, P.C.  
648 East 100 South  
Salt Lake City, Utah 84102

Nika Bower

SUBSCRIBED AND SWORN TO before me this 20th day of September, 2004.



John SEALE, personal representative  
of the Estate of Beverley Seale,  
Plaintiff and Appellant,

v.

Donald F. GOWANS, M.D., and Holy Cross  
Hospital, dba Holy Cross Breast Center,  
and Holy Cross Breast Care Services,  
Defendants and Appellees.

No. 940599.

Supreme Court of Utah.

Aug. 2, 1996.

Rehearing Denied Oct. 2, 1996.

Patient brought medical malpractice action against physicians for alleged negligent failure to diagnose her breast cancer. The District Court, Salt Lake County, Richard H. Moffat, J., denied patient's motion for judgment notwithstanding verdict, and entered judgment for physicians on basis that action was time barred. Patient appealed. The Supreme Court, Durham, J., held that physicians failed to establish that patient suffered legal harm, as would begin running of two-year medical malpractice limitations period, on date that cancer spread from her breast to her lymph nodes.

Reversed and remanded.

Stewart, Associate C.J., concurred in result.

#### 1. Appeal and Error ⇨934(1), 1024.4

When party challenges trial court's denial of judgment notwithstanding verdict (JNOV) on ground that evidence presented is insufficient to support jury verdict, state Supreme Court reverses only if, viewing evidence in light most favorable to prevailing party, Court concludes that evidence is insufficient to support verdict. Rules Civ.Proc., Rule 59.

#### 2. Limitation of Actions ⇨95(12)

Two-year limitations period for bringing medical malpractice action does not begin to run until injured person knew or should have known that he or she had sustained injury and that injury was caused by negligent action. U.C.A.1953, 78-14-4.

#### 3. Limitation of Actions ⇨55(3)

Physicians failed to establish that patient suffered legal harm, as would begin running of two-year medical malpractice limitations period, on date that cancer spread from her breast to her lymph nodes; only evidence produced by physicians was that cancer's spread to lymph nodes increased risk that cancer would recur. U.C.A.1953, 78-14-4.

#### 4. Limitation of Actions ⇨55(1)

Once some harm is manifest, the limitations period begins to run on all tort claims, present and future.

#### 5. Negligence ⇨1

Until there is actual loss or damage resulting to interests of another, claim for negligence is not actionable.

#### 6. Negligence ⇨103

Without proof of actual damages, alleged claim for enhanced risk is not adequate to sustain cause of action for negligence.

---

Fred R. Silvester, Clark A. McClellan, Salt Lake City, for the Seales.

J. Anthony Eyre, Kirk Gibbs, Salt Lake City, for Dr. Gowans.

David W. Slagle, Terence L. Rooney, Brian P. Miller, Salt Lake City, for Holy Cross.

DURHAM, Justice:

Plaintiff Beverley Seale appeals the trial court's denial of her motion for a judgment

notwithstanding the verdict.<sup>1</sup> The trial court, upon findings made by a jury, held that the statute of limitations barred Ms. Seale from bringing a medical malpractice claim against defendants Donald F. Gowans, M.D., and Holy Cross Hospital, dba Holy Cross Breast Center and Holy Cross Breast Care Services, for Dr. Gowans' allegedly negligent failure to diagnose her breast cancer. Ms. Seale now contends that there was insufficient evidence to uphold the verdict. We agree.

This case arose from Dr. Gowans' alleged failure to detect a mass in Ms. Seale's mammogram taken in August 1987 at Holy Cross Hospital. This mass was not discovered until May 1988, when Ms. Seale had another mammogram taken at the same hospital. Ms. Seale was then referred to Dr. Hugh Hogle, who performed a needle biopsy. The biopsy revealed that the mass was cancerous. When Dr. Hogle disclosed the results of the biopsy to Ms. Seale, he also showed her the mammogram taken in 1987 and pointed out to her that it contained the same, although smaller, mass found in the 1988 mammogram.

