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IN THE SUPREME COURT OF THE

STATE OF UTAH

IVAN JENKINS, Plaintiff- Appellant, vs. CHARLES M PARRISH, Defendant- Respondent.	)	Case No. 15905

BRIEF OF RESPONDENT

Appeal from the Judgment of the Third District Court
in and for Salt Lake County
Honorable Peter F. Leary, Judge

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IN THE SUPREME COURT OF THE

STATE OF UTAH

IVAN JENKINS, Plaintiff-Appellant,	)	
vs.	)	Case No. 15905
CHARLES M. PARRISH, Defendant-Respondent.	)	

BRIEF OF RESPONDENT

NATURE OF THE CASE

This is an action which was commenced by Plaintiff against several defendants alleging medical malpractice in the performance of open-heart surgery. Plaintiff claimed that as a result of Defendant's negligence he sustained permanent damage to his brain resulting in various physical impairments.

DISPOSITION IN LOWER COURT

Prior to trial all defendants, except for Dr. Charles M. Parrish, were dismissed by stipulation of the parties. A jury trial was commenced on September 19, 1977 with the Honorable Peter F. Leary presiding. After nine days of hearings the jury returned a unanimous verdict in favor of Defendant Parrish and against Plaintiff. The trial court subsequently denied Plain-

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tiff's motion for a new trial.

RELIEF SOUGHT ON APPEAL

Respondent Parrish seeks affirmance of the jury verdict.

STATEMENT OF FACTS

The Statement of Facts as presented in Appellant's brief is, in the opinion of Respondent, totally inadequate in that it presents argument rather than a factual development of this case. For this reason, Respondent offers the following Statement of Facts as developed in trial.

The plaintiff, Ivan Jenkins, testified that after dropping out of high school he joined the army and then in 1951 commenced work with Kennecott Copper. (Tr., p. 1261). For the next 20 years he worked mostly labor jobs including being a "roster" and a "rigger". (Tr., p. 1263). All of these jobs required physical climbing and exertion. (Tr., p. 1263).

Jenkins stated that in 1965 or 1966 he began experiencing problems with his chest. The pain originated below his chest and continued to increase in severity. At one point he could not walk 50 yards across the parking lot without having severe pain. (Tr., p. 1304).

Dr. Owen G. Reese, a Kennecott physician, recalled that as early as 1966 the plaintiff had complained of chest pains. It was not until 1971, however, that the doctor was able to diagnose the pain as a true angina. (Tr., p. 1774). Dr. Reese hospi-

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talized the plaintiff in 1971 for testing as to the exact cause of the plaintiff's pain. (Tr., p. 1775).

Dr. Reese called Dr. Parrish and asked him to conduct an arteriogram. (Tr., p. 1775). Defendant Dr. Parrish explained that in January of 1972 he performed selective coronary angiography in which dye is injected into the blood and x-rays are taken. The angiograph showed severe occlusive triple vessel coronary disease. (Tr., p. 1565).

Plaintiff and his wife related that Dr. Parrish subsequently informed them as to the risks of the bypass surgery and told them that Plaintiff should have a good chance of survival because of his age and habits. (Tr., p. 792, 1268).

The plaintiff and his wife shortly thereafter decided to go ahead with the operation and the plaintiff was sent to the hospital to have blood drawn for a cross match. The plaintiff was checked into the hospital on February 20. (Tr., p. 1567). That night Dr. Parrish explained to the plaintiff and his wife the extent and nature of the operation. (Tr., pp. 1568, 1270).

On February 21 at 7:30 a.m. the plaintiff was taken into the Holy Cross Hospital operating room. (Tr., pp. 912-913). Dr. Parrish testified that the surgical team operating on the plaintiff consisted of himself, the chief surgical resident, Dr. Parrish's own nurse, two additional nurses supplied by the hospital, a circulating nurse, the anesthesiologist, and the pump

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technician. (Tr., p. 1586.

Morphine was used as the anesthesia during the operation. The anesthesiologist maintained and monitored the blood pressure of the plaintiff up until the time the heart-lung machine was activated. (Tr., pp. 906-809).

Dr. Parrish then described the remainder of the operation. Veins were removed from a superficial venous system in the legs. The chest was then opened and the heart was exposed. Plastic tubes were then attached to various areas of the heart and to the femoral artery. During the preceding process the plaintiff's heart was still pumping. The heart-lung machine was then primed with blood, evacuated of all air, and the machine was activated by the pump technician. The heart-lung machine began to circulate the blood in place of the heart and to cool the blood as it circulated. As the body temperature dropped the heart slowed its beat and finally an ice saline solution was poured over the heart and within a matter of seconds the heart stopped beating. (Tr., pp. 1590-1592). The body temperature at this point was approximately 30 to 34 degrees centigrade. (Tr., p. 1591).

Mr. Charles Dyson, a Los Angeles pump technician testifying for Plaintiff, explained that the machine acts in place of the heart during the operation; that is, it circulates the patient's blood through the arteries and veins and at the same

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time oxygenates the blood. (Tr., p. 1137).

Dr. Parrish explained that the blood coming from the venous system is blue whereas the blood going through the arterial system is red. (Tr., pp. 1626-1627). A TV-screen type of oscilloscope is attached to the patient which monitors both the arterial pressure and the venous pressure. (Tr., pp. 899-900).

Dr. Parrish stated that two units of blood were used during the operation: the first unit for priming of the pump to compensate for the machine itself and the second unit to compensate for internal pooling and loss of blood. (Tr., p. 1658).

Using the veins from the plaintiff's leg, Dr. Parrish fashioned three grafts to circumvent the blocked arteries which supplied blood to the plaintiff's heart muscle.

After the operation was completed the heart-lung machine increased the temperature of the blood circulating through the body until such time as the temperature was high enough to allow the heart to be shocked back into operation. (Tr., pp. 1597, 1643). The operation of Plaintiff was completed at 12:45 p.m. (Tr., p. 913).

The plaintiff was then placed into the intensive care unit of the hospital where his vital signs continued to be monitored. At 7:10 p.m. that night the plaintiff's blood pressure severely dropped. At that time Dr. Parrish ordered two drugs to be administered in order to increase the blood pressure. (Tr., pp. 1029-1030).

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On the day following the operation the plaintiff's condition had stabilized. (Tr., p. 1610). The plaintiff remained in the intensive care unit for five days until he was subsequently taken to a private room. (Tr., p. 797).

Plaintiff claimed at trial that he immediately noticed visual problems upon awakening from the surgery. (Tr., p. 1271). Plaintiff's wife verified that her husband was complaining about his vision immediately after the surgery. (Tr., p. 795). She stated that during the rest of his stay at the hospital he constantly complained about his vision. (Tr., pp. 795-799). She testified that Dr. Parrish was informed of this fact but merely assured them that the plaintiff's system was in a state of shock and would be all right after it had recovered. (Tr., p. 797).

Plaintiff called several friends, relatives, and business associates who testified that during his stay at the hospital and immediately after his return to his home the plaintiff complained about vision problems. (Tr., pp. 1092, 1247, 1253, 1441, 1540).

Defendant Dr. Parrish stated that the first time he knew that the plaintiff had a neurological problem was in April of 1972, approximately six weeks after the operation. He could not recall any complaints that Plaintiff made to him about his eyesight while in the hospital. (Tr., p. 850). The doctor stated that had Plaintiff told him of any visual or coordination problems he would have been very concerned as to the question

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of neurological damage. (Tr., pp. 851-852).

Defendants called Dr. Owen Reese, the Kennecott physician who had cared for Plaintiff during his employment, and asked him if Plaintiff had made any complaints concerning his vision or coordination during office visits in February and March of 1972. The doctor replied that his records showed no such complaints and that his memory also was barren of any such complaints. (Tr., pp. 1776-1777).

