

1979

Ralph L. Conk v. Wallace L. Chambers, M.D., and Granger Medical Clinic, A Corporation : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

RALPH L. CONK,)	
)	
Plaintiff-)	
Appellant,)	
)	
v.)	Case No. 16227
)	
WALLACE L. CHAMBERS, M.D.)	
and GRANGER MEDICAL CLINIC,)	
a corporation,)	
)	
Defendants-)	
Respondents.)	

BRIEF OF RESPONDENTS

Appeal from Judgment on Jury Verdict
District Court, Salt Lake County, State of Utah
The Honorable Stewart M. Hanson, Jr., Judge

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TABLE OF CONTENTS

	<u>Page</u>
NATURE OF CASE	1
DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
ARGUMENT	
POINT I	
THE COURT SHOULD AFFIRM THE JUDGMENT ENTERED ON THE GENERAL VERDICT IF ONE OF THE DETERMINATIVE ISSUES SUBMITTED TO THE JURY WAS FREE FROM ERROR AND IF THE JURY'S FINDING ON THAT ISSUE WAS SUPPORTED BY SUBSTANTIAL EVIDENCE . .	11
POINT II	
THE JURY FOUND UNDER PROPER INSTRUCTIONS AND UPON SUBSTANTIAL EVIDENCE THAT THE DEFENDANTS WERE NOT NEGLIGENT	20
A. The Defendant Disclosed All Substan- tial and Significant Risks of the Procedure and the Jury Was Properly Instructed as to That Issue	21
B. The Court Properly Instructed the Jury as to the Standard of Care Applicable to the Defendants	27

	<u>Page</u>
POINT III	
THE JURY PROPERLY FOUND THAT THE CONDUCT COMPLAINED OF DID NOT PROXIMATELY CAUSE THE PLAINTIFF'S DAMAGES	31
POINT IV	
THE COURT'S INSTRUCTIONS ON THE STATUTE OF LIMITATIONS WERE NOT ERRONEOUS AS TO MATTERS TO WHICH THE PLAINTIFF OBJECTED AT TRIAL	37
CONCLUSION	42

Cases Cited

<u>Alexander v. Hair</u> , 38 N.E.2d 601 (Ohio App. 1942)	19
<u>Anderson v. West</u> , 241 S.E.2d 551 (S.Ct. S.C. 1978)	19
<u>Armstrong v. Gresham</u> , 73 Colo. 46, 213 P. 114 (1923)	19
<u>Berger v. Southern Pacific Co.</u> , 144 Cal.App.2d 1, 300 P.2d 170 (1956)	18
<u>Brignoli v. Seaboard Transportation Co.</u> , 171 P.2d 518, Sub. opinion 178 P.2d 445 (Cal.App. 1947)	18
<u>Burton v. Zions Co-op Mercantile Institution</u> , 122 Utah 360, 247 P.2d 514 (1952)	13

	<u>Page</u>
<u>Canterbury v. Spence</u> , 464 F.2d 772 (D.C. Cir. 1972)	32
<u>Clinchfield R.R. v. Forbes</u> , 57 Tenn.App. 174, 417 S.W.2d 210 (1966)	19
<u>Cobbs v. Grant</u> , 8 Cal.App.3d 299, 104 Cal.Rptr. 505, 502 P.2d 1 (1972)	32
<u>Colonial Stores, Inc. v. Scarborough</u> , 355 So.2d 1181 (Fla. 1978)	15
<u>Dalton v. Wadley</u> , 11 Utah 84, 355 P.2d 69 (1960)	13
<u>Denny v. St. Marks Hospital</u> , 21 Utah 2d 189, 442 P.2d 944 (1968)	36, 37
<u>Dimmick v. Utah Fuel Co.</u> , 49 Utah 430, 164 P. 872 (1917)	39
<u>Downey v. Gemini Mining Co.</u> , 68 P. 414 (Utah 1902)	31
<u>Dwyer v. Christensen</u> , 77 S.D. 381, 92 N.W.2d 199 (1958)	19
<u>Employers' Mutual Liability Ins. Co. v. Allen Oil Co.</u> , 123 Utah 253, 258 P.2d 445 (1953)	38, 39
<u>Evell & Son, Inc. v. Salt Lake City Corp.</u> , 27 Utah 2d 188, 493 P.2d 1283 (1972)	13
<u>Ficklin v. MacFarlane</u> , 550 P.2d 1295 (Utah 1976)	21, 26
<u>Foil v. Ballinger</u> , Utah Supreme Ct. No. 16071 (Sept. 19, 1979)	41

	<u>Page</u>
<u>Gittens v. Lundberg</u> , 3 Utah 2d 392, 284 P.2d 1115 (1955)	23
<u>Goldschmidt v. Chicago Transit Authority</u> , 335 Ill.App. 461, 82 N.E.2d 357	19
<u>Gossett v. Metropolitan Life Ins. Co.</u> , 208 N.C. 152, 179 S.E. 438 (1935)	19
<u>Hutchinson Lumber Co. v. Scrivener</u> , 91 Okla. 293, 217 P. 854 (1923)	19
<u>Knisely v. Community Traction Co.</u> , 125 Ohio St. 131, 180 N.E. 654 (1932)	19
<u>Lamkin v. Lynch</u> , Utah Supreme Ct. No. 15683 (Aug. 27, 1979)	24
<u>Lawrence v. Bamberger R.R. Co.</u> , 3 Utah 2d 247, 282 P.2d 335 (1955)	12
<u>Lee v. Howes</u> , 548 P.2d 619 (Utah 1976)	2
<u>Lumbliner v. Ruge</u> , 21 Wash.2d 881, 153 P.2d 694 (1944)	19
<u>Marsh v. Pemberton</u> , 10 Utah 2d 40, 347 P.2d 1108 (1959)	27
<u>McLaughlin v. Chief Consolidated Mining Co.</u> , 220 P. 726 (Utah 1923)	14
<u>McSoley v. Hogan</u> , 40 A.2d 599 (S.Ct. R.I. 1944)	19
<u>Meglio v. Comeau</u> , 137 Conn. 551, 79 A.2d 187 (1951)	18