Within a few days, Ms. Seale underwent a radical mastectomy. Pathological studies of the removed area revealed that a second malignant tumor had formed and that the cancer had spread to eight of her twenty lymph nodes. Although all known cancerous areas had been removed, Dr. Hogle told Ms. Seale that the finding of cancer in her lymph nodes signified a statistically increased probability that cancer would recur in other parts of her body. Ms. Seale subsequently under-

went radiation treatment and hormone therapy to enhance the likelihood of complete recovery. She continued to receive treatment and to have periodic monitoring for recurrence of the cancer. Up until August 1991, all subsequent tests remained negative.

In the summer of 1991, Ms. Seale began experiencing discomfort in her left hip. After receiving unsuccessful treatment for the pain, Ms. Seale had a bone scan in August 1991 which revealed cancer in her left hip. That same month, Ms. Seale commenced this action<sup>2</sup> against Dr. Gowans and Holy Cross Hospital for their allegedly negligent delay in diagnosing her cancer, which allowed the cancer to spread to her hip.<sup>3</sup>

Defendants affirmatively pleaded that the two-year limitations period in section 78-14-4 of the Utah Code barred Ms. Seale's action. They argued that the limitations period began to run in 1988 when Ms. Seale learned of her breast cancer and was shown her 1987 mammogram, which contained the suspicious mass Dr. Gowans failed to detect.

The trial court initially denied defendants' motion for summary judgment, holding that a factual issue existed as to whether Ms. Seale knew or had reason to know of her legal injury in 1988. Upon motion to bifurcate the trial, the statute of limitations issue was tried separately before a jury, which returned a special verdict in favor of defendants finding that Ms. Seale "discovered, or through the use of reasonable diligence should have discovered," her injury in June 1988, when she was correctly diagnosed.

Ms. Seale subsequently filed a motion for a judgment notwithstanding the verdict

1. Ms. Seale, who originally appealed, is now deceased. John Seale, her personal representative, has been substituted as plaintiff.

2. Ms. Seale actually commenced this action a few days before doctors informed her that the cancer had spread to her hip. Defendants thus argue that Ms. Seale knew of her injury before the recurrence of the cancer in 1991. We find no merit to this contention. 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.

3. Both parties use the terms "metastasis" and "metastasized" to denote the spread of the cancer. Defendants construe these terms to mean any spread of the cancer, including the spread to the adjacent lymph nodes. Plaintiff argues that metastasis is the spread to another part of the body. We find this definitional debate inconsequential. The true issue is whether the spread to Ms. Seale's lymph nodes constitutes a legally cognizable injury. Thus, to avoid confusion, we refer to the spread of Ms. Seale's cancer from her breast to her hip as a "recurrence" of the cancer.

(j.n.o.v.), which the trial court denied. Ms. Seale now appeals that denial, contending that the evidence was insufficient to support the verdict. She argues that the evidence does not show that she could have discovered any injury from which she sustained damages until the cancer recurred in her hip. Thus, she posits, the trial court erred in refusing to grant her motion for a j.n.o.v.<sup>4</sup>

reasonable diligence should have discovered the injury....

[1] Before reaching the merits, we set forth the standard of review. A trial court must enter a j.n.o.v. in circumstances where the facts or the law do not support the verdict. Utah R.Civ.P. 59; *see also Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 799 (Utah 1991) ("In passing on a motion for a j.n.o.v., . . . a trial court has no latitude and must be correct."). When a party challenges a trial court's denial of a j.n.o.v. on the ground that the evidence presented is insufficient to support a jury verdict, we "reverse only if, viewing the evidence in the light most favorable to the prevailing party, we conclude that the evidence is insufficient to support the verdict." *Heslop v. Bank of Utah*, 839 P.2d 828, 839 (Utah 1992); *see also Crookston*, 817 P.2d at 799; *Hansen v. Stewart*, 761 P.2d 14, 17 (Utah 1988). Thus Ms. Seale "must marshal all the evidence supporting the verdict" and then show that the evidence cannot support the verdict." *Hansen*, 761 P.2d at 17-18 (quoting *Price-Orem Inv. Co. v. Rollins, Brown & Gunnell, Inc.*, 713 P.2d 55, 58 (Utah 1986)).

