

1977

Jeannette U. Swan v. Dr. Robert H. Lamb And Dr. Dennis D. Thoen : Brief of Defendant And Respondent Dr. Robert H Lamb

Utah Supreme Court

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

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IN THE SUPREME COURT
OF THE STATE OF UTAH

JEANNETTE U. SWAN, :

Plaintiff and :
Appellant, :

vs. :

Case No. 14823

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

Defendants and :
Respondents. :

BRIEF OF DEFENDANT AND
RESPONDENT, DR. ROBERT H. LAMB

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

RAY R. CHRISTENSEN
Christensen, Gardiner, Jensen
& Evans
Attorneys for Defendant and Respondent
Dr. Robert H. Lamb
900 Kearns Building
Salt Lake City, Utah 84101

REX HANSON
Hanson, Wadsworth & Russon
Attorneys for Respondent Dr. Thoen
702 Kearns Building
Salt Lake City, Utah 84101

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

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vs.	:	BRIEF OF DEFENDANT AND RESPONDENT
	:	DR. ROBERT H. LAMB
DR. ROBERT H. LAMB and	:	Case No. 14823
DR. DENNIS D. THOEN,	:	
Defendants and	:	
Respondents.	:	

NATURE OF THE CASE

This is an action for alleged malpractice committed by the defendants in the performance of certain diagnostic procedures and surgery upon the back of the plaintiff.

DISPOSITION IN THE LOWER COURT

The case was submitted to the jury upon the theory of lack of informed consent, and the jury returned a verdict in favor of both defendants and against the plaintiff, no cause of action. Judgment was entered in favor of the defendants on the verdict.

RELIEF SOUGHT ON APPEAL

Defendants seek an affirmance of the judgment below.

STATEMENT OF FACTS

PRELIMINARY STATEMENT

The pages of the transcript of the trial proceedings are not consecutively numbered. The pages of the transcript of each day of the trial are separately numbered. Therefore, in referring to the transcript of trial proceedings, we shall designate the day by a Roman numeral and the page by Arabic numerals, e. g. a citation to the first day of trial page 18 would be as follows: (Tr. I, p. 18.)

THE FACTS

The statement of facts contained in plaintiff's brief is not complete and is somewhat misleading; and we deem it necessary to supplement plaintiff's statement as follows:

At the time plaintiff came under the care of defendants here, she was 68 years of age. In her early 40's she first experienced problems with her back. (Tr. IV, p. 82.) This ultimately resulted in surgery which was performed in New York City in 1953. (Tr. I, p. 62; IV, p. 68.) Following

the surgery she enjoyed a good recovery and for a period of several years was symptom free. However, for several years before the date of the surgery giving rise to this case she had experienced increasingly severe back symptoms. (Tr. I, p. 62; IV, pp. 68, 95.)

Her family physician was Dr. Robert Dalrymple, an internist. She was under treatment from him for high blood pressure and other medical problems. In March 1971, she complained to him of pains in her back. She made the same complaint in May of '71, and in August of 1972 she complained of low back pain and pain in the right lower extremity. (Tr. I, p. 32; IV, p. 67.) This was severe. Dr. Dalrymple recommended bed rest which is a form of conservative therapy. (Tr. I, p. 58.) He examined her again on September 12, 1972. At that time she had severe pain in the low back and right leg. (Tr. IV, p. 92.) He concluded that she was sick enough to be put in the hospital for definitive diagnosis and treatment. She was admitted to St. Mark's Hospital on the same day. (Ex. 1P; Tr. I, pp. 27, 29, 33-34, 60, 62, 65.) At that time she had a lot of pain and spasm in her back and severe disease of the back, which was progressive. In his mind there was some question of spinal cord damage.

(Tr. I, pp. 34, 47, 60, 62-64.) He referred her to defendant Dr. Robert Lamb, orthopedist, for definitive care. Dr. Lamb enlisted the assistance of defendant Dr. Dennis Thoen, a neurologist, in the diagnosis and treatment of plaintiff. (Tr. II, p. 90; III, p. 10.)