	<u>Page</u>
<u>Messier v. Zanglis</u> , 144 Conn. 449, 133 A.2d 619 (1957)	18
<u>Moore v. Jewel Tea Co.</u> , 46 Ill.2d 288, 263 N.E.2d 103 (1970)	18
<u>Ohio Finance Co. v. Berry</u> , 219 Ind. 97, 37 N.E.2d 2 (1941)	19
<u>Paull v. Zions First Nat'l. Bank</u> , 18 Utah 2d 183, 417 P.2d 759 (1966)	2
<u>Ratcliff v. Murphy</u> , 150 Mont. 31, 430 P.2d 627 (1967)	19
<u>Redevelopment Agency of Salt Lake City v.</u> <u>Barrutia</u> , 526 P.2d 47 (1974)	38
<u>Redevelopment Agency of Salt Lake City v.</u> <u>Mitsui Investment, Inc.</u> , 522 P.2d 1370 (Utah 1974)	13
<u>Reese v. Cradit</u> , 12 Ariz.App. 233, 469 P.2d 467 (1970)	18
<u>Robinson v. Hreinson</u> , 17 Utah 2d 261, 409 P.2d 121 (1965)	13
<u>Rose v. Strike</u> , 10 Utah 2d 72, 348 P.2d 563 (1960)	14
<u>Royal Homes, Inc. v. Dalene Hardwood Flooring</u> <u>Co., Inc.</u> , 199 A.2d 698 (Conn. 1964) . . .	17
<u>State Tax Commission v. Magma Copper Co.</u> , 41 Ariz. 97, 15 P.2d 961 (1932)	18

	<u>Page</u>
<u>Swan v. Lamb</u> , 584 P.2d 814 (Utah 1978)	27, 28
<u>Tenn. Cent. Ry. v. Umenstetter</u> , 155 Tenn. 235, 291 S.W. 452 (1927)	19

Statutes and Authorities Cited

<u>Utah Code Ann.</u> , § 78-14-5 (1953)	21, 32
<u>Utah Code Ann.</u> , § 78-12-28(3) (1953)	40
Anno. <u>Modern Status of Views as to General Measure of Physician's Duty to Inform Patient of Risks of Proposed Treatment</u> , 88 ALR3d 1008 (1978)	27
Rule 1, Utah Rules of Civil Procedure	37

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BRIEF OF RESPONDENTS

NATURE OF THE CASE

This is a medical malpractice action in which the plaintiff claims damages incident to renal failure following an intestinal by-pass procedure for obesity.

DISPOSITION IN LOWER COURT

The case was tried to a jury which returned a unanimous verdict in favor of defendants and against the plaintiff, no cause of action. Judgment on the verdict was entered on November 30, 1977.

RELIEF SOUGHT ON APPEAL

Defendants seek affirmance of the judgment.

STATEMENT OF FACTS

Defendants object to plaintiff's statement of facts which is incomplete, argumentative and violative of the well-established principle that evidence and all reasonable inferences that can be fairly drawn therefrom must be viewed in a light most favorable to the jury verdict and judgment entered thereon. Lee v. Howes, 548 P.2d 619 (Utah 1976); Paull v. Zions First Nat'l. Bank, 18 Utah 2d 183, 417 P.2d 759 (1966). Accordingly, defendants submit their own statement of facts.

The parties will be described as they appeared in the trial court.

In March of 1973, the plaintiff presented himself to Dr. Wallace Chambers, a Board-certified specialist in surgery, and requested the defendant to perform an intestinal by-pass procedure for treatment of the plaintiff's obesity and hypertension of long standing duration. (R. 767, 790)

Mr. Conk had been under the care of specialists in internal medicine at the Granger Medical Clinic for treatment of exogenous obesity and hypertension since 1965 and sought surgical treatment for his condition at the suggestion of his physicians. (R. 1106, 1133, 992-93, 789)

The intestinal by-pass procedure had been developed and used for more than twenty-five years as a surgical method to achieve weight loss in extremely obese patients. (R. 1197) The procedure itself involves removal of a large segment of the small intestine from the alimentary canal to reduce the area in which absorption of nutrients occurs. The "by-passed" segment of intestine remains intact in the abdominal cavity and can be reconnected should the need arise. During the 1960's, extensive studies with hundreds of patients had been conducted and reported in the medical literature. Although there was wide diversity among surgeons as to the optimum lengths of intestine to be left in the digestive tract, the procedure was considered safe and appropriate treatment for

morbid obesity. (R. 820-21, 1207-08, 1197-98) Dr. Chambers had studied the procedure for several years and had consulted with another expert in Philadelphia before he performed his first by-pass operation in 1968. (R. 783-85)

When Dr. Chambers first examined the plaintiff, Mr. Conk was fifty years old, weighed 336 pounds and, although taking medications to control hypertension, had a blood pressure of 180/112. (R. 977, 1167) His records from prior years indicated that he had weighed as much as 344 pounds and that his blood pressure had reached systolic levels of 204 and diastolic levels of 130. (R. 1133, 1119) He exhibited shortness of breath while at rest and had a skin color evidencing poor oxygenation which are indications of a "Pickwickian syndrome" often found in the morbidly obese. (R. 1160-67, 1201-02) Blood tests revealed elevated levels of blood fats which are associated with cardio-vascular diseases. (R. 1163) Years of elevated blood pressure had also caused structural changes in the small blood vessels of the plaintiff's kidneys, a condition

known as hypertensive nephrosclerosis, which had caused minute amounts of protein to spill into the urine on three occasions before Dr. Chambers' initial examination. (R. 1256-57, 1261-63) Experts for the plaintiff and for the defendants agreed that the plaintiff's obesity, hypertension and related problems prior to surgery were of such severity that, were he not treated, Mr. Conk would be expected to live only a few years. (R. 433, 1164, 913) Although the plaintiff was already acquainted with the operation because Dr. Chambers had performed an identical procedure on Mr. Conk's daughter approximately one month earlier, Dr. Chambers thoroughly reviewed the procedure with Mr. Conk, using diagrams as illustrations. (R. 992, 819)