[2] The statute of limitations applicable to malpractice actions against health care providers, commonly referred to as the "discovery rule," is set forth in Utah Code Ann. § 78-14-4, which provides in part:

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

In *Foil v. Ballinger*, 601 P.2d 144, 148 (Utah 1979), this court construed the term "injury" in section 78-14-4 to mean "legal injury." In other words, the two-year limitations period "does not commence to run until the injured person knew or should have known that he had sustained an injury and that the injury was caused by negligent action." *Id.*; *see also Chapman v. Primary Children's Hosp.*, 784 P.2d 1181, 1184 (Utah 1989) ("Discovery of legal injury . . . encompasses both awareness of physical injury and knowledge that the injury is or may be attributable to negligence.").<sup>5</sup> In *Foil*, we adopted the following reasoning from the Oregon Supreme Court:

To say that a cause of action accrues to a person when she may maintain an action thereon and, at the same time, that it accrues before she had or can reasonably be expected to have knowledge of any wrong inflicted upon her is patently inconsistent and unrealistic. She cannot maintain an action before she knows she has one. To say to one who has been wronged, "You had a remedy, but before the wrong was ascertainable to you, the law stripped you of your remedy," makes a mockery of the law.

601 P.2d at 148-49 (quoting *Berry v. Bran-ner*, 245 Or. 307, 421 P.2d 996, 998 (1966)).

[3] As with any affirmative defense, defendants have the burden of proving every element necessary to establish that the statute of limitations bars Ms. Seale's claim. Utah R.Civ.P. 9(h) ("[T]he party pleading the statute must establish, on the trial, the facts showing that the cause of action is so barred."); *see also Stewart v. K & S Co.*, 591 P.2d 433, 435 (Utah 1979); *Slayden v. Sixta*, 250 Kan. 23, 825 P.2d 119, 122 (1992). De-

4. -Ms. Seale also argues that the trial court erred in refusing to present her proposed instruction to the jury. However, because we find that the trial judge erred in finding that the evidence was sufficient to support the jury's verdict, we do not reach this argument.

5. The court correctly instructed the jury that "[k]nowledge of a 'Legal Injury' is defined as the date upon which the injured person knows or should know that she has sustained an injury and that the injury was caused by negligence."

defendants contend that the evidence produced at trial shows that in May 1988, Ms. Seale had discovered or should have discovered both Dr. Gowans' negligence in failing to detect her cancer and the injury that resulted from that negligence. They assert that the injury triggering the running of the statute was the cancer's spread to Ms. Seale's lymph nodes, which statistically increased the chance that the cancer would recur and thus decreased her chance of long-term survival.<sup>6</sup>

We agree that the evidence was sufficient to show that in 1988, she knew or should have known that Dr. Gowans had negligently failed to diagnose her cancer. We also agree that the evidence was sufficient to show that in 1988, Ms. Seale knew of the cancer's spread to her lymph nodes. However, defendants have failed to show that the cancer's spread to her lymph nodes was a sufficient legal injury to start the running of the limitations period.

[4,5] General tort law recognizes that when a person has suffered physical harm caused by the negligence of another, "he is entitled to recover damages not only for harm already suffered, but also for that which will probably result in the future." Restatement (Second) of Torts § 912 cmt. e (1979); *Jackson v Johns-Manville Sales Corp.*, 781 F.2d 394, 412 (5th Cir.1986). Indeed, most courts follow the general rule that once some injury becomes actionable, a plaintiff *must* plead all damages, both present and future, and cannot thereafter bring another action once future harm occurs. *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1136-37 (5th Cir.1985) ("[O]nce injury results

there is but a single tort and not a series of separate torts, one for each resultant harm . . . [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.");<sup>7</sup> *see also* Restatement (Second) of Judgments §§ 24-26 (1982). Accordingly, once some harm is manifest, the limitations period begins to run on all claims, present and future. *See Sery v. Security Title Co.*, 902 P.2d 629, 634 (Utah 1995) ("The general rule regarding statutes of limitations is that the limitation period begins to run when the last event necessary to complete the cause of action occurs."). However, 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. *Gideon*, 761 F.2d at 1136 (quoting *Prosser and Keeton on Torts*, § 30, at 165 (5th ed. 1984)); *see also Hunsaker v State*, 870 P.2d 893, 897 (Utah 1993) (actual damages along with breach of duty must be pleaded to sustain cause of action for negligence). 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. *Keeton, supra*, at 165. Until a plaintiff suffers actual harm or damages, the limitations period will not accrue.

[6] Applying these principles to the instant case, we 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 can-

#### 6. Dr Hogle testified

[W]omen 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.

