

1979

Ivan Jenkins v. Holy Cross Hospital of Salt Lake City, Charles M. Parrish, F. Clyde Null, Robert M. Stovall, A. Thompson, Xyz Manufacturing Company and Abc Distributing Company : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

---

IVAN JENKINS,

Plaintiff-Appellant,

vs.

HOLY CROSS HOSPITAL OF  
SALT LAKE CITY, CHARLES  
M. PARRISH, F. CLYDE NULL,  
ROBERT M. STOVALL, A.  
THOMPSON, XYZ MANUFACTURING  
COMPANY and ABC DISTRIBUTING  
COMPANY,

Defendants-Respondents.

---

APPEAL FROM THE JUDICIAL DISTRICT COURT  
DISTRICT COURT OF THE  
STATE OF UTAH, HONORABLE JUDGE

---

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

---

IVAN JENKINS,	)	
	:	
Plaintiff-Appellant,	)	
	:	
vs.	)	
	:	
HOLY CROSS HOSPITAL OF	)	Case No. 15905
SALT LAKE CITY, CHARLES	:	
M. PARRISH, F. CLYDE NULL,	)	
ROBERT M. STOVALL, A.	:	
THOMPSON, XYZ MANUFACTURING	)	
COMPANY and ABC DISTRIBUTING	:	
COMPANY,	)	
	:	
Defendants-Respondents.	)	
	:	

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BRIEF OF APPELLANT

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APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL  
DISTRICT COURT IN AND FOR SALT LAKE COUNTY,  
STATE OF UTAH, HONORABLE PETER F. LEARY, PRESIDING

---

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IN THE SUPREME COURT OF THE STATE OF UTAH

---

IVAN JENKINS,	:	
Plaintiff-Appellant,	:	BRIEF OF APPELLANT
vs.	:	
CHARLES M. PARRISH,	:	Case No. 15905
Defendant-Respondent.	:	

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BRIEF OF APPELLANT

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NATURE OF THE CASE

This is an action for medical malpractice brought by the plaintiff, Ivan Jenkins, against the defendant, Dr. Charles M. Parrish, a specialist in the field of open-heart surgery, for injuries sustained during the course of open-heart surgery from which the plaintiff suffered severe brain damage and blindness, and which occurred as a result of the defendant's failure to supply an adequate blood supply to the Plaintiff during the open-heart surgery.

DISPOSITION IN THE LOWER COURT

The case was brought on a theory of negligence and was tried before a jury. The trial court submitted the issues of liability and damages to the jury. Upon the evidence the appellant was allowed to present, and upon the instructions of the court, the jury found that the defendant was not negligent. The appellant's motions for a directed verdict and new trial were denied.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the decision in the trial court below and an order remanding the case for a new trial.

## STATEMENT OF FACTS

A. Error Committed in Selection of Jury. During the course of the voir dire examination in open court, one of the jurors, Judith Eddins, volunteered that her ex-husband was a veterinarian and her father was an M.D. (Medical Doctor) (R. 684). The venireman further volunteered "The fact that my father was an M.D. would influence me." (R. 689.) Counsel for appellant specifically challenged this juror for cause. (R. 690.) Appellant's counsel then requested that the court conduct a further hearing of the matter in chambers so as to not belabor the matter of bias and prejudice before the entire jury panel. (R. 691.) The court then held a hearing in chambers in which questions were asked of the venireman Judith Eddins which established that:

1. She would be somewhat partial to the doctor.
  2. She would feel that the defendant medical doctor's testimony would be "more likely to be truthful than untruthful."
  3. She would give more weight to his testimony simply because he's a doctor. (R. 699-702, see Appendix "A".)
- Thereupon the in camera proceeding was concluded and after a few additional questions by the court, plaintiff's counsel renewed their challenge for cause of venireman Eddins which the court denied. (R. 699.) Whereupon the plaintiff's counsel removed venireman Eddins by exercising peremptorial challenge (Plaintiff's number 3, R. 369).

B. Errors Committed During Trial. The appellant in February of 1972 was a 46-year-old man who had been employed as a rigger for Kennecott Copper Corporation. The appellant had

been having difficulty with heart problems, but previously had no difficulty with vision, equilibrium, coordination, memory, personality change or speech until he had open heart surgery on February 21, 1972, by the respondent, Dr. Charles M. Parrish, a thoracic and cardiovascular surgeon. Appellant first was seen by the respondent doctor in the early part of February 1972. Thereafter, certain tests were administered to the appellant, and the respondent doctor advised the appellant to have open heart surgery for a triple by-pass graft of veins upon the heart. The operation was a success as far as intended to correct the heart difficulties. No claim is made concerning the heart repair itself.

Appellant makes claim for injuries that occurred due to improper perfusion (supplying inadequate pressures and amounts of oxygenated blood to vital organs, specifically, the brain and eyes) during the surgery upon the heart. The injuries claimed were partial blindness, certain loss of coordination and impairment of equilibrium, memory loss, personality changes and slowness of speech. Appellant's doctors, Dr. Charles Bailey, a cardiovascular surgeon, Dr. William Hoyt, a neuro-ophthalmologist, and Dr. Ward Woods, a neurologist, all testified that these injuries had occurred during and as a result of the perfusion inadequacy during the open heart surgical procedure. (R. 1362, Appendix B, 891.) The appellant, his wife, family and friends all verify that the appellant complained of these problems immediately after the surgery at various times during the recuperative period.

(R. 1271-1280, 794-803, 807-813, 1253-1255.) Dr. Parrish's hospital record and his office record do not record any problem, as though it didn't exist, until six weeks after the surgery when he referred in an office note to Post Pump visual problems. (R. 852-859, Exhibit 2P.) Dr. Parrish admitted that coordinated visual problems appearing immediately after surgery would be significant and he would stop doing surgery until the problem was found. (R. 851-3, 2037.) But, he made no such investigation. (R. 857-9, 871, 888.

At the trial, Dr. Parrish, the defendant and respondent, testified concerning the surgery he performed and the manner in which it was carried out.

Certain procedures designed to insure adequate flow from the heart lung pump were omitted, and certain other procedures fell below the standard of acceptable minimal care exercised by experts in the same field in cities of comparable size, and throughout the medical profession according to Dr. Charles Bailey, a noted cardiovascular surgeon. Dr. Bailey was professor and director of the department of thoracic surgery at Hahneman Medical College from 1952 until 1959 and chairman of the department of surgery at New York Medical College from 1959 to 1962, then an instructor of cardiovascular surgery from 1962 until 1974. (R. 1309.) Dr. Bailey has written over 200 medical articles, almost all of them on thoracic surgery and heart surgery; he has written three medical books and contributed to several other books. (R. 1313-1314.) He has an honorary Doctor of Human Letters from Rutgers University and an honorary Doctor of Law from Hahneman Medical College, and was part of a team which received the American Medical Association's gold medal award for presentations on heart surgery in 1951 and in 1971. He belongs to a multitude of medical societies, including honorary membership.

in Portugal, Brazil, Mexico and has lectured and demonstrated all over the United States, was president of the International College of Surgeons and a member of every major national thoracic surgery society in the United States. (R. 1314-1316.) He was one of the pioneers in by-pass graft vascularization procedures. (R. 1318.) Dr. Bailey testified of countless contacts with physicians from all over the United States at the national meetings of the various societies and organizations to which he has belonged.

Both Dr. Bailey and the defendant Parrish were trained in thoracic surgery in New York City. (R. 836.) Dr. Parrish's testimony was to the effect that when Mr. Jenkins went on the pump, the blood pressure started at a level of 30-35 and then slowly rose during the procedure. (R. 1013-1015.) Neither he nor his technician actually recorded what the blood pressures had been during the pump run. (R. 972.) In the years before Mr. Jenkins' operation, Dr. Parrish had followed procedures to determine exactly how much blood went into the patient, that is, the perfusion flow rate during the pump run. (R. 877, 961, 1017.) The doctor originally calculated the necessary flow rate before surgery in order to provide an adequate amount of oxygen to the tissue (R. 877-78), measured the brain function with an electroencephelogram (R. 1017), and monitored the blood temperature at the pump (R. 1018), and measured the oxygen in the blood (R. 1018-20), but discontinued all of these precautions. Dr. Parrish's pump technician kept the information concerning flow rates on a specific form (Exhibit 6P, R. 887). At the trial, the flow rate of 1,000 cc's per minute recorded by the technician was disclaimed by Dr. Parrish as an "obviously incorrect flow rate." (R. 888-89.) The trial court refused to require Dr. Parrish to answer the question as to whether or not, if the pump technician actually felt that 1,000 cc's was an adequate

flow rate, then that pump technician was improperly trained. (R. 888-89.) Dr. Parrish excused this technical error by stating that he relied on the patient's blood pressure rather than following the flow rate (R. 888-89), even though he admitted there were instances where the flow rate could change but blood pressure would remain constant (R. 962), such as when drugs are given that cause vasodilation, which leads to pooling of blood in the veins. (R. 962.)

During the course of the trial, the appellant's counsel called Dr. Parrish's pump technician, Diane Nelson, who worked under the direction of the respondent surgeon, as to practices she employed while operating the heart-lung by-pass machine during course of the surgery.

Dr. Parrish's pump technician was merely trained to put the blood back into the body which came out. (R. 893, 1043.) However, if there is pooling of the blood in the veins, then it wouldn't return to the pump from the body and, therefore, the flow rate would go down. R. 905. Dr. Parrish used large amounts of morphine, which is a venous vasodilator, according to the testimony of Dr. Bailey; but Dr. Parrish didn't know whether it was a vasodilator or not (R. 905-06), and it is, therefore, reasonable to conclude that Dr. Parrish would be unaware of this effect causing a reduction of flow rates.

The plaintiff's evidence at trial was to the effect that according to the standard of care of capable, competent thoracic heart surgeons in similar localities, it was a departure from the standard of care to merely assure that the blood which came from the pump was pumped back into the patient and it was a departure from the standard of care to let the blood pressure drop down to the 30-35 range. According to the testimony of Dr. Charles Bailey, more precautions were required by the general community of thoracic

surgeons who practiced in similar localities. Dr. Bailey testified that it was incumbent upon the operating surgeon and his pump technician to:

1. Maintain a blood pressure above fifty millimeters of mercury during the time the heart-lung machine provides the blood flow and pressure, especially when the patient has a pre-operative blood pressure of 120 over 80, and a mean pressure of about 95 to 100. R. 1347-1349.

Although Dr. Parrish permitted the blood pressure to hover as low as 30, brain damage occurs when the mean pressure is allowed to be below 50 for any significant period of time. (R. 1848.)

2. Calibrate the blood flow going into the patient through the heart-lung pump and to maintain a minimum standard of flow to keep the brain and tissues alive.

Dr. Parrish's agent and pump technician kept a record of flows on a pump infusion record. She did not calibrate the machine, and the numbers recorded were so low that a human of Mr. Jenkin's size could not remain alive. (R. 1341 and 1343.) The flow rates recorded were stated by Dr. Parrish and Dr. Bailey to be in error. (R. 988-89, 1343.) The pump technician did not attempt to calibrate the pump machine, but, rather, relied on the calibration made years before by a former technician who calibrated the pump using a different sized tubing. (R. 1045-1048.)

Thus, the technician and the surgeon could not and did not know the rate of blood flow into the patient during surgery.

