

1977

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

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

JEANNETTE U. SWAN, :
 :
Plaintiff and :
Appellant, : Case No. 14823
 :
vs. :
 :
DR. ROBERT H. LAMB and :
DR. DENNIS D. THOEN, :
 :
Defendants and :
Respondents. :

REPLY BRIEF OF APPELLANT

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

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TABLE OF CONTENTS

CASES CITED.	i
AUTHORITIES CITED.	ii
ARGUMENT	1
POINT I. THE TRIAL COURT'S ERRONEOUS APPLICATION OF THE STRICT LOCALITY RULE PREJUDICIALLY AFFECTED PLAIN- TIFFF'S ABILITY TO PROPERLY QUALIFY HER EXPERT WITNESS.	1
POINT II. DEFENDANT DR. THOEN'S ARGUMENT FOR EXISTING WIDE ACCEPTANCE AND APPLI- CATION OF THE STRICT LOCALITY RULE FAILS TO CONSIDER THE FULL RANGE OF COURT PRONOUNCEMENTS, IN THE JURISDICTIONS CITED, WHICH SHOW THE CONTRARY.	3
POINT III. ARGUMENTS MADE BY DR. LAMB CONCERN- ING DR. ROCOVICH'S CREDENTIALS ARE NOT MATTERS AFFECTING THE ADMISSI- BILITY OF HIS TESTIMONY, BUT, RATHER, THE WEIGHT TO BE GIVEN IT	6
POINT IV. DEFENDANTS ATTACK THE NATIONAL STANDARD TEST WITH INAPPOSITE ARGUMENTS CONCERNING UTAH'S RURAL CHARACTERISTICS EVEN THOUGH THEY ADMITTED BEING GOVERNED THEMSELVES BY A NATIONAL STANDARD OF CARE.	11
POINT V. BY PERMITTING A NON-RESIDENT EXPERT WITNESS TO TESTIFY FOR A PLAINTIFF IN A MEDICAL MALPRACTICE CASE A COURT DOES NOT REDUCE THE CONSIDERABLE BURDEN OF PROOF WHICH THE PLAINTIFF HAS	14
CONCLUSION	18

CASES CITED

PAGE

<u>Allred v. Davis</u> , No. 208981 (3d Dist., S.L.Co., Utah. November 6, 1974)	16
<u>Baerman v. Reisinger</u> , 124 D.C.App. 180, 363 F.2d 309 (1966)	8
<u>Borowski v. VonSolberg</u> , 14 Ill.App.3d 672, 303 N.E.2d 146 (1973)	5
<u>Cahoon v. McKay</u> , No. 205196, (3d Dist., S.L.Co., Utah, November 12, 1973)	15
<u>Carbone v. Warburton</u> , 11 N.J. 418, 94 A.2d 680 (1953)	7, 8
<u>Chealez v. St. Mark's Hospital</u> , No. 210376 (3d Dist., S.L.Co., Utah, September 12, 1974)	16
<u>Coleman v. Garrison</u> , 349 A.2d 8 (Del. 1975).	4
<u>DeFilippo v. Preston</u> , 173 A.2d 333 (Del. 1961)	4, 5
<u>Harris v. Smith</u> , 372 F.2d 806 (8th Cir. 1967)	7
<u>Hawkins v. Schofman</u> , 204 S.2d 336 (Fla.App. 1967).	8
<u>Herrera v. Barton</u> , No. 207735 (3d Dist., S.L.Co., Utah, August 26, 1974.)	16
<u>Jones v. Nielsen</u> , No. 225455 (3d Dist., S.L.Co., Utah, March 8, 1976.)	16
<u>Mann v. Sanders</u> , 173 N.E. 2d 12 (Ill.App. 1961)	5
<u>Martinez v. Armstrong</u> , No. 218595 (3d Dist., S.L. Co., Utah, February 26, 1975).	16
<u>Maxfield v. Clegg</u> , No. 206682 (3d Dist., S.L.Co., Utah, June 24, 1974.)	15
<u>Nelson v. Peterson</u> , No. 204648 (3d Dist., S.L.Co., Utah, July 16, 1973.)	15
<u>Ollerton v. Carson</u> , No. 210500 (3d Dist., S.L.Co., Utah, November 20, 1974.)	16
<u>Osguthorpe v. Broadbent</u> , No. 212598 (3d Dist., S.L.Co. Utah, May 17, 1976.)	16