The defendant called Donna Jorgensen, an LPN who worked at Holy Cross in 1972, who testified that she could recall the plaintiff making no complaints to her and that had such complaints been made they would have been charted. The records revealed no such notations. (Tr., p. 1766).

Likewise, Sister Mary Agnes Mullen explained that she was a registered nurse in charge of patient relations in 1972. She was assigned to the intensive care and post intensive care units and met with the patients and their families one to three times a day. She could not recall Plaintiff or his wife making any complaints as to his condition. (Tr., pp. 1768-1770). The hospital records, which were admitted into evidence, also reflected no comments made by the nursing staff concerning Plaintiff's vision or coordination. (Exhibit 13-D, "Nursing Clinical Summaries".)

Plaintiff testified that since the operation he experienced blurred vision, a weakness in his right arm, a loss of equilibrium,

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a speech problem, and an inability to get along with his friends and family. (Tr., pp. 1278-1280). His wife related her husband's coordination problems, vision problems, speech problems, and irritability. (Tr., pp. 809-813). Various other witnesses called by Plaintiff substantiated this behavior. (Tr., pp. 1091-1093, 1248, 1255).

On cross-examination the plaintiff stated that he had gone fishing five or six times after the operation, had gone deer hunting twice and had shot one deer, was still bowling, and still had a Utah driver's license. (Tr., pp. 1297-1305).

Dr. Parrish testified that he had examined the plaintiff in April and July of 1972 and February of 1973. (Tr., p. 860). By February of 1973 it became apparent that the plaintiff was suffering from a neurological problem. (Tr., p. 863).

The plaintiff introduced the video-tape deposition of Dr. William Hoyt, a neuro-opthalmologist from San Francisco (Tr., p. 1218--testimony has not been transcribed for this appeal) and the deposition testimony of Dr. Ward Woods, a San Diego, California surgeon with a specialty in neurology and neurosurgery. (Tr., pp. 1474-1536). Both Dr. Hoyt and Dr. Woods described to the jury the neurological reasons for the symptoms suffered by the plaintiff.

It was the cause of these symptoms that comprised the issue in this case. Defendant Dr. Parrish contended that Plaintiff's

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neurological damage probably resulted from a stroke suffered after the plaintiff had left the hospital. (Tr., pp. 618, 632). He explained that the symptoms could also have been caused by a particle of a blood clot from the heart being pumped to the brain during or after the surgery--a normal risk of such a surgical procedure. (Tr., p. 1026).

Plaintiff, on the other hand, contended that the neurological problem was caused during the surgery because of a failure to properly operate the heart-bypass pump in a manner which provided sufficient oxygen to Plaintiff's brain cells.

Extensive testimony from both sides was heard as to the technical aspects necessary for a successful heart bypass operation. Without going into detail, Plaintiff called Charles Dyson, a certified Los Angeles pump technician, who stated that the records concerning Plaintiff's operation showed improper use of the machine and that the procedure followed by the defendant and his pump technician did not meet the minimum standard of care required in 1972. (Tr., pp. 1108-1186).

Dr. Charles Bailey, a heart surgeon residing in New Jersey, also reviewed the procedure utilized in Plaintiff's operation and concluded that Defendant had failed to properly utilize the heart-lung machine thereby causing a deficient oxygen flow to the brain during the operation. (Tr., pp. 1306-1419).

A detailed analysis of the testimony of both Mr. Dyson and Dr. Bailey will be presented in Point II of the argument section

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of this brief concerning the admissibility of testimony as to the standard of care.

Dr. Hoyt, during his video-tape deposition also stated that in his opinion Plaintiff's brain damage was caused by hypoxia during the open-heart surgery. Dr. Ward Woods voiced his opinion that the neurological damage was caused during the operation. (Tr., p. 1505).

Dr. Parrish, on the other hand, testified that the operation was performed in a safe manner and in accordance with the standard of care prevailing in 1972 and justified all procedures used in the surgery. (Tr., pp. 878-1038).

Dr. Richard Hughes, a cardiovascular surgeon practicing in Los Angeles, testified that Dr. Parrish performed the surgery in accordance with the standards of practice generally accepted in 1972. (Tr., pp. 1669-1735).

Finally, Dr. Russell Nelson, a cardiovascular surgeon practicing in Salt Lake City, disputed the claimed errors made by Plaintiff as to the correct procedure followed by Dr. Parrish and explained that Dr. Parrish operated in accordance with the standard prevailing in 1972. (Tr., pp. 1736-1763).

After nine days of trial the matter was submitted to the jury. A unanimous verdict was returned in favor of the defendant and against the plaintiff. (Tr., pp. 1891-1892).

On March 22, 1978, Plaintiff argued his Motion for New Trial or Judgment Notwithstanding the Verdict. (Tr., pp. 546-582).

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Both motions were denied. (R., p. 529).

Plaintiff now appeals from the judgment on the verdict and from the denial of these motions. (R., p. 531).

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO DISMISS VENIREMAN EDDINS FOR CAUSE.

A. Based Upon the Examination of Jurors, the Trial Court Properly Exercised its Discretion in Refusing to Dismiss Venireman Eddins for Cause.

It is universally recognized that it is the prerogative of the trial judge to examine and pass on the qualification of jurors including their credibility as to their qualification. *State v. Brooks*, 563 P.2d 799, 806 (Utah 1977)(J. Crockett, dissenting).

Matters of possible juror bias or prejudice rest within the sound discretion of the trial court. *State v. Dixon*, 560 P.2d 318 (Utah 1977). The ruling of a trial court concerning a prospective juror will not be disturbed unless clearly erroneous or where there has been an abuse of judicial discretion. *State v. Amodei*, 563 P.2d 440 (Kan. 1977). With this standard in mind an examination of the record clearly shows that the trial court did not abuse its discretion in failing to dismiss Venireman Eddins.

During the examination of the prospective juror panel the

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trial court first asked whether any of the jurors would refuse to follow the Court's instruction regardless of the juror's personal belief. No venireman responded. (Tr., p. 674).

The court then asked the veniremen whether any of them if chosen as a juror would not try the case solely upon the evidence adduced before them and the witnesses which appeared before them. None of the veniremen replied. (Tr., p. 675).

The court then proceeded to ask the veniremen if any of them knew the prospective witnesses or parties. Venireman Hudson stated that he was acquainted with two of Plaintiff's witnesses and may be influenced because they were good friends. (Tr., p. 678). Venireman Hudson was then asked by the court if it developed during the evidence that the testimony of his friend was obviously wrong in light of other evidence whether he would still believe the testimony of the friend even knowing that the testimony was obviously wrong. Venireman Hudson replied, "God, I don't know. It's hard to say, Judge Leary, Your Honor."

The trial court then asked Venireman Hudson,

> Well, would you be able to--if the testimony was either wrong or erroneous, and you knew that individual who testified--to be able to put aside your acquaintanceship with them and to render a fair and impartial verdict in accordance with the evidence?
>
> VENIREMAN HUDSON: I really don't know. I really don't know. It's just the way it influences me. (Tr., p. 680).

Venireman Eddins, the person now in question, stated that

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she also knew one of the plaintiff's witnesses, Dr. Robert Wray. (Tr., p. 678). This Court should note that the plaintiff's statement in his brief that Mrs. Eddins was a personal acquaintance of one of the "defendant's" expert witnesses is therefore obviously incorrect. (Appellant's brief, p. 12; Tr., pp. 660-661). When Venireman Eddins was asked whether her acquaintanceship with Plaintiff's witness would cause her to give more weight to his testimony she replied, "No, I would be fair and impartial as far as knowing Dr. Wray is concerned." (Tr., p. 680).