Dr. Chambers advised Mr. Conk that the procedure would be major surgery and would be "very dangerous" during the immediate post-operative period. (R. 1057, 1059, 819) Dr. Chambers told the plaintiff that he might not survive the surgery as the operation had an 8% mortality rate. (R. 1059-60, 802) He was also told that he could expect

to have severe diarrhea and nausea for a prolonged period of time and that his liver would be seriously damaged if he ever consumed alcohol. (R. 819, 994) Mr. Conk was also informed that he would receive injections and oral medications for at least two years to replace vitamins and minerals that would not be absorbed naturally due to the by-pass. (R. 994) Finally, Dr. Chambers informed the plaintiff that the technique he intended to use was new and that, in Dr. Chambers' opinion, the operation should be considered "experimental." (R. 788, 1061-62)

Before agreeing to perform the procedure, Dr. Chambers also questioned the plaintiff concerning methods of weight control and therapy for hypertension Mr. Conk had previously undertaken to determine if alternatives to surgery ought to be tried. (R. 804) Mr. Conk testified that he considered himself to be a very light eater and admitted that he had never been able to lose weight by dieting despite twenty years of urging from every physician who had treated him. (R. 1041, 1047-48) During the years, Mr. Conk had tried

various medications to suppress his appetite, but had found them to have undesirable side effects, including exacerbation of his hypertension. (R. 1046-47) The plaintiff also had learned of, but rejected, a weight reduction program whereby the patient's jaws are wired shut. (R. 1046-47) The plaintiff was unable to control his hypertension because of his extreme weight and because he failed to take, regularly and faithfully, the medications his physicians had prescribed. (R. 1129, 1139-40) In summary, Mr. Conk's previous efforts to lose weight and to control his hypertension through diet and medication were unsuccessful despite warnings from his physicians that he was "killing himself" by not following their instructions. (R. 1129, 1139-40) At the time he consulted Dr. Chambers, the plaintiff admitted he was fearful, and justifiably so, of suffering a "stroke." (R. 1042)

After confirming that he was an appropriate candidate for intestinal by-pass, Dr. Chambers admitted the plaintiff to the Valley West Hospital on April 21, 1973 for pre-

operative tests with the expectation of performing the procedure on April 23, 1973. (R. 224) A complete battery of blood and urinalysis tests were performed, together with an electrocardiogram, chest x-rays and complete physical, which showed that the plaintiff was in fit and proper condition to undergo the contemplated surgery. (R. 1163, 833) Of particular importance to this action were tests which revealed perfectly normal renal function. (R. 824, 1163)

The by-pass procedure was performed without incident on April 23, 1973 and the plaintiff had an excellent post-operative course. (R. 1145) Dr. Chambers examined the plaintiff on a monthly basis following the operation and noted a steady loss in weight and a satisfactory reduction in blood pressure to normal and near normal levels. (R. 889, 814-15) Mr. Conk returned to work forty to sixty days after the operation and continued on what Dr. Chambers observed to be a totally satisfactory recovery. (R. 996, 1173, 1160, 1155) After five months, the plaintiff

reported no complaints, except for fatigue, and was pleased with the results of the operation. (R. 1150) By May of 1974, the plaintiff had reached a stable weight of 244 pounds, had been "eating heavily and working hard." (R. 1153)

On June 12, 1974, Dr. Chambers noted that the plaintiff's general health was good, that his blood pressure was normal and he ordered a routine battery of extensive blood tests. (R. 1154) The test results showed totally normal kidney function and no abnormalities of any kind in the blood chemistries. (R. 1154-55) During the remainder of 1974, the plaintiff continued to receive monthly examinations, reported minor ailments such as muscle cramps, fatigue and abdominal pains, but was otherwise progressing satisfactorily. (R. 1155-58)

In response to the plaintiff's continuing complaints of fatigue and cramps in his legs and thighs, Dr. Chambers ordered another battery of blood tests on December 30, 1974. (R. 1158) The tests again showed totally normal kidney

function and no irregularities except for slightly low calcium levels for which Dr. Chambers prescribed a calcium supplement. (R. 1158) When the complaints of malaise or fatigue persisted, Dr. Chambers referred the plaintiff to a specialist in internal medicine for consultation in late February, 1975. (R. 1160) As of that date, there had been no indications of any kind to suggest the possibility of renal damage and, to the contrary, blood tests had revealed perfectly normal kidney function. (R. 1161)

On March 5, 1975, blood tests identical to those performed on December 30, 1974 were repeated which revealed a sudden and dramatic change in renal function. (R. 1170) Within sixty-five days, kidney function had progressed from "excellent" to advanced and irreversible kidney failure. (R. 1275) Despite an exhaustive investigation by the kidney specialists, who treated the plaintiff, the cause of the renal failure remains unknown. (R. 1278)

There had never been a reported case of renal failure following by-pass surgery during the time Dr. Chambers

treated the plaintiff. (R. 1194, 1196) The first such case study ever reported appeared in December, 1975, and, at the time of trial, of the tens of thousands of by-pass procedures performed, only two cases of renal failure were described in the literature. (R. 1278-79, 1285-86) In each of the other cases, a disease process that could not be identified in the present action was found to have caused the kidney damage and ultimate renal failure. (R. 1327)

ARGUMENT

POINT I

THE COURT SHOULD AFFIRM THE JUDGMENT ENTERED
ON THE GENERAL VERDICT IF ONE OF THE
DETERMINATIVE ISSUES SUBMITTED TO THE JURY
WAS FREE FROM ERROR AND IF THE JURY'S
FINDING ON THAT ISSUE WAS SUPPORTED BY
SUBSTANTIAL EVIDENCE

The judgment of the lower court was entered in this action on a general verdict of the jury in favor of the defendants. The plaintiff neither requested special interrogatories on the several issues determinative of this proceeding nor objected to the general verdict form. In accordance with this Court's long-standing presumption

of validity in favor of the verdict of the jury and the judgment entered thereon, the Court must presume that the jury found all issues of liability in favor of the defendants. Accordingly, if one of the issues submitted to the jury was free from error and if the jury's finding on that issue was supported by substantial evidence, the judgment of the lower court must be affirmed.