3. Assess and maintain a minimum flow rate of blood through the body from the heart-lung pump machine. The minimum blood flow necessary to prevent brain and tissue injury was high when the body temperature was high and was lower when the temperature of the brain and tissues were lower. (R. 1345-1347.)



Dr. Parrish reduced the blood flow before the brain temperature was cooled down to where it could survive on such flow (R. 1348), and warmed up the body before increasing the blood perfusion flow. (R. 1346.)

4. Assess the blood flow by direct measurement rather than by relying on blood pressure, which was not proportional to flow. (R. 1350-1351, 1354.)

Dr. Parrish and his technician relied on replacement of the blood which came out of the patient's body and on the patient's blood pressure to determine adequacy of flow. If the blood pooled in the patient's veins, or if the blood was lost through the hemorrhage which is part of surgery, then there would be reduced venous return and reduced perfusion flow. (R. 1351-1354.)

At the same time, the blood pressure may be up when blood perfusion flow (to the brain and organs) is down. (R. 1350-1351.) So, direct measurement of flow is necessary to prevent brain damage.

5. Measure the body temperature at a point which would reflect the brain temperature rather than the temperature of the inflow of cooling blood which was used to cool the body.

Dr. Parrish placed a thermometer in the esophagus next to the inflow of blood from the heart-lung pump. He should have used a rectal thermometer which more accurately reflects how much the body has been cooled. (R. 1343-1344.)

This is important where the surgeon artificially stops the patient's beating heart before the brain temperature has been reduced to a safe level. The heart-lung pump flow was so much lower than the normal flow put out by the heart that the brain would be endangered if the brain temperature were too high. (R. 1344-1347.)

Since Dr. Parrish's pump technician had been erroneously recording flow rates for several years, plaintiff proffered the testimony of Mr. Chen-

Dyson, a pump technician from San Diego and Los Angeles, who, as noted above, was well-qualified and who established a foundation that there was a national certifying organization of pump technicians known as the American Society of Extracorporeal Technicians. Mr. Dyson had attended numerous conferences and seminars for pump technicians and thoracic surgeons and had impressive credentials to establish the foundation that he was familiar with the practice of other pump technicians and that the field was not practiced by rugged individualists. The court sustained objections to his testimony based on lack of foundation where plaintiff's counsel could not qualify Mr. Dyson as an expert witness as to the standard of care expected of pump technicians in the same locality, that is, Salt Lake City.

The court did not allow the testimony of Charles Dyson, pump technician from San Diego and Los Angeles who had run some 1,500 pump runs (R. 1081), trained other pump technicians in both San Diego and Los Angeles, taught Cardiac Pulmonary Physiology at the college level (R. 1070), was certified by the American Society of Extracorporeal Technicians since 1970 (a society that meets regularly and publishes guidelines for standards of practice in the field of open-heart surgery). (R. 1064-67.) This national accrediting organization holds regional professional meetings and conferences just like physicians do. (R. 1068-70.)

Mr. Dyson had read numerous texts and medical periodicals concerning perfusion, attended numerous conferences and seminars for pump technicians and thoracic surgeons, was familiar with the Sarns heart-lung pump of the type used on the appellant (R. 1075-78), and had numerous other qualifications to testify as to the standards of a similar locality. (R. 1062-78, 1108-1113.) He was of the opinion that there was a minimum standard of practice among pump

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technicians throughout the country. (R. 1109.) But the trial court sustained an objection based on lack of foundation where plaintiff's counsel could not qualify his expert witness as to the standard of care in the same locality. (R. 1113.)

Before this, plaintiff presented evidence that Dr. Parrish and the other physicians who were practicing heart-lung by-pass surgery in Salt Lake City in 1972 were not trained in Salt Lake City for the performance of their surgery in general. Dr. Parrish admitted that the physicians were trained literally all over the country, and testified very clearly in the record that the standards of practice were based upon medical knowledge and experience from all over the country. (R. 1094-1103.)

Mr. Dyson was not permitted to testify as to the standards expected of a pump technician concerning the frequency of calibration of the heart-lung pump to determine what the actual flow rate was (R. 1119-20), as to what the flow rate would be on the machine if the machine had been calibrated to flow 1,100 cc's per minute with quarter-inch tubing and then the tubing was changed to 3/8-inch tubing, as occurred here (R. 1126), as to whether or not the esophageal temperature probe used in Mr. Jenkin's case accurately reflected the temperature of the body (R. 1139-41), and finally, the witness was not permitted to testify as to whether there was a minimum standard of practice among such pump technicians with regard to monitoring of blood pressure. (R. 1175-78.) This latter objection was sustained because of the framing of the question in terms of an area similar to Salt Lake City, rather than in Salt Lake City.

On the second day of trial, prior to asking plaintiff's expert witnesses concerning the standard of care, plaintiff's counsel had submitted

a detailed twelve-page brief (R. 113) which clearly sets forth the apparent law within the state of Utah in support of the Similar Locality rule. Counsel for the defendant doctor submitted no memorandum concerning the standard of care. Despite plaintiff's efforts in submitting the brief and advising the court of the apparent adoption of the similar locality rule, the trial court failed and refused to rule as to which of the two rules apparently applied (R. 1174), but, apparently, refused to allow evidence as to the standard of care in a similar locality, and rather pointedly enforced the strict locality rules.

The court required the appellant to show that his expert witnesses had experience and were familiar with the same local standard of care that existed in the Salt Lake City area (R. 1339) which standard, according to the respondent's expert medical witnesses (R. 1679-80, 1741-1746), required far fewer precautions, suggesting a lower standard of care than that enunciated by the appellant's expert medical witnesses, Dr. Charles Bailey, the cardiovascular surgeon from New York City, New York, and Charles Dyson, the pump technician from Los Angeles, California. Although Dr. Bailey did qualify and did give testimony under the strict locality rule (R. 1317-1318, 1340), since it was obvious that Dr. Bailey was not as familiar with the practice in Salt Lake City as the respondent's witnesses, who were actually practicing in Salt Lake City, the jury, in all probability dismissed Dr. Bailey's testimony regarding practice in Salt Lake City as less authoritative.

During the course of the trial, the court allowed a surprise witness, Dr. Russell Nelson, to testify, although his name had not been previously disclosed, as required at a prior pre-trial hearing held September 12, 1977, and also at empaneling of the jury at the commencement of the trial.

During the cross-examination of defense witnesses, Dr. Nelson and Dr. Hughes by plaintiff's counsel, the court refused to allow the plaintiff's counsel to cross-examine them as to whether their own procedures for operation of the heart-lung pump were the same as those of Dr. Parrish (R. 1716-17, 1747) and refused testimony concerning how the other heart surgeons operated their pumps.

## ARGUMENT

### POINT I

THE TRIAL COURT ERRED IN FAILING TO DISMISS A JUROR FOR CAUSE AND THEREBY FORCED THE PLAINTIFF TO WASTE ONE OF HIS PEREMPTORY CHALLENGES.

A. The trial court erred in failing to dismiss the prospective juror, Mrs. Eddins, for cause.

Rule 47(f)(6), Utah Rules of Civil Procedure, prescribes a challenge for cause upon the grounds, "That a state of mind exists on the part of the juror with reference to the cause, or to either party, which will prevent him from acting impartially and without prejudice to the substantial rights of the party challenging." During the course of the voir dire of the jury panel, a prospective juror, Judith T. Eddins, revealed personal relationships which would tend to make it difficult, if not impossible, for her to be impartial in this type of lawsuit. Her father was a medical doctor and, in addition, she had been married to a veterinarian who had been a defendant in a malpractice case. (T. 684). Mrs. Eddins was also a personal acquaintance of one of the defendant's expert witnesses, Dr. Robert Wray. (T. 678). When asked whether she could, in spite of these relationships, act impartially as a juror, she stated that she could not. (T. 700). The state of mind evidenced by Mrs. Eddins clearly comes within the provisions of Rule 47(f)(6), URCP, and she should have been dismissed for cause. The trial court erred in failing to do so.

This Court has consistently required that jurors sitting in judgment in this state be impartial and unbiased as mandated by Rule 47(f)(6), Utah Rules of Civil Procedure. In Crawford v. Manning, 542 P. 2d 1091 (Utah 1975), a prospective juror was challenged for cause when she indicated that she had strong feelings about wrongful death actions. The trial court in Crawford refused to dismiss the witness for cause, presumably because the witness stated that in spite of her feelings she could be an impartial and unbiased juror. This Court reversed holding that in spite of her expressed desire and ability to remain fair and impartial, she should have been dismissed for cause.

One doubts that a person who harbors strong feelings concerning anyone who would see to recover money for the death of another could be a fair and impartial juror. (Crawford, supra, at 1092.)

It is apparent from Crawford, supra, that when a prospective juror reveals a state of mind that would obviously make it doubtful that he or she could remain impartial and unbiased, such a person must be dismissed for cause to insure the integrity of the trial, even if the prospective juror in question affirmatively states that he or she could remain fair and impartial. In the instant case, Mrs. Eddins clearly expressed a biased state of mind, and worse, unlike the Crawford case where the prospective juror maintained she could remain impartial, Mrs. Eddins candidly revealed that she could not remain impartial.

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. (Emphasis added.)

As the transcript shows, there is no question but that Mrs. Eddins should have been removed for cause; she was biased and candidly said so. Thus, the facts in the instant case argue even more strongly for dismissal than those found in Crawford case.

In a more recent case, this Court reaffirmed its determination to assure that only impartial, unbiased jurors be empaneled. State v. Moore, 562 P.2d 629 (Utah 1977) presented the case of a prospective juror who was challenged for cause.



when he stated that he did not know for certain whether he could act impartially in arriving at a verdict. The trial court refused to excuse the prospective juror for cause. This Court, as in Crawford, again reversed and remanded the case, holding that the trial judge erred in failing to dismiss the prospective juror for cause since he could not state affirmatively that he could act impartially as a juror. Note that in Moore, supra, there were sufficient grounds to compel a dismissal for cause when the prospective juror simply could not state whether or not he could act impartially. And in Crawford, supra, even though the prospective juror affirmatively stated that she could be impartial in spite of her strong feelings against the type of case involved, the Court held that she should have been removed for cause. As pointed out above, in the instant case Mrs. Eddins not only expressed bias and prejudice, she actually stated she would have difficulty remaining impartial. Clearly under Rule 47(f)(6), and the Crawford, supra, and Moore, supra, decisions, Mrs. Eddins should have been dismissed for cause; the trial court committed reversible error in failing to do so.

B. The trial court's failure to remove the prospective juror, Mrs. Eddins, for cause prejudiced the Plaintiff in that he was forced to waste one of his peremptory challenges to remove her.

Despite the fact that the prospective juror, Mrs. Eddins, expressly indicated that she could not remain impartial,



(R. 700), the trial judge declined to remove her for cause and it became necessary for the Plaintiff to remove her by use of one of his three peremptory challenges. In the case of Crawford v. Manning, 542 P.2d 109 (Utah 1975) this Court held that a party should not be compelled to waste a peremptory challenge on a juror who should have been excused for cause. In Crawford, supra, the appellant used one of his three peremptory challenges to remove a prospective juror whom the trial court should have removed for cause but refused to do so. Upon review, this Court found that the prospective juror evidenced actual bias compelling her removal. When the trial court failed to remove the prospective juror in question, the Plaintiff was prejudiced in that he was forced to waste a peremptory challenge to accomplish that which the trial court should have done. This Court reversed and remanded on that ground, stating:

A party is entitled to exercise his three (3) peremptory challenges upon impartial prospective jurors, and he should not be compelled to waste one in order to accomplish that which the trial judge should have done. (Crawford, supra, at 1093.)

