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Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

CHESTER E. FARROW, Plaintiff and Appellant, vs. HEALTH SERVICES CORP., SALT LAKE CLINIC, LOUIS J. SCHRICKER, M.D., and LOUIS G. MOENCH, M.D., Defendants and Respondents.	)	No. 15458

BRIEF OF RESPONDENTS SALT LAKE CLINIC AND LOUIS G. MOENCH

Appeal from the Judgment of the Third District Court in and for Salt Lake County
Honorable Stewart Hansen Jr., Judge

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Clerk, Supreme Court, Utah

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BRIEF OF RESPONDENTS SALT LAKE CLINIC AND LOUIS G. MOENCH

STATEMENT OF THE CASE

This is an action for malpractice brought by Appellant Chester E. Farrow against the Health Services Corporation, the Salt Lake Clinic, Louis J. Schricker, M.D., and Louis G. Moench, M.D.

Plaintiff-Appellant alleges that the defendants were negligent in their care and treatment of him during his 1974 confinement in the L.D.S. Hospital.

DISPOSITION IN LOWER COURT

Shortly before trial the court granted summary judgment in favor of Dr. Schricker and the Health Services Corporation.

A jury trial was held as to the remaining defendants,

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Moench and the Salt Lake Clinic. The jury found in favor of Moench and the Salt Lake Clinic by returning a verdict of no cause of action.

RELIEF SOUGHT ON APPEAL

Respondents Salt Lake Clinic and Louis G. Moench seek affirmance of the jury verdict.

STATEMENT OF FACTS

Respondents Salt Lake Clinic (hereinafter referred to as Clinic) and Dr. Louis G. Moench (hereinafter referred to as Dr. Moench) disagree with the Statement of Facts in Appellant's Brief because it omits evidence detrimental to Plaintiff. Respondents submit the following Statement of Facts as a more accurate account of the evidence adduced at trial. It should also be noted that Respondents Clinic and Dr. Moench are not involved in the questions or evidence presented at the motions for summary judgment and therefore any pre-trial testimony which was not used during the trial itself will not be relied upon in this Statement.

Background Prior to Hospitalization

The plaintiff Chester E. Farrow testified that at the time of trial he was 52 years of age and had worked as a geological consultant. (Tr., p. 1344). He obtained a bachelor's degree from Oklahoma State University in 1949 and thereafter worked for the United States Geological Survey. He worked for the Atomic

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Energy Commission, as a consultant for various private companies, as an in-house geologist for one such company, and was an independent consultant at the time of the incident. (Tr., p. 1345).

Plaintiff related that in August of 1974, while helping his wife move groceries from his Chevrolet Blazer, he hit his arm against the mirror bracket. This impact immediately caused a series of spasms and great pain to his arm and neck region. (Tr., p. 1349). Shortly thereafter he went to the Moab Hospital and consulted with a Dr. Peters. He was given some medication to ease the pain. (Tr., p. 1350).

The following Monday he contacted his family doctor who gave him more medication. The next day he went to the Moab Hospital and had x-rays taken. (Tr., p. 1351). At that time it was suggested that he go to Salt Lake City for further treatment. (Tr., p. 1352).

Upon cross-examination the plaintiff admitted that he had experienced marital difficulties over a long period of time and in fact his wife had divorced him in 1966 but subsequently remarried him. (Tr., p. 1422). His wife felt there were more serious problems with the marriage than did the plaintiff. (Tr., p. 1426).

Hospitalization and Surgery

Plaintiff stated that he arrived in Salt Lake City on Au-

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gust 11 and checked into the L.D.S. Hospital the following day. (Tr., p. 1352). He stated that he was examined by Dr. Schricker who took his medical history and told him there was a good chance he would have to undergo an operation. He had previously been told of this possibility by his Moab doctor. (Tr., p. 1352).

Dr. Schricker testified that he performed a physical examination and neurological examination of the plaintiff at the time of his admission and recommended x-rays of the neck and a myelogram. (Tr., p. 1887). These tests subsequently revealed that the plaintiff had a ruptured cervical disk at the C-6 level. He discussed the findings with Plaintiff and his wife and it was mutually agreed that Plaintiff undergo corrective surgery. (Tr., p. 1887).

Prior to surgery Plaintiff stated that he informed both Dr. Schricker and the anesthesiologist that he had had a bad reaction to sodium pentothal in a 1949 appendectomy operation and that he became very violent under the drug's influence. (Tr., pp. 1354-1355).

On August 15 Dr. Schricker performed a cervical laminectomy and a foramentomy. These operations removed part of the bone of the spinal column and the root of a small tunnel called the foramen in order to allow the nerve more room and to do away with compression. (Tr., p. 1888). Dr. Schricker testified that af-

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ter this type of operation the area is unprotected and there is considerable danger of injury to the spinal column unless activity and stress are avoided. (Tr., p. 1893).

August 16 Through August 22

Dr. Schricker recalled that on the 16th of August the plaintiff told him that he was free of pain in his arm and neck area except for the expected discomfort from the incision itself. (Tr., p. 1893). During this period Dr. Schricker testified that the plaintiff suffered mild confusion from the medication which he had received--especially the morphine. The confusion fluctuated a great deal so that sometimes he appeared quite clear and other times he appeared quite confused. (Tr., p. 1894).

Karen Pool testified that she was a registered nurse who was assigned as the "charge" nurse for the sixth floor, west ward. (Tr., p. 1668). She was on duty approximately nine of the 10 days that the plaintiff was in the ward, (Tr., p. 1684) although she worked at different hours on different days. (Tr., p. 1686).

She stated that for several days after the operation he progressed very well but continually tried to get up and walk around. (Tr., p. 1672). The nurses were concerned he would harm himself because of the vulnerability due to the nature of the surgery. On August 17 at 6:30 p.m. a Posey belt was put on

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the plaintiff to restrain him in bed. (Tr., p. 1685). The belt is like a vest with straps on it designed to keep a patient in bed and is also used as a reminder that he should not get up. Shortly after the belt had been placed on the plaintiff Miss Pool found him wandering in the halls and found him to be angry and frustrated at having been restrained. (Tr., p. 1674).

On August 19 or 20 Dr. Schricker had a conversation with Mr. Farrow concerning personal problems. Plaintiff related that he was concerned about his wife with whom he had had marital and domestic difficulties over a long period of time. He told the doctor he had a young daughter who "he thought the world of" and who he was very concerned about. He also stated that his business had not been going well and that he had other financial worries. (Tr., p. 1895).

Dr. Schricker stated that by August 20 the patient had improved, was quite oriented, and was wondering what had happened during the last few days.

Between the time of the operation and probably August 20 the plaintiff testified that he suffered from visual hallucinations. He had great fear of what was going on and thought the world was coming to an end. (Tr., p. 1357). During this period he experienced sexual fantasies and was extremely frightened. (Tr., p. 1358). The plaintiff stated that he first saw visual hallucinations and later suffered from audio hallucinations.

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He described these sensations, both audio and visual, to Dr. Schricker during his confinement. (Tr., p. 1359). Dr. Schricker, however, recalled Plaintiff's complaint about visual hallucinations but did not recall any conversation regarding audio hallucinations. (Tr., pp. 1919-1920).

On August 20 because of his previous discussion with Plaintiff, Dr. Schricker requested Mr. Kent Griffiths, a psychological social worker of the hospital, to visit the plaintiff in order to help him with his difficulties. (Tr., pp. 1895-1896, 1922). About this time Plaintiff recalls waking up in the hospital bed and looking at his chart and finding a span of time for which he could not account. (Tr., pp. 1356-1357).

On this day the social worker made a notation in the progress notes as follows:

> Had long discussion with patient. Reveals extensive history of personal and marital difficulties. He expressed the dynamics involved in his wife's problems and his own. His confusion seems to revolve around the lack of any consistent meaning to the significant relationship in his life. He loves his family dearly but is unable to express those feelings to them and is often suppressed by his wife when he tries to talk to her. This can be seen as an extension of her own insecurity and needs. So both are struggling to have their needs met and neither is listening to the other. Will follow up daily. Signed Kent Griffiths, M.S.W. (Ex. D-1, p. 87).

Plaintiff testified that during this period of time he became afraid of all hospital personnel except for Kent Griffiths.

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He said that he would be feeling good and in complete control of his emotions and suddenly would go into hallucinations and become frightened. (Tr., p. 1360).

The audio delusions which he heard would be the voices of four people who were always making derogatory comments about him. He stated that Dr. Schricker's voice was involved in the hallucination, the voice of an older man, the voice of an older woman, and the voice of a man with a southern accent. They were not talking directly to him but about him. He thought at times he was in a room where psychiatric patients were observed. (Tr., p. 1363).