This Court has long recognized a presumption of validity in favor of all aspects of a verdict challenged on appeal. In Lawrence v. Bamberger R.R. Co., 3 Utah 2d 247, 282 P.2d 335 (1955), for example, the Court affirmed the judgment of the lower court and stated:

When the court has made findings and entered judgment thereon as was done here, it is then our duty to review the evidence in the light most favorable to the findings, and they must be allowed to stand if reasonable minds would agree with them. Likewise every reasonable intendment ought to be indulged in favor of the validity and correctness of the judgment under review and it will not be disturbed unless the appellant meets his burden of affirmatively showing error.
282 P.2d at 337 (Emphasis added)

Similarly, in Redevelopment Agency of Salt Lake City v. Mitsui Investment, Inc., 522 P.2d 1370 (Utah 1974), the Court affirmed a judgment on a jury verdict and stated:

This case falls within the framework of the fundamental principle: That what the parties are entitled to is a fair opportunity to present their respective cases to a court and jury for determination. When this has been accomplished, all presumptions favor the verity of the verdict and the judgment; and this includes all aspects of the conduct of the proceedings, and rulings of the court. 552 P.2d at 1374 (Emphasis added)

See, also, Burton v. Zions Co-op Mercantile Institution, 122 Utah 360, 247 P.2d 514 (1952); Evell & Son, Inc. v. Salt Lake City Corp.; 27 Utah 2d 188, 493 P.2d 1283 (1972); Robinson v. Hreinson, 17 Utah 2d 261, 409 P.2d 121 (1965); Dalton v. Wadley, 11 Utah 84, 355 P.2d 69 (1960).

As one aspect of the presumption in favor of a judgment, this Court, in accordance with an impressive majority of jurisdictions throughout the country, has recognized that when several issues determinative of an action are submitted to the trier of fact and the basis for decision

is unknown, it is the duty of the court to presume that the trier of fact relied upon a proper theory and upon proper evidence. In McLaughlin v. Chief Consolidated Mining Co., 220 P. 726 (Utah 1923), for example, the Court considered a general verdict in favor of the plaintiff and against the mining company in a negligence case in which the mining company's agent was exonerated from liability. Rejecting the appellant's contention that the general verdict in favor of the agent also exonerated the principal, the Court assumed that the jury had adopted a theory of liability that could properly be sustained on appeal. Affirming the judgment, the Court stated:

If the evidence supports the theory that the mining company was liable without taking into consideration anything that [the agent] did or said, or that he failed to do, it is the duty of this court to assume that the jurors adopted the theory supported by the evidence. 220 P. at 731 (Emphasis added)

Similarly, in Rose v. Strike, 10 Utah 2d 72, 348 P.2d 563 (1960), the Court reviewed a judgment in an action

where the trial court failed to render an opinion stating the basis of his decision. Noting that claims could have been based on at least one and perhaps more theories, the Court nevertheless affirmed stating:

[W]e will indulge ourselves in assuming that the trial court concluded as he did on a proper theory. The record disclosed no request for such an opinion and no exception to the lack of it. 348 P.2d at 564.

The presumption applied by the Utah court to sustain a judgment or general verdict where one, but not necessarily all, of several counts, issues or theories submitted to the trier of fact was free from error and supported by substantial evidence is widely recognized and approved in other jurisdictions as the "two issue rule."

In Colonial Stores, Inc. v. Scarborough, 355 So.2d 1181 (Fla. 1978), the Supreme Court of Florida recently adopted the two issue rule as the better reasoned approach both as a matter of policy and in view of the presumption of validity afforded to judgments challenged on appeal. In that case, the plaintiff had obtained a general verdict in an action for malicious prosecution and false imprisonment.

An intermediate appellate court sustained the judgment upon a finding of sufficient evidence of malicious prosecution and did not address alleged errors pertaining to the false imprisonment count. Affirming the decision of the intermediate court, the Supreme Court addressed the "two issue rule" as follows:

The question arises where two or more issues are left to the jury, and of which [one or more] may be determinative of the case, and a general verdict is returned, making it impossible to ascertain the issue(s) upon which the verdict was founded. One line of authority holds that reversal is improper where no error is found as to one of the issues, as the appellant is unable to establish that he has been prejudiced. This is known in jurisprudence as the "two issue" rule. It is a rule of policy, designed to simplify the work of the trial courts and to limit the scope of proceedings on review.

The weight of authority to the contrary mandates a reversal where error has affected one issue unless it is clear that the complaining party has not been injured thereby. 355 So.2d at 1186 (Citations omitted)

The Supreme Court recognized and adopted the "two issue" rule as a better view supported by greater weight of authority. The Court dismissed arguments that injustice could result from adoption of the rule because counsel may simply request a special verdict as to each count in a case to determine the basis for the jury's decision. The Court therefore concluded:

Where the District Court determined under these circumstances that one of the issues submitted to the jury was free from pre-judicial error, it will be presumed that all issues were decided in favor of the prevailing party and the judgment will be affirmed. Id.

The "two issue" rule applies equally to general verdicts in favor of the plaintiff or in favor of the defendant. In Royal Homes, Inc. v. Dalene Hardwood Flooring Co., Inc., 199 A.2d 698 (Conn. 1964), the Court held that the failure to properly instruct the jury with respect to one of the defendant's defenses was harmless error because the general verdict in favor of the defendants was presumed to be based on a second and separate defense. The Court stated:

The fact that there were these two distinct defenses brought into operation the rule expressed in Meglio v. Comeau, 137 Conn. 551, 553, 79 A.2d 187, 188: "The Connecticut rule may be stated as follows: If there is no error in the instructions as to one of two distinct defenses, a general verdict for the defendant should be sustained To qualify under this definition, the defenses must be distinct. That is the decisive test." 199 A.2d at 700.