The Utah Supreme Court has dealt with the same issue on two occasions since the Crawford, supra, case was decided in 1975. On both occasions the court has affirmed its decision in Crawford. In State v. Moore, 562 P.2d 629 (Utah 1977) the trial court refused to excuse a juror for cause after the juror indicated actual bias. The defendant then exercised one of his peremptory challenges to excuse the juror. The Court, relying on Crawford,

supra, held that the juror should have been dismissed for cause, but since he was not, the defendant was forced to waste one of his peremptory challenges to have the juror excused. The Court further held that such was prejudicial error, and the defendant was granted a new trial.

In State v. Brooks, 563 P.2d 799 (Utah 1977) this Court again held that when a trial judge improperly refused to excuse a juror for cause, thus forcing a party to waste one or more of his peremptory challenges, that party has been prejudiced and will be granted a new trial. In Brooks, two jurors were challenged for cause on the basis that they were personal friends with key witnesses for the prosecution. The trial court, having refused to excuse the jurors in question, forced the defendant to waste his peremptory challenges to remove them. The Supreme Court, relying on Crawford, supra, reversed and remanded the case for a new trial stating:

Defendant was entitled to four peremptory challenges (77-30-15[b]) all of which he exercised. However, since he had to use two of the four peremptory challenges to remove the two jurors he challenged for cause, he was effectively deprived the use of two he might have used to remove other jurors whom he so desired. Under such circumstances, there was prejudice. (Brooks, supra, at 801.)

A recent Arizona case found the Utah Court's reasoning in Crawford v. Manning, supra, sound and relied thereon in reaching the same result as the Utah Court did in

Crawford. In Wasko v. Frankel, 569 P.2d 230 (Ariz, 1977), which, like the instant case, involved a claim for medical malpractice, the trial court declined to excuse a prospective juror challenged for cause, after he had made statements indicating he was biased. The plaintiff used one of his peremptory challenges to remove the juror. The court held that such circumstances prejudiced the plaintiff and necessitated a new trial. In so holding that Court said:

Peremptory challenges form an effective method of assuring the fairness of a jury trial. Hence, forcing a party to use his peremptory challenges to strike jurors who should have been stricken for cause deprives the litigant of a substantial right. (Wasko, supra, at 232.)

In the instant case, as in Crawford, supra, Moore, supra, and Wasko, supra, the challenged prospective juror clearly should have been removed for cause but the trial court failed to do so. And, as in the above cases, the Plaintiff was forced to "waste" one of his peremptory challenges to "accomplish that which the trial court should have done." The Plaintiff was prejudiced as a result and must be granted a new trial.

When the appellant argued the motion for a new trial and pointed out the error of the trial court concerning the failure to dismiss this juror for cause, the court took the position that appellants did not ask for a hearing or trial when the challenge was made against Mrs. Eddins for cause (R. 553). Such a hearing was in fact held in the

trial court's chambers, testimony was taken, and that testimony was certainly sufficient to demonstrate the prospective juror's bias and prejudice.

## POINT II

THE TRIAL JUDGE ERRED IN REQUIRING THE PLAINTIFF TO PROVE HIS CASE CONCERNING THE STANDARD OF MEDICAL CARE WHICH GOVERNED DEFENDANT'S CONDUCT ACCORDING TO THE STRICT LOCALITY RULE, RATHER THAN THE SIMILAR LOCALITY RULE.

During the course of the trial, counsel for the plaintiff called Charles Dyson, of San Diego and Los Angeles, California, an eminently well-qualified heart-lung by-pass pump machine technician, as an expert in the use of said machine. Testimony was elicited showing the witness to be an expert, knowledgeable in the minimum standard of care in respect to the use of the said pump machine in 1972 in localities similar to Salt Lake City, Utah. Plaintiff's counsel propounded a series of questions to the witness concerning the minimum standards in locales similar to Salt Lake City, but upon objections from defense counsel, the witness was not allowed to testify to these standards. (R. 1171-1179.) Although the trial court explicitly refused to give a reason for not allowing the witness to respond (R. 1172, 1173), it is apparent, from the defense counsel's voir dire of the witness that the court refused to apply the "similar locality" rule to expert testimony and instead tenaciously and without justification imposed the "strict locality" rule.

The courts of the United States have used four basic approaches in establishing the standard of care to be required of physicians and surgeons. They have variously required that such practitioners exercise the skill and care of physicians in good standing in (1) the defendant's same locality (strict locality rule); (2) the defendant's same general neighborhood (same general neighborhood rule); (3) localities similar to defendant's (similar locality rule); or (4) the medical profession (national standard rule).

Annot., 37 A.L.R. 3d 420 (1971); D. Louisell and H. Williams, 1 Medical Malpractice, 8.06 (1973).

The "strict locality" rule was favorably adopted by some early courts in this country. Baxter v. Snow, 79 Utah 817, 2 P.2d 257 (1931). At the time of its first adoption, there was a rational basis for the application of such a rule, in many instances. At a time when communication and travel was more primitive, when there were fewer medical schools and they were located in a few large cities, and a majority of doctors were general practitioners who were isolated from major medical centers, it was unrealistic to scrutinize the standard of care of such local-community general practitioners by use of experts who were unaware of the limitations within that community. For an expert from a major medical facility to sit in judgment of a local doctor having limited facilities and little, if any, access to the most recent developments at the major facilities, could result in some injustice.

Happily, times have changed. Travel and communication has vastly improved over the years and medical science has made great advancements. Whole new areas of medical knowledge have developed into specialized fields. Most, if not all, experts receive their advanced expert training from major medical facilities. There is almost instant communication among practicing experts of advancements and discoveries made in their respective fields through professional journals and seminars. Experts regularly seek national certification. In such an atmosphere, the application of a strict locality rule makes no sense. Experts practicing in their discipline all have access to the same knowledge, techniques and advancements, and any qualified expert is in a position to know what is acceptable practice within the field of expertise in question and what is not. Certainly any physician who is practicing in a field as specialized as cardiac by-pass surgery in a major city such as Salt Lake, and holds himself out as a nationally-trained and

board certified expert should not be insulated from the just criticism of his qualified fellow experts who practice at similar medical centers.

The majority of jurisdictions in the United States have long embraced a test which holds a defendant practitioner to the standard of skill and care ordinarily observed by other physicians in good standing in the defendant's same or a similar locality. Annot. 37 A.L.R. 3d. 420 426 (1977); King and Coe, The Wisdom of the Strict Locality Rule, 3 Balt. L. Rev. 221, 222 (1974). Similar locality is defined not by socioeconomic and geographic factors but by the similarity of medical factors such as medical schools, teaching hospitals and research and laboratory facilities in the locality to be compared. See Cook v. Lichbalu, 144 So. 2d 312 (Fla. Dist. Ct. App. 1962); Sampson v. Veenboer, 252 Mich. 660, 234 N.W. 170 (1931); Cavallero v. Sharp, 84 R.I. 67, 121 A.2d 669 (1956); Teig v. St. John's Hospital, 63 Wash 2d 369, 387 P.2d 527 (1963). See also 40 Fordham L. Rev. 435, 439 (1971); 14 Stan. L. Rev. 884, 890 (1962).

The following is a particularly good description of the proper factors to be considered in determining an expert's qualifications under the similar locality rule:

"The modern view of a majority of courts is that a medical expert is free to testify in a malpractice case if his community or other communities with which he is familiar bear sufficient similarity to that of the defendant. And in determining similarity the courts will not now look to such socioeconomic 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 facilities 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. Of course the nature of the community in which the witness currently practices is irrelevant if he happens also to possess familiarity with standards in the defendant's locale or in areas sufficiently similar to it." Waltz. 18 DePaul L. Rev. 408 at 415.

The above rule is not foreign to the traditional notion of justice in tort law. As Justice Crockett pointed out in the recent case of Swan v. Lamb, Utah, 584 P.2d 814 (1978), the proper application of the "similar locality" rule is "but a specialized application of the standard of conduct so universally imposed by the law: of requiring the degree of care which the ordinary, reasonable and prudent person would observe under the same or similar circumstances." Swan v. Lamb, supra at 819. Thus, experts practicing in the same field of expertise, having access to the same fund of knowledge, receiving the same or similar training at similar medical facilities are quite properly qualified to testify concerning the applicable standard of care. The Tenth Circuit Court of Appeals, in the case of Riley v. Layton, 329 F.2d 53 (10th Cir. 1964), some fifteen years ago, in applying Utah law, embraced the "similar locality" rule. Justice Crockett, in Swan v. Lamb, supra, indicated that the Tenth Circuit was correct in doing so.

The facts of the instant case clearly call for the application of the similar locality rule. The defendant, Dr. Parrish, was trained in New York City ( R. 836 ), and he holds himself out as practicing by national standards of care. He was Board Certified to meet minimum national standards of practice and competency in 1957 (Depo. #1, p. 6). The basis of cardiovascular surgery in Salt Lake City is not dependent upon what thoracic surgeons do in Salt Lake City alone. Dr. Parrish claims he has taken the usual steps to keep abreast of medical developments from all over the country and to conform his practice to those standards. He is a member of several national societies of heart doctors, including the Society of Thoracic Surgeons, the American College of Chest Physicians, the American College of Cardiology and the Trudeau Society (Depo. #1, p. 5). He is also a member of the American Medical Association and of the various regional medical groups



In order to keep up in this field, he subscribes to the Annals Thoracic Surgery; Journal of Thoracic and Cardiovascular Surgery; Chest; Circulation; American Journal of Cardiology; and the Archives of Surgery. All of these publications are edited and distributed on a national basis to similar doctors throughout the country.

The standards of practice of doctors in New York City and other parts of the country are not foreign to Dr. Parrish; he has attended post-graduate courses at Mount Sinai Hospital in New York City (Depo. #1, p. 9), as well in Bermuda (Depo. #1, p. 9), and in places all over the country and out of country (Depo. #1, p. 9).

He has observed the practice of cardiovascular surgery using a by-pass pump at hospitals in New York City at Roosevelt Hospital, New York Hospital, and Mount Sinai Hospital, and at hospitals in Texas and in various parts of California. (R. 840, 841.) His observations at these institutions were applied as a basis for his practice at Holy Cross Hospital (Depo. #1, pp. 14-15). Dr. Parrish holds himself out to be practicing at standards of quality of care which were comparable to the above institutions (Depo. #1, pp. 14-15).

It is, thus, very obvious that Dr. Parrish has held himself out to be keeping abreast of the significant changes in the practice of surgery by taking advantage of the available medical knowledge from all over the country. It is also apparent that the basis for his practice of medicine is not his limited experience in Salt Lake City, Utah. Indeed, one could rationally claim that a doctor who did not take advantage of the medical knowledge and experience in other areas in a field as sophisticated as cardiovascular surgery would be negligent in not taking advantage of the available medical knowledge. It is quite clear, then, that in applying the "medical factors" the courts consider with respect to the "similar locality" rule, that is,

similar medical facilities, experience and training, and considering that Dr. Parrish practices in Salt Lake City at some of the finest facilities in the country, he ought to be held to a standard consistent with that of other similarly well-qualified competent cardiovascular surgeons practicing at similar facilities in similar communities.