After defendant doctors took plaintiff's history and performed a series of diagnostic tests and procedures, including a myelogram, they concluded that plaintiff's only hope for improvement was surgery. She had experienced some aggravation of her symptoms following the myelogram. (Ex. 1-7; Tr. II, pp. 5-11, 21, 81-82, 86, 90-93, 113-114, 117; III, pp. 10-21, 46, 68-71.) There were risks inherent in both the myelogram and the surgery, but if she did not have the surgery she would follow a progressively downhill course with increasing symptoms and disabilities as time progressed (Tr. II, pp. 94; III, pp. 46, 68-71.) According to their testimonies, apparently believed by the jury, both defendants warned plaintiff and her husband that there were hazards in the procedures. (Tr. II, pp. 17, 21, 23, 94-95; III, pp. 22, 24, 70-71, 76, 97.)

A spinal decompression surgical procedure was performed by Dr. Lamb, following which plaintiff became

paraplegic, for which injuries the present suit was brought. Plaintiff proceeded on two theories: (1) failure of defendant doctors to treat plaintiff in accordance with the standard of care prevailing in the community; and (2) failure to obtain the informed consent of the plaintiff to the procedures which they performed. (R. 2-5.) Plaintiff's family physician, Dr. Dalrymple, testified that he did not know of anything done or omitted to be done by defendant doctors which would be a departure from the standard of care prevailing in this community, and that he was familiar with the standard of care of orthopedic surgeons in the community. (Tr. I, pp. 68-69.)

In order to prove the standard of care in this community, plaintiff offered as an expert witness Dr. Peter Rocovich of Los Angeles, California. (Tr. III, p. 100.) Dr. Rocovich was a member of the Southern California Neurosurgical Society, American Medical College [Association], California Medical Association, Los Angeles County Medical Association, Western States Federation of Neurological Sciences. (Tr. III, p. 102.) It will be noted that he was not a member of a single professional organization which was national in scope except the American Medical [Association]. That is

not a specialty association, and admission is to all physicians in good standing in their profession, regardless of training, experience, specialty, or competence.

It is of particular importance that Dr. Rocovich had taken and "flunked" the board examinations in his own specialty, and therefore was not, and could not be board certified. (Tr. III, p. 103; IV, p.21.) Moreover, he did not belong to any nationally recognized professional association dealing with his specialty such as the Harvey Cushing Society, American College of Surgeons, American Academy of Neurosurgeons and similar organizations. (Tr. IV, p. 22.) Apart from the American Medical Association, the only society he belonged to which was more than purely local in scope was the Western States Federation of Neurological Sciences. There was no evidence that any particular qualifications were necessary to obtain membership in that organization.

By way of offer of proof, counsel for the defendants established without contradiction, that Dr. Rocovich had never attended medical school in the State of Utah, had never taken any medical classes in the State of Utah, had not attended any medical lectures or seminars in the State of Utah, had no personal knowledge of the medical school at

the University of Utah, had never been licensed to practice in the State of Utah, had never undertaken to practice in the State of Utah, had never performed a surgical procedure in the State of Utah, had never "scrubbed in" at a Utah hospital with a Utah doctor to observe him perform surgery, had never observed a spinal decompression being done in the State of Utah, and had no personal knowledge concerning the standards of practice of medicine in this state. (Tr. IV, pp. 20-21.)

There was no indication that he had ever repeated and passed the national board examination, or that he had ever remedied the deficiencies which had caused him to fail the initial examination. Not being board certified, he, of course, did not receive the publications of the speciality board of his own speciality. (Tr. IV, p.21.)

He had absolutely no specialty training in orthopedic surgery and did not subscribe to any orthopedic surgery periodicals. There are differences in practice between orthopedic surgeons and neurosurgeons in the field of spinal surgery. (Tr. IV, p. 22.)

