1980

# Elizabeth Irene Reiser, By And Through Her Guardian, Richard E. Reiser And Eleanor Reiser v. Richard Lohner And Howard Francis, Medical Doctors, And Provo Obstetrical And Gynecology Clinic, Inc., A Professional Corporation : Brief of Defendants-Respondents

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

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| ELIZABETH IRENE REISER, by and through her Guardian, RICHARD E. REISER and ELEANOR REISER, Plaintiffs-Appellants, vs. RICHARD LOHNER and HOWARD FRANCIS, Medical Doctors, and PROVO OBSTETRICAL AND GYNECOLOGY CLINIC, INC., a Professional corporation, Defendants-Respondents. | Case No. 16,444 |

# BRIEF OF DEFENDANTS-RESPONDENTS

APPEAL FROM A VERDICT OF THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY, STATE OF UTAH
HONORABLE JAMES S. SAWAYA, PRESIDING

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BRIEF OF DEFENDANTS-RESPONDENTS

## STATEMENT OF THE NATURE OF THE CASE

Defendants agree generally with the Statement of the Kind of Case as set forth in the plaintiffs' Brief, denying, however, any malpractice in the treatment of Eleanor Reiser during her pregnancy with Elizabeth.

## DISPOSITION IN THE LOWER COURT

Defendants agree generally with the plaintiffs' discussion of the Disposition in the Lower Court in plaintiffs' Brief.

## RELIEF SOUGHT ON APPEAL

The Judgments entered and the Rulings made by the District Court be affirmed.

## STATEMENT OF FACTS

Defendants do not agree with many of the facts or the interpretation of facts as set forth in plaintiffs' Brief.

Defendants agree that Richard and Eleanor Reiser had an Rh incompatibility and that Eleanor Reiser was Rh sensitized. Rh sensitivity is the development of antibodies in an Rh negative mother which occurs at the time of delivery of the first Rh positive baby. The antibodies are then present thereafter to affect future Rh positive babies, by actually crossing the placental barrier and attaching themselves to the red blood cells of the fetus ultimately causing destruction of those cells.

During the pregnancy of the fifth child, David, defendant Dr. Howard Francis induced labor at 38 weeks of pregnancy because of Rh sensitization and because of emotional and physical upset of the patient Mrs. Reiser. (R. 1135, 1394, 1507, 1726) Dr. Francis had determined that induction of labor was a suitable alternative to leaving the fetus in the womb inasmuch as the cervix was soft and effaced or thinning out, which made the conditions favorable for induction. (R. 1726)

In the latter part of 1970, and the early part of 1971, Mrs. Reiser was in her sixth pregnancy. By this time, defendants had developed a rotation system for seeing patients, which allowed the patient to become acquainted and familiar with each of the physicians in the clinic who might be called upon to deliver the patient's child.

Dr. Lohner first saw Mrs. Reiser at the defendants' medical clinic on June 24, 1971, which was approximately the 38th week of pregnancy. At the time of this visit, Dr. Lohner reviewed the clinical charts for Mrs. Reiser and learned that she was Rh negative. (R. 1503)

During the course of the June 24, 1971 examination, a "titer test" was performed, which was an evaluation of a sample of Mrs. Reiser's blood. The titer test is simply a measurement of the level of Rh sensitivity in the mother, and is not an accurate measurement of the status or involvement of the fetus. For example, it is possible to have a rather significant titer reading, meaning there is a high level of sensitivity, but the fetus itself may be Rh negative and not in danger from the mother's antibodies, or Rh positive but not affected to the point of danger. (R. 1311-1333, 1429, 1510-1511) This was the first titer test taken on this pregnancy.

The June 24th test results were received by Dr. Lohner on June 26, 1971. (R. 1507-1508, plaintiffs' Exhibit 6) The test of 1:128 revealed a significant titer, indicating the possibility that the fetus was in some danger, depending again on the individual capability of this infant to resist the antibodies. Mrs. Reiser was asked to come in that same day, June 26, 1971, to discuss the options available to properly care for the mother and child. One of the options discussed was to induce labor, which Dr. Lohner would have preferred if the conditions were favorable. (R. 1236-1237) Dr. Lohner explained to Mrs. Reiser that the fetus may be severely involved with the Rh problem and that induction would be the best route to take, but that he wanted to do a vaginal examination to assess the status of the cervix and determine whether conditions were favorable for induction. (R. 1511-1516)