<u>Pearce v. Linde</u> , 113 Cal.App. 2d 627, 248 P.2d 506 (1952)	8
<u>Richman v. Pemberton</u> , No. 225996 (3d Dist., S.L.Co., Utah, November 8, 1976.)	16
<u>Steinberg v. Indemnity Insurance Co.</u> , 364 F.2d 266 (5th Cir. 1966)	7

AUTHORITIES CITED

31 <u>Am.Jur.2d</u> , Expert and Opinion Evidence (1967)	7, 8
Annot., 31 <u>A.L.R.3d</u> 1163 (1970)	7, 8
Annot., 46 <u>A.L.R.3d</u> 275 (1972)	7, 8
<u>Utah Code Annotated</u> 1953, §78-14-8	17

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and DR. DENNIS D. THOEN,	:	
Defendants and	:	
Respondents.	:	

POINT I

THE TRIAL COURT'S ERRONEOUS APPLICATION
OF THE STRICT LOCALITY RULE PREJUDICIALLY
AFFECTED PLAINTIFF'S ABILITY TO PROPERLY
QUALIFY HER EXPERT WITNESS.

Both defendants admit in their briefs that the trial court disallowed testimony from plaintiff's expert, Dr. Peter M. Rocovich, because he had no "personal contact or experience within the state of Utah." Tr. day 3 at 118; 4 at 6-7; Brief for Respondent Dr. Thoen at 15, 40; Brief for Respondent Dr. Lamb at 8. It thus appears uncontested that the trial court applied what plaintiff has characterized as the "strict" rather than the "similar" locality rule. Dr. Lamb, however, unlike Dr. Thoen, argues that, for purposes of this case, it is not important which of the said "locality" rules was applied. See Brief for

Respondent Dr. Lamb at 11; Brief for Respondent Dr. Thoen at 19-34, 37. Dr. Lamb's position in this respect is erroneous.

For an expert witness to be permitted to testify when the "strict locality" is applied, he must show knowledge and familiarity with the relevant methods and customs of medical practice within a specific geographic locality. According to the rule, said knowledge and familiarity must have been acquired through personal contact and experience with that locality and its physicians. On the other hand, under the "similar locality rule," such a witness need only show knowledge and familiarity with the relevant methods and customs of medical practice in localities of similar makeup to the area in question. There is no need to demonstrate first-hand acquaintance with the area itself.

Clearly where an expert witness claims familiarity with the standard of care in a locality, not on the basis of his first-hand contacts with that locality, but on the basis of his contacts and experiences in and with localities of a similar nature, the court selection of either a "strict" or a "similarly" locality rules, will make all the difference in the world in whether that expert will be allowed to testify.

Dr. Thoen, agrees that had the trial court allowed testimony as to the similarity of medical

factors in Los Angeles as compared to Salt Lake City, Dr. Rocovich's testimony on the standard of care may have been allowed. See Brief for Respondent Dr. Thoen at 37. Since evidence of similarites between the two areas did not enter into the trial judge's consideration in making his ruling, it is obvious which "locality" rule he applied, and that such application was important to the outcome of the case. The only way in which the decision of that court can be affirmed is by adoption in Utah of the "strict locality rule."

POINT II

DEFENDANT DR. THOEN'S ARGUMENT FOR EXISTING WIDE ACCEPTANCE AND APPLICATION OF THE STRICT LOCALITY RULE FAILS TO CONSIDER THE FULL RANGE OF COURT PRO-
NOUNCEMENTS, IN THE JURISDICTIONS CITED, WHICH SHOW THE CONTRARY.

Dr. Thoen argues that Utah has a long tradition of following the strict locality rule and claims that such a rule is "absolutely necessary" in Utah. See Brief for Respondent Dr. Thoen at 19, 23. Interestingly, Dr. Lamb recognized no such "necessity." In fact, Dr. Lamb appears to argue that the Utah standard is and should be the "similar locality rule." See Brief for Respondent Dr. Lamb at 10-19. Such confusion in the perceptions and positions of the defendants is supportive of plaintiff's argument, as stated in her initial brief, that the law in Utah is neither clear

nor established. Not until this appeal has the Utah Supreme Court had to decide precisely what the Utah Medical Standard of Care was.

Dr. Thoen undertakes to discredit plaintiff's position that the strict locality has been adopted in only a small minority of American jurisdictions, by reporting the results of his "exhaustive study" of U.S. medical standards which he claims show that no less than 17 states presently apply the strict locality rule in medical malpractice cases. See Brief for Respondent Dr. Thoen at 22 et seq.