A third venireman, Mrs. Timothy, stated that she also knew one of Plaintiff's witnesses and stated that she would be able to fairly hear the evidence in spite of this acquaintanceship. (Tr., p. 681). Finally, Venireman Hewett stated he had employed Mr. Fairbourn previously as his attorney. (Tr., p. 676).

The court then asked the veniremen whether any of them had a belief that a case of this nature should not be brought into court for determination by a jury. Venireman Birkner and James Hewett both raised their hands. (Tr., p. 681).

The court then asked the veniremen if any of them had any belief or feeling toward any of the parties, attorneys or witnesses that might be regarded as a bias or prejudice for one or against any of them. None of the veniremen responded. (Tr., pp. 681-682).

The court then asked several other questions including whe-

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ther any of the veniremen had ever been sued or whether a similar claim had been presented against them or any member of their friends or families. (Tr., pp. 683-684). Venireman Eddins replied, "My ex-husband was a veternarian and had one case." (Tr., p. 684). No further discussion concerning her relationship with her ex-husband or the nature of the case was entered into by the court or requested by counsel.

Next, the court inquired whether any members of the veniremen had family or close friends with special training in medicine. Mrs. Eddins replied that her father was an M.D., Venireman Hewett replied that her uncle was a radiobiologist, Mr. Gardner replied his mother-in-law was a nurse, Mrs. McDonald replied her daughter was a nurse, Mrs. Birkner replied that her cousin was a nurse, and Mrs. McRoberts replied that her sister was a nursing student. (Tr., p. 684). In addition, Venireman Hilton responded that her niece was a radiologist, and Venireman Nelson stated that she had worked as a nurse's aide for nine years. (Tr., p. 685).

Finally, the court, in closing, asked if there was any reason that had occurred to any of the veniremen during questioning that might make them doubtful that they would be completely fair and impartial in this case. Mrs. Eddins replied, "The fact my father was an M.D. I'm sure would influence me." (Tr., p. 689).

A hearing was held in chambers before the court and with various veniremen as to their qualifications. In chambers Mr.

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Fairbourn, Plaintiff's co-counsel, stated that, "Mrs. Eddins has indicated that her father is a physician and that she has stated that she believes that she would be unduly biased and prejudiced by this fact." The court replied, "Well, I didn't pursue that matter with her." (Tr., p. 689a).

In addition, Plaintiff challenged the qualifications of Venireman Birkner and Venireman James Hewett who had told the court that they believed this type of case should not be brought. (Tr., p. 689a). Finally, Mr. Slagle, attorney for Defendant, requested that he be able to examine Mr. Ardin Hewett as to his attorney-client relationship with Mr. Fairbourn. (Tr., p. 690).

The court accordingly asked each venireman to come into chambers individually. Venireman Birkner stated that she did not think that malpractice actions should be brought because doctors do the best they can. She stated that she had read articles about malpractice and does not believe in medical malpractice cases. (Tr., pp. 691-692).

Venireman James Hewett stated that the plaintiff was obviously needing medical attention or would not have asked for it and that it must have been successful because the plaintiff was still alive. (Tr., p. 693). Venireman James Hewett then stated that he was not sure that anyone had the right to bring a malpractice action and that his attitude would remain the same even if the doctor was shown to be negligent. (Tr., p. 695).

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Venireman Ardin Hewitt was then interviewed by the court and stated that he had once employed Mr. Fairbourn in a child custody case. He stated that this would not have an effect upon his ability to weigh evidence. He stated that he could listen to the evidence and give a fair and impartial verdict. (Tr., pp. 696-697).

Both Veniremen Birkner and Venireman James Hewett were challenged by Plaintiff for cause. (Tr., pp. 692, 696).

Venireman Eddins was then called into the court's chambers for examination. This dialogue between Mrs. Eddins and the court has been partially quoted in Appellant's brief and Appellant has emphasized various statements made by her. (Appellant's brief, pp. 13-14). Respondent believes that other statements are equally important and should be emphasized and that some of the crucial testimony was omitted. The following dialogue occurred between Mrs. Eddins and the court:

> THE COURT: Sit down, Mrs. Eddins. I just want to make some inquiry as to some of your qualifications to serve. One of the things I'm a little bit concerned with is your response as to whether there was anything that would make you think that you might not be a fair and impartial juror in this matter. You indicated that--the fact that your father either was or had been an M.D.--
>
> VENIREMAN EDDINS: Yes.
>
> THE COURT: You thought this might, for one reason or another, influence your determination in connection with this matter. I suppose maybe I ought to ask you:

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Because of your father being a medical doctor, would you be inclined to give more weight to the testimony of a medical doctor simply because he's a medical doctor?

VENIREMAN EDDINS: I think I probably would.

THE COURT: Would you give less weight to his testimony?

VENIREMAN EDDINS: No.

THE COURT: Would you be inclined to give more weight to the testimony of--well, perhaps I'd better not ask it that way. Even though your father is a medical doctor, do I understand that you do not believe that you would be able to listen to the evidence and based thereon render a fair and impartial verdict? Or, let me put it another way: Do you think if you were selected as a juror that you would be able to listen to the evidence and based thereon render a fair and impartial verdict?

VENIREMAN EDDINS: I definitely believe they can make mistakes. I would hope I could listen to it. But I know I would be somewhat partial to the doctor.

THE COURT: Well, are you telling me that you would give more weight to the testimony which would be presented on behalf of the defendant in this action simply because he happens to be a medical doctor?

VENIREMAN EDDINS: No, I think I could weigh the evidence. I think when it got to his personal testimony that would be the only time it would possibly influence me, and I would feel it was more likely to be truthful than untruthful.

THE COURT: And I take it, then, your answer would be that you would give more weight to his testimony simply because he's a doctor?

VENIREMAN EDDINS: I'm afraid so.

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THE COURT: Would you give less weight to his testimony because he's a doctor?

VENIREMAN EDDINS: No.

THE COURT: If the evidence indicated that the doctor's testimony was not in accordance with the evidence, would you still be inclined to give more weight to his testimony simply because he was a doctor?

VENIREMAN EDDINS: No, I think I could see it.

THE COURT: I'll ask it this way: I think you've answered the question, ma'am, but do you think that actions such as this should not be brought against--not be brought?

VENIREMAN EDDINS: No, I don't think they shouldn't be brought.

THE COURT: Do you think that they, if the situation warranted such an action, would be appropriate?

VENIREMAN EDDINS: Certainly. (Tr., pp. 699-701) (Emphasis added).

Subsequently, the veniremen panel was brought back into court at which time Plaintiff moved to dismiss Venireman Birkn and James Hewett for cause. This motion was granted. (Tr., p 709). Defendant moved to dismiss Venireman Hudson for cause a this motion was granted. (Tr., p. 710). The motion to dismis Mrs. Eddins was denied. (Tr., p. 709).

The preceding review of the venire examination reveals that the court carefully examined the panel as to every facet of possible bias or prejudice. The court felt that two of the veniremen were not qualified to serve because of their prejud against bringing a malpractice action. The court also felt t

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one of the veniremen could not render a fair verdict in light of his relationship with a witness. On the other hand, the court ruled that Mrs. Eddins was a qualified juror based upon her response to the questioning.

The trial court was correct in this ruling. Plaintiff never challenged Mrs. Eddins or inquired further into the fact that her ex-husband who was a veternarian had been previously involved in an action. (Tr., p. 689). The fact that Mrs. Eddins was a personal acquaintance of one of Plaintiff's proposed expert witnesses, Dr. Robert Wray, can hardly be said to be prejudicial to Plaintiff.