Dr. Rocovich admitted that he spends a substantial amount of his time in court testifying. He spent the entire

week of trial in Salt Lake City in connection with this case. He has testified in Utah before and has testified in Arizona on one or two occasions. He has testified on several occasions for attorney David Harney of Los Angeles, a specialist in medical malpractice litigation. He also has a business relationship with attorney Harney. (Tr. IV, pp. 54-55.) He has previously testified at the request of the attorney for the plaintiff in this case in another case in Utah. In that case, he undertook to testify as to the standard of care of a hospital in the State of Utah. He was in Utah for several days on that occasion. (Tr. IV, pp. 58-59.)

After considerable discussion, consideration and debate, the trial judge determined not to accept the proffered testimony of Dr. Rocovich as to the standard of care in Utah. The judge set forth the reasons for his decision in a rather lengthy and thoughtful statement. See Tr. IV, pp. 3-6 and 10-12. Judge Croft indicated that Dr. Rocovich had failed to establish to his satisfaction, familiarity with the degree of care and skill of other practitioners in the locality of Utah sufficient to qualify him to testify as to the standard of care of physicians in this state. (Tr. IV, p. 6.)

Dr. Robert Lamb is a specialist in orthopedic surgery. He is board certified and has been since 1953. He is also a member of the American Academy of Orthopedic Surgeons and a fellow of the American College of Surgeons. To become board certified it was necessary for him to pass both written and oral examinations. (Tr. II, pp. 2, 78.)

Defendant, Dr. Thoen is likewise board certified in his speciality of neurology. As with Dr. Lamb, he obtained certification by taking and passing both written and oral examinations. (Tr. III, pp. 65-66.)

Plaintiff offered no evidence other than the testimony of Dr. Rocovich concerning the alleged departure from the standard of care by the defendant doctors. Since the proffered testimony was not received, the court, of necessity, directed a verdict in favor of both defendants and against the plaintiff on the issue of defendants' negligence in the care and treatment of the plaintiff. The case was submitted to the jury on the single issue of whether plaintiff had given an informed consent to the diagnostic and surgical procedures which were performed upon her. Upon that issue, the jury found in favor of the defendants and returned a verdict in their favor, upon which judgment was entered. This appeal followed.

ARGUMENT

The single issue before this court is whether the trial judge erred, or abused his discretion, in refusing to receive the proffered expert testimony of Dr. Peter Rocovich as to the standard of care by the defendant doctors in this case.

However, plaintiff has somewhat fragmented her argument and in order to meet squarely the issues which she has raised, we have subdivided our argument.

POINT I. THE LOCALITY RULE IS THE WELL ESTABLISHED RULE OF DECISION IN THIS COURT AND SHOULD NOT BE ABANDONED NOW

Plaintiff opens her brief with a general discussion of the various standards which have been applied in evaluating the skill and care of defendant physicians in malpractice cases. She then reviews the applicable Utah decisions and concludes that Utah has never committed itself to any of the four rules enumerated, namely the strict locality rule, the general neighborhood rule, the similar locality rule or the national standards rule. While it may be that the question has never been presented to the court quite as pointedly as it is here, the innumerable holdings of this court clearly demonstrate that this State is thoroughly committed to the

locality rule. There may be some loose expressions in some of the cases referring to "the same or similar locality." For purposes of this case, we do not regard it as important whether the "strict locality," or "same or similar locality" rule is held to be applicable.

Plaintiff then launches on a diatribe on the locality rule, describing it as "archaic", "outmoded," "unjust," and without any reason in fact. In support of her position plaintiff relies inter alia upon reports, surveys and other materials never offered or received in evidence, and not properly before the Court.