Plaintiff examined some of the cases to which Dr. Thoen referred and investigated the laws of some of the jurisdictions cited. Certain discrepancies came to light in that investigation. For instance, Coleman v. Garrison, 349 A.2d 8 (Del. 1975), is cited in support of the proposition that Delaware uses a strict community standard. It is true that the footnote in Coleman from which Dr. Thoen gleans his information reads as follows:

The settled rule in Delaware is that a surgeon is bound to the same standards of care and competence as other surgeons in good standing ordinarily adhere to in the community. DeFilippo v. Preston, Del.Supr., 173 A.2d 333 (1961); Christian v. Wilmington General Hospital Association, Del.Supr., 135 A.2d 727 (1957). Coleman, Supra at 10, n.2.

The DeFilippo case, however, cited in the footnote, clarifies that "community" as used in Coleman,

means "the same or a similar community:"

The general rule is that a surgeon is bound to the same standards of care and competence as other surgeons in good standing ordinarily adhere to in the same or a similar community. 41 Am.Jur., Physicians and Surgeons, §82; 70 C.J.S., Physicians and Surgeons, §43. This general rule is also the law of Delaware. *Christian v. Wilmington General Hospital*, 11 Terry 550, 134 A.2d 727; *Mitcnell v. Atkins*, 6 W.W. Harr. 451, 178 A. 593. See *DeFilippo*, supra at 336. (Emphasis added.)

Thus, the Delaware standard would appear to be the "similar locality rule" rather than the "strict locality rule" as represented by Dr. Thoen.

Dr. Thoen also suggests that the Illinois standard is the strict locality rule and cites Mann v. Sanders, 173 N.E.2d 12 (Ill.App. 1961). However, in a later case, a broader statement explaining the nature of such a "locality" appeared:

[I]llinois . . . [follows] the "locality rule" under which a defendant doctor is bound to exercise such care and diligence as a good practitioner practicing in a same or similar community or hospital. *Borowski v. VonSolberg*, 14 Ill.App.3d 672, 303 N.E.2d 146 (1973). (Emphasis added.)

Such language is not reflective of the existence of a strict locality rule in Illinois. (Note that the statement is broad enough to cover general practitioners and specialists alike.)

While it is not doubted that Dr. Thoen intended to accurately represent to the Court the current status of the law in sister states, it appears that at least some

of the cases cited do not contain information which is complete enough to allow for a determination as to which standard of care really governed. It can be supposed that in others of the cases cited by Dr. Thoen, a proper factual setting for a definitive pronouncement concerning the standard of care to be applied might have been lacking, thereby making any pronouncement thereon merely dicta. (See Brief for Appellant Swan at 14-20 for a discussion of this characteristic as concerns Utah.) Plaintiff considers herself to have made no mistake in stating that the strict locality rule is still viable in only a small minority of American jurisdictions.

POINT III

ARGUMENTS MADE BY DR. LAMB CONCERNING DR. ROCOVICH'S CREDENTIALS ARE NOT MATTERS AFFECTING THE ADMISSIBILITY OF HIS TESTIMONY, BUT, RATHER, THE WEIGHT TO BE GIVEN IT.

Defendant Dr. Lamb devotes a considerable portion of his brief to the argument that because Dr. Rocovich was not a board certified specialist he was incompetent to express an opinion concerning the conduct of the defendants. Dr. Lamb complains that:

Plaintiff has failed to cite a single case where 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 specialty. The situation is ludicrous on its face. We submit that no such condition should ever

be permitted to exist. Brief for Respondent
Dr. Lamb at 22.

There are actually a number of cases which could be cited to show that experts not only need not be board certified but need not be specialists in order to explain the standard of care applicable to specialists. In Harris v. Smith, 372 F.2d 806 (8th Cir. 1967), the testimony of a general practitioner was allowed on the standard of care of a Nebraska specialist in orthopedic surgery. In Carbone v. Warburton, 11 N.J. 418, 94 A.2d 680 (1953), an 82 year-old general practitioner who had been retired for 20 years was held competent to testify as to the standard of care for an orthopedic surgeon. The witness said he kept abreast of medical and surgical progress through the reading of texts and medical journals. Again in Steinberg v. Indemnity Insurance Co., 364 F.2d 266 (5th Cir. 1966), a general practitioner testified for the plaintiff as an expert witness in a case involving alleged malpractice by a plastic surgery specialist. For additional references see comments and analysis in Annot., 31 A.L.R.3d 1163 (1970); Annot. 46 A.L.R.3d 275 (1972); 31 Am.Jur.2d Expert and Opinion Evidence §§105-107 (1967).