The examination revealed that the conditions were not favorable for induction inasmuch as the cervix was "thick and

firm", rather than soft and effaced as in the fifth pregnancy where labor was induced. (R. 1511-1512) As induction of labor was further discussed, Mrs. Reiser reported that she had had two prior inductions and that they were the worst experiences she had ever had and if there was another alternative, she would like to take a chance on waiting for the natural delivery of the child. (R. 1138, 1517)

Dr. Lohner then explained to Mrs. Reiser that an amniocentesis could be performed to more accurately determine the status of the baby. The amniocentesis procedure as explained to Mrs. Reiser requires the insertion of a needle probe and the extraction of sample fluid from the amniotic sac. The level of the baby's involvement with the Rh factor is measured quantitatively by an analysis of the amount of bilirubin in the amniotic fluid. The more elevated the bilirubin level becomes, the greater danger to the baby.

Once the involvement of the fetus is determined, the future management of the Rh factor can be decided. If the fetus is severely involved and incapable of surviving, the obstetrician can induce labor or take the child by cesarean section unless the infant is not mature enough to exist outside the environment of the uterus, in which event an intra-uterine transfusion can be given. If the involvement of the fetus is not severe, then the pregnancy will be allowed to continue.

Dr. Lohner explained to Mrs. Reiser the usual complications and risks that are associated with the amniocentesis including sticking the baby with the needle and inducing infec-

tion within the uterus. (R. 1518)

Mrs. Reiser was aware that if the Rh incompatibility was bad enough in this pregnancy that it could cause very severe damage to the baby, (R. 1138), and realizing that, she decided and agreed with Dr. Lohner that an amniocentesis would be a suitable alternative so as to more accurately determine the status of the baby. (R. 1519)

Mrs. Reiser was then prepared for the amniocentesis and Dr. Lohner took the patient's blood pressure and found it to be within the normal range, although he did not record the blood pressure reading because of the unexpected occurrences after the amniocentesis. (R. 1522)

Mrs. Reiser was placed on her back for the amniocentesis. During the procedure Mrs. Reiser did not appear to be in any distress, was not perspiring and did not complain of any problems. (R. 1197-1198, 1527-1528)

Following the amniocentesis, Dr. Lohner left the examination room, leaving Mrs. Reiser in the care of his registered nurse, Grace Nielsen. Mrs. Nielsen asked Mrs. Reiser how she felt, and Mrs. Reiser responded by saying, "I feel fine." The nurse then obtained for Mrs. Reiser a glass of water from the lab, and as Mrs. Reiser was raising up to drink the water, she suddenly said, "Don't let me fall" and began to get pale as if she were going to faint. Mrs. Nielsen then reassured Mrs. Reiser that she would not let her fall and tried to get the table back down. She then called for the other nurse, Delores Bahr, to come in and assist her in getting the table down. (R. 1181-1182, 1205-1206) The testimony differs from that point on whether

Mrs. Bahr or Mrs. Nielsen went to obtain some smelling salts while the other nurse stayed with Mrs. Reiser. Mrs. Bahr remembers that she could not find the smelling salts and that she stayed with Mrs. Reiser while Mrs. Nielsen went to find them. At this point Mrs. Bahr said Mrs. Reiser was lying on her right side facing Mrs. Bahr. (R. 1607-1608) As Mrs. Bahr looked at Mrs. Reiser she suddenly noticed that her color was dark so she called Dr. Lohner who immediately came into the examining room and made the diagnosis of cardiac arrest and started his resuscitative efforts. (R. 1608)

Dr. Lohner immediately gave Mrs. Reiser a big thump on the chest, established an airway, began mouth-to-mouth respirations and closed chest cardiac massage. He asked his nurse Grace Nielsen to contact an internist and have him meet them at the hospital. He asked the other nurse Delores Bahr to call the ambulance. (R. 1208, 1609)

Dr. Lohner continued his resuscitative efforts after the ambulance arrived and he was with Mrs. Reiser until they arrived at the hospital at 11:40 a.m., which was approximately ten minutes after Dr. Lohner had first diagnosed the cardiac arrest. (R. 1541) Resuscitation efforts continued at the hospital. The cardiac arrest was diagnosed as "ventricular fibrillation".