He recalled telling Mr. Griffiths about these hallucinations around the 18th or 19th of August. (Tr., p. 1366). The plaintiff testified that he spent most of his time with Mr. Griffiths talking about his marital problems. (Tr., p. 1469).

On August 21 the hospital notes revealed the following:

> Dr. Schricker! Can we consider a psych consult on this pt? Kent Griffiths.

Immediately following this notation is the word, "Yes!" in the handwriting of Dr. Schricker. (Ex. D-1, p. 87).

On the following day another notation was made by Mr. Griffiths:

> Discussed problems with wife and pt. There definitely are and have been for years problems in this marriage that need psychiatric if not other forms of counseling. There seems to have been very little give and take

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> and this has affected not only the marriage but the children as well. Feelings of jelousy, inadequacy, resentment, fear, withdrawal have been expressed. Will continue. Signed Kent Griffiths, M.S.W. (Ex. D-1, p. 88).

The plaintiff stated that Mr. Griffiths did not talk to both him and his wife at the same time. (Tr., p. 1425). He disagreed with part of this statement and said specifically that while they had marital problems over a fairly lengthy period of time there were also long periods of time when they had no problems. He asked Mr. Griffiths if he would continue marriage counseling after he had been discharged from the hospital. He did this to please his wife more than for his own personal needs. (Tr., p. 1426).

August 23--The Day

Dr. Schricker stated that on August 23 he had a conversation with the plaintiff concerning the need for psychiatric help. The primary purpose for obtaining the psychiatrist was to help Mr. Farrow with his marital and family problems. The doctor stated that at that time he believed the plaintiff was suffering from anxiety but not from depression. The plaintiff never hinted nor intimated in any way that he might want to take his own life. (Tr., p. 1896).

Plaintiff testified that on the morning of the 23rd he talked with Dr. Schricker and asked that the best psychiatrist available in Salt Lake City contact him. He stated he wanted

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someone that could straighten out the hallucinations and his great anxiety. (Tr., p. 1369). At this time he was also concerned that the hospital had lost $3,000 or $4,000 which he had on his person when he arrived. (Tr., p. 1369). The plaintiff stated that Dr. Schricker said he would obtain a psychiatrist for him but never said that one was actually coming. (Tr., p. 1372).

On the morning of the 23rd Dr. Schricker testified that he called Dr. Moench and asked him for a consultation. Dr. Moench asked if the evening would be all right and Dr. Schricker replied it would. (Tr., p. 1897). He told Dr. Moench that the patient was having marital difficulties. He then told the plaintiff that Dr. Moench would see him that evening. (Tr., pp. 1897-1898). Dr. Moench testified that he asked Dr. Schricker if it was an emergency and Dr. Schricker replied it was not. (Tr., p. 1299).

The plaintiff stated that later on in the day Mr. Griffiths visited him in his room and asked him if he would like to go into the garden area for a while. The plaintiff remembers walking down at least two flights of stairs and then taking the elevator the rest of the way. (Tr., p. 1443). Farrow recalled that they spent about an hour in the patio area which was his most pleasant day at the hospital. (Tr., p. 1444). During the meeting they discussed his anticipated Tuesday discharge--this buoyed his spirits. He then returned with Mr. Griffiths to his room by tak-

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ing the elevator up six floors. (Tr., p. 1445-1446).

When Farrow arrived back in his room it was still daylight. During the rest of the evening Farrow stated he would pace up and down in the room, sit in a chair for a while, get up, lie down, etc. He had been doing this for several nights. (Tr., p. 1447).

He admitted on cross examination that during these times he realized he was on the sixth floor and frequently looked out over the city. (Tr., p. 1447). He stated that he knew when he was having a hallucination but that they were overwhelming and that he did not have great control over his actions. (Tr., p. 1448).

Lerona Callahan testified that she was a licensed practical nurse and had been working at the L.D.S. Hospital for 12 years. (Tr., p. 714). She started work on August 23 at 3:00 p.m.. On that day she attended the plaintiff at 4:00 and took his temperature and vital signs. She asked him how he was and he said he was fine. He looked fine and had no complaints. (Tr., p. 1716).

Around 5:00 she gave the plaintiff his food tray and at 5:30 she collected it. He again had no complaints at that time. She recalls looking in on him around 6:00 when she walked down the hall. She did not routinely chart every visit unless something significant occurred. (Tr., pp. 1717-1718).

August 23--The Night

Around 7:00 on the evening of the 23rd the defendant Dr.

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Louis Moench arrived at the hospital and reviewed Plaintiff's chart. He then conferred with the charge nurse and discussed Plaintiff's previous behavior including the prior restraint using the Posey belt. (Tr., pp. 1304-1324).

Dr. Moench testified that he entered the room of Plaintiff, introduced himself, and began to discuss Plaintiff's background. He reviewed with him his medical history concerning the operation and also extensively discussed his private life. The plaintiff talked about his marital situation, his financial situation, and his confinement in the hospital. He related an incident where he pulled a gun on his wife because she was five minutes late coming home and told how his wife ultimately got the gun from him and stuck it in his ribs. (Tr., pp. 1241-1242; 1879-1880).

Defendant stated that during the conference Farrow told him that he was hearing voices from the ceiling and the doctor then showed him that some of the voices were coming from a pillow speaker used for television and inter-hospital paging. The plaintiff seemed relieved after learning about this speaker. (Tr., p. 1242).

The plaintiff, according to Dr. Moench, expressed fear about being transferred to the psychiatric ward and the doctor reassured him that he did not think this would be necessary. (Tr., p. 1292). During these conversations the plaintiff never

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stated that he was in terror or fear nor did the doctor gain an impression of this fact from talking with him. The doctor stated that the plaintiff's demeanor during the interview was initially very restless but that he calmed down towards the end. He seemed perfectly cooperative and by the end of the conversation the doctor thought he had a fairly good rapport with the plaintiff. Farrow seemed perfectly willing to continue the conversation as long as the doctor thought it was necessary. (Tr., p. 1306).

The testimony of Plaintiff concerning this visit was generally in accordance with that of Dr. Moench. The plaintiff stated that he openly discussed his problems with Dr. Moench and willingly answered any of the doctor's questions. The plaintiff stated to the doctor that he needed and wanted psychiatric help. (Tr., p. 1377-1378).

The plaintiff stated that when the doctor showed him the pillow speaker he told the doctor that he already had discovered this device and had asked the nurses to stop playing music on it. (Tr., p. 1378). Farrow stated that the defendant reassured him that everything would be all right. (Tr., p. 1379).

Plaintiff recalled that Dr. Moench frightened him very much, and that after he left the plaintiff felt anxiety-ridden and fearful that the doctor was transferring him to a state mental institution. (Tr., p. 1379). The plaintiff admitted on cross

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examination that during the interview with Dr. Moench the plaintiff made no mention or hint of any intention to jump out of the window. (Tr., pp. 1484-1485).

Dr. Moench testified that upon leaving the plaintiff's room he immediately prepared a consultation report. (Ex. D-1, pp. 68-70; Tr., pp. 1245-1246). Although previously reproduced in Appellant's brief, (Appellant's Brief, pp. 20-21) the importance of this report requires verbatim repetition. The report stated the following:

> Pt. is a geologist from Moab who had a recent injury & operation for cerv. disc. Following, he has had marked & rapid swings in mood, in contact with reality, has fluctuated between cooperation & compliance & combative, suspicious hostility.
>
> At present he is very tense, says he hears voices of 2 to 4 persons--in hall & ceiling, talking about (not <u>to</u>) him, keeping him under surveilance, (sic) accusing him of being a sex fiend, etc. etc.
>
> Tells of prolonged marital problems, of lack of problem-solving skills (bilateral), of periods of tension over finances, & esp. recently when his work pressures are high. Had 2 counselling (sic) sessions but felt that he was cast as the villain, so he didn't continue. Has enjoyed & appreciated his visits--Mr. Griffiths. Was esp. appreciative of a visit off the ward, where the surveilance (sic) doesn't follow.
>
> Inp: 1. Long term marital maladjust.
> 2. Present episode is either a dissociative reaction or a paranoid schizophrenic reaction. His tension is very high; his anxiety level very high; his distortion of reality may lead to acts of poor judgment.

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Suggest:

1. a phenothiazine med. in fairly large doses promptly (I'll take the liberty of ordering).

2. Avoid barbiturates, if possible

3. Repeated reassurance by direct nurse contact (nurse entering room, standing by bed, while talking)

4. If aud. hallucinations don't subside promptly, may have to move to 3 North for safety.

5. Continue marital counseling--Mr. Griffiths.

Thanks.