The general rule in this regard is that a physician or surgeon is not incompetent to testify as an expert though he is not a specialist in the particular branch of medicine involved in the case. See 31 Am.Jur.2d

Expert and Opinion Evidence §106 (1967).

If a physician who is duly licensed by the proper authorities to engage in the general practice of his profession says that, assuming a hypothetical statement of facts to be true, he can express an opinion satisfactory to himself as to a question or science pertaining to a particular branch of medicine, he is not precluded from testifying as an expert simply because he is not a technical specialist in that particular department. Id.

Some states, such as California, go beyond a mere licensure requirement and ask that a witness show that he has "occupational experience" with the procedure in question. See Pearce v. Linde, 113 Cal.App.2d 627, 248 P.2d 506 (1952). Other states, such as New Jersey, require only that an expert show knowledge of and familiarity with the procedure from private study, observation or consultation. See Carbone v. Warburton, 11 N.J. 418, 94 A.2d 680 (1953). Speciality certification under either system is not at all determinative of admissibility of testimony but goes merely to the weight to be attached to it. See Baerman v. Reisinger, 124 D.C.App. 180, 363 F.2d 309 (1966); Hawkins v. Schofman, 204 S.2d 336 (Fla.App. 1967); Annot., 31 A.L.R.3d 1163 (1970); Annot., 46 A.L.R.3d 275 (1972); 31 Am.Jur.2d Expert and Opinion Evidence §106 (1967). When Dr. Lamb, in his brief, argues that Dr. Rocovich was unfit to testify because he was not board certified and because he had testified in other malpractice cases, he is

mistaking matters which will affect the weight to be given the doctor's testimony for matters which will affect its admissibility. Matters of weight are for the jury.

The only reason for a court to require that a plaintiff's expert be a specialist would be if the medical procedures involved were of such a specialized nature as to be, by a witness' own admission, outside the area of his knowledge and familiarity. Of course, such was not the case with the myelogram and spinal decompression laminectomy procedures performed upon plaintiff by the defendants. Each was a common place procedure. Dr. Lamb said he had performed thousands of back operations of the type performed upon the plaintiff. Brief of Respondent Dr. Thoen at 5-6. Dr. Dalrymple, an internist, on questioning by counsel for Dr. Lamb, stated that he knew that the standard of care was in orthopedic surgery. Brief for Respondent Dr. Lamb at 5; Tr. day 1 at 68-69. When Dr. Rocovich testified that he had performed over 1,000 different myelograms and over 1,000 spinal decompression laminectomies, he overcame any objection that defendants could raise concerning his credentials with respect to either procedure. Tr. day 3 at 109.

As for Dr. Lamb's assertion that it would be ludicrous to allow a non-board certified doctor to

testify regarding the standard of care in a board certified specialty, Dr. Thoen, for one, stated that the standards for both certified and noncertified specialists were the same in his field. Tr. day 3 at 6. It is hardly ludicrous to allow testimony from a noncertified specialist in light of such an admission. Neither is it ludicrous to suggest that a noncertified specialist or even an internist, for that matter, should be able to testify as to those things for which he professes proper knowledge and familiarity.

Finally, it is suggested by Defendant Lamb that Dr. Rocovich is a "foreign quack," a "charlatan," and "nothing more than a professional witness without either professional qualifications or conscience." Brief for Respondent Dr. Lamb at 24. This unfortunate attack on a fellow professional is a most regrettable but nevertheless accurate indication of the kind of vicious collegial pressure that is brought to bear on a lone doctor who dares call them as he sees them when he sees malpractice. Dr. Rocovich has been a highly respected and able teacher as well as practitioner of neurosurgery for more than two decades. He has headed neurosurgical departments in two major U.S. hospitals and has helped to train interns and residents in the very fields in which defendants specialize. He has proven his expertise in the performance of thousands of

delicate operations and relieved much pain and suffering through the exercise of his considerable skills and abilities. It was in recognition of the very talents which defendants claim were lacking, that the trial court allowed Dr. Rocovich to express his expert opinion on the causation question. See Brief for Respondent Dr. Thoen at 13; Tr. day 4 at 46-47. Dr. Lamb's unjustified comments help to demonstrate why a conspiracy of silence exists among doctors who must continue to practice in communities where they might otherwise be called upon to testify.