The "two issue" rule has been expressly adopted in the vast majority of jurisdictions that have considered the question. See, e.g., State Tax Commission v. Magma Copper Co., 41 Ariz. 97, 15 P.2d 961 (1932); Reese v. Cradit, 12 Ariz.App. 233, 469 P.2d 467 (1970); Berger v. Southern Pacific Co., 144 Cal.App.2d 1, 300 P.2d 170 (1956); Brignoli v. Seaboard Transportation Co., 171 P.2d 518, Sub. Opinion 178 P.2d 445 (Cal.App. 1947); Messier v. Zanglis, 144 Conn. 449, 133 A.2d 619 (1957); Meglio v. Comeau, 137 Conn. 551, 79 A.2d 187 (1951); Whitaker v. Creedon, 99 Ga.App. 228, 108 S.E.2d 335 (1959); Moore v. Jewel Tea Co., 46 Ill.2d 288, 263 N.E.2d 103 (1970).

Goldschmidt v. Chicago Transit Authority, 335 Ill.App. 461, 82 N.E.2d 357; Ohio Finance Co. v. Berry, 219 Ind. 97, 37 N.E.2d 2 (1941); Gossett v. Metropolitan Life Ins. Co., 208 N.C. 152, 179 S.E. 438 (1935); Knisely v. Community Traction Co., 125 Ohio St. 131, 180 N.E. 654 (1932); Alexander v. Hair, 38 N.E.2d 601 (Ohio App. 1942); Anderson v. West, 241 S.E.2d 551 (S.Ct. S.C. 1978); Dwyer v. Christensen, 77 S.D. 381, 92 N.W.2d 199 (1958); McSoley v. Hogan, 40 A.2d 599 (S.Ct. R.I. 1944); Tenn. Cent. Ry. v. Umenstetter, 155 Tenn. 235, 291 S.W. 452 (1927); Clinchfield R.R. v. Forbes, 57 Tenn.App. 174, 417 S.W.2d 210 (1966). Other states have also recognized that a jury, by its general verdict, is presumed to have found all issues in favor of the prevailing party. See, e.g., Armstrong v. Greshaam, 73 Colo. 46, 213 P. 114 (1923); Ratcliff v. Murphy, 150 Mont. 31, 430 P.2d 627 (1967); Hutchinson Lumber Co. v. Scrivener, 91 Okla. 293, 217 P. 854 (1923); Lumbliner v. Ruge, 21 Wash. 2d 881, 153 P.2d 694 (1944).

In the present case, the defendants advanced three separate and distinct defenses at the time of trial: First, that the defendants were not negligent; second, that any negligence was not the proximate cause of the plaintiff's renal failure; and third, that the plaintiff's claims were barred by the statute of limitations. Since it must be presumed that the jury found in favor of the defendants on all three issues, each of which is dispositive of the action, the Court should affirm the general verdict if any one of the issues can be sustained on appeal.

POINT II

THE JURY FOUND UNDER PROPER INSTRUCTIONS AND UPON SUBSTANTIAL EVIDENCE THAT THE DEFENDANTS WERE NOT NEGLIGENT

The plaintiff asserts as grounds for reversal two issues that relate to the defendants' conduct. First, the plaintiff argues that Dr. Chambers negligently failed to obtain an informed consent and that the jury was not properly instructed on that issue. With respect to informed consent, the plaintiff specifically claims that

Dr. Chambers should have advised him that the by-pass procedure was "experimental" and that the operation was ill-advised because of the condition of the plaintiff's kidneys prior to surgery. Second, the plaintiff assails the court's refusal to give certain instructions purporting to define the standard of care required of the defendant. Since the plaintiff submits no other allegations of error upon which the defendant's conduct is challenged, no additional claims will be addressed.

A. The Defendant Disclosed All Substantial And Significant Risks Of The Procedure And The Jury Was Properly Instructed As To That Issue.

This Court has previously recognized the physician's duty to disclose to a patient the material and usual, but not highly speculative, risks of medical treatment. Ficklin v. MacFarlane, 550 P.2d 1295 (Utah 1976) That duty is now codified in the Utah Health Care Malpractice Act which requires physicians to inform patients of "substantial and significant" risks of a proposed procedure. Utah Code Ann., § 78-14-5 (1953) The jury correctly

found that Dr. Chambers complied in all respects with that duty.

The plaintiff stresses in his brief the argument that the intestinal by-pass procedure was "experimental" in that the medical profession by 1973 had acquired too little knowledge to anticipate the risks attendant to that operation. The jury quite properly rejected that proposition. Dr. Daniel Hunter, an experienced Ogden surgeon, who at the time of trial had performed 160 by-pass operations, testified that the usual and expected results of the procedure were known as early as 1963 when one of the foremost proponents of the operation reported on sixteen years of experience and follow-up with his patients. (R. 1197) Dr. Hunter flatly rejected the suggestion of plaintiff's counsel that the procedure was still "experimental" when he stated:

I did not consider it experimental or I wouldn't have been doing it in private practice. I considered it an operation that had been observed for eight years, had been tried in a large enough series and had some expected results. I have found that there are some additional problems that I have become acquainted with as the time has gone on since I first started doing them. There may be

others in the future, but this is true whether I'm talking about gastric surgery or colon surgery, it's true of every phase of surgery. We are making advances. We can't know everything about everything that is done. We get a reasonable experience with it, and then we can start to use it with expectation that it is going to be an improvement in the patient's health. (R. 1028)