As indicated above, the appellant called Mr. Charles Dyson to testify as to the standard of care in the use of a heart-lung by-pass pump machine. Mr. Dyson is a highly qualified pump technician who has performed over 1,500 "pump runs" during by-pass surgeries. (R. 1061.) He is a certified perfusionist by the American Society of Extracorporeal Technicians. (R. 1065.) He has taught courses related to perfusion technology. (R. 1070.) He has attended seminars and listened to speakers throughout the country. (R. 1069-71.) He is familiar with perfusion technology throughout the country and in Salt Lake City. (R. 1071.) Nevertheless, the court imposed the strict locality rule, which prevented this expert witness from giving his opinion concerning the standard of care in a similar locality. Had the plaintiff's witness 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 by-pass pump machine. By refusing to allow such testimony, the plaintiff was prevented from presenting to the jury the very heart of his case. The court's failure to allow the jury to judge the defendant doctor's care of the plaintiff by the standard of care in similar localities was clearly prejudicial error.

Later in the trial, the appellant called another expert witness, Dr. Charles Bailey. Dr. Bailey and the respondent Dr. Parrish have both received training in New York. (R. 836, 1368-69.) Dr. Bailey is the author

of a text on thoracic surgery (R. 1311), has over two hundred articles on thoracic and cardiac surgery to his credit. (R. 1313.) His qualifications are set forth in the Statement of Facts. (See also R. 1309-1322, etc.) In spite of the fact that the respondent testified that he had nationwide training and held himself out as subscribing to national standards, and despite the fact that the appellant's expert, Dr. Bailey, and the respondent both received their training in New York, Dr. Bailey was not allowed to testify as to the standard of care in similar localities. Dr. Bailey was eventually allowed to testify as to the standard of care practiced in Salt Lake City as he could testify to some familiarity with the practice of cardiovascular surgery in Salt Lake City. However, as he was not actually engaged in medical practice in Salt Lake City, as were the defendant's experts, Dr. Russell M. Nelson and Dr. Richard K. Hughes, Dr. Bailey's testimony about the minimum standard of care adhered to by Salt Lake cardiovascular surgeons was, in all likelihood, viewed by the jurors as less authoritative than the defendant's Salt Lake City-based expert witnesses. Much of the effectiveness of Dr. Bailey's testimony was diluted by requiring foundational questions which tended to show minimal actual experience and familiarity with the same locality, vis a vis the Salt Lake City, Utah, area.

The net effect of the employment of the same locality rule was that the respondent's expert witnesses testified to a much lower standard of care and tended to better qualify by having more experience in the Salt Lake City area, as they had actual practice within the area.

In the recent case of Swan v. Lamb, Utah, 584 P.2d 814 (1978), this Court held it reversible error to apply the "same locality" rule where the "similar locality" rule should have been applied. The facts in the present case are very similar. Both cases dealt with highly specialized areas of medical expertise for which there were national standards; in Swan it was

spinal surgery, and in this case it is cardiovascular by-pass surgery. In both cases experts were offered who were highly regarded nationally-renowned surgeons. In both cases the experts had had wide experience concerning the practice of their specialty throughout the country. In both cases the defendant doctors were practicing at and associated with major medical facilities in Salt Lake City, facilities that are highly regarded throughout the country. The reasoning of the Court in Swan is just as applicable to the instant case:

"There is no reason to hold that doctors in Salt Lake City who profess to be experts in the field of surgery or medicine should not be held to the standards of care exercised by experts in the same field in cities of comparable size and throughout the medical profession." Swan, supra at 817.

In that opinion, Justice Ellett went on to say:

"Our quality of medical care in Utah rates with the best in the nation. Our hospitals are among the finest with the most recent technology, and the medical college at the University of Utah enjoys an outstanding reputation. In addition, doctors practicing their profession here come from various medical colleges throughout the nation. Medical journals are available nationally as are seminars and workshops. There is no need for doctors here to have a lower standard of care than that of other doctors who are practicing in similar localities. Indeed, it is doubtful that any physician in the State of Utah would be willing to admit that his skill and knowledge is not equal to any other physician trained in his field, or that his ability is less than that of doctors trained and practicing in other cities." Swan, supra at 817.

The trial court's refusal to allow Dr. Bailey to testify as to the standard of care of practicing cardiovascular surgeons in similar communities and Mr. Charles Dyson concerning the standard of care in similar communities in the use of by-pass pump machines constituted prejudicial error. As in Swan, the trial court's error calls for a reversal and a new trial.

### POINT III

PLAINTIFF WAS DENIED A FAIR TRIAL BECAUSE THE TRIAL COURT FAILED TO ALLOW OBJECTIONS CONCERNING JURY INSTRUCTIONS TO BE MADE DIRECTLY TO THE COURT.

A. Objections must be both timely and specific.

The trial court did not allow the plaintiff to make known to the court his objections to jury instructions, but rather required the objection be made to the court reporter.

Rules 46 and 51 of the Utah Rules of Civil Procedure outline the procedure for making objections to jury instructions. Under Rule 46 it is no longer necessary to make formal exceptions concerning claimed error in jury instruction. What Rule 46 does require is that a party make "known to the court" his objection and his grounds therefore. Rule 51 adds the further requirement that the objection must be made before the instructions are given to the jury, if the instructions are to be given in writing, or at least before the jury retires, if the instructions are to be given orally. Rule 51 further amplifies the requirement of Rule 46 by mandating that objections to instructions not only must be made, but must be made with specificity. Thus for any claimed error regarding jury instructions, (1) an objection must clearly be made, (2) the objections must be made in a timely manner, and (3) the objection must specifically state the grounds of the objection. Failure to make a timely, specific objection to a claimed error in the instructions will ordinarily result in the appellate court's refusal to review the claimed error. Cordner v. Cl  
Inc. 15 Utah 2d 86, 387 P.2d 685 (1963); In re Richards, 5 Utah 2d 106, 297 P.2d 542 (1956), Johnson v. Simons, Utah, 551, P.2d 515 (1976).

B. Purpose of the Rule.

When Rules 46 and 51 are read together it is quite clear that what is important is not the taking of a formal exception but making known to the trial court the exact reasons of the objections at a time when an error can be corrected. In speaking to the purpose of the rule requiring timely, specific objections to the trial court's giving or refusing to give certain jury instruction, the Utah Supreme Court has stated:

One of the purposes in requiring counsel to make objections to instructions in the trial court is to bring to the attention of the court all claimed errors in the instructions and to give him an opportunity to correct them if he deems it proper. Employers Mut. Liability v. Allen Oil Co., 123 Utah 251, 258 P.2d 445 (1953) at 450.

And in Pettingill v. Perkins, 2 Utah 2d 266, 272 P.2d 185 (1954), the court emphasized the need to keep the trial as free from error as possible by making a proper, timely and specific objection so that the trial court can correct any error:

Generally appellate courts will not review a ground of objection not urged in the trial court. The duty is incumbent upon counsel to give the trial court the opportunity to correct the error before asking the appellate court to reverse a verdict and a judgment thereon. Pettingill, supra, at 186.

Most, if not all, jurisdictions in this country, have adopted procedural rules similar to Rules 46 and 51 of the Utah Rules of Civil Procedure, requiring objections to jury instructions to be timely and specific so that the trial judge can correct any error and thereby avert a mistrial or unnecessary appeal. See, for example, Michie v. Calhoun, 84 Ariz. 270 336 P.2d 370 (1959); In re Site for Civic Center, 54 Wash. 2d 387, 341 P.2d 148 (1959); Tapia v. Panhandle Steel Erectors, Co., 78 N.M. 86, 428 P.2d 625 (1967); Lathrop v. Smith, Nev., 288 P.2d 212 (1955); Phillips v. Komornic, 159 Colo. 335, 411 P.2d 238 (1966); Edwards v. Harris, Wyo., 197 P.2d 87 (1964); Ross v. Guthbert, 239 Or. 429, 397



P.2d (1964); Robinson v. Kathryn, 23 Ill. App. 5 2d, 161 N.E. 2d 477 (1959)

Rule 51 of the Federal Rules of Civil Procedure, after which Rule 51, URCP, is patterned, requires that objections be timely and specific. commenting on the purpose of the rule, Professor Wright, in his treatise of Federal Courts (3rd Ed.), at p. 465, states:

Rule 52 precludes a claim of error for giving an improper instruction, or failure to give a proper one, unless an objection has been taken, stating distinctly the grounds of the objection, before the jury retires. Thus the judge is made aware of the supposed defect in the instructions while he still has an opportunity to correct it.

And in 5A Moore's Federal Practice, paragraph 51.04, it states:

The Rule does not require formality, and it is not important in what form an objection is made or even that a formal objection is made at all, as long as it is clear that the trial judge understood the party's position; the purpose of the Rule is to inform the trial judge of possible errors so that he may have an opportunity to correct them. (at 2521)

C. The purpose of Rules 51 and 46 is undermined if the trial judge refuses to listen to counsel's proper objections.

It is clear from the above that what is contemplated by Rules 51 and 46 is an exchange between opposing counsel and the trial judge so that the judge can be fully informed by counsel of their respective opinions concerning claimed error in the jury instructions. Thus, having been fully appraised by counsel, the court can make a more informed ruling and avert possible error. In the instant case the trial court did not allow such an exchange to take place. Plaintiff was denied an opportunity to make his objections to the court; instead, the court absented himself and required plaintiff to make his objections to the court reporter (R. 1827-39). Such a procedure undermines the intent and the purpose of Rules 51 and 46. Such a procedure is a mere formality, a technical exercise in making and preserving a record for appeal. It does not work to make the trial as error-free as possible. It cannot work to inform the trial judge of the claimed error, for the judge is not present. It does, in fact, result in

antithesis of the intended effect envisioned in Rules 51 and 46: whereas Rules 51 and 46 attempt to eliminate formality and work toward an error-free trial by informing the judge of possible error, the procedure followed in the present case is a meaningless formality with no possibility of informing the judge of error.

In United States v. Certain Property Interests in Property in Borough of Brooklyn, 326 F.2d 109 (3rd Cir. 1964), the court expressly recognized that Rule 51, FRCP (upon which Rule 51, Utah Rules of Civil Procedure, is patterned), not only requires that counsel state distinctly and specifically the grounds for his objections, but also requires that the court afford counsel an opportunity to explain its objections. In so ruling, the court said:

We emphasize that 51 of the Rules of Civil Procedure explicitly permits a party to state distinctly the matter to which he objects and the grounds of his objection. One significant purpose of the rule is to allow the [trial] judge to correct any errors in his charge brought to his attention by any of the parties. Unless the court permits the parties to explain their objections, this important purpose of Rule 51 cannot be effectuated. (emphasis added) Certain Property Interests, supra, at 118.

Rules 51 and 46 clearly intend that the trial court give to counsel an opportunity to explain to him their objections with such specificity that he can fully understand that nature of any potential error. Such a procedure is the premise upon which the requirement of timeliness and specificity are based. As noted above in Employers Mutual Liability, supra, the Utah Court stated that:

One of the purposes in requiring counsel to make objections to instructions in the trial court is to bring to the attention of the court all claimed errors. (at 450, emphasis added)

How can counsel "bring to the attention of the court all claimed errors" if the court will not listen? In Kesler v. Rogers, 542 P.2d 354 (Utah 1975), the trial court refused to consider a claimed error with regard to jury instructions because "there was no clear and correct statement to the court as to what instruction defendant desired in that regard." (at 358, emphasis added) Here again the court expressly recognized that to satisfy the Rules, the objections



must be made "to the court". Unless the potential error is actually "made known to the court", the result intended by Rules 51 and 46 will be frustrated. Courts in other jurisdictions who follow rules similar to our own Rules 46 all clearly recognize that the trial court must actually be made aware of the claimed error. In Tapia v. Panhandler Steel Erectors Co., 78 N.M. 86, 462 (1967) the court said:

The specific vice in the instruction must be pointed out so as to leave no doubt that the court's mind was actually alerted to it. (at 632, emphasis added.)