LG Moench
23 Aug. 74
20:00 hour

After preparing this report he discussed it with the charge nurse and Mrs. Nola Hunt, the nursing supervisor. He told them that they should check upon the patient at regular intervals and suggested at least once an hour. He also suggested that they go talk to the plaintiff, identify themselves, and ask how he was and if he needed anything. (Tr., pp. 1273-1274). At that time he also wrote an order for his prescription which stated the following: Mellaril, 100 mg. Stat, 50 mg. q.i.d. and p.r.n. Dalmane 30 mg. h.s., p.r.n. (Tr., p. 1253). It was the responsibility of the hospital to obtain the necessary drugs and to administer them according to the order. (Tr., p. 1253).

The doctor stated that he did not view the plaintiff's condition as a psychiatric emergency and thought that the procedure and medicine prescribed would adequately take care of any problem that night. (Tr., pp. 1267-1269). He did not call back

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to the hospital that night since he presumed that if anything occurred contrary to his orders he would be notified. (Tr., pp. 1268-1269). Nor did he see any reason to call the attending physician Dr. Schricker. (Tr., p. 1255).

Karen Pool, the registered nurse on duty between 3:00 p.m. and 11:00 p.m., testified that she was not aware of any hallucination problems until the night of August 23 when she was informed of this fact by Dr. Moench. He told her that Plaintiff was hallucinating with voices and made suggestions that the nurses watch him closely. He also suggested that the nurses not give him barbiturates and ordered Mellaril as a prescription drug. (Tr., pp. 1675-1676). Nurse Pool stated that she understood Dr. Moench's comments as a nursing order. (Tr., p. 1676).

She stated that she then read the report that Dr. Moench made and conferred with her staff consisting of an LPN and a nurse's aide. She told both of the women the essence of the consultation and both of them then read the report themselves. It was decided that the plaintiff should be checked at least every hour. (Tr., p. 1678).

The nurses decided to keep his door open so they could look in on him as they walked by his room. Nurse Pool placed herself in a position to check on him frequently. The medication order was sent down to the pharmacy. (Tr., p. 1679).

The Mellaril was not given until 10:00 even though the or-

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der required that it be given immediately. At 10:00 she entered the room of plaintiff and gave him the Mellaril and asked him if he wanted something for sleep. He replied no. At 11:00 she again asked him if he wanted anything for sleep and he again refused. (Tr., p. 1680; 1702). When the witness last saw the plaintiff she stated he was calm and unexcited and there was no evidence that he was suffering from hallucinations. (Tr., p. 1710).

LaRona Callahan, the LPN on duty from 3:00 to 11:00 o'clock, testified that after Dr. Moench left the hospital she had a conversation with Karen Pool and the nurse's aide concerning the patient. She stated she read the consultation report and checked on the plaintiff at least every hour to make sure he was comfortable. Around 8:00 she talked with him about going home and about seeing his little girl. (Tr., p. 1720). At that time he seemed calm and rested. (Tr., p. 1721).

At 9:00 or 9:30 she went in and gave him a backrub which is known as H.S. care. He also appeared calm and coherent at that time. (Tr., p. 1722).

The next time she saw the plaintiff was around 10:30 or 11:00. She recalled a conversation with the plaintiff as to how beautiful the city was at night and how the lights shone. She went off shift at 11:30 and noticed him resting and watching TV at that time. (Tr., p. 1723).

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Nurse Pool stated that upon the changing of the shift at 11:00 she gave the full report to her replacement Diana Karren. She told Diana the contents of the consultation and told her to leave the door open and to make frequent visits. (Tr., p. 1681).

The testimony of Plaintiff during this period of time was in marked contrast with that of the nurses. He stated that after Dr. Moench left, his feelings of anxiety and fear greatly increased. He believed he heard the doctor talking out in the hallway about him and that he would be transferred to a state mental institution. Sometime before 9:00 he called his wife and told her to call him by 9:30 the next morning because he felt that something was going to happen to him. (Tr., pp. 1379-1381). He thought that people were going to come in at night and take him away.

He stated that during this period of time the audio hallucinations continued. He would get into bed and would lie there for a few minutes and then walk back and forth around the room. He would then get up and pace again. (Tr., p. 1381). Farrow stated that he was frightened of the nurses and therefore did not confide in them. (Tr., p. 1433). He stated he had no recollection of any nurses coming into his room after the doctor left nor could he recall taking any medication after 8:00. He also could not remember a backrub given to him by Nurse Callahan

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as stated in her testimony. (Tr., pp. 1433-1434).

The Fall and After

The plaintiff testified that he became more and more anxiety ridden and finally decided he had to get out of the room. He attempted to go through his bathroom into an adjoining room. However, when he approached the room he heard somebody coughing and this frightened him so much that he went back to his own room. (Tr., p. 1382). He stated that during this time he lost track of where he was and part of the time thought he was back in the one-story Moab Hospital. (Tr., p. 1382).

He related that the decision to jump occurred only a few moments before he did it. He said that he had no previous intention of jumping and so therefore could not have told anyone of his desire to escape. (Tr., pp. 1483-1485). He at first tried to unlock the window but could not do so because it was bolted. (Tr., p. 1485).

Thinking that he was on the ground and that he could just jump out of the window and run, he carefully broke the window clean so there would be no jagged edges. (Tr., p. 1383). He stated on cross-examination that he jumped through the window feet-first as if running a hurdle. (Tr., p. 1454). He stated that the process of picking up the chair, smashing the window, smashing it again, and smashing it once again, throwing it out the window, stepping back two paces, and hurdling through the

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window took approximately 15 seconds. (Tr., p. 1463). The plaintiff stated on cross examination that even though he took elaborate pains not to get cut he jumped through the window in spite of his neck injury because he was afraid that the voices would come in when they heard the breaking glass. (Tr., pp. 1486-1487).

As soon as he exited the window he stated he immediately knew what was happening and said, "Oh my God". He landed falling face-down and then rolled on his back. (Tr., p. 1383).

The testimony concerning what was said after the plaintiff had landed on the roof differed greatly between Plaintiff's version and that of Defendants. Joseph Saxton, a security officer for the L.D.S. Hospital, testified that on the morning of August 24 he received a message on his radio to go to the west end of the hospital. When he arrived the night supervisor told him to go up on the roof. He climbed up the lattice and turned his flashlight on an object. He then saw the plaintiff who was fully conscious. He asked him what he was doing there and the plaintiff said he had jumped out of the window. The officer asked him why he had jumped and the plaintiff said, "I wanted to kill myself". He then asked how he got out of the sealed window and was told that Plaintiff had thrown a chair through and broke the window. (Tr., pp. 1779-1780).

The witness immediately called the operator and told her to

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notify the emergency room to send a doctor to the west end of the hospital. (Tr., p. 1780). After this call another guard and the hospital emergency doctor arrived on the roof. (Tr., p. 1786). The witness then went to the second floor where he opened a window so there would be better access to the roof. In order to do this, however, it required him to use a screw-driver, a pair of pliers, a hammer, and a chisel since the window was bolted in the same manner as the window in the plaintiff's room. (Tr., pp. 1786-1787).

Defendants called Dr. John Thompson, an intern on duty at the L.D.S. Emergency Ward on the night of August 24. He stated that he was summoned around 2:00 that night by a security guard who told him that an individual had jumped from a window and was lying on the roof. (Tr., pp. 1649-1650).

When he arrived there a second security guard was standing over the individual with a flashlight. The plaintiff was lying on his back and was completely conscious. He examined the plaintiff and found his vital signs to be stable. He did not, however, find any affirmative response to a neurological examination. (Tr., pp. 1651-1652).

He asked him if he had jumped from the window and the plaintiff responded affirmatively. He then asked him if he was trying to commit suicide and he again answered affirmatively. (Tr., p. 1654).

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Dr. Louis Schricker, the plaintiff's attending physician, related how he was notified at 2:40 in the morning by the nursing supervisor that Plaintiff had jumped out of the hospital window. He stated that he immediately got dressed and drove to the hospital where he was taken by an intern to a window which gave him access to plaintiff. (Tr., p. 1898). At the time he arrived the plaintiff was fully conscious, alert, and fully oriented. At that point, he said, "Chester, Chester, why in the world did you do that?" The plaintiff replied to the effect that he could not face going back to Moab and the problems confronting him. (Tr., p. 1900).