In the arena of asbestos exposure, a few courts have construed the "single cause of action" rule so as not to preclude a later suit for latent

disease even though earlier injuries were incurred. *E.g., Wilson v Johns-Manville Sales Corp.*, 684 F.2d 111, 112 (D.C. Cir.1982) (allowing suit for mesothelioma even though deceased had earlier discovered he had asbestosis without bringing suit for that disease). Because defendants have failed to show that Ms. Seale discovered any damages resulting from the spread to her lymph nodes in 1988, we need not address whether we would similarly construe the single cause of action rule for failure to diagnose cases

cer's spread was that it increased the risk that the cancer would recur. They failed to argue or 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 decrease 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. See *Steingart v. Oliver*, 198 Cal.App.3d 406, 243 Cal.Rptr. 678, 681 (1988) (holding that breach of professional duty causing only nominal damages, speculative harm, or threat of future harm does not suffice to create cause of action for negligence).<sup>8</sup> As a result, 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.

Defendants' reliance on cases from other jurisdictions is misplaced. See *Colbert v. Georgetown Univ.*, 641 A.2d 469, 474 (D.C.Cir.1994) (en banc) (negligent performance of lumpectomy instead of radical mastectomy); *Swain v. Curry*, 595 So.2d 168, 171 (Dist.Ct.App.1992), review denied, 601 So.2d 551 (Fla.1992) (failure to detect breast cancer). In these cases, the evidence showed that the plaintiffs had suffered actual damages in conjunction with the increased risk of the cancer's recurrence. Ms. Seale's case is more similar to the circumstance addressed by the Florida Court of Appeals in *Johnson v. Mullee*, 385 So.2d 1038 (Dist.Ct.App.1980), review denied, 392 So.2d 1377 (Fla.1981). In that case, a doctor's misdiagnosis caused a patient's cancer to go undetected for six months. Similar to Ms. Seale's circumstance, pathological studies of the area removed from the patient also revealed that

the cancer had spread to the patient's lymph nodes. *Id.* at 1039. However, the patient did not file suit for the negligent misdiagnosis until the cancer had recurred in another part of her body two years later. The court held that under those circumstances, the trigger date for the purposes of the statute of limitations was when she "first learned that the cancer had metastasized beyond the surgically removed portions" to another part of her body, not when the patient was correctly diagnosed. *Id.* at 1040-41. The court reasoned that when the patient first learned of the misdiagnosis, there was no evidence that the alleged negligence "had resulted in any harm to her." *Id.* at 1040. The court then noted that under the discovery rule, "it is the knowledge of injury" which triggers the statute, "not notice of probable or possible injury." *Id.* at 1041.

Our holding that damages in the form of an enhanced risk only are not sufficient to start the running of the statute of limitations not only comports with generally accepted principles of tort law, but also minimizes the filing of speculative suits, thus saving judicial time and resources. More importantly, any alternative ruling might effectively preclude a patient from any recovery, even when a significant harmful effect, such as the recurrence of cancer, later occurs. As previously noted, current recovery for future harm is "based upon the probability that harm of one sort or another will ensue and upon its probable seriousness if it should ensue." Restatement (Second) of Torts § 912 cmt. e (1979). Many courts, following the Restatement approach, have adopted a "reasonably certain" standard, requiring that the plaintiffs prove that it is more likely than not that the projected consequence will occur. See *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111, 119 (D.C.Cir.1982). Following this approach, if we were to adopt defendants'

8. This case is unlike the situation we addressed in *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 979-81 (Utah 1993). In that case, we ruled on the narrow issue of whether an individual could recover for medical monitoring costs necessitated by an increased risk of contracting cancer due to an exposure to asbestos. We did

not reach the issue of whether the enhanced risk alone was a sufficient injury to support a cause of action. *Id.* at 973 n. 2. In fact, we noted that the plaintiffs could bring another action "if and when they do develop a serious disease as a result of their exposure." *Id.* at 973.



position, plaintiffs who are not exhibiting any actual physical harm but are facing the running of the limitations period would be forced to bring an action for injuries that may or may not occur in the future. However, many 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.