In State v. Compton, 57 N.M. 227, 257 P.2d 915 (1953), the New Mexico court further stated:

The primary purpose of any objection of an instruction is, of course, to alert the mind of the judge to the claimed error contained in it. This fundamental purpose must be read into any and all rules on the subject. (at 921, emphasis added.)

Such a purpose is indeed fundamental to Rules 51 and 46, but the purpose is impossible to carry out if, as in the instant case, the trial court refuses to have his mind alerted. In Saxton v. Harris, 395 P.2d 71 (Ala. 1964) the Alaskan Supreme Court stated:

The purpose of this rule is to enable the trial judge to avoid error by affording him an opportunity to correct his charge before it goes to the jury. The dictates of the rule are satisfied only if the judge is clearly made aware of the alleged error in an omission from the instructions. (at 73, emphasis added.)

See also Ross v. Cuthbert, 239 Or. 429, 397 P.2d 529 (1964); Lathrop v. State, 288 P.2d 212 (Nev. 1955); Lucero v. Torres, 67 N.M. 10, 350 P.2d 1028 (1961).

It is clear from the above that the dictates of Rules 51 and 46 of the UCRP are not satisfied unless counsel make their objections in a timely and specific manner. It is equally clear that the trial court must listen to and weigh objections, weigh them carefully, and correct any error in time to avoid the necessity of appeals and retrials. In the instant case, Plaintiff attempted to object to the instructions in a timely manner, but the trial court did not fully comply with Rules 51 and 46, but the procedure followed by the tri

by absenting himself when the objections were made, denied the Plaintiff the opportunity to explain his objections as required by the rules, and in so doing, denied Plaintiff a fair trial.

#### POINT IV

THE TRIAL COURT ERRED WITH RESPECT TO THE FOLLOWING JURY INSTRUCTIONS:

A. The Trial Court erred in giving Instruction No. 12 dealing with the standard of care and who may testify thereon.

The second paragraph of jury instruction No. 12 states as follows:

The only way you may properly learn such a standard, and thus determine whether or not the doctor conformed to it, is through evidence presented during this trial by physicians testifying as expert witnesses who knew or (sic) that standard as it existed at that time.

This instruction instructs the members of the jury that only the testimony of a physician can be relied on to determine the standard of care. While such is quite often the case in medical malpractice litigation, it is not always so. As more and more sophisticated machines are employed in medical procedures, technicians who are trained experts in the use of such machines are used to operate them.

In the present case Mr. Charles Dyson, a highly qualified heart-lung by-pass pump machine technician testified for the plaintiff concerning the physiology involved with the by-pass pump machine and the proper use of said machine. Mr. Dyson is quite clearly a highly knowledgeable expert in the field of by-pass pump machines. (R. 1081) By instructing the jury that only the

testimony of expert physicians could be relied 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. Such an instruction prejudicially harmed the appellant and denied him a fair trial.

B. The Trial Court erred in that Instruction No. 11 failed to include essential elements of the appellant's theory of the case.

The second paragraph of Instruction No. 11 states as follows:

The plaintiff claims that the defendant failed to exercise such required care, skill and diligence in the operation of the heart-lung by-pass machine, or in failing to properly train and supervise his perfusion pump technician.

Such a statement is a wholly inadequate statement of the appellant's claims. The appellant has the right to have his theory of the case presented to the jury, but such an instruction, which purported to set forth the appellant's claims failed to do so.

The appellant claimed that the pump was not properly operated, but more importantly, the appellant claimed that the respondent and his pump technician failed to properly monitor the appellant while using the pump machine. It is quite conceivable that the jury found that the pump was physically operated within the standard of care, but had they been so instructed, there was sufficient testimony that they would have likely found that certain necessary precautions were not taken, among which were the following:

1. Failure to properly obtain arterial and venous blood gas tests throughout the operation;
2. Failure to properly monitor the patient's temperature.

The court failed to instruct on the above important theories of the appellant's case, and such failure constituted prejudicial error.

C. The trial court erred in failing to give the appellant's requested instructions Nos. 6 and 7.

The appellants requested the following instructions regarding use of depositions in trial:

Appellants requested Instruction No. 6:

In the present action certain testimony has been read to you by way of deposition. You are instructed that you are not to discount this testimony for the sole reason that it comes to you in the form of a deposition. It is entitled to the same consideration on your part with reference to its weight as if the witness had personally appeared.

Appellants requested Instruction No. 7:

In the present action certain testimony has been given to you by way video television. You are instructed that you are not to discount this testimony for the sole reason that it comes to you in the form of a video television. It is entitled to the same consideration on your part with reference to its weight as if the witness had personally appeared.

For various reasons it is sometimes necessary to use deposition trial rather than live testimony. It is likely that members of the jury tend to discount testimony by deposition in comparison to live testimony. Witnesses they can see and hear. However the party offering testimony by deposition has the right to have such testimony weighed in the same manner as live testimony. Testimony by deposition should not be given greater or less consideration simply because it is testimony by deposition and the jury should properly be so instructed.

In the instant case the appellant offered testimony by deposition recorded both in written form and in video television form. The above requested instructions were particularly important with respect to the video deposition as such a manner of presenting evidence is a rather new and novel procedure. It is quite likely that members of the jury, unless explicitly instructed otherwise, would give less credibility to evidence seen on a television screen.

The appellant was entitled to an instruction on the use of deposition testimony, and the courts failure to so instruct prejudiced the appellant.

POINT V

THE DEFENDANT DOCTOR HAVING REFUSED TO RECOGNIZE ANY MEDICAL TEXT AS AUTHORITATIVE, THE TRIAL COURT ERRED IN REFUSING TO ALLOW PLAINTIFF'S EXPERT TO AUTHENTICATE AUTHORITATIVE MEDICAL

Near the outset of the trial, the plaintiff called the defendant Doctor Parrish, as an adverse witness. During the course of plaintiff's examination of the defendant doctors, plaintiff's counsel questioned the defendant doctor concerning medical text books authored by several eminent heart surgeons. (R. 841-46) The defendant doctor evasively refused to acknowledge any of the experts or their medical texts. Indeed the trial court consistently sustained objections to foundational questions which were clear going to the authentication of medical texts. (R. 841-46) Counsel for plaintiff repeatedly attempted to lay a foundation concerning several texts but each time the trial court refused to allow such questions. Counsel for plaintiff offered to make a proffer of proof concerning authoritativeness of the medical texts in questions. (R. 846) Nevertheless the court refused to allow plaintiff's counsel to pursue such a line of inquiry even though it was a cross-examination of the defendant doctor.

Later in the trial, counsel for plaintiff attempted to authenticate medical text books by testimony from plaintiff's expert witness, Dr. Charles Bailey. (R. 1379-1383) The trial court repeatedly refused to allow questions as to the authenticity of prominent medical texts. (R. 1379-83) Counsel for plaintiff then made the following proffer:

MR. DIXON: Your Honor, the plaintiff would like to proffer to the Court at this time that Dr. Bailey would have authenticated a number of medical textbooks related to bypass surgery, extracorporeal circulation, surgery of the chest, and related matters that would all be textbooks which Dr. Bailey

authenticate as being regarded as reliable authorities by himself and other physicians and that are generally accepted in the field as accurately reflecting the state of the art as of the times that these were published.

The plaintiff would have--or, the plaintiff proposed to authenticate them through this witness so that the textbooks could be used in cross-examination of defense witnesses inasmuch as it's quite apparent that Dr. Parrish is unwilling to authenticate anything.

And Dr. Parrish has no textbooks of any current value, most of his textbooks relating back to before 1960.

I'll be happy if the Court would like to bring in all of the textbooks and--

THE COURT: The proffer is in the record. The Court's ruling remains the same in connection with the matter, Mr. Dixon.

It is quite apparent from the record that counsel for the plaintiff intended to use authoritative medical texts for purposes of cross-examination of the defendant doctor and the defendant doctor's experts. The refusal of the defendant, Dr. Parrish, to authenticate any of the standard texts on heart by-pass surgery is clearly documented. In the face of such recalcitrance, counsel for plaintiff attempted to authenticate these medical texts through his own expert, but was not allowed to do so. Had the appellant been allowed to use the texts in question, on cross-examination, he would have shown that the respondent doctor was negligent in performing, as he did, the by-pass surgery on Mr. Jenkins. The trial court's refusal to allow counsel for the appellant to question the respondent concerning the authenticity of medical texts was prejudicial error. Likewise, the trial court's refusal to allow appellant to then authenticate medical texts by his own expert witness constituted prejudicial error and denied the appellant a fair trial.

The traditional rule is that medical texts are not admissible to prove the truth of statements contained therein, but the use of medical texts in cross-examining medical experts is almost universally recognized. 6 Wigmore, Evidence, (3rd ed. 1940) §§1690-1700; McCormick, Evidence, §296; 60 ALR. 2d, 77. Even in the states still clinging to the traditional approach, an expert witness may be cross-examined to determine whether or not he recognizes certain



medical texts or treatises as authoritative. If the expert recognizes the text or treatise as authoritative, that text or treatise may then be used to impeach, contradict, impeach and discredit the witness.

In the instant case, as pointed out above, counsel for appellant was not even allowed to ask the respondent doctor, who is an expert, foundational questions as to the authenticity of certain medical texts, let alone whether the respondent doctor considered such texts to be authoritative. (R. 841-846.) Even under the strictest application of the traditional rule regarding the use of medical texts, the trial court wrongfully and prejudicially cut off the examination of the respondent doctor.