Likewise, the fact that Mrs. Eddins' father was a physician was not challenged per se any more than the other veniremen who stated they had relatives who were also in the medical field. The only basis for such a challenge was Mrs. Eddins' own statements made to the court. An examination of these statements revealed no abuse in the court's discretion.

First, the fact that Mrs. Eddins stated she would be inclined to give more weight to the testimony of a medical doctor because he's a medical doctor would not adversely affect Plaintiff any more than Defendant since Plaintiff called three medical doctors himself. (Tr., p. 699).

Second, Mrs. Eddins stated that she could weight the evidence but that she thought it more likely a doctor would be truthful than untruthful.

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The court in Wheeler v. State, 362 So.2d 377 (Fla. App. 1978) faced a similar claim that a juror was disqualified because of her statements. The court therein stated:

> No prejudicial error appears in the trial court's denial of Appellant's challenge for cause of a prospective juror whom Appellant later struck peremptorily. The prospective juror simply stated that she had great respect for police officers and that it would be difficult for her to believe that a police officer had testified untruthfully. That feeling did not disqualify the prospective juror. Id. at 378. (Emphasis added).

Likewise, the United States Court of Appeals for the Fifth Circuit held that the statement of a prospective juror that he would give more credibility to an F.B.I. agent than to any other witness did not constitute grounds for reversal. United States v. Cross, 474 F.2d 1045 (5th Cir. 1973).

The Supreme Court of Louisiana also held that the trial court did not abuse its discretion in failing to dismiss a prospective juror whose husband was a law enforcement officer and who stated that she would be more inclined to believe a law enforcement officer than other witnesses. State v. Qualls, 353 So. 978 (La. 1977).

Finally, the Florida Appellate Court in Williams v. Nowling, 297 So.2d 82 (Fla. App. 1974) held that the trial court erred in dismissing prospective jurors who said they would give more weight to the testimony of a physician than a chiropractor. The

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court stated:

> It is, of course, a juror's prerogative to determine the weight and believability he will accord to a particular witness's testimony, and he makes that determination from various factors including his general knowledge. If a juror in the final analysis after hearing the testimony can make that determination based upon his understanding of such factors, he should not be stricken for cause. Of course, questions on voir dire may uncover such prejudice on the part of a juror that he could not fairly make such a determination, but here the questions asked the juror did not go far enough or to the point of uncovering prejudice. A judgment based upon a juror's understanding of the qualifications of an expert witness in a particular field based upon his common sense, judgment and experience is not prejudice. It is his duty and responsibility to make such determination. Id. at 83-84.

Venireman Eddins clearly stated that if a doctor's testimony was not in accordance with the evidence she would not be inclined to give more weight to his testimony simply because he was a doctor. She also stated that she believed malpractice actions should be brought and that if they were warranted they would be certainly appropriate. (Tr., p. 701).

Each party exercised four peremptory challenges because of the addition of an alternate juror. One of Plaintiff's challenges was applied to Mrs. Eddins who, of course, did not serve on the jury panel.

Mrs. Eddins was obviously candid in her answers and the trial court, who watched her demeanor and heard her testimony,

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did not abuse its discretion in deciding that she would be a qualified juror.

B. The Authorities Cited by Appellant are Distinguishable.

Appellant cites several Utah cases in support of his position that Venireman Eddins should have been dismissed from the panel. The Crawford v. Manning case, 542 P.2d 1091 (Utah 1975) involved a potential juror who stated that "She had strong feelings concerning anyone who would sue to recover money for the death of another." This testimony was similar to that given by Venireman Birkner and Venireman James Hewett (Tr., pp. 602-695) to which the trial court sustained Plaintiff's challenge for cause. (Tr., p. 709).

In State v. Moore, 562 P.2d 629 (Utah 1977) the prospective juror stated, "I feel very strongly against people that use or sell narcotics. I don't know whether I could be fair in a verdict or not." Again, the prospective juror in that case was prejudiced against the type of action being brought. In this case, however, Mrs. Eddins stated that a malpractice action was perfectly appropriate and that they should be brought in appropriate cases. (Tr., p. 701).

Finally, the case of State v. Brooks, 563 P.2d 799 (Utah 1977) involved potential jurors who were personal friends of two of the prosecution witnesses. This Court held that the record indicated that there was a "friendship" rather than a mere "acquaintance." The trial court in this case believed that Mr.

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Hudson had such a friendship relationship with the plaintiff's witnesses and accordingly dismissed him for cause. (Tr., p. 710).

This review of Plaintiff's authorities clearly shows that the facts in each case must be examined and that the trial court must be given a large amount of discretion in determining whether a prospective juror is qualified. In this case the record shows that the trial court thoughtfully and carefully questioned numerous prospective jurors as to a variety of potential conflicts and in fact concluded that three of the prospective jurors were not qualified.

The trial court followed this Court's direction in the three previously cited cases and dismissed veniremen for those reasons stated in this Court's opinions. For this reason, there was no error committed by the trial court in the selection of the jury.

POINT II

THE TRIAL COURT WAS CORRECT IN ITS RULINGS REGARDING THE ADMISSIBILITY OF TESTIMONY BY PLAINTIFF'S EXPERT WITNESSES.

A. The Trial Court Properly Excluded Certain Portions of Testimony in Which Foundation was Lacking.

This case was tried in September of 1977. It concerned an operation which had taken place in February of 1972. The trial court properly applied the law as it existed at the time the action arose and at the time of trial.

In August of 1978 this Court decided Swan v. Lamb, 584 P.2d 814 (Utah 1978) where the majority held that the local community

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standard should be changed to encompass a "similar" community standard with regard to expert testimony.

It is manifestly unfair to hold that a trial court has erred in its rulings concerning a standard which was in existence at the time of the trial because of a subsequent change in the standard by a higher court. The decision in Swan is unclear as to whether the new standard is applicable to actions arising prior to the decision. Respondent respectfully submits that Swan should be given only prospective effect and should not apply to causes of action or, at the very minimum, to trials which occurred prior to the rendering of the decision.

This Court in numerous decisions has constantly held that rights, duties, and privileges should generally be changed only by the legislature or in rare instances by this Court; but that in every case fair notice must be given to those who relied upon previous law. Rubalcava v. Gissmann, 384 P.2d 389 (Utah 1963); Williams v. Utah State Department of Finance, 464 P.2d 596 (Utah 1970); State Farm Mutual Insurance Co. v. Farmer's Insurance Exchange, 493 P.2d 1002 (Utah 1972); Brunyer v. Salt Lake County, 551 P.2d 521 (Utah 1976); Stanton v. Stanton, 564 P.2d 303 (1977); State v. Kelbach, 565 P.2d 700 (1977).

Thus, any application of the strict locality rule by the trial court was not error since it conformed with the law existing at the time of trial and the time the claim arose. Plaintiff's claim at this time is therefore without merit.

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Even assuming, arguendo, that the "similar community" standard should have been applied by the trial court, the plaintiff failed to establish that either Los Angeles, California, the city in which Mr. Dyson the pump technician practiced, or Belmar, New Jersey, the city in which Dr. Bailey, the cardiovascular surgeon practiced, were "similar" to Salt Lake City.

The Swan decision contains five separate opinions of the Justices of this Court. Justice Crockett in a special concurring opinion stated the requirement of foundation as to a "similarity" in communities: Justice Crockett stated:

> [I]t is also appreciated that in other specialized aspects of the practice of medicine, there are in fact different standards in different localities. In larger metropolitan areas where there are educational institutions, hospitals and clinics, so that there are available more advanced facilities and equipment, and higher degrees of specialization in particular fields, and higher earnings for practitioners, there are undoubtedly higher standards than in less favored areas. When this fact situation has a bearing on the problem involved, that is an important factor to be taken into account. 584 P.2d at 819.