We cannot agree with plaintiff that the locality rule has outlived its usefulness or vitality in the year 1977, particularly in the western part of the United States. It cannot be denied that the doctors practicing in rural areas do not have the same advantages, and therefore, should not be held to the same standard of care, as doctors practicing in the urban centers. For example, doctors in the urban centers have ready access to consultation by specialists in the whole gamut of medical specialties. They have access to sophisticated diagnostic equipment, and to consultations by experienced specialists in all fields. They have access to

fast ambulance service, superior hospital facilities and extensive medical libraries. Rural doctors do not have the freedom to leave their practices in isolated communities for extended periods of time to attend seminars and supplemental training sessions. In many communities there is but one doctor, and when he is absent from the town there is no medical help available.

Many recent decisions have reaffirmed the locality rule. See for example Lockart v. Maclean, (Nev.), 361 P.2d 670; Murphy v. Dyer, (10th Cir.), 409 F.2d 747; McGay v. Mitchell, (Tenn. App.), 463 S.W.2d 710; Burley v. Williams 189 Neb. 484, 203 N.W.2d 454; Gandara v. Wilson, 85 N.M. 161, 509 P.2d 1356; Goedecke v. Price, 19 Ariz. App. 320, 506 P.2d 1105. A recent case from the Supreme Court of Arkansas gave thoughtful consideration to the entire problem, and we quote from it at length. See Gambill v. Stroud, (Ark.), 531 S.W.2d 945. The following quotations are pertinent here:

"The thrust of appellants' argument is that the rule set out in AMI 1501 is no longer applicable to modern medicine, because doctors practicing in small communities now have the same opportunities and resources as physicians in large cities to keep abreast of advances in the medical

profession, due to availability of the Journal of the American Medical Association and other journals, drug company representatives and literature, closed circuit television, special radio networks, tape recorded digests of medical literature, medical seminars and opportunities for exchange of views between doctors from small towns and those from large cities where there are complexes of medical centers and modern facilities.

"However desirable the attainment of this ideal may be, it remains an ideal. It was not shown in this case, and we are not convinced, that we have reached the time when the same postgraduate medical education, research and experience is equally available to all physicians, regardless of the community in which they practice. The opportunities for doctors in small towns, of which we have many, to leave a demanding practice to attend seminars and regional medical meetings cannot be the same as those for doctors practicing in clinics in large centers. It goes without saying that the physicians in these small towns do not and cannot have the clinical and hospital facilities available in the larger cities where there are large, modern hospitals, and medical centers or the same advantage of observing others who have been trained, or have developed expertise, in the use of new skills, facilities and procedures, of consulting and exchanging views with specialists, other practitioners and drug experts, of utilizing closed circuit television, special radio networks or of studying in extensive medical libraries found in larger centers.

"The rule we have established is not a strict locality rule. It incorporates the similar

community into the picture. The standard is not limited to that of a particular locality. Rather, it is that of persons engaged in a similar practice in similar localities giving consideration to geographical location, size and character of the community. Restatement of the Law, Torts 2d, 75 Comment g, §299A. The similarity of communities should depend not on population or area in a medical malpractice case, but rather upon their similarity from the standpoint of medical facilities, practices and advantages. . . .

"Modern means of transportation and communication have extended boundaries but they have not eliminated them. See Sinz v. Owens, supra; Tvedt v. Haugen 70 N. D. 338, 294 N.W. 183, 132 A.L.R. 379 (1940). The opportunities available to practitioners in a community are certainly matters of fact and not law and may be shown by evidence under our own locality rule.

"Our locality rule is well expressed in Restatement of the Law, Torts 2d (1965) 73, §299A, viz:

Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities.

"It is fallacious to say that our locality rule permits a doctor in one place to be more negligent than one in another place. It is a matter of skill that he is expected to possess, i.e., the skill possessed and used by the members of his profession in good standing, engaged in the same type of practice in the locality in which he practices, or a similar locality. The similar locality rule prevents highly incompetent physicians in a particular town from setting a standard of utter inferiority for the practice of medicine there. . . .