Shortly thereafter he entered a notation in the "progress notes" which reads as follows:

> August 24 - At time I arrived at 0325 patient was on the roof at second floor level over the P.T. Entrance. I went out to him and found him covered with blankets, head sandbagged, and lying as he had landed. Depression in the roof. Patient alert and conscious. I asked him why he did such a thing and he replied that life was not worth fighting for, that he had wanted to die for many months and this seemed like a good time to do it. . .. (Ex. D-1, p. 89; Tr., p. 1904).

The evidence presented was consistent in showing that Plaintiff was fully conscious and alert after his fall. All witnesses previously referred to noted this fact and Plaintiff never denied his mental sharpness. The vital signs of Plaintiff taken immediately after the incident showed he was calm, awake, and lucid. (Tr., pp. 1905-1908).

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The plaintiff remembered these conversations quite differently. The plaintiff denied telling the guard, Mr. Saxton, that he had tried to commit suicide. He further denied telling Dr. Thompson that he tried to commit suicide. (Tr., p. 1936).

As to the conversation with Dr. Schricker he specifically denied telling him that life was not worth fighting for or that he wanted to die for many months and that it seemed like a good time to do it. All he recalled was being asked why he had jumped and replying, "I don't know". (Tr., p. 1937, 1386).

A jury trial was commenced on August 30, 1977 before the Honorable Stewart M. Hansen, Jr.. In addition to those witnesses previously referred to in this Statement of Facts, several other witnesses were called by both the plaintiff and the defendant for the purpose of establishing liability and damages. Plaintiff read into the record the deposition of Dr. Sidney Walker, a California psychiatrist. (Tr., pp. 1558-1559, 1566). In addition, the testimony of Dr. Hardin Branch, the former head of the University of Utah Department of Psychiatry, was read to the jury. (Tr., p. 1569). At the request of Plaintiff's counsel the testimony of both of these doctors and any objections made by opposing counsel were omitted from the record. (R., p. 519; Tr., p. 1569). The plaintiff also called Dr. Charles Rich Smart, the chief of surgery of the L.D.S. Hospital, as a witness. (Tr., pp. 1575-1584). Other medical witnesses testified on

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Plaintiff's behalf but limited themselves solely to the question of damages.

Dr. Lincoln Clark and Dr. Eugene Bliss testified on behalf of Defendants as to the issue of liability. (Tr., pp. 1790-1855). They testified that Dr. Moench had not violated any medical standard in the treatment of Plaintiff. Since most of the pertinent testimony of these medical witnesses will be discussed during the Argument portion of this brief, further comment is unnecessary at this point.

After the court denied Defendant's Motions for Directed Verdict (Tr., pp. 1649, 1946) the questions of liability and damages were submitted to the jury. The jury returned a verdict in favor of the defendants and against the plaintiff, no cause for action. (R., p. 454).

Plaintiff has initiated this appeal as to Defendants Salt Lake Clinic and Louis G. Moench based upon the jury verdict. In addition, Plaintiff has appealed from the granting of summary judgments in favor of Health Services Corporation and Louis J. Schricker. (R., pp. 508-509).

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY AS TO THE DUTY OF DEFENDANT MOENCH WHEN VIEWED IN LIGHT OF PLAINTIFF'S THEORY OF THE CASE AND THE EVIDENCE.

Appellant in his brief claims that the trial court erred in

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giving Instruction No. 19 to the jury. This instruction reads as follows:

> If you find from a preponderance of the evidence that the plaintiff intentionally jumped from the window in an attempt to commit suicide, he is not entitled to recover from defendants, and you must find against him, and for the defendants, no cause of action. (R., p. 483).

This instruction was modified by the court from the original instruction submitted by Defendants which stated the following:

> If you find from a preponderance of the evidence that when the plaintiff jumped from the window he was attempting to commit suicide, he is not entitled to recover damages from the defendants. (R., p. 443).

It should be noted that the modified instruction uses the word "intentionally" whereas the proposed instruction omits this word. Obviously, the instruction read to the jury was intended to preclude Plaintiff from recovery against the defendants if the jury found that the plaintiff intentionally attempted to take his own life.

Plaintiff in his brief now argues that this instruction was erroneous. The argument is made that, while Plaintiff may have attempted to take his own life, he did so only because of a deranged mind and the act of suicide itself was the "poor judgment" referred to in Dr. Moench's report. Plaintiff then cites several authorities to the effect that a psychiatrist has the duty to prevent suicide if it is reasonably foreseeable that it may

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occur. (Appellant's brief, pp. 45-47).

A review of the record in this case clearly shows, however, that Plaintiff's argument is without merit in light of the evidence and the theories introduced by Plaintiff at trial. The controversy in this case, as shown by the record, evolved around two opposing contentions of the parties: Plaintiff claimed that the voices and hallucinations forced him to try to escape out the window which he believed at the time to be only one story high and this attempted escape was the type of "poor judgment" Dr. Moench referred to in his consultation report; Defendants, on the other hand, claimed that Plaintiff knowingly and intentionally attempted to commit suicide because of his personal desires not to live.

There was no evidence at trial nor was there any theory propounded that Plaintiff attempted to commit suicide because he was not in full control of his senses. Plaintiff consistently maintained throughout the trial that he never tried to commit suicide for any reason. Likewise, the plaintiff never offered any instructions to the court counteracting Defendant's theory that suicide was intentional. An examination of the record amply supports these contentions.

Appellant himself quotes his testimony concerning his attempt to escape from the voices. (Appellant's brief, pp. 9-12). He states that he attempted to escape through an adjoining room

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but was frightened by people talking and coughing. He stated that since he thought he was on the ground floor of the Moab Hospital that he could easily escape by jumping through the window. Finally, he testified that as soon as he began falling from the window he immediately knew what had happened, i.e., that he was actually on the sixth floor of the L.D.S. Hospital.

This testimony was again repeated during cross examination of the plaintiff. The following dialogue between Mr. Hanson (Defendant Salt Lake Clinic's attorney) and the plaintiff occurred:

> Q But before you went out of the window, you have a clear recollection of the events that you told us about, do you not?
>
> A Yes, I was trying to get out of the room.
>
> Q When you went out of the window?
>
> A Yes, sir.
>
> Q You said you ran and jumped out, is that right?
>
> A Ran as much as you can and take two steps.
>
> Q That's right. In other words, you were moving a little faster than you ordinarily would have been?
>
> A Yes, sir.
>
> Q I think you also told us, as I recall your testimony this morning, that you put one foot on the window sill?

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A I said I may have. I didn't say that I did.

Q Do you recall whether or not you did?

A I'm not certain of it.

Q Yes. You were concerned, it didn't occur to you at the time you were concerned about the voices or concerned about your safety to go through the window and climb down so you wouldn't be hurt?

A I didn't realize I was on the sixth floor. I thought that I was on the first floor, that I would be able to jump out and start running and get away from the hospital. My sole purpose was to get out of that room.

Q When you thought you were on the first floor, did you have any idea how far it would have been from the first floor down to the ground level?

A Maybe four or five feet.

Q You thought you were on the first floor even though that day you had been down from the sixth floor down to the patio and down to the lower level with Mr. Griffiths; is that right?

A That is correct. But I have also told you that I had been hallucinating; I would have been hallucinating off and on all day long. It was a problem for me. And my sole intention was to get out of that room, and I thought at that time that I was on the ground floor. Also, I thought I was confused in this respect, that part of the time I thought that I was in the hospital at Moab and part of the time I thought I was in the hospital in Salt Lake City. That's as best as I can remember. (Tr., pp. 1436-1437).

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In sharp contrast to this testimony that the exit from the window was caused by a desire to escape the voices is the testimony of several witnesses who spoke with Plaintiff after the fall.

Mr. Joseph Saxton was the security guard who first arrived at the scene and found Plaintiff lying on his back on the roof. Mr. Saxton stated the following in his examination by Mr. Snow:

> Q Did you observe whether or not this man who was still on the roof was conscious or not?
>
> A He was conscious, yes sir. He was talking.
>
> Q Did you have a conversation with him?
>
> A Being surprised, I looked down. I said, "What are you doing here?"
>
> Q Who was present when you said that to him?
>
> A Myself and him.
>
> Q Was anyone else there on the roof at that time?
>
> A No, no one else was on the roof at that time.
>
> Q All right. Tell the jury what you said to him and what he said to you.
>
> A I said to him basically, as I recollect, "What are you doing here?" He said, "I jumped out of the window." I said, "Why did you jump out of the window?" He said, "I wanted to kill myself". (Tr., pp. 1779-1780).

Upon being asked by the plaintiff's attorney whether the plain-

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tiff had stated to him that he was trying to get away from voices the witness replied, "No, sir, I do not recall that." Mr. Garrett then asked, "That could have formed part of that conversation, though, couldn't it?" The witness then replied, "Not to my recollection, sir. The recollection of the conversation is just as I have explained previously." (Tr., p. 1792).