Justice Wilkins, in a concurring opinion, quoted an authority which also outlined the rule for foundational requirement. This rule states the following:

> [I]n determining similarity the courts will not now look to such socio-economic facts as population, type of economy, and income level but to factors more directly relating to the practice of medicine. In the main, an expert practicing in a locality having medical fa-

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cilities comparable to those existing in the defendant's community is permitted to testify concerning the standard of care governing the defendant. The number and quality of hospitals, laboratories and medical schools are typical considerations. 584 P.2d 820.

The record is void of any comparisons between Salt Lake City's facilities, medical school, etc. with those of Los Angeles, California and Belmar, New Jersey. Thus, even assuming _arguendo_ that the similar community standard should have been applied by the trial court, even though it was not the applicable law at the time of trial, the plaintiff still failed to establish a proper foundation and any objections were rightfully sustained.

In addition, unlike the _Swan_ case, the plaintiff here made no proffer of proof as to what the witnesses would have said had the objections not been sustained. Such proffer is necessary if omission in testimony is claimed as error. _Sun Cab Company v. Walston_, 289 A.2d 804 (Md. Ct. Spec. App. 1972).

B. _The Testimony of Mr. Charles Dyson and Dr. Charles Bailey Amply Covered the Alleged Negligence and Failure to Meet Standards of the Defendant and Therefore any Exclusion of Testimony was Harmless Error_.

Plaintiff makes the following statement in his brief:

> Had the plaintiff's witness (Mr. Charles Dyson) been allowed to testify as to the standard of care in locales similar to Salt Lake City, Utah, he would have given testimony that would have shown that the defendant doctor's care of the plaintiff fell far below the existing and recognized standard of care in similar localities with respect to operation of the heart-lung bypass pump machine. By refusing to allow such testimony, the plaintiff was prevented from presenting to the jury the very heart of his case. (Appellant's brief, p. 25).

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An examination of the record, however, shows that Mr. Dyson repeatedly gave his opinion as to a breach of standard committed by the defendant.

Mr. Dyson stated that in his opinion there was a standard of practice among perfusion technicians throughout the country in February of 1972. (Tr., p. 1109). He testified that if the pump head was not adjusted for occlusion each time the tubing was changed that this would be a departure from the standard of practice of a capable, competent pump technician in accordance with minimum standards in 1972. (Tr., p. 1116). He claimed that a capable, competent pump technician of 1972 should have understood the physiology of flow rates and should have known that the recorded flow rate of 1,100 cc's (as recorded by Defendant's pump technician during Plaintiff's operation) was completely erroneous. He also said that a capable, competent pump technician in 1972 should have been aware of certain laws of physiology as to minimum flow rate at various body temperatures. (Tr., p. 1127).

In addition to these statements Mr. Dyson was also questioned by Plaintiff's attorney as to the following opinions:

> Q Do you have an opinion as to what the minimum standard of practice required with regard to observing and recording flow rates under these circumstances, sir?
>
> A The flow rates should have been observed and recorded by the technician.

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Q Can you explain why in your opinion the flow rates should be observed and recorded during the course of the pump run?

A I just don't know how you can tell what you're doing if you don't know what you're flowing. Obviously, in a state of no flow, that's what we call death. Now, you come above no flow and you get in a range that may support life and may not support life. Now, how do you know that the patient was getting an adequate amount of arterialized blood unless you record it? Or, how can you ever say the patient was getting an adequate amount of arterialized blood? (Tr., p. 1180).

The witness also related that the minimum standard of technicians in 1972 required that the temperature be recorded every 10 minutes and that the standard required that the blood pressure be recorded every 10 to 15 minutes. (Tr., p. 1181).

Mr. Dyson stated that the average surgical team would use a higher flow rate than that which was used by Defendant upon the plaintiff. (Tr., p. 1182). He testified that the flow rate which was used on the plaintiff was the very lowest minimum standard and that at such a rate a blood gas sample should have been obtained to determine if sufficient oxygen was going into the blood. (Tr., p. 1182).

The preceding review amply illustrates that while the court sustained objections as to certain questions asked by Plaintiff, numerous opinions of the witness were introduced before the jury in terms of a "minimum" standard of pump technicians in 1972. (Tr., p. 1109).

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There is no doubt, moreover, that the testimony of Dr. Charles P. Bailey, Plaintiff's expert cardiovascular surgeon, was superior and repetitious to the testimony of Mr. Dyson who was merely a pump technician. Plaintiff himself admits that Dr. Bailey was allowed to testify as to the standard of care practiced in Salt Lake City. (Appellant's brief, p. 26).

The omission, therefore, of any of Mr. Dyson's testimony, even assuming that such omission was erroneous, is not reversible error. "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 Farmers Cooperative, 251 P.2d 663 (Utah 1952).

Dr. Bailey was given a hypothetical question based upon the facts developed in the previous testimony and asked whether or not the care given to Plaintiff in February of 1972 "was in accordance with the standard of care, diligence and caution that would be expected as a minimum standard of a capable, competent, thoracic surgeon practicing in the locality of Salt Lake City, Utah." The doctor replied: "My opinion is that it was not up to the minimum acceptable standard of care. And if you would like, I will point out the way in which I think it wasn't satisfactory." (Tr., p. 1340). Dr. Bailey then proceeded to

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describe in detail the reasons for this opinion including: inadequate blood flow rate (Tr., p. 1341-1342); the failure to use a rectal thermometer (Tr., p. 1344); the failure to use an adequate flow rate based upon a correct temperature (Tr., pp. 1345-1346); the allowance of the blood pressure to drop below 50 mm's of mercury (Tr., p. 1348); and the negligence of Defendant in relying upon blood pressure alone to monitor the operation (Tr., pp. 1350-1351).

Finally, Plaintiff's counsel asked this question of Dr. Bailey concerning the "pump perfusion team":

> Q Do you have an opinion as to whether the standard of practice of a pump perfusion team under the circumstances as we've described in February of 1972 required that the pump technician be aware of what the flow rates or the blood pressure is of the patient during the course of a pump run such as this?
>
> * * *
>
> A At that time in medical history, as at the present time, the vast, the accumulated opinion of doctors doing this kind of work is that you must know what your perfusion rate is, and that you will maintain it at an adequate level. (Tr., p. 1354).

An accurate summary of Dr. Bailey's testimony is also found in Appellant's Statement of Facts. (Appellant's brief, pp. 7-8).

The most that Appellant can say regarding the testimony of Dr. Bailey is that "in all likelihood" the jurors viewed the testimony as less authoritative than the Salt Lake City based

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expert witnesses called by Defendant. (Appellant's brief, p. 26). Such a claim goes to the weight of testimony, is mere speculation, and does not constitute a sufficient ground for error.

For these reasons, the trial court was correct in its rulings as to the testimony of Plaintiff's expert witnesses.

POINT III

THE PROCEDURE UTILIZED IN FORMULATING AND OBJECTING TO JURY INSTRUCTIONS WAS NOT ERRONEOUS.

There is no showing in the record that Plaintiff's attorneys were not given ample opportunity to object to the giving and refusal to give jury instructions. In addition, the legal authorities cited by Plaintiff in his brief are not on point since they do not deal with the specific question raised by the appellant. (Appellant's brief, pp. 28-33).

Rule 46 of the Utah Rules of Civil Procedure states that formal exceptions to rulings or orders of the court are unnecessary and that it is sufficient that a party, at the time the ruling or order of the court is made or sought, "make known to the court the action which he desires the court to take."