Whether the procedure was in fact "experimental" is inconsequential in any event because the jury reasonably concluded that the plaintiff was advised of Dr. Chambers' opinion that the operation should be considered to be "experimental." Dr. Chambers testified that he so informed the plaintiff and Mr. Conk admitted that the defendant described the operation as "a new procedure." (R. 788, 1062) The matter of witness credibility, of course, falls within the province of the jury. As this Court stated in Gittens v. Lundberg, 3 Utah 2d 392, 284 P.2d 1115 (1955):

It is the duty of this court to leave the question of credibility of witnesses to the jury or finder of fact and we have quite consistently adhered to that policy. As has often been said, the jury is in a favored position to form impressions as to the trust to be

reposed in witnesses. They have the advantage of fairly close personal contact; the opportunity to observe appearance and general demeanor; and the chance to feel the impact of personalities. All of which they may consider in connection with the reactions, manner of expression and apparent frankness and candor or want of it in reacting to and answering questions on both direct and cross-examination in determining whether, and to what extent, witnesses are to be believed. Whereas, the appellate court is handicapped by being limited to a review of an impersonal record. 284 P.2d at 1117.

See, also, Lamkin v. Lynch, Utah Supreme Ct. No. 15683 (Aug. 27, 1979).

The contention that Dr. Chambers had a duty to inform the plaintiff of a kidney "problem" that was alleged to be a contraindication to the by-pass surgery is equally meritless. The uncontroverted evidence was that the plaintiff's kidney function was totally normal immediately prior to the operation. (R. 824, 1163) The only indication prior to surgery of any abnormal kidney condition was the presence of protein in the plaintiff's urine that was observed on three occasions prior to surgery.

(R. 1256-57, 1261-63) The specialist in kidney diseases who treated the plaintiff testified that the incidents of proteinuria were the result of the plaintiff's long-standing hypertension and that the condition would be expected to improve dramatically and perhaps disappear entirely upon a reduction in blood pressure brought about by weight loss. (R. 1256-57, 1261-63, 1272) The evidence established that the plaintiff's hypertensive nephrosclerosis was not a contraindication to any need of surgery and, to the contrary, the objectives of the surgery were expected to improve the condition. (R. 1271, 1273, 1194, 1211, 1222)

The plaintiff's challenges to the court's instructions on informed consent likewise must fail for several reasons. First, there was no evidence upon which to rest a claim of lack of informed consent under any theory. Renal failure of the type present in this action was unknown to the medical profession in 1973. (R. 1194, 1278-79) Even at the time of trial, only two reports of renal failure had

been published among the tens of thousands of by-pass patients. (R. 1278-79, 1285-86) Under such circumstances, as a matter of law, Dr. Chambers could not be held liable for failing to disclose such a risk. See, Ficklin v. McFarlane, 550 P.2d 1295 (Utah 1976) (concurring opinion). It was also conclusively established that the condition of hypertensive nephrosclerosis was not a contraindication to surgery nor was it related in any way to the ultimate renal failure. (R. 1271, 1273, 1194, 1211, 1222, 1282) In short, undisclosed "risks" of which the plaintiff complains were never shown to be material, substantial or usual complications of the by-pass procedure.

Second, the challenged instructions when viewed in light of the evidence are not inherently inconsistent. The plaintiff complains that the defendant's proffered instruction limits the duty of disclosure to those risks which would have been disclosed as a part of accepted medical practice among surgeons practicing in accordance with the applicable standard of care. (R. 155) The

defendants believe that instruction correctly states the law that exists in Utah as well as the majority of other jurisdictions. Cf. Marsh v. Pemberton, 10 Utah 2d 40, 347 P.2d 1108 (1959); Anno. Modern Status of Views As to General Measure of Physician's Duty to Inform Patient of Risks of Proposed Treatment, 88 ALR3d 1008 (1978). In any event, no witnesses testified nor was any contention made that the standard of care applicable to Dr. Chambers required less than full disclosure of any and all substantial and usual risks known to accompany the by-pass procedure. Accordingly, any conflict in the language of the subject instructions and any difference in the theories proposed by the respective parties are wholly inconsequential under the facts of this case.

B. The Court Properly Instructed The Jury As To The Standard Of Care Applicable To The Defendants.

In Swan v. Lamb, 584 P.2d 814 (Utah 1978), the Court expressly adopted the rule that a physician is held to a standard of care that is shown to exist in that physician's

community or in communities similar to the one in which he practices. The rationale for adopting the "same or similar locality" rule was stated by the Chief Justice as follows:

[T]here is no reason to hold that doctors in Salt Lake City who profess to be experts in a field of surgery or medicine should not be held to the standard of care exercised by experts in the same field in cities of comparable size and throughout the medical profession. 584 P.2d at 817.

Although this action was tried in 1977, the trial court accepted the plaintiff's requested instructions and charged the jury in accordance with the same or similar locality rule subsequently adopted in Swan. The court's instruction no. 14 states, in its relevant part:

You are instructed that a treating physician and surgeon who specializes in a field of medicine has a duty in the diagnosis and treatment of a patient to exercise the degree of skill exacted by the professional standards of said specialty in the community or similar communities wherein said specialty is practiced. The failure of such a specialist to treat a patient in conformity to such standards would be

negligence. In this connection, if you should find and believe from a preponderance of the evidence that Dr. Chambers failed to treat plaintiff in accordance with the professional standards of his specialty as a Board certified surgeon . . . then you are instructed that said defendant physician was negligent.
(R. 153)

The court further instructed the jury in instruction no. 18 as follows:

You are instructed that a physician who becomes licensed to practice his profession and who undertakes the treatment of a patient impliedly represents that he possesses, and it is his duty to possess, that degree of learning and skill ordinarily possessed by physicians of good standing in the same or similar communities. Furthermore, if a physicians [sic] becomes Board certified and undertakes to practice in a specialized field of medicine, he impliedly represents that he possesses, and it is his duty to possess, that degree of learning and skill ordinarily possessed by Board certified physicians practicing said specialty in the same or similar communities.