Dr. John Thompson testified that he was on duty at the emergency ward the night of the incident. He stated that he was summoned to the roof by a security guard and that upon arriving he stated:

> I asked him if he jumped from the window and he responded affirmatively. That was a vocal response but at this time I do not remember the exact words.
>
> Q Was there any further conversation?
>
> A Following that I asked him if he was trying to commit suicide, and he again answered affirmatively. (Tr., p. 1654).

Finally, Dr. Louis Schricker, the plaintiff's attending physician, testified as to his conversation with the plaintiff upon arriving approximately one hour after the fall. The doctor stated the following:

> "Chester, Chester, why in the world did you do that?" And he said that he couldn't face going back to Moab, that the problems there-- I can't recall the words exactly, but other than the fact that he couldn't go back. (Tr., p. 1900).

Immediately after examining the plaintiff, Dr. Schricker

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wrote a "Neurology Resident Note" which stated in pertinent part:

> Patient alert and conscious. I asked him why he did such a thing and he replied that life was not worth fighting for, he had wanted to die for many months and this seemed like a good time to do it. (Tr., p. 1904).

In addition to these direct statements made by Plaintiff at the time of his fall there was other evidence indicating emotional problems. Plaintiff confirmed that he had divorced his wife in 1966 but that they had gotten back together since that time. (Tr., p. 1422). His marital difficulties were still continuing, however, as evidenced by the notations made by Mr. Kent Griffiths, the psychiatric social worker. Mr. Griffiths made the following notation on August 20 concerning a consultation with Plaintiff:

> Had long discussion with patient. Reveals extensive history of personal and marital difficulties. He expressed the dynamics involved in his wife's problems and his own. His confusion seems to revolve around the lack of any consistent meaning to the significant relationships in his life. He loves his family dearly but is unable to express those feelings to them and is often supressed by his wife when he tries to talk to her. This can be seen as an extension of her own insecurity and needs. So both are struggling to have their needs met and neither is listening to the other. (Tr., p. 1423).

A second entry dated August 22 also reveals family difficulties. This stated:

> Discussed problems with wife of patient. There definitely are and have been for years problems in this marriage that need psychia-

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> tric if not other forms of counseling. There seems to have been little give and take and this has affected not only the marriage but the children as well. Feelings of jealousy, inadequacy, resentment, fear, withdrawal have been expressed. (Tr., p. 1424).

Dr. Schricker testified that he had a conversation with the plaintiff prior to the incident. He related this conversation as follows:

> Mr. Farrow was very concerned about his wife, that he had had some marital and domestic difficulties over a long period of time and was concerned about her and concerned about his children. And he had a young daughter who at that time was seven years of age, a pretty little blond gal, that he thought the world of, but there was a lot of worry, concern. Apparently his business had not been doing too well, he had financial worries, and we talked about these from time to time. (Tr., p. 1895).

As a result of this conversation Mr. Griffiths, the psychiatric social worker, was consulted in order to try to help him solve these problems. (Tr., p. 1922). Other things bothered the doctor concerning the relationship between Mr. Farrow and his wife. He stated:

> Yes, there were many things going on there that were disturbing, that were obvious. One of the things that disturbed me, and some of the nurses, too, for instance, was that when Mrs. Farrow would come, why, instead of feeding Mr. Farrow like most other relatives do, why, she would come and have a guest tray, but let the nurse feed him. We thought this was a little strange. And one of the discussions that Mr. Farrow and I had centered around this. And it was obvious that there

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> was a good deal of stress and strain here, that he loves his little daughter, I think, probably more than anyone else in the world and was always very happy and pleased when she was there. And it would be things of this nature that we would discuss. (Tr., p. 1925).

It was agreed by all medical witnesses, however, that while Plaintiff was obviously bothered by these personal problems, he showed no outward signs of depression or other symptoms generally associated with suicide. (Tr., pp. 1808; 1838; 1882; 1897).

On rebuttal the plaintiff adamantly denied any attempt of suicide. The following dialogue occurred between Plaintiff and his counsel during rebuttal testimony:

> Q Now, in connection with the time that you were talking there on that roof, do you remember Dr. Thompson talking to you?
>
> A Vaguely.
>
> Q And you saw Dr. Thompson here testify?
>
> A Yes, I did.
>
> Q In this case. And do you recall what your conversation was with him, if any?
>
> A There was very little conversation with him.
>
> Q Do you remember what was said?
>
> A It was mostly just about how I felt, and he really didn't say a whole lot of anything.
>
> Q <u>And did he ever say to you, "Did you try to commit suicide?" And you replied, "Yes."</u>?

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A Absolutely he did not.

Q Now, do you remember Mr. Saxton who testified here in this case?

A The guard?

Q Yes.

A Yes, I do.

Q And do you remember him on the roof that night?

A Yes, I do.

Q Did you have a conversation with him?

A Very brief. He was busy trying to get help. He said practically nothing to me.

Q Did you ever say to him that you had tried to commit suicide?

A Certainly not.

Q And did you try to commit suicide?

A No, sir.

Q Now, there was a conversation that you had with Dr. Schricker when he arrived; do you remember that?

A Yes, sir.

Q On the roof?

A Yes, sir.

Q And I will ask you to state whether or not this transpired in that conversation: "I asked why he did such a thing--" that is you "--and he--" that is you "--replied that life was not worth fighting for, that he had wanted to die for many months, and

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that this seemed like a good time to do it." Did you ever say that?

A No, sir.

Q And do you recall that conversation on the roof with Dr. Schricker?

A Not what you just said, but I remember our conversation with him.

Q Could you tell us what you said and what he said?

A Well, he said he asked me first--and he was standing up a few feet from me--and he asked, "Chester, why did you do it?" And I said, "I don't know." And after he came over and was leaning over examining me, he said, "Why did you do it?" I said, "I don't know." He asked me again, "Why did you do it?" I said, "I don't know." And that was about the end of the conversation. (Tr., pp. 1936-1937) (Emphasis added).

In closing argument, Plaintiff's counsel adamantly denied any attempt of suicide regardless of what the motivating cause may have been. Mr. Garrett stated to the jury:

> This was not an attempted suicide, ladies and gentlemen. This man had nothing to be depressed about. His business was going good. Sure, he had trouble with his wife. There is no question about that. You don't kill yourself over that; you get a divorce. That's the modern way. And that's all it was here. He had a little daughter that he loved. And he wouldn't want to take his life. You heard that from Dr. Schricker. That little daughter means everything to him. You don't kill yourself when you are raising babies. He was responding to those voices, trying to get away from them, and that's all he was doing at the time. And that's what Dr. Branch says. (Tr., p. 1968).

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After Defendant's counsel made their closing statement to the jury observing that suicide was a very likely possibility in light of the testimony and evidence introduced at the trial Mr. Roberts, in rebuttal, then made the following statement:

> The testimony of Mr. Farrow, I think, rings true. He was having these auditory hallucinations. He was scared. He wanted to get away from these voices. And that's why he went out the window. He had no reason. What reason did he have to kill himself? He was having marital difficulties, yes. Said he was having no financial difficulties, he was doing better than he had done for a year at that time. Why would he want to take his life?
>
> He had a daughter that he loved, people that he wanted to live for, had been talking about getting out on the next Tuesday. He had things to live for. That isn't the frame of mind of a person who is going to commit suicide.
>
> And then I think one thing of great significance is one of these notes on the progress reports on August 30--this is after the event--and Mr. Griffiths, his friend who has been talking to over this period of time, put the note in the progress report, and he says this: "Nice discussion with patient. He was very coherent and self-expressive. We discussed the precipitance of his accident. He felt that the voices and noises were unbearable at that moment and that they were even out in the hall, so the window seemed the only escape route.
>
> And then the other thing that would indicate that this is not a suicide: Can you imagine somebody who is going to commit suicide checking around and taking all of the glass off so he won't get cut? Isn't that the action of a man who wants to get out of there and get away? He said, I hurdled that. He said, I

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> thought I was in Moab. I thought I was on the first floor.
>
> So we submit that on this question of suicide that he did not intend to commit suicide. Nobody in this record said that he indicated he was going to do it. And he had been under close observation. Dr. Moench didn't see it. He just didn't commit suicide. He was trying to escape from those voices that were giving him the problem. (Tr., pp. 2001-2002). (Emphasis added).