Rule 51 of the Utah Rules of Civil Procedure provides that the court shall inform counsel of its proposed action with regard to jury instruction requests prior to instructing the jury; and it shall furnish counsel with a copy of its proposed instructions. All objections must be made before the instructions are given to the jury or before the jury retires to consider its

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verdict.

Plaintiff's counsel during the argument for new trial and judgment n.o.v. admitted that a conference had been held prior to the formal exceptions to the instructions before the court reporter. (Motion transcribed separately numbered Tr., pp. 546-582; 562-563). Upon being asked by the court whether Plaintiff's counsel had an opportunity to consult with the court prior to the time the exceptions were taken, Mr. Fairbourn replied:

> Part of them, not all of the instructions. They were rather numerous instructions and in this particular case the court indicated to us that he had gone over the instructions and we were given a copy of the court's proposed instructions and we went over these with the court. (Tr., p. 563).

This event was apparently unreported since there is no transcription of these conversations. Mr. Slagle, counsel for Defendant, stated the following concerning his recollection of the exceptions:

> It's my recollection and I think Mr. Fairbourn will bear this out, that we did not take a lunch break that day but rather had lunch in the courtroom. That when you came back, which was sometime before 12:50 we sat in the jury room in here for approximately an hour, assembled jury instructions, went through them with you and put them together. You marked all of our jury instructions as to whether they were given, not given, or given in substance. You then asked both of us whether or not, after we had gone through them with you, whether we had any serious objections that we needed to take at that time.

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> Now whether or not there was a court reporter, whether Mr. Midgley was in the jury room at that time I don't recall. At which time we both said Okay we told you what our serious objections were and you then said, "You can take your formal exceptions while I get a couple of these changes typed." (Tr., p. 578).

Thus, the record fails to show that the objections of the Plaintiff with reference to jury instructions were not "made known to the court." Rule 46, U.R.C.P.

In addition, the trial court was concerned at the Motion for a New Trial hearing that the plaintiff's counsel had not informed the court that his absence from the formal exceptions would be claimed as error. (Tr., p. 566).

As stated by the court: "I don't have any independent recollection of either you or Mr. Dixon shaking, rattling and rolling me and saying if you don't do this, Judge, you're committing error. Now maybe you did but it sure did not register." (Tr., p. 566).

The court in a further comment stated to Plaintiff's counsel:

> [T]he thing I'm concerned with is whether or not, in connection with the instructions, if you saw that I was committing an error, and it's obvious that you're relying upon an error that you claim that I committed, whether or not the record reflects that you endeavored to have me correct that error before I continued on down the merry path that causes the problem. Now if the record so reflects that's fine. If it doesn't it would be a concern to me that where I have been led into an error by my own doing I

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> think there's a responsibility before counsel to so advise the court that he's committing an error and get it corrected. (Tr., p. 568).

The record shows no objection to the court's absence from the formal exceptions.

Plaintiff's counsel admitted that "part" of the instructions had been discussed with the court prior to the time of the formal exceptions. (Tr., p. 563). There is also no showing in the record as to which specific instructions were or were not discussed. Unless it can be shown that counsel was given no opportunity to discuss a particular instruction which is claimed to have been erroneous, any failure to provide such opportunity is harmless error. Pagan v. Thrift City Inc., 460 P.2d 832 (Utah 1969).

The Rules of Civil Procedure, both federal and state, do not require that a formal, on-the-record discussion be held concerning jury instructions. The purpose of the rules is to provide the court and counsel with an opportunity to discuss and criticize the instructions prior to submission to the jury.

In the instant case, it is clear that such an opportunity was present and there is nothing in the record showing that the trial court "refused to listen to counsel's objections." (Appellant's brief, p. 30). On the contrary, it appears from the discussion of the court and counsel during the motion for new trial that a conference was held discussing the instructions and

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that the trial court was not physically present during the taking of the formal exceptions because such matters had previously been discussed.

If Plaintiff's counsel was unhappy with this procedure, a formal objection should have been lodged into the record stating which instructions had not been discussed with the trial court. This was not done and therefore Plaintiff has waived any claimed error.

POINT IV

THE TRIAL COURT DID NOT ERR WITH RESPECT TO JURY INSTRUCTIONS.

Appellants complain that two instructions should not have been given by the court (Appellant's brief, pp. 34-35) and that two instructions were erroneously omitted by the court. (Appellant's brief, p. 36). Both arguments are without merit.

It is fundamental in determining the propriety of jury instructions that the instructions must be considered as a whole. Whyte v. Christensen, 550 P.2d 1289 (Utah 1976). Applying this rule reveals that both instructions Number 12 and Number 11 were proper in light of all the instructions given by the court.

Appellant complains that Instruction Number 12 denied the opportunity of the jury to assess the testimony of Mr. Charles Dyson, the heart-lung by-pass pump machine technician. Appellant states:

> By instructing the jury that only the testimony of expert physicians could be relied

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> upon to establish the standard of care, the jury was erroneously misled into rejecting out of hand all testimony given by the appellant's by-pass pump machine technician. (Appellant's brief, pp. 34-35).

Instruction Number 18 given by the trial court clearly allows the testimony of Mr. Dyson to be considered in assessing the standard to be utilized by pump technicians. This instruction reads:

> When a physician undertakes to use an employee to operate a coronary by-pass pump machine, he <u>is expected to take reasonable steps to assure that the pump technician is properly trained and sufficiently knowledgeable under the circumstances to operate the machine prudently and safely</u>.
>
> <u>If you find that there were minimum standards of knowledge, skill, or diligence that were customarily exercised by other pump technicians under similar circumstances</u>, in February of 1972 then you must determine whether or not in failing to have sufficient knowledge or in failing to exercise sufficient skill or diligence as required by those minimum standards, there was a departure and if there was any injury caused by that departure, then Dr. Parrish is liable for that injury. (R., p. 465) (Emphasis added).

As previously noted, the testimony of Mr. Dyson was to the effect that there was a 1972 standard for pump technicians and that this standard had been violated during the operation on Plaintiff. Thus, the two instructions together established both the standard for the physician himself and the vicarious standard for the physician employing a pump technician.

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Appellant now complains about Instruction No. 11 as not properly presenting Plaintiff's theory of the case. Plaintiff claims that the instructions should have informed the jury that failure to obtain blood gas tests and to monitor the patient's temperature were additional factors which could have resulted in negligence.

It is Plaintiff's obligation to formulate and present an instruction of his case theory and present it to the trial court for consideration. The record is barren of any proposed instruction by Plaintiff specifically referring to blood gas or monitoring of temperature. (R., pp. 410-420.) Likewise, there is no exception in the record as to the failure of the court to give a requested instruction by Plaintiff specifically referring to blood gas and temperature monitoring. (Tr., pp. 1833-1839). As stated by this Court:

> If Defendants desired instructions on defenses. . .they should propose them. Ferguson v. Jongsma, 350 P.2d 404, 410 (Utah 1960).

This same rule is equally applicable to claims of a plaintiff.

In addition, the court in several other instructions repeatedly told the jury that the defendant would be negligent if he failed to "exercise such care and diligence as was ordinarily exercised by physicians and surgeons doing the same type of work in the Salt Lake civinity or similar locality." (Instructions Numbers 8, 9, 12, and 13; R., pp. 455, 456, 459, 460).

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Certainly, the failure to monitor blood gas and temperature could be considered by the jury as the failure to exercise care and diligence required of physicians or required of pump technicians. There was ample testimony by Plaintiff's witness that such standards, in their opinions, were breached. (Tr., pp. 1181-1183). It was, therefore, not necessary, in the absence of a specific request by Plaintiff, to include each factor of the claimed negligence in the general instruction outlining Plaintiff's case.