Since the trial court effectively blocked all cross-examination of the respondent doctor by the use of medical texts in that it allowed him to refuse to concede whether a text was authoritative or not, counsel for the plaintiff attempted to authenticate the medical texts through his own expert witness. This the trial court refused to allow, apparently applying the traditional rule concerning the manner in which medical texts may be authenticated. A great many courts are increasingly breaking away from strict application of the traditional rule regarding authentication of medical texts and their use in cross-examination of medical experts. The United States Supreme Court long ago rejected the rigid traditional approach in the case of Reilly v. Pinkus, 365 U.S. 269 (1949). In Reilly the appellant was not allowed to use for purposes of cross-examination, certain medical texts which were otherwise shown to be reliable, because the respondent's expert witnesses refused to authenticate them. In granting a new trial, the Court said:

"...It has been pointed out that the doctors' expert evidence rested on their general professional knowledge. To some extent their knowledge was acquired from medical textbooks and publications, on which these experts placed reliance. In cross-examination respondent sought to question these witnesses concerning statements in other medical books, some of which at least were shown to be respectable authorities. The questions were not permitted

We think this was an undue restriction on the right to cross-examine. It certainly is illogical, if not actually unfair, to permit witnesses to give expert opinions based on book knowledge, and then deprive the party challenging such evidence of all opportunity to interrogate them about divergent opinions expressed in other reputable books." (388 U.S. 269, 275)

A large number of state courts have, either by judicial decision or state statute, rejected the strict application of the traditional rule and adopted the procedure of allowing cross-examination by use of medical texts authenticated either by another expert witness or authenticated by judicial notice. See, for example, Illinois: Darling v. Charleston Community Memorial Hospital, 33 Ill. 2d 326, 211 N.E. 2d 253 (1965); Nebraska: Oliverius v. Wisks, 107 Neb. 821, 187 N.W. 73 (1922); Texas: William Cameron Company v. Downing, Ct. Civ. Appls., 147 S.W. 2d, 963 (1941); Washington: Dabroe v. Rhodes, 64 Wash. 431, 392 P.2d 317 (1964); Florida: City of St. Petersburg v. Ferguson, Dis. Ct. Appls. 2d, 193 So. 2d 648 (1967). In addition, the Hawaii court has indicated that it will establish such a rule when the issue is properly brought before it: Tittle v. Hurlbutt, 53 H. 526, 497 P.2d 1354; and Michigan has indicated a willingness to allow authentication by judicial notice: Jones v. Bloom, 388 Mich. 98, 200 N.W. 2d 196. The following states have adopted the more flexible approach by statute: Nevada (Nev. Rev. Stat. §51.255 (1973)); New Mexico (N.M. Stat. §20-4-803(18) (1973)); Maine (Me. R. Evid. 803(18) (1976)); Wisconsin (Wis. Stat. §908.0 (18) (1975)); Kansas (Kan. Stat. §60-460(cc) (1964)). The federal courts allow cross-examination by use of medical texts which have been authenticated by other expert witnesses or by judicial notice. Federal Rules of Evidence 803(18) and both the Model Code of Evidence (Rule 529) and the Uniform Code of Evidence (Rule 63(31)) have embraced such an approach.

The traditional justification for not allowing the freer use of medical texts, especially to prove the truth of the matter as asserted, is that quotations from texts constitutes hearsay. In turn, the principal concern about hearsay evidence in general is that it is unreliable. In the case of authoritative medical

texts, the concern about reliability is substantially negated by other safeguards. These include the fact that the authors of texts have no interest in the outcome of the litigation at hand and are therefore unbiased; the authors are professional persons who write for their peers and are concerned about their reputation for accuracy and authenticity among their peer group; the texts in question must be authenticated in the courtroom by qualified experts. As a result of these considerations many courts allow, upon authentication, medical texts to be used on direct evidence to prove the truth of the matter asserted. See, e.g. Federal Rules of Evidence, Rule 803(18); Nevada Revised Statutes §51.255 (1973); New Mexico Statute §20-4-803(18) (1973); Maine Rules of Evidence 803(18) (1976); Alabama Code Title 7 §413(1960). On balance, when the safeguards to reliability are considered, the advantages gained in determining the veracity of expert witnesses through the use of medical texts, far outweigh the concerns about reliability.

Utah has already adopted a statute that allows for historical works, books of science or art etc. to be accepted as prima facie evidence of fact in cases of general notoriety (§78-25-6 Utah Code Annotated). One of the requirements of this code section is that the author of the texts in question must have been "indifferent between the parties [to the litigation]". Medical texts certainly qualify. Additionally medical texts are works of science. Other states with identical statutes, have allowed technical medical information to be introduced by virtue of such a statute. In Julian v. Barker, et al. 75 Idaho 415, 276 P.2d 719 (1954), interpreting Idaho Code §9-402(1948), the court allowed affirmative evidence to be submitted concerning a drug manufacturer's instructions about the use of a certain medicine; and in In re Sultan, 83 Id. 265, 361 P.2d 793 (1961) the court allowed a witness to quote medical texts in his testimony. Under Montana Revised Code §93-1101-8 (1964) the court in Rausen v. Toston Irrigation District, 565 P.2d 632 (1977) allowed as evidence a U.S. Geological report

the above example, evidence more technical than general notoriety was allowed. Alabama, under a code section similar to Utah Code Annotated §78-25-6 has long allowed the use of medical texts, in both direct and cross-examination. These jurisdictions have recognized the great advantages gained in checking the veracity of expert witnesses by allowing the freer use of medical texts in direct and cross-examination and have used statutes similar to or identical with Utah's to achieve such an end.

In the instant case, the respondent doctor was allowed to insulate himself from effective cross-examination by the use of authoritative and reliable texts by simply refusing to concede that any texts were authoritative. The trial court aided the respondent's efforts to insulate himself by refusing to allow the plaintiff's expert, Dr. Bailey, to authenticate medical texts. In so doing, the court unwarrantedly and unfairly restricted the appellant's ability to cross-examination the respondent doctor and his medical expert witnesses, and in so doing denied the appellant a fair trial.

## POINT VI

REVERSIBLE ERROR WAS COMMITTED BY THE TRIAL COURT IN ALLOWING A SURPRISE WITNESS, DR. RUSSELL M. NELSON, TO TESTIFY, IN CONTRAVENTION OF THE PRE-TRIAL ORDER. IT WAS ALSO REVERSIBLE ERROR ON THE PART OF THE TRIAL COURT TO ALLOW DR. NELSON TO RENDER AN OPINION ON MATTERS OTHER THAN REBUTTAL TO THE TESTIMONY OF CHARLES DYSON.

A. Dr. Russel M. Nelson, was called as a surprise witness by defense, and in so doing, not only surprised unfairly the Plaintiff, but violated the pre-trial order.

In anticipation of the trial of the above-entitled matter, a pre-trial conference was held before the Honorable Judge Ernest Baldwin, in his chambers on September 12, 1977. Although no written memorandum of Judge Baldwin's pre-trial order was prepared, he nevertheless did make an order requiring each party to disclose all witnesses who would be called at trial. (R. 494,495; Affidavit of attorney for plaintiff paragraph 3a. This fact is further borne out by statements of counsel during the trial (R. 1737-1740).

The appellant disclosed witnesses pursuant to the pre-trial order, but did not disclose the respondent's counsel. However, during the course of the trial, the court, in contravention to the controlling pre-trial order, permitted the respondent's counsel to call an expert medical witness, not disclosed at pre-trial, to testify on direct examination. As a result of this violation of the pre-trial disclosure requirement, the Plaintiff was unfairly and prejudicially surprised, not having had the opportunity to make discovery, through deposition or otherwise, on

witness. In addition, the Plaintiff was prejudiced in that he did not have an opportunity to fully investigate Dr. Nelson's credentials and qualifications, analyze the theories of his expert testimony, nor procure rebuttal witnesses. Even at the time of the commencement of the trial, when the court required of both appellant's and respondent's counsel the names of the witnesses they intended to call, counsel for the respondent did not include Dr. Russel M. Nelson in his list of witnesses (R. 659 and R.660). Consequently the judge never inquired as to whether members of the jury knew of Dr. Russel M. Nelson (R. 677). One of the evils that resulted is that there may have been members of the jury who knew Dr. Nelson or who knew of him, and counsel had no opportunity to be appraised of this fact or make further inquiry into that matter.

Bertram v. Harris, 423 P.2d 909 (Alaska 1967), presents a case very similar to the present one. In Bertram, a pre-trial order was made requiring the parties to disclose witnesses, but as in the instant case, no written order was issued. During the trial, the appellant called a witness that had not been disclosed as required by the pre-trial order. The trial court properly refused to allow the witness to testify. The appellant appealed the court's ruling, but upon review it was held that the witness was properly excluded. The court held that no formal pre-trial order requiring the exchange of witness lists was necessary. As long as the pre-trial judge required the exchange of lists, such an order, even if not formalized into a pre-trial order, controlled the calling of witnesses at trial.

In Fairbanks Publishing Company v. Francisco, 390 P.2d 784 (Alaska 1964) a pre-trial conference was held at which time the parties were required to exchange witness lists. At the time of trial the Plaintiff attempted to call witnesses not included in the list as required. The Defendant made a timely objection. The matter was extensively argued in the trial court with the trial judge eventually ruling that either party could call witnesses other than those

included in the pre-trial order. The Alaskan Court held that such an abandonment of the pre-trial order by the trial judge was error and the defendant was prejudiced thereby.

In the instant case, the Plaintiff made a complete disclosure of all witnesses called by him, and made a timely objection at trial to the use of witnesses not disclosed as required at the pre-trial conference (R. 1738-41). Dr. Nelson was not named as a witness by the defense and should not have been allowed to testify. Dr. Nelson's testimony unfairly and prejudicially surprised the appellant. He had no opportunity to prepare for such testimony, to examine Dr. Nelson's qualifications, obtain discovery of Dr. Nelson's testimony or methods of practice, nor obtain rebuttal testimony. Dr. Nelson's testimony was a clear case of "trial by ambush," the very thing pre-trial conferences are designed to prevent.

B. The trial court erred in failing to restrict Dr. Nelson's testimony to rebuttal to Mr. Charles Dyson's testimony.

At the time the defense called Dr. Russel Nelson to testify, the appellant entered an objection based upon the grounds enumerated above. (R. 1738-41). A conference was held out of the hearing of the jury and the objection was argued. The court ruled that Dr. Nelson would be strictly limited to rebuttal to the testimony of Mr. Charles Dyson. However, the court failed to restrict Dr. Nelson's testimony to rebuttal, and Dr. Nelson was, in fact, allowed to give his opinion as to the entire question of the standard of care and other matters (R. 1735-47).

It is well recognized that in the rare case that it becomes necessary to modify a pre-trial order at the time of trial for the purpose for preventing a manifest injustice, the trial must impose restrictions to protect the

parties. Land v. Air Carrier Engine Service, Inc., 263 F.2d 948 (5th Cir. 1959). See also Note, Federal Pre-trial Procedure, 51 Georgetown L.J. 309 (1963). In Land v. Carrier, supra, the court said:

"The Court does have the right. . . to relieve counsel of pre-trial stipulations to prevent manifest injustice. . .but the court is responsible for seeing that suitable protective terms or conditions are imposed to prevent substantial and real harm to the adversary. \*\*\*Whatever form it takes, the protection must be as full as needed to assure that the authorized change does not subject the adversary to insuperable and irretrievable harm." at 953.

The trial court failed to so protect the appellant, as required. After having ruled that Mr. Nelson's testimony would be limited to rebuttal to Mr. Charles Dyson, he was, over objection (R. 1737-41), allowed to testify as a general defense witness and was permitted to answer a hypothetical question relating to the general liability of the defendant. Such testimony was prejudicial to the appellant, and denied him a fair trial.



POINT VII

TRIAL COURT ERRED IN THAT IT DENIED THE PLAINTIFF THE RIGHT TO A FULL AND FAIR CROSS-EXAMINATION.

A. A party has a right to a full and fair cross-examination of all matters examined on direct.

It is a basic rule of law that a party has the right to confront cross-examination, any witness who is called to testify against him. Alford, 282 U.S. 687 (1931); Resurrection Gold Min. Co. v. Fortune Gold Min., 129 F. 668 (8th Cir. 1904); State v. Zolantakis, 70 Utah 296, 259 P. 1044 (1927); McCormick on Evidence, 2d Ed. §19; Wigmore, Evidence §1367; 81 Am. 2d, Witnesses §464. For the past two hundred years, common law judges and attorneys alike have regarded cross-examination as "an essential safeguard to the accuracy and completeness of testimony...". McCormick, supra, §19. Wigmore calls it the "greatest legal engine ever invented for the discovery of truth" and states further that "Cross-examination, not trial by jury, is the greatest permanent contribution of the Anglo-American system of law to improve methods of trial procedure." Wigmore, supra, §1367. Because of the importance of cross-examination as a vehicle for the discovery of truth in a judicial proceeding, virtually all courts of last resort in the United States recognize cross-examination as a right and not a mere privilege. See e.g. State v. Zolantakis, 70 Utah 296, 259 P. 1044 (1927); Fahy v. Clark, 125 Conn. 41, 3 A.2d 313 (1938); 81 Am. Jr. 2d, Witnesses §464, n. 49, 50 & 51.