Because the only evidence defendants presented at trial, and the only evidence Ms. Seale could marshal, showed that Ms. Seale could not have discovered any legally cognizable injury until 1991, we find that the evidence was insufficient for a jury to find that Ms. Seale discovered her injury in 1988. As a result, the trial court erred in denying Ms. Seale's motion for a j.n.o.v. We reverse and remand the case to allow John Seale, as Ms. Seale's personal representative, to argue her case on its merits.

ZIMMERMAN, C.J., HOWE, J., and GUY R. BURNINGHAM, District Judge, concur in Justice DURHAM's opinion.

STEWART, Associate C.J., concurs in the result.

Having disqualified himself, RUSSON, J., does not participate herein; District Judge GUY R. BURNINGHAM sat.



JONES, WALDO, HOLBROOK & Mc DONOUGH, a Utah professional corporation, Plaintiff, Appellee, and Cross Appellant,

v.

Jerilyn Shelton DAWSON, Defendant, Appellant, and Cross-Appellee.

No. 940595.

Supreme Court of Utah.

Sept. 6, 1996.

Law firm brought action against former client to collect attorney fees incurred representing client in divorce action. The District Court, Washington County, J. Philip Eves, J., awarded firm attorney fees incurred in divorce but denied request for attorney fees incurred in collection action. Client appealed. The Supreme Court, Howe, J., held that: (1) collateral estoppel did not bar client from relitigating reasonableness of attorney fees; (2) attorney's oral statements capped fees to which firm was entitled; and (3) firm was not entitled to collect fee for pro se representation in collection action.

Affirmed as amended.

### 1. Appeal and Error ⇌1008.1(5)

Trial court's finding is clearly erroneous if it is against clear weight of evidence or if appellate court otherwise reaches definite and firm conviction that mistake has been made. Rules Civ.Proc., Rule 52(a).

### 2. Appeal and Error ⇌842(2)

Supreme Court reviews trial court's legal determinations for correctness, granting them no deference.

### 3. Judgment ⇌634

For collateral estoppel to bar relitigation of issue, issue challenged must be identical in previous action and in case at hand, issue

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Court of Appeals of Utah.

Jamie MEDVED, Plaintiff and Appellant,

v.

C. Joseph GLENN, M.D.; and Estate of Blayne L. Hirsche, M.D., Defendants and Appellees.

No. 20030338-CA.

May 13, 2004.

**Background:** Patient brought medical malpractice action against gynecologist and surgeon, alleging that defendants failed to timely diagnose breast cancer. Defendants filed motion to dismiss for failure to state a claim upon which relief could be granted. The Fourth District, Provo Department, Lynn W Davis, J., granted motion and dismissed action without prejudice. Patient appealed.

**Holdings:** The Court of Appeals, Davis, J., held that:

- (1) claim for damages concerning increased risk of recurrence of cancer was not actionable, and thus prohibition on splitting actual and speculative claims arising from a single tort warranted dismissal without prejudice, and
- (2) claim for actual damages would be preserved, for limitations purposes, until speculative damages became actual damages.

Affirmed.

[1] Appeal and Error ⚡863

30k863 Most Cited Cases

Because a dismissal for failure to state a claim upon which relief can be granted is a conclusion of law, Court of Appeals reviews such dismissal for correctness, granting no deference to the trial court's decision. Rules Civ.Proc., Rule 12(b)(6).

[2] Pretrial Procedure ⚡622

307Ak622 Most Cited Cases

[2] Pretrial Procedure ⚡680

307Ak680 Most Cited Cases

Purpose of a motion to dismiss for failure to state a claim upon which relief can be granted is to challenge the formal sufficiency of the claim for relief, not to establish the facts or resolve the merits of a case. Rules Civ.Proc., Rule 12(b)(6).

[3] Action ⚡53(2)

13k53(2) Most Cited Cases

Patient's claim for damages concerning increased risk of recurrence of cancer was not actionable in medical malpractice action alleging that gynecologist and surgeon failed to earlier diagnose patient's breast cancer, and thus prohibition on splitting actual and speculative claims arising from a single tort warranted dismissal of action without prejudice; claim was speculative in that patient had not suffered recurrence of cancer and recurrence was not a foregone conclusion.