It is the further duty of a Board certified physician in the treatment of a patient to use the judgment and skill and possess the knowledge ordinarily used and possessed by

Board certified physicians practicing his specialty in the same or similar communities in order to accomplish the purpose for which he is employed.

. . .

In determining whether Dr. Chambers fulfilled the duties imposed upon him as a Board certified surgeon, you are not permitted to set up a standard of your own, but must look to the testimony and evidence presented by physicians at the trial as to what the standard of care was at the time in question. (R. 157)

The court permitted plaintiff's experts to testify that they were familiar with the standard of care applicable to surgeons practicing in Salt Lake County and in similar communities and to express their opinions concerning that standard of care. In view of that testimony, the instructions as a whole leave no serious question but that the meaning of the words "same and similar communities" was conveyed to and understood by the jury. Under such circumstances, the court's refusal to give plaintiff's requested instruction nos. 9, 10 and 13 which purport to define "community" and "similar communities" could not be

prejudicial error. Downey v. Gemini Mining Co., 68 P. 414
(Utah 1902).

POINT III

THE JURY PROPERLY FOUND THAT THE
CONDUCT COMPLAINED OF DID NOT
PROXIMATELY CAUSE THE PLAINTIFF'S DAMAGES

As a separate and distinct defense, the defendants asserted at trial that the conduct of Dr. Chambers of which the plaintiff complained was not the proximate cause of any damage. Specifically, the defendants maintained that a reasonably prudent person in the plaintiff's position immediately before surgery would have consented to the procedure with knowledge of the additional risks that Dr. Chambers allegedly failed to disclose. In addition, the defendants argued that the by-pass procedure and Dr. Chambers' pre-operative and post-operative care of which the plaintiff complained were not the proximate cause of the plaintiff's renal failure. The jury correctly decided these issues in favor of the defendants in view of the substantial evidence to support such claims.

The court instructed the jury that to prevail on the informed consent issue, the plaintiff must prove:

That a reasonably prudent person who had been considering an intestinal by-pass operation for weight reduction would have refused the operation if such disclosure had been made by the defendant. In determining what a reasonably prudent person in the plaintiff's position would do under the circumstances, you must use the viewpoint of the patient before the surgery was performed and before occurrence of any complications or harmful results alleged to have resulted from the surgery. (Instruction No. 16, R. 155)

The court's instruction conforms to the universally recognized rule that there must be a causal relationship between failure to inform and injury to the patient. See, e.g., Canterbury v. Spence, 464 F.2d 772 (D.C. Cir. 1972); Cobbs v. Grant, 8 Cal.App. 3d 299, 104 Cal.Rptr. 505, 502 P.2d 1 (1972); Utah Health Care Malpractice Act Utah Code Ann., § 78-14-5 (1953). The testimony of the patient is not decisive because the test is objective, not subjective. Canterbury, Id. at 787, Cobbs, Id. at 11.

In the present case, the plaintiff was morbidly obese when he first consulted Dr. Chambers. His treating physician and other experts who testified on behalf of both parties agreed that he had a life expectancy of between three to five years if his weight and blood pressure were not brought under control. (R. 433, 1164, 913) Years of efforts by specialists in internal medicine had failed to achieve lasting results and the plaintiff admitted that his efforts at voluntary weight control had never been successful. (R. 1041, 1047-48, 1129, 1139-40) In short, the need for treatment was urgent and among the limited options available, the by-pass procedure had much to offer.

As Dr. Daniel Hunter testified:

- Q. Alright. Does the surgery, the intestinal by-pass, does this have benefits or expected benefits as to any of the conditions you have just mentioned?
- A. Yes, sir. The weight loss itself makes for a better quality of life for these people. They are able to get around much easier. It does take a great load off the heart. It has very definitely

resulted in lowering a blood pressure in the majority of cases that have been so treated. It has relieved diabetes for people who have had this problem. It has helped the excess load on joints. It has improved, in my opinion, the health of many, many people.

(R. 1192)

The procedure had been used for more than twenty-five years as a surgical method to achieve weight loss and had been the subject of extensive studies that were reported in the medical literature. (R. 1197) By 1973, the procedure was considered safe and appropriate treatment. (R. 820-21, 1207-08, 1197-98)

The jury properly concluded that a reasonable, prudent patient in the plaintiff's condition who faced the probability of impending death would accept the surgery despite the remote risk of possible complications that were as yet unknown. As Dr. Hunter stated, the risk that rare complications unknown at the time of treatment may at some future date become known exists with virtually all types of medical treatment. (R. 1208)

With respect to the contention that Dr. Chambers should have informed the plaintiff of the nature of his pre-existing kidney "problem", the evidence clearly established that the condition was an indication for, rather than an additional risk of, the proposed procedure. (R. 1194, 1258, 1271, 1273) The condition of hypertensive nephrosclerosis was improved as a consequence of the procedure and did not contribute in any way to the ultimate kidney failure. (R. 1273, 1277)

Finally, the jury also properly found that Dr. Chambers' treatment was not the proximate cause of the renal failure. Dr. Chambers examined the plaintiff on a monthly basis and performed periodic tests of kidney function throughout the post-operative period. Renal function was "excellent" through the end of December, 1974 and there were no indications of any kind to suggest the possibility of kidney damage. (R. 1274-75, 1268, 1287-88, 1333) Without warning, renal function suddenly and irreversibly declined. (R. 1275-76)

As a part of their treatment of the plaintiff, specialists at the University of Utah Medical Center performed exhaustive tests to determine the cause of the kidney failure. Dr. Allan Bloomer, a specialist in kidney disease who heads the Division of Kidney Disease in the Department of Internal Medicine at the University of Utah, directed the effort and testified at trial as to his findings. Microscopic, electron microscopic and sophisticated immunologic screening procedures were performed that failed to identify the disease process that damaged the plaintiff's kidneys. (R. 1255, 1278) The plaintiff's case was unlike any other reported in the medical literature, including the two reported incidents of renal failure following intestinal by-pass procedures. (R. 1327)

The plaintiff was required to prove with a reasonable medical probability that the renal failure was the result of negligence on the part of the defendants. It is not sufficient to show that the kidney failure "might have" or "could have" resulted from such treatment. Denny v. St.