On the following morning after the cardiac arrest, June 27, 1971, plaintiff Eleanor Reiser gave birth to Elizabeth. The labor was probably induced by the shock and trauma associated with the cardiac arrest. (R. 1697) It soon became apparent that the child had severe brain damage. Every physician who testified

including both expert witnesses produced by plaintiffs, agreed that the cause of the infant's brain damage was "anoxia", which is a lack of oxygen to the infant's brain resulting from the cardiac arrest. (R. 1054, 1285-1286, 1318, 1428) Every physician agreed that the brain damage had nothing to do with the Rh factor or with the attack of the mother's antibodies upon the infant's blood. (R. 1057, 1428)

At some time on June 26, 1971, subsequent to the cardiac arrest, the serum obtained through the amniocentesis test was sent by Dr. Lohner's staff to the lab for analysis. The result was a finding of .03, which is in the "moderate" range. After the infant was born, the reports of the pediatrician reveal again only a moderate involvement with the Rh factor, and all of this indicated to each physician who testified that the baby's brain damage was not in any way related to the Rh factor. (Plaintiffs' Exhibit 6; R. 1050-1057; First Transcript of Proceedings, pp. 120-121, 576)

Plaintiffs' experts testified that the probable cause of the cardiac arrest which produced the anoxia causing the infant's brain damage, was a condition known as "supine hypotensive syndrome." This is a condition caused by depression of the vena cava vein by the uterus together with insufficient collateral circulation, which has been reported to cause some discomfort, nausea, sweating and other similar signs and symptoms. (R. 1318-1322, 1399-1400, 1409-1410, 1695) Although a few women in the late stages of pregnancy may develop a supine hypotensive syndrome, all of the physicians, including plaintiffs' experts, agreed that never in medical history had it been reported that

this condition led to a cardiac arrest. (R. 1294-1296, 1364-1369, 1412, 1418, 1685-1687, 1812)

Because the infant's brain damage was not in any way a result of the Rh factor and because plaintiffs' theory of negligence against the doctors related to leaving the patient on her back too long resulting in supine hypotensive syndrome, the trial court excluded the evidence of a failure to take a titer test and an amniocentesis prior to June 26, 1971, which would have been expected as part of the normal treatment given to an Rh sensitized pregnant woman.

The case was submitted to the jury on the questions of whether Dr. Lohner was negligent in allowing Mrs. Reiser to lie on her back for an excessive period of time, and whether Dr. Lohner was negligent in the resuscitative efforts used to revive Mrs. Reiser. The jury answered "no" to both questions and the court entered a judgment of no cause of action.

## ARGUMENT

### POINT I.

### THE TRIAL COURT DID NOT ERR IN EXCLUDING EVIDENCE THAT A TITER TEST WAS NOT TAKEN AND THAT AN AMNIOCENTESIS WAS NOT GIVEN PRIOR TO JUNE 26, 1971.

Defendants filed a Motion in Limine prior to trial to exclude evidence that a titer test was not taken nor was an amniocentesis given to Mrs. Reiser prior to June 26, 1971. Defendants contended that such evidence was not relevant or material to the issues because there was no causal connnection between these omissions and the brain damage, and that the admission of this irrelevant or minimally probative evidence

would be highly and unfairly prejudicial to defendants. Defendants' motion was granted.

The question of whether to exclude evidence is always at least a two-step analysis for the trial court. The evidence must first be "relevant" and if it is determined that it is "relevant", then it must be asked whether it should be excluded under some other rule, such as the prejudicial impact the evidence may have as weighed against its probative value. See Byers v. Santiam Ford, Inc., 574 P.2d 1122 (Ore. 1978), and Utah Rules of Evidence 1.(2), and 45.

A. Evidence That The Earlier Tests Were Not Performed Is Not Relevant Or Material Because These Omissions Were Not A Proximate Cause Of Plaintiff's Injuries.

Rule 7 of the Utah Rules of Evidence (U.R.E.) states that "except as otherwise provided . . . all relevant evidence is admissible." The implication of Rule 7 is that the evidence must first be "relevant" in order to be admissible and secondly, the relevant evidence itself may be inadmissible because of some other rule.

Relevant evidence is defined by Rule 1.(2) of the Utah Rules of Evidence as follows:

> . . . evidence having any tendency in reason to prove or disprove the existence of any material fact. (Emphasis added)

The evidence of the omission of the earlier tests in the instant case may be proof of the fact that the tests were not performed and that the management of this Rh sensitized pregnancy was not adequate, but such evidence is not "material" to the

issues in the lawsuit because the Rh factor had nothing to do with the infant's brain damage. Consequently the trial court excluded the failure to take the earlier tests, reasoning that such omissions could not have been a cause or a proximate cause of plaintiff's injuries and therefore such evidence was irrelevant and immaterial or of little probative value. Clearly the decision to exclude evidence is within the sound discretion of the trial court judge. Martin v. Safeway Stores, Inc., 565 P.2d 1139 (Utah 1977), State v. Minnish, 560 P.2d 340 (Utah 1977).