"One of the ideas suggested in appellants' argument is that a national standard of care should be observed. This is also unrealistic. We cannot accept that premise as a matter of law and we certainly do not take the theory that such a standard exists to be so well established that it can be judicially noticed. If it does factually exist, to any extent, or in any case, then certainly it can be shown by evidence. If the medical profession recognizes that there are standard treatments which should be utilized nation-wide this fact should be readily susceptible of proof under the similar locality rule because the skill and learning should be the same and all localities would be similar. See Annot, 37 A.L.R.3d 420, 425; Peters v. Gelb, 303 A.2d 685 (Del. Super. 1973); Rucker v. High Point Memorial Hospital, Inc., 285 N.C. 519, 206 S.E.2d 196 (1974); Hundley v. Martinez, 151 W. Va. 977, 158 S.E.2d 159 (1967). The same may be said for any region exceeding the boundaries of a particular city or town. . . .

* * * * *

"It is also suggested that modern transportation and communications have so extended the borders of the locality as to bring the physician in a smaller community within the boundaries of a larger community where the appropriate treatment may be assured to a patient, even though the physician in the small town be unable to give it because of limited facilities or training. Here again, the appropriate community standard may require that these doctors send such patients as may be taken to such larger centers, but when this is not practicable, the small town doctor should not be penalized for not utilizing means or facilities not reasonably available to him." (Emphasis added.)

Plaintiff complains that the locality rule is unfair and that it is impossible for plaintiffs to obtain the

testimony of local doctors in support of their claims even where meritorious. This is based on decisions from other jurisdictions, and reports and surveys from other times. Whatever the situation may be elsewhere in this country, and whatever it may have been in other times, it cannot be realistically contended that today, at least in the State of Utah, that a plaintiff cannot obtain the testimony of a properly qualified physician, familiar with the local standard of care, to testify in support of a meritorious malpractice claim.

Just one year ago the legislature of this state determined that there was a "crisis" in malpractice litigation in this state, and found it necessary in a Budget Session to enact a Health Care Malpractice Act. As the basis for the act, the legislature determined:

"The legislature finds and declares that the number of suits and claims for damages and the amount of judgments and settlements arising from health care has increased greatly in recent years." Sec. 78-14-2, U.C.A. (Emphasis added.)

If plaintiffs generally were having any substantial difficulty in finding expert testimony to support meritorious claims one must wonder why it was necessary for the legislature

almost as an emergency measure, to enact a malpractice act and to make the findings quoted above.

Plaintiff places great reliance on the case of Douglas v. Bussabarger, 73 Wash.2d 476, 438 P.2d 829. In a stinging dissenting opinion in that case Justice Rosellini said:

"Furthermore, I do not think that a plaintiff's attorney need be unduly handicapped by lack of information in testing the expertise of a medical witness. Medical knowledge has been written down and is accessible to the lawyer. If he confronts the witness with this knowledge I rather doubt that the doctor would allow his reluctance to incriminate a colleague to overcome his concern for his own reputation as a man competent in his field and so profess ignorance of matters which reasonable competence would require him to know."

At page 31 of appellant's brief it is said as follows:

"This court cannot, without believing that Utah standards are justifiably lower than those of other states, countenance the application of a same general neighborhood rule in such a way as to affirm the lower court's decision to reject testimony from Dr. Rocovich."

We emphatically disagree with this statement.

It is not that Utah standards are lower than those of other states, but that they are higher than those demonstrated by Dr. Rocovich (as we shall hereafter more fully demonstrate) that makes the ruling of the lower court eminently correct.

Appellant argues in opposition to the locality rule, that, "Close collegial relationships develop as doctors

attend the same seminars, conferences and symposia, belong to the same organizations. . ." etc. See appellant's brief page 32. The same argument could be advanced against a national standards rule with equal force. Board certified physicians in all of the specialties regularly attain and maintain collegial relationships, attend the same seminars, conferences and symposia, belong to the same organizations, etc. If this is a valid argument, it is a valid argument against a national standards rule as well as against a locality rule.