Hospital, 21 Utah 2d 189, 442 P.2d 944 (1968). The jury properly concluded that the plaintiff failed to sustain that burden.

In summary, the evidence clearly supports a finding that the plaintiff failed to establish a causal connection between any alleged misconduct of the defendant and the ultimate renal failure. For this reason, the jury's verdict should be affirmed.

POINT IV

THE COURT'S INSTRUCTIONS ON THE STATUTE OF LIMITATIONS WERE NOT ERRONEOUS AS TO MATTERS TO WHICH THE PLAINTIFF OBJECTED AT TRIAL

Rule 51, Utah Rules of Civil Procedure, provides that all objections to jury instructions are waived as to those matters not specifically brought to the Court's attention at the time of trial. The Rule provides, in its pertinent part:

No party may assign as error the giving or the failure to give an instruction unless he objects thereto. In objecting to the giving of an instruction, a party must state distinctly the matter to which

he objects and the grounds for his objection.

The Court has strictly construed the provisions of Rule 51 and has consistently required specificity as to the precise matter to which the party objects and detail as to the grounds for objection.

In Employers' Mutual Liability Ins. Co. v. Allen Oil Co., 123 Utah 253, 258 P.2d 445 (1953), for example, the Court refused to review challenges to a jury instruction to which the appellant objected in general terms at the time of trial. The Court stated:

The objection should be specific enough to give the trial court notice of the very error in the instruction which is complained of on appeal. But an objection that an instruction is "not supported by, and is contrary to, the law" lacks specififness and does not direct the court's attention to anything in particular. 258 P.2d at 450.

The Court reaffirmed its policy of strictly construing the requirements of Rule 51 in the more recent decision in Redevelopment Agency of Salt Lake City v. Barrutia, 526 P.2d 47 (1974). In that case, the appellants excepted to an

instruction as "being contrary to the law and on the grounds that it is confusing, misleading and does not comport with the evidence and testimony in the trial." Citing Employers' Mutual, the Court held:

Since defendants failed to point out with the requisite degree of particularity wherein the instruction was not supported by the law, this court will not consider the instruction on its merits. 526 P.2d at 51.

In Dimmick v. Utah Fuel Co., 49 Utah 430, 164 P. 872 (1917), the Court also refused to review portions of an instruction to which the party had not specifically objected at the time of trial. In that case, the appellant had taken exception to only a portion of the instruction and the Court stated:

Appellants' counsel, in their brief, contend that the instruction was erroneous and prejudicial in other particulars, but we find no exceptions were taken in the court below to such other portions of the instruction now complained of, and therefore this court cannot here for the first time consider them as grounds for reversal. 164 P. at 874-75.

In the present case, plaintiff made specific objections to instruction nos. 24 and 25 only insofar as those instructions provided that the plaintiff had an affirmative duty to make inquiries and to learn the nature and cause of any injurious consequences of the defendant's treatment. (R. 1338) In all other respects, plaintiff's counsel simply objected to those instructions on the basis that they were a "misstatement of the law." (R. 1338)

With respect to those matters to which plaintiff's counsel took specific exception, the Court did not err. The statute of limitations in force at the time the plaintiff's action accrued was Utah Code Ann., § 78-12-28 which was enacted as Chapter 212, § 1, Laws of Utah, 1971. It provided that medical malpractice actions had to be brought

[T]wo years after the date of injury or two years after the plaintiff discovers, or through the use of reasonable diligence, should have discovered the injury
. . . . (Emphasis added)

By the express terms of the statute, patients are charged with the responsibility to make reasonable inquiry to determine the nature, extent and cause of any untoward consequences of medical treatment. That duty was most recently recognized by this Court in Foil v. Ballinger, Utah Supreme Ct. No. 16071 (Sept. 19, 1979) where the Court stated:

Another safeguard against tardy claims is the requirement that a person exercise "reasonable diligence" in determining the nature and cause of his or her injury.

Whether the plaintiff exercised "reasonable diligence" in this action was clearly a factual question that was properly submitted to the jury. The plaintiff was entitled to rely upon the assurances of Dr. Chambers only insofar as it was "reasonable" for him to do so. The existence of a patient/physician relationship clearly does not entirely absolve a patient from the duty to exercise "reasonable diligence."

In all other respects, the plaintiff's objections to instruction nos. 24 and 25 are raised for the first time on appeal and need not be considered.

CONCLUSION

The trial of this action was commenced on November 14, 1977, and was concluded more than two weeks later on November 29, 1977. An exhaustive effort on the part of the Court, the parties and their counsel and the lay and expert witnesses was made to present the facts of this complex medical case to the jury in a fair and comprehensible fashion and to explain the law upon which the various issues were to be decided. Those objectives having been accomplished, the trial court properly submitted all issues to the jury for final disposition. The parties received a full, fair and impartial trial, and this Court should therefore affirm the judgment entered on the jury's verdict in favor of the defendants.

The jury correctly found upon proper instructions that Dr. Chambers' treatment of the plaintiff was in all respects appropriate and that his care did not proximately cause the plaintiff's renal failure. Throughout the trial of this action, the parties, counsel and the court knew the

jury's decision on those issues, and none other, would determine the ultimate outcome of this litigation. On appeal, this Court must presume that the jury found those issues in favor of the defendants and since those findings are amply supported by the record, the judgment of the court below should be affirmed.

Respectfully submitted this 5th day of November, 1979.

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CERTIFICATE OF SERVICE

I hereby certify that I served true and correct copies of the foregoing BRIEF OF RESPONDENTS upon Wayne L. Black and James R. Black of BLACK & MOORE, Suite 500 Ten Broadway Building, Salt Lake City, Utah 84101, Attorneys for Plaintiff Appellant, by mailing the same, postage prepaid, this 5th day of November, 1979.

James R. Black