POINT IV

DEFENDANTS ATTACK THE NATIONAL STANDARD TEST WITH INAPPOSITE ARGUMENTS CONCERNING UTAH'S RURAL CHARACTERISTICS EVEN THOUGH THEY ADMITTED BEING GOVERNED THEMSELVES BY A NATIONAL STANDARD OF CARE.

Both defendants oppose the adoption in Utah of a national standard of care. The chief objections to the application of such a rule seem to center around the argument that Utah is a sparsely populated Western state of essentially rural character whose doctors are isolated from or too busy to keep up with today's medical advancements. Dr. Thoen suggests that the application of a national standard in Eastern urbanized states "may be expected" since high levels of skill and superior facilities are more available there. Brief

for Respondent Dr. Thoen at 43. It is nevertheless conceded that the states of Arizona, Texas, Washington and others, whose population distributions are not unlike Utah's have readily adopted national medical standards of care. Brief for Defendant Dr. Thoen at 39-40.

The raising of hypothetical "rural" arguments against the national standard, is actually inappropriate in this case. It is important to note that Defendant Drs. Lamb and Thoen were practicing specialists with access to the most modern and advanced equipment available in several nearby fully accredited hospitals in the largest and most urban city of a state with a nationally superior physician population ratio--in many cases double that of her neighboring states. Brief for Respondent Dr. Thoen at 53. Both of the said defendants admitted being governed by a national standard in their respective practices. Brief for Appellant Swan at 44-45; Tr. day 2 at 2, Tr. day 3 at 5-6, 67. Such conditions clearly do not indicate that a national standard would have any oppressive effect on the defendants.

Dr. Thoen attempts to cause undue concern for the adoption of a national standard by relating hypothetical "horror stories" of small towns losing their doctors and of treatment costs skyrocketing. Brief for Respondent Dr. Thoen at 26, 47-48. Dr. Thoen asks rhetorically whether a town with an inadequately qualified doctor would

be better off with no doctor at all. Id. at 26. The answer could well be yes. If the doctor's lack of qualifications resulted in his misdiagnosis of classically diagnosable illnesses, his unnecessary surgery on healthy tissue, or his prescription of needless or possibly even harmful medications, a town could easily be better off without him. Fortunately, however, such a question need not be answered since the national standard test would in no way tend to drive doctors away from small towns.

Dr. Thoen expresses concern that a national standard would hold the small town baby-delivering general practitioner to the "level of knowledge" possessed by a board certified obstetrician. Id. at 57. Such is not the case. The national standard is a standard of care, not of knowledge. The general practitioner treating a heart patient need not have all the knowledge of a cardiologist. But if he attempts open-heart surgery in other than serious emergency situations, he should be held to the standard of care for such surgery. If that standard is set by specialists, so be it. If one is going to "play the game" he had better "know the rules." Rural general practitioners know this and are not threatened by it. They do not perform heart bypass surgeries or prosthetic joint replacements, nor should they. They know when something is beyond their skill or understanding and frequently rely on specialists for

consultation as well as for referral of patients whose problems may go beyond their abilities to treat.

Defendants do not suggest that when the courts of Massachusetts, Kentucky, Maryland, Wisconsin, Texas, Michigan, Minnesota, Arizona, New Jersey and Washington adopted the national standard, the doctors in said states left their practices, altered their procedures or caused a state of panic in the populace. Such things did not happen there and will not happen in Utah. It is to be expected that prior to the adoption of any new rule the stories concerning its anticipated affects will abound. The imaginary problems which such stories describe are characteristically disconcerting but nonetheless unreal. They should be identified and considered as being the scare tactics which they are.

POINT V

BY PERMITTING A NON-RESIDENT EXPERT WITNESS TO TESTIFY FOR A PLAINTIFF IN A MEDICAL MALPRACTICE CASE A COURT DOES NOT REDUCE THE CONSIDERABLE BURDEN OF PROOF WHICH THE PLAINTIFF HAS.

It should be emphasized that a pronouncement by this Court of a standard which would permit a properly qualified nonresident physician to testify as an expert for a plaintiff in a Utah medical malpractice case, would not lessen a plaintiff's burden of proof. On the contrary, by allowing plaintiff's nonresident expert

to testify, the Court only allows plaintiff to survive a motion to dismiss his action. It does not give him a favorable verdict. A plaintiff generally still must show by expert testimony that a physician violated a standard of care set by the medical profession itself, not the courts or the jury. Plaintiff must also show by expert testimony that the said violation, if any, was the proximate cause of an injury suffered by him. Then he must show that his injuries resulted in compensable damages. Finally, plaintiff must get a jury to believe the evidence that he presents. Failure of proof on any element of his case is fatal to his cause.