Thus, the preceding evidence shows quite clearly that the plaintiff's version of the fall greatly differed from that of Defendants', i.e. Plaintiff claiming escape and Defendants claiming suicide. The record is void of any argument made by Plaintiff during the trial to the effect that while he was admittedly trying to commit suicide he was doing it because of his mental condition at the time of the jump. As has been seen, Plaintiff adamantly denied attempting suicide for any reason and steadfastly claimed that the "voices" forced him to flee the window.

For Appellant to now claim that the jury instruction was prejudicial because it denied him the opportunity to argue that even an act of suicide may have been "poor judgment" is an afterthought which cannot be sustained by this Court.

It was Appellant's obligation to propose instructions which presented his theory of the facts. For example, if Plaintiff believed he had irrationally attempted suicide because of the

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negligence of Defendants in not restraining him, he should have formulated an instruction to that effect and presented it to the trial court for consideration. In fact, no such instruction was offered by Plaintiff. (R., pp. 455-461).

It was not the duty of Defendants to propose an instruction which would cover Plaintiff's theory of the incident. This Court in Ferguson v. Jongsma, 350 P.2d 404 (Utah 1960) clearly stated this rule in the reverse context of plaintiff and defendant. This Court stated:

> Plaintiff in proposing an instruction on his theory of the case is not required to also propose instructions setting out all the possible defenses thereto. If defendants desired instructions on defenses to any ground which would allow plaintiff to recover they should propose them. Id. at 410.

Furthermore, even had such an instruction been proposed, the evidence simply did not support such a theory. There was no testimony that Plaintiff attempted suicide because of the voices or because of an irrational mind. He consistently denied any suicide from any cause.

This Court in Black v. McKnight, 562 P.2d 621 (Utah 1977) stated that the trial court may properly refuse to give a requested instruction where it does not accurately reflect the law governing the factual situation of the case.

Similarly, in an earlier case, this Court in Griffin v. Prudential Insurance Company of America, 133 P.2d 333 (Utah 1943)

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stated that it was error to give instructions on a state of facts where there is no evidence even should such instruction contain correct statements of law. <u>See also Ferguson v. Jongsma</u>, 350 P.2d (Utah 1960).

Defendants do not dispute the rules of law cited by Appellant in his brief concerning the duty of a psychiatrist to prevent a patient from harming himself if such harm is foreseeable. (Appellant's brief, pp. 46-47). However, there is no evidence that Plaintiff gave any sign that he was contemplating suicide nor is there any evidence by Plaintiff's own testimony that he attempted suicide. The question of suicide, therefore, was totally a defense to Plaintiff's claims that he was driven out of the window by the voices and that Defendants negligently allowed this attempted escape to occur.

Instruction No. 20 concerning proximate cause is a correct statement of the requirement of duty, proximate cause, and damages and does not in any way distort the previous jury instruction. Plaintiff's claimed error with this instruction (Appellant's brief, p. 48) requires an extremely strained speculation of the jurors' thinking and is totally unrealistic in view of the correctness of the instruction standing by itself.

In addition to the preceding reasons for rejecting Appellant's claimed error, there exists one further ground against Appellant, i.e., the objections to Instructions 19 and 20 were

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not made timely. The parties stipulated that objections to the jury instructions could be made after the jury retired. (Tr., p. 1948). The jury began its deliberations at 1:00 p.m. and Defendants presented their objections to the instructions at that time. (Tr., pp. 2010-2023). At 3:30 p.m. the jury returned with its verdict. (Tr., p. 2024). Plaintiff's exceptions were given after the rendering of the verdict and after the jury's discharge. (Tr., pp. 2025-2027).

This Court has repeatedly held that Rule 51, U.R.C.P. requires timely objections be made to jury instructions in order to allow the trial court an opportunity to cure any error. Johnson v. Simons, 551 P.2d 515 (Utah 1976); Black v. McKnight, 562 P.2d 621 (Utah 1977); Hanson v. General Builders Supply Co., 389 P.2d 61 (Utah 1964). Certainly, objections made after the jury has been discharged cannot be considered timely.

For these reasons, the trial court was correct in submitting Instructions 19 and 20 to the jury.

POINT II

THE TRIAL COURT COMMITTED NO ERROR AS TO THE TESTIMONY OF DR. SIDNEY WALKER OR AS TO THE GIVING OF INSTRUCTION NO. 11.

A. Dr. Walker's Testimony.

1. The Plaintiff has Waived Any Claimed Error Regarding Dr. Walker's Testimony by Omitting it From the Transcript Record.

Appellant in his brief recites that Dr. Sidney Walker, a

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specialist in neuro-psychiatry, examined Plaintiff's records and reviewed various depositions before testifying at his own deposition taken on July 27, 1976. Plaintiff then asserts that even though Dr. Walker in his deposition testified that the various defendants failed to properly care for the plaintiff, the trial judge incorrectly refused to allow this opinion to be admitted into evidence. The reason for this omission, according to the plaintiff, is that the doctor had never practiced medicine in Utah and therefore was incompetent to testify as to the medical standard of care in this state. (Appellant's brief, pp. 49-50).

There is nothing in the transcript of the trial evidencing Plaintiff's contentions and, the fact is, many portions of Dr. Walker's deposition were read to the jury and were not omitted by the trial court.

The transcript offers no assistance to this Court as to what specific portions of Dr. Walker's testimony was omitted by the trial court. The transcript states on page 1558, "The testimony of Dr. Sidney Walker was read into the record. During a reading of the deposition counsel argued their respective positions". A reference is then made on page 1559 that an objection to the deposition starting on page 26 was overruled by the trial court. It is then noted that the deposition was continued to be read until 2:00 that afternoon. (Tr., p. 1559). Finally, the

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record notes that counsel concluded the reading of Dr. Walker's deposition. (Tr., p. 1556).

The "Designation of Record on Appeal" filed by Plaintiff specifically excluded the testimony of Dr. Walker. (R., p. 519). All depositions in the court file were designated and this request necessarily included the deposition of Dr. Walker. (R., pp. 677-814). However, how this deposition was used at trial and the specific objections made by Defendants' counsel is absent from the record.

The failure of Plaintiff to include the actual reading of the deposition and the rulings of the trial court precludes Plaintiff from now claiming error as to alleged omissions of testimony. Several courts in other jurisdictions have dealt with similar problems.

In <u>Grover v. Southern Bell Telephone and Telegraph Company</u>, 207 S.E.2d 584 (Ct. App. Ga. 1974) the following statement was made:

> Plaintiff asserts the trial court erred in excluding from the evidence portions of Dr. Lawrence Lee Freeman's depositional testimony. A reading of the trial transcript beginning at page 117 indicates that the deposition was not introduced as such but was read before the jury. At those portions which Appellant contends were erroneously excluded the transcript shows that objections were made by defense counsel. Instead of reading those portions into the trial record and obtaining a ruling by the judge thereon, the portions were omitted. Thus we are unable to pass upon the assertion. Our "decision must be made on the record

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> sent to this court by the clerk of the court below and not upon the briefs of counsel". Jenkins v. Board of Zoning, Etc., 122 Ga. App. 412, 413, 177 S.E.2d 204, 206. Id. at 586.

Similarly, the Missouri Court of Appeals in Williamson v. Epperson, 529 S.W.2d 25 (Ct. App. Mo. 1975) made the following pertinent observations:

> Further and more important, the plaintiffs have come to this court on a record wholly insufficient for us to adjudicate the merits of their claim. They argue specifically they were denied the opportunity to read certain questions and answers from a deposition, but the deposition is not preserved in the record, except for those parts which were actually offered and received. Since the deposition was not copied into the record, then made a part of the record here in any manner, we cannot pass on the admissibility of the parts of the deposition plaintiffs sought to offer. Id. at 29. (Emphasis added).

The Maryland Court of Special Appeals in Sun Cab Company v. Walston, 289 A.2d 804 (Md. Ct. Spec. App. 1972) stated the following:

> Appellants proffered to read into evidence some 13 lines from a pre-trial deposition of Richard B. Walston. The court, "after hearing discussion from counsel and reading the case offered" denied that request. The record does not contain the discussion, nor the deposition. We have no way of knowing what was proffered, nor the reasons advanced for and against its admission. There is nothing we can rule upon. Id. at 822. (Emphasis added).

See also Paulin v. Paulin, 102 P.2d 809 (Cal. Dist. Ct. App. 1940);

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Friesen v. Chicago, Rock Island and Pacific Railroad, 524 P.2d 1141 (Kan. 1974).

The obvious principle behind these decisions is that a reviewing court cannot tell whether prejudice has occurred by the omission of testimony unless the specific testimony omitted and the objections made are before the reviewing court. In this case the entire deposition of Dr. Walker was before the court and only portions of the testimony were objected to by Defendants. It is impossible to tell from the present record what that testimony was and whether it constituted an "opinion" of Dr. Walker or consisted of other material. In addition, it is impossible to know what the grounds for the exclusion was and if, indeed, all exclusions related solely to the medical standard of care in Utah.