Utah courts have long recognized cross-examination to be a right and not a mere privilege. State v. Zolantakis, 70 Utah 296, 259 P. 1044 (1927) involved a criminal defendant who had been given a suspended sentence. At subsequent hearing, the trial court set aside the suspended sentence requiring the defendant to serve his term. At the hearing to revoke his suspended

sentence, the defendant was not allowed to cross-examine the state's witnesses. In overturning the lower court's decision, the Supreme Court said: "In a judicial investigation the right of cross-examination is an absolute right and not a mere privilege of the party against whom the witness is called." State v. Zolantakis, supra, at 1047. More recent Utah decisions continue to affirm that cross-examination is a right and not a mere privilege. See e.g. State v. Maestas, 564 P.2d 1386 (Utah 1977).

While a party has a right to cross-examine any witness who gives testimony against him, the trial court is, of course, given a great deal of discretion as to the scope of the cross-examination. Alford v. U.S., 382 U.S. 687 (1930); State v. Zolantakis, 70 Utah 296, 259 P.1044 (1927); Weber Basin Water Conservancy Dist. v. Ward, 10 Utah 2d 29, 347 P.2d 802 (1959). This is necessarily so, as a trial judge must reasonably have control of the order of proof, the length of trial, and the protection of witnesses from unduly prolix cross-examination that serves little in the aid of the discovery of truth. Alford v. U.S., supra; Resurrection Gold Min. Co. v. Fortune Gold Min. Co., 129 F. 668 (8th Cir. 1904). Thus, even in jurisdictions such as Utah, which follow the rule that only those matters examined on direct may be the subject of cross-examination, trial judges may, in their discretion, allow a cross-examination to go into collateral matters instead of requiring the cross-examiner to call the witness as his own and elicit testimony in the form of direct testimony. Resurrection Gold Min., supra. This is done quite frequently, and such discretionary action on the part of the trial judge will be overturned only for abuse of such discretion. 81 Am. Jur. 2d Witnesses §479. The trial judge may also, in his discretion, limit the cross-examination of a witness that serves no apparent purpose other than to harass, malign or

maliciously discredit the witness. Alford v. U.S., supra. It has even been held that the trial court may, in his discretion, set a time limit to control the cross-examination of a witness, when the cross-examination has become unduly long, has not produced any important, new or qualifying facts, and does not appear that continued cross-examination along the line pursued will produce any new or qualifying fact that would be helpful to the jury. Harris v. U.S., 350 F.2d 231 (9th Cir. 1965). However, since cross-examination is such a powerful and useful check on the veracity, accuracy and impartiality of the witness, it is generally stated that a trial judge should give the cross-examiner wide latitude in his cross-examination. Resurrection Gold Min. Co., supra; Alford v. U.S., supra, at 219. Certainly cross-examination should not be stopped when it reasonably appears to be leading to the discovery of truth or important additional facts. State v. Peek, 1 Utah 2d 263, 265 P.2d 630 (1953). Clearly, it would be an abuse of discretion to halt cross-examination on material matters that the witness went into on direct. Weber Basin Water Conservancy Dist. v. Ward, 10 Utah 2d 29, 347 P.2d 862 (1959); 8 Am Jur. 2d Witnesses §478. Indeed, the trial court has discretion to limit the cross-examination only after the cross-examination on each material point covered by the witness on direct. Alford v. U.S., supra, at 219. To cut off cross-examination on any material point covered on direct before it has been fully developed, or to forbid all cross-examination on any material point that was the subject of direct examination is plain error. Alford, supra; Resurrection, supra; State v. Zolantakis, supra. Such error will, in most cases, mandate a new trial. Alford v. U.S., supra, at 220; Fahy v. Clark, Conn. 41, 3 A2d 313 (1938); McCormick on Evidence §19, at 46 (2d ed.).

In Alford v. U.S., supra, the Supreme Court overturned the conviction of the defendant because the trial court forbade all cross-examination in a legitimate area of inquiry. In that case the trial court sustained the government's objection to all questions concerning a witness's place of residence. After enunciating the general principle that "Cross-examination of witness is a matter of right," and that, "i/t is the essence of a fair trial that reasonable latitude be given the cross-examiner....," the court stated:

The extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court. It may exercise a reasonable judgment in determining when the subject is exhausted. \*\*\*But here the trial court cut off all inquiry on a subject with respect to which the defense was entitled to a reasonable cross-examination. This was an abuse of discretion and prejudicial error. (at 219 & 20).

Thus, while the court has discretion to limit the extent of the cross-examination of any appropriate line of questioning on a particular subject matter, it does not have the right to forbid all cross-examination on a subject of appropriate inquiry, until it has been fully and fairly covered.

In Ressurrection Gold Min. Co. v. Fortune Gold Min. Co., 129 F. 668 (8th Cir. 1904), that court extensively analyzed both the right of a party to a full and fair cross-examination and the discretionary control of the trial court with regard to the scope thereof. During cross-examination of plaintiff's witness, the trial court, in Ressurrection, refused to allow a question which was directly related to facts testified to by the witnesses, which, if answered, may have proved the witness to have been mistaken in his direct testimony. On appeal, counsel for plaintiff argued that permission to answer such question was discretionary with the trial court and that

refusal to allow the question was no abuse of discretion. The circuit held otherwise, stating:

But a fair and full cross-examination of a witness upon the subjects of his examination in chief is the absolute right, and not the mere privilege, of the party against whom he is called and denial of this right is a prejudicial and fatal error. It is only after the right has been fully and substantially exercised that the allowance of the cross-examination becomes discretionary with the trial court. Resurrection, supra, at 674.

The court, in Resurrection, goes on to consider the propriety of going into matters on cross-examination that were not part of the witness testimony in chief during direct examination. The court points out that this is done, the witness becomes the witness of the cross-examining party. It is at this point that the trial court's reasonable discretion comes into play. As the court states:

It is discretionary with the court to permit the cross-examiner to make the witness his own at the time he is conducting the cross-examination, because the time and the manner of the trial are within the discretion of the court. It is also discretionary with the trial court to permit leading questions to be put to a hostile witness upon his direct examination. (at 675)

This, it is in this area that the trial court properly exercises his reasonable discretion. When the speed and efficiency of the trial is enhanced by allowing the cross-examiner latitude to go somewhat beyond the witness's testimony in chief, the trial judge, who is in the best position to know this, may allow it. This rule is even more succinctly stated by Judge Hook in his concurring opinion in Resurrection, supra. He states:

The position of Judge Thayer and the writer of this opinion is that after a cross-examining party has been accorded all of this rights as limited by the rule /limiting cross-examination to the subject of the direct examination/, whether the cross-examination may then take a wider scope or latitude is generally a matter within the sound discretion of the

trial court, and error is not committed unless such a discretion is abused. \*\*\*That a trial court is given a broad discretion in controlling the latitude of a cross-examination has become an axiom of the practice. Resurrection, supra, at 681. (emphasis added) See also Judge Hook's full discussion of this point at pages 681-684.

While the court makes it clear that great discretion is given the trial judge to allow cross-examination beyond the scope of the direct, as long as the cross-examiner is pursuing subjects opened by the direct examination, the right to a full and fair cross-examination on each such subject is "invaluable, and it should be carefully preserved." Resurrection, supra, at 675.

During the course of the trial, the defendant called an expert witness, Dr. Russel M. Nelson, M.D., to testify as to the community standard of care with respect to the monitoring of blood flow pumped by a heart-lung machine. Dr. Nelson was thoroughly examined by counsel for defendant on direct examination, as to that standard, including hypothetical questions eliciting his opinion as to what is and is not proper medical procedure, as practiced by the doctors in this community, in relation to the proper monitoring of said machine. (Tr. p. 1735-1747). On cross-examination, counsel for the plaintiff asked the following question:

Q. Dr. Nelson, you've indicated that you have an opinion based on the community standard. Did you perform surgery in the same way that was described in that hypothetical? (Tr. p. 1747).

Counsel for defendant objected on the grounds that the question was "irrelevant and immaterial." Such an objection is without merit. As is clear from the cases and authorities examined above, a party has a right to a full and complete cross-examination on all material points examined on direct. The question objected to went to the heart of the witness's testimony, the

standard of care by which the defendant's conduct was to be judged. Nevertheless, the objection was erroneously sustained, and the plaintiff was, thereby, denied the right to a full and fair cross-examination on the most pertinent subject of the witness's direct testimony.

B. The question propounded to Dr. Nelson is clearly material and relevant.

Since the question objected to was asked on cross-examination, the most fundamental inquiry regarding the relevancy of the testimony sought has already been considered above, that is, whatever was the subject of the witness's testimony on direct is a legitimate area of inquiry on cross-examination. The cross-examining party not only has a right to go into such subject matter fully and completely, he should be given great latitude in so doing. Alford, supra, and Resurrection Gold Min., supra. However, the objection was stated to be based on a lack of materiality and relevancy; an analysis of the standard of materiality and relevancy is appropriate.

Traditionally a distinction has been made between materiality and relevancy. The question of materiality goes to whether the testimony elicited relates to a matter in issue. McCormick on Evidence, at 434 (2d ed. 1961). Relevancy relates to whether evidence is probative, that is whether it tends to prove or disprove a fact in issue. McCormick, supra, at 434. Thus, evidence needs to be both related to facts in issue and tend to, in some way, prove or disprove one of those facts. This distinction between the terms materiality and relevancy is articulated less frequently today, but the same kind of analysis is made: evidence clearly must be related to matters in issue and tend to prove or disprove such matters. 29 Am. Jur 2d, Evidence § 101.



conversely, unless excluded by some specific rule of exclusion (i.e., Hearsay Rule, Best Evidence Rule, etc.), all evidence of facts and circumstances tending to prove or disprove any proposition which is in issue is properly admissible and such evidence must not be excluded. Foster v. Keating, 120 C.A. 2d 435, 261 P.2d 529 (1953); Bole v. Bole, 76 C.A. 2d 344, 172 P.2d 936 (1946); Berkshire v. Baren, 181 O.R. 42, 178 P.2d 133 (1947); Keeney v. City of Overland Park, 203 Kan. 389, 454 P.2d, 456 (1969).

The testimony sought by the question clearly relates to a matter in issue; indeed it relates the single most important issue in a medical malpractice case: the establishment of the community standard of care. The standard of care is without a doubt the single most important consideration in proving or disproving liability in a medical malpractice case. How physicians in the community perform the medical procedure in question determines the standard of care. The witness is a practicing physician engaged in the same specialty as the defendant and practices in the same community. How the witness performs the medical procedure in question clearly relates to the community standard of care and, therefore, clearly relates to a "matter in issue." The evidence sought is material.