Finally, Plaintiff complains that his Instructions Numbers 6 and 7 concerning the credibility to be given to deposition and video-tape testimony were wrongfully excluded. (R., pp. 391, 392). Plaintiff states: "It is likely that members of the jury would tend to discount testimony by deposition in comparison to live testimony from witnesses they can see and hear." (Appellant's brief, p. 36). Such a statement is mere speculation on the part of Plaintiff.

In addition, the testimony referred to in Instructions Numbers 6 and 7 is basically concerned with medical causation and damages--not negligence. Dr. William Hoyt, a San Francisco neuro-ophthalmologist, testified on video tape as to the extent of the damage to Plaintiff's eyesight and the fact it was probably caused by hypoxia. Likewise, Dr. Ward Woods, a San Diego neurosurgeon, testified by deposition as to the neurological damage to the plaintiff and the resulting symptoms. (Tr., pp.

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1474-1536).

Since neither of these medical witnesses was qualified in the area of medicine practiced by Defendant, the value of their testimony was only to evaluate the extent of damage and to hypothesize that such damage could have been caused during open-heart surgery. However, since the jury did not reach the question of damages, the importance of this depositional testimony was obviously minimal. Any error, therefore, was harmless.

For these reasons, the trial court was correct in the instructions given to the jury.

POINT V

THE TRIAL COURT WAS CORRECT IN REFUSING TO ALLOW PLAINTIFF'S EXPERT TO AUTHENTICATE TEXTBOOKS.

Plaintiff complains that Defendant Dr. Parrish "evasively refused to acknowledge any of the experts or their medical texts" propounded by Plaintiff. (Appellant's brief, p. 39). Such a characterization is unjustified as is shown by the record. The testimony of Defendant is consistent that he was either unaware of the reputation of the offered authority, was not familiar with their textbook, or was not familiar with the authority. (Tr., pp. 839-846).

The defendant, on several occasions, testified that because of the rapidly changing field his information comes mainly from monthly periodicals and not from textbooks. (Tr., pp. 844-845).

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Thus, with Dr. Parrish failing to recognize or authenticate the textbooks inquired of by Plaintiff an attempt was made to authenticate these materials through Plaintiff's own expert witness, Dr. Charles Bailey. (R., pp. 1379-1383). The court properly refused to allow Dr. Bailey to authenticate these references for the purpose of later cross-examining Defendant Dr. Parrish.

Plaintiff's position, as argued in his brief, is that when an expert witness fails to recognize or authenticate a textbook or reference the opposition should be allowed to authenticate such textbook or reference using their own expert witnesses. At that point, the book or reference, now authenticated, can be used for cross examination of the opposing expert.

While this procedure has been adopted by some states, most states still require that an authority or reference may only be used to cross examine a witness who has specifically recognized or depended upon such source as a basis of the witness's direct testimony.

A few recent examples of those states following the traditional rule are as follows: Arizona: Purcell v. Zimbelman, 500 P.2d 335 (Ariz. App. 1972); California: Hope v. Arrowhead, 344 P.2d 428 (Cal. Ct. App. 1961); Colorado: Ross v. Colorado National Bank of Denver, 463 P.2d 882 (Colo. 1969); Maryland: Fleming v. Prince George's County, 358 A.2d 892 (Md. 1976);

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Minnesota: Rosenthal v. Kolars, 231 N.W.2d 285 (Minn. 1975); New Jersey: Swank v. Halivopoulis, 260 A.2d 240 (N.J. Super. 1969); New York: Florrence v. Goldberg, 369 N.Y.S.2d 794 (N.Y. A.D. 1975); and Texas: Webb v. Jorns, 530 S.W.2d 847 (Tex. Civil. App. 1975).

These states apply the traditional rule, followed by the trial court, that an expert witness may only be cross examined as to specific authorities and references he bases his opinion upon during direct examination or as to authorities he specifically recognizes as authorities. If the witness bases his opinion solely upon his own experience and does not authenticate any authorities he cannot be held accountable for information contained in those authorities and therefore cannot be cross examined about them. 32 C.J.S., Section 574, pp. 694-699.

Some states have enacted statutes which specifically allow medical textbooks to be used as direct evidence in a malpractice action. See Note, "Medical Malpractice--Expert Testimony" 60 N.W. U. L. Rev. 834 1966; Note, "Statutory and Common Law Innovations", 45 Minn. L. Rev., 1019 (1961). In such cases the textbook assumes the status of a live witness even though the defense does not have the opportunity to cross examine the author. Fortunately, Utah has not adopted this procedure.

A hybrid between the use of textbooks as direct evidence and the requirement of authentication by the expert witness himself is the position now advocated by Plaintiff that a text-

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book may be used for cross examination if it is authenticated by the opposing party's expert. The obvious difficulty with this procedure is that the two experts may have wide differences in opinion as to what is a "reputable" source or as to what is a "widely accepted" source.

In this case, for example, had Dr. Bailey recognized and authenticated a textbook by Dr. John Doe and had Dr. Parrish denied that Dr. John Doe was an authority or denied that the textbook contained correct information or disavowed any knowledge of either John Doe or the textbook, the jury would ultimately be faced with the same question it was in the present trial: Is Dr. Bailey more knowledgeable and reputable in the field of cardiovascular surgery than is Dr. Parrish?

In other words, the authenticated textbook, in cases where the witness disavows the author or the material, is only as good and credible as the expert witness authenticating it.

Rather than contributing any useful information to the jury the introduction of the intermediary textbook can only serve to confuse them since the authenticating witness could probably have stated the same information directly without any reference to any textbook.

Plaintiff finally argues that such references can be admitted into evidence as "scientific books" which contain "evidence of facts of general notoriety and interest" pursuant to

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Utah Code Annotated, Section 78-25-6 (1953). (Appellant's brief, p. 42). Such an argument is without merit since it is patently obvious that the procedure used in open-heart surgery does not fall into the category of how many feet are in a mile or an actuarial table of life spans. (Appellant's brief, p. 42).

For these reasons, the trial court was correct in excluding Dr. Bailey's testimony relating to an attempt to authenticate medical treatises which were neither relied upon nor recognized by Dr. Parrish during his direct examination

POINT VI

DR. RUSSELL NELSON WAS NEITHER A "SURPRISE" WITNESS NOR DID HE TESTIFY IMPROPERLY.

Appellant claims that the trial court erred in allowing Dr. Russell Nelson to testify in controvention of the pre-trial order and in rendering an opinion on matters other than rebuttal to the testimony of Charles Dyson. Such contention is totally without substance.

Plaintiff asserts that Judge Baldwin in the pretrial conference required "each party to disclose all witnesses who would be called at trial." (Appellant's brief, p. 44). As authority for this proposition Appellants cite the Affidavit of Clayton Fairbourn, co-counsel for Plaintiff. (R., pp. 494-495).

There is no doubt that the parties exchanged the names of witnesses during the pretrial conference as evidenced by the

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minute order of Judge Baldwin. (R., p. 336). There is no record, however, supporting Plaintiff's claim that Judge Baldwin ordered that no other witnesses could be called except those exchanged at the conference. Defendant has adamantly denied this assertion during and after the trial. (Tr., pp. 1739, 577).

In a conference with counsel immediately prior to the commencement of the trial, each side listed their witnesses for the judge so that he could inform the jury as to their names. Mr. Slagle, attorney for Defendant, listed the names of approximately ten witnesses and then stated, "At the present time that's all the witnesses I know of. It may be necessary, of course, to call others, Your Honor, as the evidence develops in rebuttal." The court replied, "I understand that." (R., p. 660).