For this reason alone, Plaintiff's contention that the court erred in omitting portions of Dr. Walker's testimony cannot be substantiated by this Court and must therefore be rejected.

2. In Any Event, the Testimony of Dr. Walker Was Cumulative and Inferior to That of Plaintiff's Other Expert, Dr. Branch and Any Omission Was Therefore Harmless.

It is important to note that this is not a case where Plaintiff was denied expert witness testimony for failure to meet a standard. First, as previously noted, a large portion of Dr. Walker's testimony was read to the jury. Second, and mo

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importantly, the testimony of Dr. Hardin Branch was read to the jury in its entirety with no omissions or deletions. (Tr., p. 1569). The testimony of Dr. Branch in and of itself was sufficient to establish Plaintiff's theory of a standard and created a jury question.

The deposition of Dr. Branch was taken on two separate occasions: first on August 4, 1977 (R., pp. 853-927); and again on September 3, 1977 (R., pp. 1095-1155).

There is no doubt that Dr. Branch was eminently qualified to testify both in his expertise as a psychiatrist and as to his experience in Utah. He obtained his M.D. degree in 1935 and subsequently worked in Pennsylvania. From 1948 until 1970 he was Chairman of the Department of Psychiatry at the University of Utah Medical Center. (R., pp. 861-862). The doctor was familiar with Utah health care facilities (R., pp. 863-864), supervised residents who trained in the various hospitals including the L.D.S. Hospital (R., p. 916), and attended various conventions and conferences in Utah since 1970. (R., p. 917). Dr. Branch was the supervisor at various times of Dr. Eugene Bliss and Dr. Lincoln Clark who testified on behalf of the Defendants. In fact, Dr. Moench himself was also a member of the department which Dr. Branch headed. (R., p. 889).

Defendants' expert witness, Dr. Lincoln Clark, stated that Dr. Branch had hired him at the time he joined the University of

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Utah faculty and that he considered Dr. Branch to be a nationally-recognized competent psychiatrist. (Tr., pp. 1815-1816). Dr. Eugene Bliss, Defendants' second expert witness, also acknowledged Dr. Branch as a very competent psychiatrist who had international recognition. (Tr., p. 1844).

In fact, the only question as to the competency of any expert witness was made by Dr. Branch concerning the qualifications of Dr. Walker--Plaintiff's expert witness whose testimony is claimed to have been so critical. Dr. Branch stated that there is no such thing as a "neuro-psychiatrist" since doctors are either certified in psychiatry or in neurology. (R., pp. 881-882).

Dr. Branch was qualified as an expert witness under either the "local community" standard or any other standard and the trial court allowed his testimony to be read to the jury. Without elaborating as to the essence of Dr. Branch's testimony it suffices to say that it was sufficient to challenge the actions of Defendants as to the proper psychiatric standard. Dr. Branch testimony is well summarized in the argument of counsel during Defendant's Motion for Directed Verdict. (Tr., pp. 1624-1643; see *e.g.* Tr., pp. 1624-1626; 1641-1643).

The reliance upon Dr. Branch as establishing a standard is further shown in the closing argument to the jury by Mr. Garrett:

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> Now, let me try and put a little more on that. First of all, Dr. Branch testified in this case for the plaintiff, and he testified concerning the standard of care--in other words, what must you do if you are to avoid being at fault with a patient? That is what, in effect, he is saying. And he had an opinion to render, and I bring it to you for your assistance at arriving at a verdict in this case.
>
> This was a question by Mr. Roberts: And doctor do you have an opinion as to whether or not Dr. Moench used the care and diligence ordinarily exercised by psychiatrists in the vicinity of Salt Lake City in caring for this patient to whom he had been called in for a psychiatric consultation? Do you have such an opinion?
>
> Answer: Yes, sir, I do.
>
> Question: And what is that opinion?
>
> Answer: <u>I think that ordinary care would have required the placing of this patient in a more protected situation either in his own room or in a psychiatric unit</u>.
>
> * * *
>
> There are other things in his testimony, as you will recall. He amplified on that. <u>He said he didn't sufficiently impress the nurses with the urgency of the situation</u>. (Tr., pp. 1956-1957). (Emphasis added).

Thus, the testimony of Dr. Branch sufficiently presented Plaintiff's theory of the standard which Defendants allegedly failed to maintain. Dr. Branch was eminently more qualified to testify than was Dr. Walker. It is therefore difficult to believe that Dr. Walker's testimony would have had any effect upon the jury's consideration.

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As stated by the Supreme Court of Kansas, "Error may not be predicated upon the exclusion of evidence which is merely cumulative and does not add materially to the weight or clarity of that already received." Friesen v. Chicago, Rock Island and Pacific Railroad, 524 P.2d 1141, 1149 (Kan. 1974). See also Watkins v. Utah Poultry and Farmer's Cooperative, 251 P.2d 663 (Utah 1952).

In summary, the Plaintiff has waived any claim of error committed as to the exclusion of Dr. Walker's testimony. But even if such an error were not waived, Plaintiff has made no showing that the alleged omitted testimony would have had any substantial effect upon the outcome of this case in light of the testimony of Dr. Branch--a man acknowledged by Defendants own medical witnesses to be an internationally recognized expert in psychiatry.

B. Instruction No. 11.

1. Plaintiff Himself Proffered Two Instructions Containing the "Local Community" Standard and Cannot Now Claim Error.

Appellant complains that the eleventh instruction the court read to the jury, speaking in terms of "accepted standards of psychiatric care in this community", was erroneous because it applied the "locality rule". (Appellant's brief, 50). Appellant then proceeds to attack the existence of the locality rule and argues that a more liberal standard should

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be adopted. (Appellant's brief, pp. 51-58). Of course, this Court has in fact adopted the more liberal "similar community" standard argued by Appellant in its recent decision of Swan v. Lamb, Case No. 14823. Admittedly, Instruction No. 11 utilized the existing standard of the "local community". (R., p. 475).

Unlike the plaintiff in the Swan case, however, Appellant proffered instructions to the court containing the local standard. One proposed instruction of Plaintiff stated:

> You are instructed that if you find from a preponderance of the evidence that the Defendant Louis G. Moench, in treating Plaintiff, failed to exercise the care and diligence ordinarily exercised by a psychiatrist in Salt Lake City, Utah, then you are instructed that the said Louis G. Moench was negligent. (R., p. 457). (Emphasis added).

Plaintiff's second instruction stated:

> And if you find further from a preponderance of the evidence that such conduct in one or more of the foregoing ways constituted a failure on the part of the said defendant to exercise the care and diligence ordinarily exercised by psychiatrists in Salt Lake City, Utah, then you are instructed that said Louis G. Moench was negligent. (R., p. 458). (Emphasis added).

Both of these instructions were given by the trial court as Nos. 12 and 13. (R., pp. 476-477).

Thus, it is difficult to imagine how Plaintiff can complain about the giving of Instruction No. 11 when it is basically no different than Instructions Nos. 12 and 13 which were proposed

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by Plaintiff and adopted by the trial court. Plaintiff has thus waived any claim of an erroneous standard being given by the fact that he compounded the error.

2. The Similar Community Standard Was In Fact Given by the Trial Court in Instruction No. 10.

Defendant Moench proffered an Instruction No. 5 which included the similar community standard. (R., p. 405). Plaintiff proffered a similar instruction including this standard. (R., p. 456).

The court combined both of these proffered instructions and gave them as Instruction No. 10. It stated the following:

> In performing professional services for a patient, a physician or surgeon has the duty to have that degree of learning and skill ordinarily possessed by physicians and surgeons of good standing, practicing in the same or a similar locality and under similar circumstances.
>
> It is his further duty to use the care and skill ordinarily exercised in like cases by reputable members of his profession practicing in the same or a similar locality under similar circumstances, and to use reasonable diligence and his best judgment in the exercise of his skill and the application of his learning, in an effort to accomplish the purpose for which he is employed.
>
> In determining whether Dr. Moench properly fulfilled the duties imposed upon him as a psychiatrist, you are not permitted to set up a standard of your own, but must look to the testimony and evidence presented by physicians at the trial as to what the standard of care was at the time in question. (R., p. 474). (Emphasis added).

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Thus, Instruction No. 10 was extremely specific as to the standard of care and actually utilized the "similar community" standard even though it was not required by Utah law at that time. For purposes of determining propriety of jury instructions the instructions should all be considered together. Whyte v. Christensen, 550 P.2d 1289, (Utah 1976).