The question, likewise, is probative on the issue of the community standard of care, that is, the answer to the question would tend to either prove or disprove the standard of care the defendant was attempting to establish with the witness. If the witness had testified that he performed the medical procedure in question in the same manner he described as the standard of care in the community, that would give greater weight to the establishment of that standard. If, on the other hand, he testified that his practice was different than the standard described by him as the community standard, a whole new line



of questioning would be appropriate. If the new line of questioning established that the witness's own practice reflects a higher standard of care, the juror ought to be made aware of that fact; as such fact, would, unless explained, tend to lessen the witness's testimony regarding the proper community standard.

The fact that the question was asked of an expert on cross-examination adds a further dimension to the question of relevancy. It is generally recognized that the standard of relevancy is applied less strictly on cross-examination than on direct. 81 Am. Jur. 2d, Witnesses §476; McCormick on Evidence, §29 (2d ed.). Thus, it is widely held that any question which tends to explain, contradict, or discredit the evidence offered by a witness, or serves to test his accuracy, memory, veracity, credibility, or impartiality is proper on cross-examination, even though irrelevant or remote. Weber Basis Water Conservancy Dist. v. Ward, 10 Utah 2d 29, 347 P.2d 802 (1959); 81 Am. Jur. 2d, Witnesses §476, 484. The effectiveness of cross-examination as a probe into these areas is "the principal factor in establishing cross-examination as one of the chief agencies for the development of truth in judicial inquiries." Further, "cross-examination is not confined to the identical details testified to in chief, but extends to its entire subject matter, and to all matters that may modify, supplement, contradict, rebut, or make clearer the facts testified to in chief by the witness." 81 Am. Jur. 2d, Witnesses §481. Utah cases recognized such areas of inquiry as the intended purpose of cross-examination. In Weber Basis Water Conservancy District v. Ward, 10 Utah 2d 29, 347 P.2d 862 (1959), the court reversed the trial judge who did not allow respondent to sufficiently cross-examine in these legitimate areas. In so doing, the court stated:

The purpose of cross-examination is to give adversary counsel the opportunity not only to inquire into uncertainties

relating to the testimony in chief, but to test its credibility. Whatever may tend to explain, modify or contradict that direct evidence should be allowed. Weber Basin, supra, at 864-65. (See also State v. Peek.)

Thus, questions that would be objectionable on the basis of irrelevancy if asked on direct, are proper when asked on cross, if the questions are reasonably designed to elicit testimony which tends to explain, modify, or contradict the witness's direct testimony, or to serve to test his accuracy, memory, veracity or impartiality.

Even greater latitude must be given in the cross-examination of an expert witness who has given testimony based on his expert opinion. 31 Am. Jur. 2d, Expert and Opinion Evidence §45, 48. Any question which tests the accuracy and value of the witness's opinion or credibility is proper on cross-examination. Coca-Cola v. Moor, 246 F 842 (8th Cir. 1917); State v. Peek, 1 Utah 2d 263, 265 P.2d 630 (1953). Thus, in 31 Am. Jur. 2d, Expert and Opinion Evidence §48, it states:

A liberal range of examination is allowed touching all matters testified to in chief, or tending to test the qualification, skill, or knowledge of the witness and the accuracy or value of his opinion. \*\*\*The cross-examination of an expert witness is not confined to the specific questions and details of the direct examination. The witness may be tested on the basis of any pertinent additional fact that the cross-examiner may see fit to cover, or may be called upon to answer hypothetical questions pertinent to the inquiry. \*\*\*The data on which an expert witness rests his specific opinion, as distinguished from the knowledge which qualifies him to offer one at all, may be fully inquired into upon cross-examination. Inquiry may be made into the reasons for the witness's opinion, and the methods by which he arrived at his conclusions, the difference between his opinion and other experts, as well as errors of opinion which he has made in other similar cases. 31 Am. Jur. 2d, supra at §48 (emphasis added.)

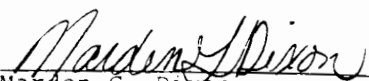
In the instant case, the obvious intent of the propounded question was to test the accuracy and validity of the witness's opinion and attempt to modify, contradict, and, if possible, rebut the expert witness's opinion concerning the community standard of care. The purpose and intent of the question clearly falls within the proper bounds of cross-examination, indeed it is the classic situation for which cross-examination is so uniquely suited as a tool of judicial inquiry. The witness has testified extensively on direct examination as to the community standard of care, he has given his opinion as to what he thinks the standard is, and has answered hypothetical questions put to him by the party which has paid him to testify, which questions are asked of him based on the fact that he is a medical specialist engaged in the same speciality as the defendant doctor, and practicing in the same community. If justice ever begged a chance to test the accuracy of a witness's opinion, to scrutinize in detail the data on which that opinion is based, and the factors considered in forming it, to inquire into possible bias or impartiality, in short, to have the opportunity to fully and completely make inquiry into all areas which can reasonably be expected to modify or, in some way, contradict the witness's testimony, it is in just such a situation. If the witness had been required to answer, and were to have answered that his practice conformed to the standard he testified to, his testimony would have been strengthened. If the witness were to have answered that his practice differed from the standard he described to the jury as the proper standard, then the jury ought to know in what respect his practice differed, why his practice differed, if other doctors in the area practiced in conformity with the witness's practice; if so, how many; if not, why not? If the witness had answered that his practice were different, a

new line of questioning then becomes relevant and legitimate cross-examination. Plaintiff was not allowed to go into this important line of questioning, which examination very reasonably could be expected to modify or even rebut the testimony given by the witness; the court ruled in limine that no cross-examination in this area would be allowed. As in Alford, supra, Resurrection Gold Min., supra, Weber Basin Water, supra, and in Zolantakis, supra, the plaintiff was denied, at the outset, all cross-examination into an area that was, by all standards, material, relevant and legitimate cross-examination. Plaintiff had a right to fully and fairly cross-examine the defendant's expert witness in this area, and denial of that right was prejudicial and reversible error.

# CONCLUSION

For the reasons and upon the grounds outlined above, the appellant respectfully urges the Court to reverse the judgment of the court below and remand this case for a new trial.

Respectfully submitted this 15<sup>th</sup> day of January, 1979.

  
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Mailed a copy of the foregoing Brief of Plaintiff-Appellee to David W. Slagle, Attorney for Defendant-Respondent, 7th Floor Continental Bank Building, Salt Lake City, Utah 84101, this 15<sup>th</sup> day of January, 1979.



Appendix "A"

Q. Where?

A. In California.

Q. Have you ever held any other medical licenses?

A. No.

Q. Did you have a medical license when you practiced in New York?

A. No.

Q. And what professional organizations are you a member of?

A. Oh, gosh, I don't know the list. You want me to go through everything?

Q. Yes.

A. The AMA. Is that where you want to start?

Q. Yes.

A. Utah State, Salt Lake County, the --

Q. These are medical societies that you're referring to, the Utah State Medical Society and Salt Lake County Medical Society?

A. Yes. Is that what you want?

Q. Yes. What other organizations are you a member of?

A. Society of Thoracic Surgeons, American College of Chest Physicians, American College of Cardiology, Salt Lake Surgical Society, The Trudeau Society. I'd have to get the list to -- that's basically the important ones.

Q. What is the Trudeau Society?

A. That's an old chest society. I think that's really

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1 incorporated now into the College of Chest Physicians.

2 Q. Do you subscribe to any professional journals to keep  
3 up in your field of medicine?

4 A. Yes.

5 Q. What are they?

6 A. ANNALS OF THORACIC SURGERY; JOURNAL OF THORACIC AND  
7 CARDIOVASCULAR SURGERY; the journal called CHEST, which is the  
8 organ of the College of Chest Physicians; CIRCULATION; AMERICAN  
9 JOURNAL OF CARDIOLOGY; which is the journal of the College of  
10 Cardiology; ARCHIVES OF SURGERY, and that's most of them.

11 Q. Are you Board certified, sir?

12 A. Yes.

13 Q. In what fields?

14 A. General surgery and thoracic surgery.

15 Q. And when were you so certified?

16 A. Let's see. General surgery I think in 1954 and thoracic  
17 surgery in 1957.

18 Q. What hospitals have you had privileges at?

19 A. At what point in time?

20 Q. I'd like to know all of them.

21 A. Since coming to Utah?

22 Q. Well, I presume that you had privileges while you were  
23 in New York as a resident. Is that right?

24 A. Yes.

25 Q. And you had privileges while you were in the military

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a member?

A. Well, there are post-graduate courses at some of the hospitals that are without specific groups that put this on: It's done by local hospitals. That's one area that you're not a member. I'd have to look these things up. I don't really know specifically.

Q. Can you be more specific about what local hospital groups hold meetings that you've attended?

A. I was just recently at Mount Sinai a couple of months back in New York.

Q. Any others?

A. I'd have to look up to see. I was at -- in Bermuda at Rogers Heart Foundation, which I'm not a member of, about a year ago. The great majority of the meetings are those that I'm a member in.

Q. I gather from what you're telling me that you customarily attend meetings literally all over the country and out of the country?

A. No question about that.

Q. Approximately how many thoracic surgeons are there in the United States that are Board certified at the present time?

A. I don't have that exact figure.

Q. Do you have an estimate?

A. Um-hum. Somewhere between a thousand and fifteen hundred I'd say.

Q. Which journal is the one that the Board certified

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1 cardiovascular surgery at other hospitals in which a bypass  
2 machine was used?

3 A. Oh, yes.

4 Q. Could you tell me what that experience consisted of?

5 A. Well, I have been at hospitals in Texas and in California  
6 and in New York, and perhaps other places. I'd have to review that.

7 Q. Could you tell me the names of the hospitals in each of  
8 these jurisdictions that you've referred to, please?

9 A. In Texas at the Heart Institute, Texas Heart Institute --

10 Q. Is that at Dallas?

11 A. No, no, that's in Houston.

12 In California at the University of California and I  
13 believe over in Oakland at one time. I don't remember that  
14 hospital name. In New York at the Roosevelt Hospital and once  
15 up at the New York Hospital and at the Mount Sinai.

16 Q. Well, while you were observing these various operations  
17 using the bypass machine in these other areas in Texas, California  
18 and New York, did you have occasion to compare the quality of  
19 the surgery which was performed at those institutions with the  
20 quality which was performed at the Holy Cross Hospital involving  
21 the same type of surgery?

22 A. Yes.

23 Q. And what did you observe?

24 A. I feel we were at least comparable.

25 Q. Was one of your purposes in observing these procedures

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1 at these other institutions to obtain additional information  
2 which you'd apply at Holy Cross Hospital?

3 A. Of course.

4 Q. Was it another of your purposes in reviewing the  
5 procedures at these other institutions to compare your work  
6 with that of other surgeons?

7 A. Yes.

8 Q. Up until 1972 had you been performing cardiovascular  
9 surgery using the bypass machine on a regular basis?

10 A. Yes.

11 Q. Can you give me some kind of breakdown in general terms  
12 as to approximately how many procedures you were performing in  
13 the year 1971 which involved the bypass machine?

14 A. What year?

15 Q. 1971.

16 A. I couldn't give you that figure.

17 Q. Can you give me an estimate?

18 A. I don't think I could do that without looking it up.

19 Q. Would the number of procedures which you performed in  
20 1971 involving the bypass machine be more than ten?

21 A. Oh, certainly.

22 Q. Would it be more than 40?

23 A. Yes.

24 Q. Would it be more than a hundred?

25 A. Well, I think it would be close to that figure but I

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