In Blye v. Rhodes, (Va.) 222 S.E.2d 783, plaintiff's counsel made the same appeal as is being made here for an abandonment of the locality rule and adoption of a national standards rule. In rejecting that argument the Virginia Court said at pp. 788-789:

"We acknowledge, as the plaintiff points out, that changes in communication, education, and attitudes have resulted in the abandonment by some jurisdictions of locality standards in favor of a national standard for determining medical malpractice of specialists. And we cannot deny the apparent merit of the arguments favoring change to a national standard applicable to specialists.

"We are firmly of the view, however, that such a material change in the substantive law of Virginia should not be accomplished by the mere

brush of the judicial pen. The Virginia (same or similar community) standard is imbedded in the jurisprudential law of this Commonwealth; it has been long relied upon by lower courts, the legal and medical professions, and the public. If for no other reason, we reject the challenge for change because basic concepts of stare decisis dictate maintenance of the established law.

"Sound considerations of policy also militate against a bench change of the present law. We have noted in Part I the critical national situation caused by proliferating medical malpractice litigation. If any changes in the substantive rules applicable to such litigation are to be made midstream of the controversy, the legislature and not this court should be the recipient of the pleas for change. . . ." (Emphasis added.)

Within the last year the Utah legislature has considered and legislated on this subject. Since it did not see fit to alter the present, well established locality rule, this court should not do so.

POINT II. UNDER ANY STANDARD, DR. ROCOVICH
DEMONSTRATED NO QUALIFICATIONS TO TESTIFY
AGAINST DEFENDANT DOCTORS IN THIS CASE

Even under a national standards rule, Dr. Rocovich demonstrated no qualifications to testify as an expert concerning the professional conduct of Dr. Lamb and Dr. Thoen. As we have previously demonstrated, Dr. Rocovich was not board certified in his own speciality, neurosurgery, much less in the specialities of the defendant doctors. He

did not belong to any national associations which had merit or specialty qualifications for membership. There is no showing that he subscribed to the publications of the national speciality societies. In fact, it is affirmatively shown that Dr. Rocovich was not able to pass the test necessary for certification as a specialist in his own field. How, then, can he be qualified to testify as against the defendants in this case who are specialists in different fields? The very argument which plaintiff makes for a national standards rule, wholly defeats any claim that Dr. Rocovich was qualified to testify against the defendants in this case.

As heretofore noted, this is not the first time that Dr. Rocovich has been offered as an expert in this state to testify on medical matters not involving his own speciality. In the case of Johnson v. L.D.S. Hospital, No. 12970, Dr. Rocovich testified as an expert as to the standard of care of one of the local hospitals. That case was appealed to this court but pending appeal was settled between the parties. However, briefs were filed and an examination of them will show that the same Dr. Rocovich was offered by the same attorney in that case as presently represents the appellant here.

Plaintiff relies upon the case of Kronke v. Danielson, 108 Ariz. 400, 499 P.2d 156. That case also involved Dr. Rocovich. That fact does not appear from the report of the case in Kronke, but reference to the case of Hoeffel v. Campbell, (Ariz. App.), 494 P.2d 777 will demonstrate that again the same Dr. Peter Rocovich is involved. In Kronke the court said:

"To qualify an expert to express an opinion on what that standard of care is for the speciality of the defendant, the party offering the witness must establish the witness' knowledge and familiarity with the standard of care and treatment commonly practiced by physicians engaged in the same type of speciality as the defendant."

On page 46 of her brief, appellant says:

"As was stated by one court, 'A defendant should not be judged by a lower standard than he himself requests.'"

We emphatically agree with this. This is exactly what the defendants ask in this case. Dr. Lamb, a board certified orthopedic surgeon, and Dr. Thoen, a board certified neurologist, should not be judged by the standards of a neurosurgeon who has flunked the certifying examination in his own specialty and who has demonstrated no knowledge whatsoever concerning the practice or standards in the State of Utah. Plaintiff has failed to cite a single case wherein

a doctor who is not board certified in his own speciality has been allowed to testify as to the standard of care or qualifications of a defendant who is board certified in a different speciality. The situation is ludicrous on its face. We submit that no such condition should ever be permitted to exist. Dr. Rocovich was wholly unqualified to testify as against these defendants and the court properly rejected his testimony.