The court also informed the jury after reading the list of witnesses that "it may be there are additional witnesses whom they desire to call." (Tr., p. 681). Thus, even in the beginning it is clear that the attorneys for the parties and the court were aware that witnesses other than those specifically exchanged may be called.

Near the conclusion of the trial Dr. Russell Nelson took the stand on behalf of the defendant. At that time Plaintiff's counsel objected that Dr. Nelson was a surprise witness and that, in any case, he could only testify to rebut the testimony of Mr. Dyson. (Tr., p. 1738).

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Mr. Slagle acknowledged that Dr. Nelson was not listed as a witness but it was pointed out that Mr. Dixon, co-counsel for Plaintiff, on the Wednesday or Thursday of the first week of trial was informed that Dr. Nelson may be used as a rebuttal witness and that Plaintiff had therefore known about Nelson for two weeks. (Tr., p. 1739).

Furthermore, Slagle stated that he never intended on using Dr. Nelson only to rebut Dyson's testimony and that the defense did not have to anticipate every bit of evidence that may be used in rebuttal. (Tr., p. 1739).

After being told by Plaintiff's counsel that Judge Baldwin ordered that no other witnesses except those exchanged could be called at trial, the court replied:

> Well, even if the court did order that, I presume that one is entitled to bring on any other witnesses he may desire in connection with the matter in rebuttal if its necessary. I don't think anybody is precluded if the exigencies of the situation were to indicate it such being the case.
>
> * * *
>
> I suppose if there was something testified to, and there is the desire to rebut it, I suppose that is an exigency that may arise.
>
> * * *
>
> Well, the court is not going to preclude him from presenting his evidence if he believes that it's necessary to present it. (Tr., pp. 1740).

Thus, the conference at trial revealed that Plaintiff was

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aware of Dr. Nelson's possible testimony two weeks prior to his being called and that the trial court never limited his testimony to strictly rebuttal of Mr. Dyson's testimony. (Appellant's brief, p. 46).

Appellant cites the case of Bertram v. Harris, 423 P.2d 909 (Ala. 1967) in support of his position that a pretrial order has to be followed precisely by the trial court. In that case, however, the Supreme Court of Alaska stated that a trial court is still left with discretion as to whether a witness should be excluded from trial if not listed in a pretrial order. The court stated:

> Whether or not we will interfere with such discretion as in other cases where discretion is involved, depends on whether the discretion was abused, which would be the case only if we were left with the definite and firm conviction on the record that the judge had made a mistake in deciding as he did to exclude or not to exclude a witness not listed in accordance with the order for a pretrial conference. Id. at 917.

Even assuming arguendo that Judge Baldwin required all witnesses to be listed at the pretrial conference and stated that no surprise witnesses would be allowed, the trial court had discretion to decide whether a witness was a "surprise" and discretion as to the scope of the witness's testimony. The record shows that the trial court did not abuse this discretion. Cf Cheney v. Rucker, 381 P.2d 86 (Utah 1963).

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POINT VII

THE TRIAL COURT DID NOT ERR IN DENYING PLAINTIFF THE RIGHT TO CROSS EXAMINE DR. RUSSELL NELSON.

Appellant devotes a significant number of pages in his brief to support and acclaim the virtues of cross examination. (Appellant's brief, pp. 48-59). Respondent basically agrees with all of the legal authorities cited by Appellant and concurs that cross examination is an essential tool at any trial.

However, when these legal principles are specifically applied to the facts of this case it becomes evident that no right of cross examination was denied.

Appellant complains that he was unable to cross examine Dr. Russell Nelson as to whether he performed surgery in the same way described in the hypothetical. (Tr., p. 1747). Appellant states that this question "went to the heart of the witness's testimony, the standard of care by which the defendant's conduct was to be judged." (Appellant's brief, pp. 53-54).

It was established many years ago that what an individual physician does in his medical practice is irrelevant and immaterial to how another physician performs in his practice. The Utah Supreme Court said:

> The witness was asked to give his opinion of various steps in the method of treatment adopted by Dr. Shields and then to give his opinion of the method as a whole. To permit him to answer sets his opinion up as a basis from which to determine whether Dr. Shields was negligent or

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> not. It is an effort to set off one opinion against another as proof of error in the latter, whereas the standard of care required of a surgeon is that he exercise the reasonable care, skill, and diligence as is ordinarily exercised by--not one surgeon--but surgeons generally, not to mention for the moment, the question of restricting the general group to any particular community or locality. It is our opinion that the questions were fatally defective by reason of calling for a comparison with only one opinion rather than a general group. And the lower court was correct in ruling the answers out. Coon v. Shields, 39 P.2d 348 (Utah 1934) (Emphasis added).

Thus, Dr. Nelson's personal practice and manner in which he performs surgery is immaterial and irrelevant as to a direct comparison with the practices of Dr. Parrish. Had Dr. Nelson, however, "testified previously that he based his opinion" as to the standard of practice in Salt Lake City in 1972 upon his own practice as well as the practice of other doctors it probably would have been proper to inquire further as to the foundation of his opinion.

The record is void of any reference as to what elements comprised the standard in which he formulated. For this reason, the question as asked was irrelevant to the formulation of the standard which Dr. Nelson had previously related.

The trial court is given considerable discretion in deciding whether evidence submitted is relevant. Bambrough v. Bethers, 552 P.2d 1286 (Utah 1976). In ruling upon questions during the examination of witnesses, and more particularly the cross examination, the trial court has considerable latitude,

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and its rulings will not be held to be reversible error unless it appears that they are clearly erroneous and, generally speaking, prejudicial. Good v. West Seattle Gen. Hosp. Corp. 335 P.2d 590, 593 (Wash. 1959).

As stated previously, the court did not abuse its discretion in ruling that the question of Dr. Nelson's personal practice was irrelevant to the establishment of the community standard without a showing that this was a factor comprising the opinion. In addition, the failure to answer the question was not prejudicial since Plaintiff effectively obtained the answer from Dr. Nelson in the questions following the cited question. The following dialogue occurred:

Q (By Mr. Dixon) Dr. Nelson, did--have you reviewed vividly the practices of the other doctors in the community to determine whether or not they were practicing surgery in the same way that was described in that hypothetical?

A I've been doing heart surgery here for 22 years and am pretty well acquainted with the work of the others in the area.

Q And did they generally practice the same way you do?

A Surgeons are like concert pianists; each one is highly individual, highly different, and yet obedient to certain basic rules.

Q One of those basic rules is that the body needs a certain amount of oxygenation; isn't that correct?

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A But the defining of that limit is subject to a good deal of dispute. (Tr., p. 1747).

The doctor, in effect, admitted that he practiced in the same way as other doctors in the community and then proceeded to explain the certain "basic rules" as propounded by Plaintiff's attorney. (Tr., pp. 1747-1762).

Plaintiff's counsel thoroughly examined Dr. Nelson's testimony as to how open-heart surgery should be performed and such testimony was clearly based upon the doctor's own opinion and experience.

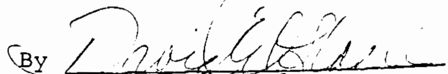
Thus, the court did not abuse its discretion in refusing to allow the question as framed to be answered but in still permitting examination of Dr. Nelson's personal practice and opinions as to the standard of open-heart surgery.

CONCLUSION

In summary, the trial court did not err or abuse its discre in the selection of jurors, the admissability of testimony, the procedures and substance of jury instructions, or in trial proc generally.

For the reasons outlined in this brief, the judgment of the jury should be affirmed.

SNOW, CHRISTENSEN & MARTINEAU

By 
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