As attested by the recent medical malpractice cases which have survived motions to dismiss in Salt Lake County, the mere fact that a case reaches the jury does not mean that the plaintiff will recover damages. Of eleven medical malpractice cases in Salt Lake County which went to the jury between the years 1973 and 1976, eight of them resulted in jury verdicts of no cause of action. See Records on file with the Salt Lake County Clerk's Office: Nelson v. Peterson, No. 204648 (3d Dist., S.L.Co., Utah, July 16, 1973), verdict: no cause of action; Cahoon v. McKay, No. 205196 (3d Dist., S.L.Co., Utah. November 12, 1973) verdict: no cause of action; Maxfield v. Clegg, No. 206682 (3d Dist., S.L.Co., Utah, June 24, 1974), verdict: no

cause of action; Herrera v. Barton, No. 207735 (3d Dist., S.L.Co., Utah, August 26, 1974), verdict: \$10,039.82; Chealez v. St. Mark's Hospital, No. 210376 (3d Dist., S.L.Co., Utah, September 12, 1974), verdict: \$5,202.00; Allred v. Davis, No. 208981 (3d Dist., S.L.Co., Utah, November 6, 1974), verdict: no cause of action; Ollerton v. Carson, No. 210500 (3d Dist., S.L.Co., Utah, November 26, 1974), verdict: no cause of action; Martinez v. Armstrong, no. 218595 (3d Dist., S.L.Co., Utah, February 26, 1975), verdict: no cause of action; Jones v. Nielsen, No. 225455 (3d Dist., S.L.Co., Utah, March 8, 1976), verdict: no cause of action; Osguthorpe v. Broadbent, No. 212598 (3d Dist., S.L.Co., Utah, May 17, 1976), verdict: no cause of action; Richman v. Pemberton, No. 225996 (3d Dist., S.L.Co., Utah, November 8, 1976), verdict: \$50,000.00. (Interestingly, in many of the said cases, the Third District Court allowed testimony from out-of-state experts.)

Even when a plaintiff's case overcomes a motion to dismiss, a defendant doctor has the opportunity to elicit testimony exposing and attacking the biases or weaknesses of plaintiff's expert, including his credentials, qualifications and background. He can pit his testimony and that of a battery of experts, if he chooses, against the opinion of what may be the only expert witness which a plaintiff's meager resources allow him to secure.

Defendants do not need the additional advantage which is given them under the terms of a "strict locality rule."

It is both serious and costly for a person, even though damaged, to sue a medical professional in Utah. A lawsuit cannot, in light of exacting statutory requirements, be brought first and an investigation of the basis for the claim be conducted later. (See the rigorous requirements for serving advance notice of intent to commence malpractice action in §78-14-8, Utah Code Annotated 1953.) By the time a case has reached the trial stage, a plaintiff will have incurred considerable expense securing his expert witnesses who must leave busy and demanding practices in order to be present in court to testify. There must be some certainty as to whether the expert will pass muster before the court.

In cases such as the present one, where unsettled questions of law were pivotal to the case, the trial judge could have taken defendant's motion to dismiss under advisement, submitted the case to the jury, and, if he felt it necessary, overturned a jury verdict for the plaintiff by entering a judgment notwithstanding the verdict, on grounds of incompetent expert testimony. Then, in the event of reversal on appeal, this Court would only have to reinstate the jury verdict without causing plaintiff to incur the

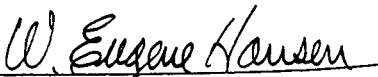
expense of a second trial.

CONCLUSION

As pointed out by Dr. Lamb, the trial judge has wide discretion in judging the qualifications of an expert witness. Brief for respondent Dr. Lamb at 22-23. However, he must utilize correct principles of law as criteria for judging credentials of the proffered expert. Failure to do so would constitute a prejudicial error and would result in reversal of his decision. In the instant case the trial judge applied the strict locality rule as the standard of care for physicians and surgeons in Utah. Since this was not the correct standard to apply, the judgment in the case should be reversed with instructions on the proper standard, and remanded for a new trial.

RESPECTFULLY submitted this 9th day of
December, 1977.

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