[3] Health ⚡673

198Hk673 Most Cited Cases

[3] Health ⚡684

198Hk684 Most Cited Cases

Patient's claim for damages concerning increased risk of recurrence of cancer was not actionable in medical malpractice action alleging that gynecologist and surgeon failed to earlier diagnose patient's breast cancer, and thus prohibition on splitting actual and speculative claims arising from a single tort warranted dismissal of action without prejudice; claim was speculative in that patient had not suffered recurrence of cancer and recurrence

was not a foregone conclusion

**[4] Damages** ⚡141

115k141 Most Cited Cases

Once some injury becomes actionable, a plaintiff generally must plead all damages, both present and future, and cannot thereafter bring another action once future harm occurs

**[4] Judgment** ⚡600.1

228k600 1 Most Cited Cases

Once some injury becomes actionable, a plaintiff generally must plead all damages, both present and future, and cannot thereafter bring another action once future harm occurs

**[5] Negligence** ⚡460

272k460 Most Cited Cases

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

**[6] Limitation of Actions** ⚡55(3)

241k55(3) Most Cited Cases

Patient's claim in medical malpractice action for actual damages resulting from doctors' alleged failure to timely diagnose breast cancer would be preserved, for limitations purposes, until speculative damages concerning increased risk of recurrence of cancer became actual damages, actual and speculative damages arising from a single tort could not be split

Fourth District, Provo Department, The Honorable Lynn W Davis

James W Gilson and Michael F Richman, Murray, for Appellant

Curtis J Drake, Anne D Armstrong, and Dennis C Ferguson, Salt Lake City, for Appellees

Before Judges BENCH, DAVIS, and JACKSON

OPINION (For Official Publication)

DAVIS, Judge

\*1 ¶ 1 Plaintiff appeals the trial court's dismissal of her complaint, pursuant to rule 12(b)(6) of the Utah Rules of Civil Procedure. We affirm.

## BACKGROUND

¶ 2 From 1991 through early 1998, Dr. Glenn served as Plaintiff's obstetrician/gynecologist. In late 1997, Dr. Glenn diagnosed a lump on Plaintiff's breast as fibrocystic breast disease. On July 13, 1998, Plaintiff saw Dr. Hirsche [FN1] about a breast augmentation. One week later, Dr. Hirsche ordered and performed a mammogram, which revealed dense fibroglandular tissue bilaterally, no significant abnormality, and no evidence of malignancy. The report from the mammogram indicated that the breast was heterogeneously dense and that this may lower the sensitivity of mammography. On August 12, 1998, Dr. Hirsche performed a bilateral breast augmentation and a needle aspiration of three suspected cysts on Plaintiff's right breast. After monitoring Plaintiff's progress and the suspected cysts on her right breast, Dr. Hirsche performed an excisional biopsy of three right breast nodules on December 16, 1998. A pathological examination of the excisional biopsy revealed the presence of differentiated infiltrating ductal carcinoma. To treat this particularly malevolent form of breast cancer, Plaintiff underwent a radical mastectomy of her right breast on December 28, 1998, and followed that procedure with chemotherapy, radiation therapy, and surgical reconstruction of her breast. To this date, Plaintiff has not suffered a recurrence of cancer.

¶ 3 Plaintiff filed her complaint against Dr. Glenn and Dr. Hirsche (collectively, Defendants) on March 5, 2001, alleging that they acted negligently and delayed the breast cancer diagnosis. Plaintiff further alleged that this delay caused her to undergo more extensive treatment than necessary, and left her with an increased risk of cancer recurrence. Defendants, relying upon rule 12(b)(6) of the Utah Rules of Civil Procedure, filed a joint motion for dismissal without prejudice on August 2, 2002. The trial court, stating that "Utah law has not recognized claims of increased risk in the absence of a related injury [and that] Plaintiff has not claimed an injury clearly related to risk[ of cancer recurrence,]" granted Defendant's joint motion and

dismissed Plaintiff's complaint without prejudice on March 19, 2003. Plaintiff now appeals.