The Tenth jury instruction specifically spoke in terms of the medical standard to be applied and utilized the "similar community standard". The Eleventh, Twelfth, and Thirteenth instructions only incidentally referred to a standard and any erroneous standard was included in two instructions offered by Plaintiff himself.

For this reason, any misstatement of the standard in the Eleventh, Twelfth, and Thirteenth instructions was harmless even if it were assumed that the similar community standard was applicable prior to the Swan decision.

Finally, as discussed supra Plaintiff failed to make a timely objection as to Instruction No. 11 and has therefore waived any claimed error. Black v. McKnight, 562 P.2d 621 (Utah 1977).

C. The Local Community Standard was a Correct Statement of the Law in Utah at the Time of the Incident and at the Time of Trial and any Change in such Standard Should Not be Applied Retroactively to Incidents or Trials Predating the Swan Decision.

It is manifestly unjust to apply the new "similar locality standard" to the defendants in this case and to any other par-

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ties retroactively because this Court's decision in Swan has changed a standard of care upon which these defendants, defendants in other pending lawsuits, and doctors not yet sued, have been entitled to rely upon.

Justice Hall and Justice Henriod in the Swan decision dissented on the grounds that the decision should be applied prospectively only. This position is correct in light of the severe prejudice a retroactive change in a standard can create.

Dr. Moench and the other defendants in this case acted in accordance with the local community standard in the treatment of Plaintiff. It is manifestly unjust to now, two years later, require different standards of care than that which all parties relied upon at the time of the incident and the time of the trial.

This Court on numerous occasions has refused to apply a change in statutory or common law retroactively when substantial rights were being affected. Rubalcava v. Gissman, 384 P.2d 389 (Utah 1963); Williams v. Utah State Department of Finance, 464 P.2d 596 (Utah 1970); Brunyer v. Salt Lake County, 551 P.2d 521 (Utah 1976); and Stanton v. Stanton, 564 P.2d 303 (Utah 1977).

This Court's decision of State v. Kelbach, 565 P.2d 700 (1977) stated in great detail the purpose of applying overruled decisions prospectively:

> As a general proposition the law as established should remain so until changed by the legisla-

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> ture, whose prerogative it is to make and change the law. This does not mean to say that where there is judge-made law which is later observed to be clearly in error, that such error should be so set in cement that it cannot be remedied. In such circumstances the court undoubtedly can and should correct it.
>
> But more important than any of the above is the oft proclaimed salutary principle: That ours is a government of laws and not of men. Accordingly, the law should not be changed simply because of the will or desire or judges as to what the law is or ought to be. Much less so, should it be so changed during the course of a particular proceeding to have a retroactive effect thereon. Notwithstanding the fact that the change the state advocates would vindicate the position taken in the dissent referred to, to so hold in this case retroactively would violate what we regard as a higher principle: that of honoring the established law. <u>If there is to be such a change in the law, whether by legislative act or by judicial decision, it seems that it should have only prospective effect and that fairness and good conscience requires that it should not be applied retroactively to adversely affect rights as they existed at the time the particular controversy arose.</u> <u>Id.</u> at 702. (Emphasis added).

This long line of cases clearly shows this Court's concern that the law be a reliable monument upon which a party can rely--not a shifting mound of sand. The change to the "similar locality rule" is a drastic one that overrules a standard which has existed for over 100 years. It is unjust to apply this new standard with all of its consequences and ramifications to these defendants and to other physicians who in good faith attempted to meet the local community standard existing at the time the

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alleged malpractice occurred.

Such unfairness affects the defendants in the instant case, all the physicians presently in litigation, and all future physicians or professionals whose actions occurred prior to the Court's decision in Swan.

For these reasons, even if it is assumed for the sake of argument that Dr. Walker's testimony was wrongfully excluded or that Instruction No. 11 was wrongfully given, this Court should hold that the similar community standard is not applicable to cases predating the Swan decision.

POINT III

DR. MOENCH AND THE SALT LAKE CLINIC HAVE BEEN VINDICATED BY A JURY AND THIS COURT'S DECISION AS TO THE OTHER DEFENDANTS SHOULD NOW HAVE NO EFFECT UPON THEM.

Appellant argues in his brief that all of the defendants should be tried jointly in order to avoid prejudice to the Plaintiff since a litigating defendant has the opportunity of "pointing the finger" to a missing defendant. While this may or may not be true, there is no rule of law which requires all defendants to be tried concurrently and in fact Rule 20(b) and Rule 42(b) specifically allow a trial court discretion in separating the trial of parties or issues.

Dr. Moench and the Salt Lake Clinic have undergone an exhaustive trial and have been vindicated by a jury. The fact that Dr. Schricker and the L.D.S. Hospital did not participate

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in this trial is irrelevant to these defendants. If this Court determines that the summary judgment as to those defendants was improperly granted then a new trial should be ordered as to those defendants but Dr. Moench and the Salt Lake Clinic are certainly not required to undergo a second trial for the advantage of the plaintiff and his claim of prejudice by their absence.

If, indeed, the jury concluded that the hospital was the negligent party in failing to correctly administer the orders of Dr. Moench, then it is probable that a new jury would reach this same conclusion when the hospital itself was being tried. Notwithstanding Plaintiff's argument, even if the hospital points the accusing finger to Dr. Moench, it must be presumed that the new jury will determine which party, if any, was negligent in the treatment of Plaintiff and bring back a verdict against that defendant if he or it is a party to the trial.

Even the plaintiff himself in his brief indicates that had the medication ordered by Dr. Moench been given at the correct time and in the correct dosage, "this tragedy could have been prevented". (Appellant's brief, pp. 27, 33). And Plaintiff also notes that had Dr. Schricker responded promptly "as he should have, this tragedy would have been avoided". (Appellant's brief, p. 37).

Obviously, if both Dr. Schricker and the L.D.S. Hospital

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caused the injury to Plaintiff, the correct verdict was rendered favorably for both Dr. Moench and the Salt Lake Clinic and they should not be subjected to a second trial regardless of the outcome concerning the other defendants.

CONCLUSION

A brief review of the Statement of Facts reveals that at the time Plaintiff was admitted to the L.D.S. Hospital he was encountering severe personal problems. Dr. Moench quickly and professionally responded to Dr. Schricker's request for assistance and professionally evaluated and prescribed treatment for Plaintiff. The evidence is clear that Plaintiff exhibited no signs of self-destruction. There was no way, therefore, that Dr. Moench could have predicted the action which Plaintiff took on the night of August 24.

Plaintiff claimed that he heard voices which compelled him to escape from his room. Defendants claimed, on the other hand, that for personal reasons--and perhaps based upon reckless impulse alone--Plaintiff attempted to kill himself. These were the only two theories propounded at trial and argued by the respective parties.

Instruction 19 concerning suicide was properly given by the trial court in that it presented Defendants' theory of the incident. Had Plaintiff wanted to contend that he was actually attempting to commit suicide but that his action was compelled

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by his delusions and hallucinations, he should have introduced evidence in support of this theory and tendered an instruction.

In reality, however, there was neither evidence of this theory now argued in Appellant's brief nor was an instruction offered presenting it. In addition, Plaintiff did not make timely objection to the instructions and has therefore waived any claimed error. For these reasons, the trial court was correct in giving Instruction No. 19 and No. 20 to the jury.

The plaintiff fails to present an adequate record to this Court for review of Dr. Walker's testimony. This failure constituted a waiver of any such claim. In addition, any testimony offered by Dr. Walker was cumulative to the superior testimony of Dr. Branch who was eminently more qualified as an expert in psychiatry and whose opinion as to Defendants' breach of standard was received into evidence.

Instruction Eleven was not prejudicial because Instruction Ten actually presented the "similar community" standard and in light of the fact that Plaintiff himself offered two instructions adopting the local community standard about which he now complains.

The decision by this Court in Swan should only be applied prospectively from the date of the decision so that doctors and other professional people are not held accountable to a standard which did not exist at the time the alleged malpractice occurred.

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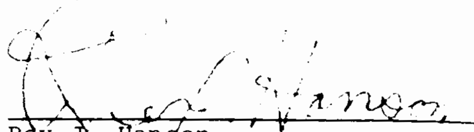
Finally, the outcome as to the other defendants in this appeal is irrelevant to these defendants since they have already been tried and vindicated by a jury.

For all of these reasons, therefore, the jury verdict should be affirmed.

Respectfully submitted,



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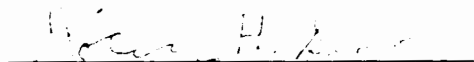

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