POINT III. THE TRIAL JUDGE HAS WIDE DISCRETION
AS TO THE QUALIFICATIONS OF AN EXPERT WITNESS

The trial court has discretion in the first instance to determine the qualifications of a proffered expert and in the absence of abuse of discretion his ruling will not be reversed. Plaintiff relies on the case of Riley v. Layton, (10th Cir.), 329 F.2d 53, wherein a decision by Judge Ritter to receive the testimony of a San Francisco general practitioner to testify as to the standard of care of a doctor practicing in Kanab, Utah was affirmed. The basis of the appellate court's ruling, however, was that the testifying expert demonstrated some knowledge and experience of the methods of practice in similar localities, and that in the absence of a showing of abuse of discretion in ruling on the qualifications of the expert to testify, the ruling of the trial judge would not be

disturbed. In a later case, more like the case at bar, the same court sustained the ruling of a trial judge in rejecting the testimony of a nationally renowned expert in anesthesiology, in a case against a local obstetrician, because there was no showing that he was familiar with the local standard of care. Murphy v. Dyer, (10th Cir.), 409 F.2d 747.

In McCay v. Mitchell, et al, (Tenn. App.), 463 S.W.2d 710, the court said at p. 718:

"To qualify an expert witness in a malpractice action, it must appear he is familiar with the treatment and care and skill of practitioners in the locality in question. . . .

"The qualification of a witness as an expert is a matter largely within the determination of the trial court. Appellate courts will not reverse the ruling of a trial judge on the issue unless it is shown the trial judge was clearly in error. Quinley v. Cocke, supra; McElroy v. State (1921) 146 Tenn. 442, 242 S.W.2d 883. After a careful review of the rather lengthy and full testimony produced to qualify Dr. Chodoff as an expert medical witness, we feel the Trial Judge did not abuse his discretion in refusing to allow this witness to testify as to the standards of care and skill required of orthopedic surgeons and general practitioners in Memphis, Tennessee. (Emphasis added.)

CONCLUSION

We respectfully suggest that any relaxation of the traditional locality rule should be undertaken with the

utmost caution. Any such relaxation invites the testimony of foreign quacks and charlatans, who are nothing more than professional witnesses without either professional qualification or conscience. If the doors are to be opened to the testimony of professional witnesses from outside the state, to testify as to the standards of care of local professionals, care should be taken that such alleged experts are in fact what they purport to be, and that they do have those professional qualifications which would qualify them to pass judgment upon the professional conduct of local physicians. Such a showing is completely absent here.

Under the traditional locality rule which this court has heretofore consistently followed, the testimony of Dr. Rocovich was clearly inadmissible. Even under the most liberal rule, no proper foundation for the testimony of Dr. Rocovich was ever laid, and it would be equally inadmissible under that rule. Certainly there has been no showing of an abuse of discretion by the trial court in rejecting the proffered testimony of Dr. Rocovich. The judgment should be affirmed.

Respectfully submitted,

CHRISTENSEN, GARDINER, JENSEN & FERGUSON

By

Ray R. Christensen
Attorneys for Respondent Dr. Lane

CERTIFICATE OF SERVICE

Mailed two copies of the foregoing Brief of Defendant and Respondent, Dr. Robert H. Lamb to W. Eugene Hansen, attorney for Appellant, Hansen & Orton, 2020 Beneficial Life Tower, 36 South State Street, Salt Lake City, Utah 84111, and Rex Hanson, attorney for Respondent Dr. Thoen, Hanson, Wadsworth & Russon, 702 Kearns Building, Salt Lake City, Utah 84101, this ____ day of June, 1977.