#### ISSUE AND STANDARD OF REVIEW

[1][2] ¶ 4 Although Plaintiff purports to raise several issues on appeal, she essentially argues that the trial court erred by dismissing without prejudice her complaint for current, actual damages and speculative damages. Specifically, Plaintiff argues that the Utah Supreme Court's decision in *Seale v Gowans*, 923 P.2d 1361 (Utah 1996), allows individuals to bring claims for both actual damages that have accrued and prospective damages that may or may not occur. "Because a rule 12(b)(6) dismissal is a conclusion of law, we review for correctness, granting no deference to the trial court's decision." *Whipple v American Fork Irrigation Co.*, 910 P.2d 1218, 1220 (Utah 1996). "[T]he purpose of a rule 12(b)(6) motion is to challenge the formal sufficiency of the claim for relief, not to establish the facts or resolve the merits of a case. [D]ismissal is justified only when the allegations of the complaint clearly demonstrate that the plaintiff does not have a claim." *Id.* "In determining whether a trial court properly dismissed an action under rule 12(b)(6), we assume that the factual allegations in the complaint are true and we draw all reasonable inferences in the light most favorable to the plaintiff." *Id.* at 1219.

#### ANALYSIS

\*2 [3][4][5] ¶ 5 "[M]ost courts follow the general rule that once some injury becomes actionable, a plaintiff *must* plead all damages, both present and future, and cannot thereafter bring another action once future harm occurs." *Seale v Gowans*, 923 P.2d 1361, 1364 (Utah 1996) (alteration in original). "[T]he 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.* (citations omitted). "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." *Id.*

¶ 6 In *Seale*, the Utah Supreme Court decided whether the statute of limitation for malpractice actions against health care providers barred the plaintiff's claim for negligent failure to diagnose her

breast cancer. *See id.* at 1362-66. Plaintiff claimed that the defendants failed to detect a cancerous mass in her breast during an earlier mammogram. *See id.* at 1362. A few months later, a second mammogram showed a larger mass that was confirmed to be cancerous. *See id.* The plaintiff underwent a radical mastectomy, and although all known cancerous areas were removed, her doctors found that the cancer had spread to eight of her lymph nodes. *See id.* This spread increased the likelihood of recurrence of cancer. *See id.* Little more than three years after her mastectomy, a bone scan revealed that the cancer had recurred in her left hip. *See id.* The statute of limitation issue was tried before a jury, and the jury returned a verdict finding that the plaintiff should have discovered her injury when she was originally diagnosed with cancer, and therefore, the statute of limitation had run on her claim. *See id.* On appeal from the trial court's denial of the plaintiff's motion for judgment notwithstanding the verdict, the Utah Supreme Court reversed the trial court. *See id.* at 1363, 1366.

¶ 7 The supreme court held that the statute of limitation did not begin to run on the plaintiff's claim until she discovered the recurrence of cancer because, under Utah law, claims cannot be split by plaintiffs. *See id.* at 1364 (noting parenthetically that "[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." (first and third alterations in original) (citation omitted)). Accordingly, the statute of limitation begins to run on all present and future claims once a harm is discovered. *See id.* In *Seale*, the claimed harm was the recurrence of the cancer, and since it did not manifest itself until three years after the plaintiff's radical mastectomy, the statute of limitation began running when the plaintiff discovered the recurrence. *See id.* at 1365-66. To hold otherwise would allow statutes of limitation to run on negligence claims that had yet to occur. *See id.* at 1364 ("[T]he 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.'" (citations omitted)).

\*3 ¶ 8 Plaintiff argues that *Seale* does not prevent her from bringing a negligence action against

Defendants for their failure to diagnose her breast cancer earlier, nor does it prevent her from recovering damages for her actual harm as well as future damages if cancer recurs. Plaintiff points 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 damages. *See id.* at 1365 ("[W]e conclude that without proof of actual damages, an alleged claim for enhanced risk is not adequate to sustain a cause of action for negligence.").

¶ 9 Plaintiff's reliance upon *Seale* for her position is misplaced. *Seale* clearly stands for the proposition that speculative claims are not allowed under Utah law. *See id.* at 1366 ("We believe that the better approach is to wait until the potential harm manifests itself, allowing for more certain proof and fewer speculative lawsuits.").

[6] ¶ 10 Then, relying on our prohibition against claim splitting, Plaintiff asserts that she should be allowed to pursue her claim for speculative damages so long as she simultaneously pursues her claim for actual damages. *Seale* does not stand for this proposition. Rather, *Seale* preserves Plaintiff's claim for actual damages until speculative damages become actual damages. *See id.* While it may be true that Plaintiff has an increased risk of cancer, whether the cancer will recur is purely speculative. Since the radical mastectomy, chemotherapy, radiation therapy, and reconstruction, Plaintiff has not suffered a recurrence of cancer. While she is faced with a higher risk of breast cancer, this recurrence is not a foregone conclusion. As such, Plaintiff's claim for the increased risk of recurrence of cancer is "not actionable." [FN2] *Id.* at 1364.

¶ 11 We therefore conclude that the trial court correctly dismissed Plaintiff's action without prejudice. We do not reach the issue of whether Plaintiff may amend her pleadings to pursue her claim for actual damages, perhaps waiving her claim to speculative damages to avoid the proscription of *Seale*. Nor do we address the consequences of such an action, including the application of the statute of limitation to her claim for actual damages, unconnected to a claim for speculative damages.

#### CONCLUSION

¶ 12 Under Utah law, an action for negligence cannot be pursued until a plaintiff suffers an injury. The risk of the recurrence of cancer does not constitute an injury. 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.

¶ 13 WE CONCUR: RUSSELL W. BENCH, Associate Presiding Judge and NORMAN H. JACKSON, Judge.

FN1. Dr. Hirsche was killed in an airplane accident in November 2002, and on December 10, 2002, the estate of Dr. Hirsche was substituted as a party defendant.

FN2. Plaintiff also relies upon *George v. LDS Hospital*, 797 P.2d 1117 (Utah Ct.App.1990). *George* is inapposite to this case because (1) it was a wrongful death case where actual damages had already been sustained, and (2) the focus of the decision was on causation, not speculative damages. *See id.* at 1118-22.

2004 WL 1065503, 2004 WL 1065503 (Utah App.), 499 Utah Adv. Rep. 25, 2004 UT App 161

END OF DOCUMENT

**MUJI 27.2****PERSONAL INJURY – GENERAL DAMAGES**

In awarding such damages, you may consider any pain, discomfort, and suffering, both mental and physical, its probable duration and severity, and the extent to which the plaintiff has been prevented from pursuing the ordinary affairs of life as previously enjoyed. You may also consider whether any of the above will, with reasonable certainty, continue in the future. If so, you may award such damages as will fairly and justly compensate the plaintiff for them.

No definite standard or method of calculation is prescribed by law to fix reasonable compensation for pain and suffering. Nor is the opinion of any witness required as to the amount of such reasonable compensation. Furthermore, the argument of counsel as to the amount of damages is not evidence of reasonable compensation. In making an award for pain and suffering, you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in light of the evidence.

*References:*

*Judd v. Rowley's Cherry Hill Orchards, Inc.*, 611 P.2d 1216 (Utah 1980)  
*Paul v. Kirkendall*, 1 Utah 2d 1, 261 P.2d 670 (1953)  
BAJI No. 14.13 (Supp. 1992). Reprinted with permission; copyright ©  
1986 West Publishing Company

**MUJI 27.3****PERSONAL INJURY — SPECIAL DAMAGES  
EXPENSES INCURRED**

**In awarding such damages, you may consider the reasonable value of medical [hospital and nursing] care, services and supplies reasonably required and actually given in the treatment of the plaintiff [and the reasonable value of similar items that more probably than not will be required and given in the future].**

*Comments*

It may be necessary to spell out the collateral source rule in certain cases. If that is necessary, the following may be added: “The fact, if it be a fact, that any of the foregoing expenses were paid by some source other than the plaintiff’s own funds does not affect the plaintiff’s right to recover for such expenses.”

*References:*

*Judd v. Rowley’s Cherry Hill Orchards, Inc.*, 611 P.2d 1216 (Utah 1980)  
BAJI No. 14.10 (Supp. 1992) Reprinted with permission, copyright ©  
1986 West Publishing Company

**MUJI 27.5****PERSONAL INJURY — SPECIAL DAMAGES  
LOSS OF FUTURE EARNING CAPACITY**

**If you find the plaintiff has suffered a loss of earning capacity, you should award the present cash value of earning capacity reasonably likely to be lost in the future as a result of the injury in question.**

***References:***

*Clawson v. Walgreen Drug Co.*, 108 Utah 577, 162 P.2d 759 (1945)  
BAJI No. 14.12 (Supp. 1992). Reprinted with permission, copyright ©  
1986 West Publishing Company