There is no dispute in this case that the Rh factor did not contribute to the infant plaintiff's brain damage, and that the actual cause of the brain injury was "anoxia", which resulted from lack of oxygen to the brain cells of the infant during the cardiac arrest. Plaintiffs' experts both testified to this fact. (R. 1318, 1428)

Furthermore, it is plaintiff's position that the cardiac arrest, which then led to the infant's brain damage, was caused by leaving Mrs. Reiser on her back too long which resulted in "supine hypotensive syndrome". (R. 1318-1319, 1401) This syndrome is totally unrelated to the Rh factor.

1. The Jury Has Removed A Vital Link In Plaintiffs' Chain Of Causation.

In an effort to attach liability from the test omissions, plaintiffs argue a chain of causation something like the following: The earlier tests were not performed and consequently Dr. Lohner performed an amniocentesis at 38 weeks pregnancy, and that such act, which was not necessary, resulted in Mrs. Reiser lying flat on her back, and that defendants were

negligent in allowing Mrs. Reiser to stay on her back, which then led to a condition known as supine hypotensive syndrome, which then led to ventricular fibrillation, which then led to the anoxia or lack of oxygen to the infant's brain cells, thereby causing the brain damage to the infant.

One obvious problem with this theory is that a vital link in plaintiffs' "chain" of causation has already been removed by the jury. The jury has definitely decided that Dr. Lohner was not negligent in allowing Mrs. Reiser to stay on her back for an excessive period of time. The jury obviously felt that Mrs. Reiser did not suffer from supine hypotensive syndrome, or that the syndrome was not the cause of the cardiac arrest, or that such a possibility was simply not foreseeable to a reasonable physician. In any case, if the failure to perform the earlier tests somehow contributed to the decision to place Mrs. Reiser on her back, such omissions cannot be a proximate cause of the infant's brain damage because the causal connection has been severed. Even if plaintiffs could feasibly present a "chain of causation" prior to the jury verdict, such an effort now appears "moot" in light of the verdict.

2. The Reason Mrs. Reiser Was On Her Back Is Not Relevant Or Causally Related To The Infant's Brain Damage.

Even if plaintiffs' argument wasn't moot, plaintiff's causation argument is something like saying that going for a walk on a Sunday afternoon was the proximate cause of an auto-pedestrian accident. The first event is merely a condition making injury possible from later intervening events.

It is admitted by plaintiffs that performing the amniocentesis procedure itself, i.e. insertion of the needle in the abdomen--had nothing to do with the arrest. On the contrary, it is plaintiffs' claim that leaving Mrs. Reiser on her back too long caused the supine hypotensive syndrome which in turn caused the arrest. The amniocentesis was simply the reason under the facts of this case for Mrs. Reiser being on her back. She could have been on her back for a myriad of reasons--during a vaginal examination, while sleeping, during a routine pre-natal examination, while her blood pressure was being taken, for induction of labor and for many other purposes.

Since being left on her back too long is the thrust of plaintiffs' claim of negligence, the reason for putting her on her back can have nothing to do with causing the arrest, even if the amniocentesis was unnecessary or contraindicated.

If doing the amniocentesis at 38 weeks, whether it was contraindicated or not, had nothing to do with causing the arrest, how can the failure to do prior titers and amniocentesis, even if they should have been done, have anything to do with the real issue in this case; namely, was Mrs. Reiser left on her back too long, and did that cause the cardiac arrest?

Plaintiffs argue that this particular amniocentesis should not have been performed and that labor should have been induced because of the unavailability of data from omitted earlier tests. (Plaintiffs' Brief, p. 13-14, R. 1073) If labor had been induced, Mrs. Reiser would have been put on her back for that reason, which according to plaintiff was medically indicated and in accordance with good medical practice. Had this been done

and Mrs. Reiser developed a cardiac arrest because of being left on her back too long, plaintiffs would be claiming negligence, not because of the reason she was placed on her back, i.e. to induce labor, but because she was left there too long.

The reason for placing Mrs. Reiser on her back whether performing a medically indicated procedure--induction of labor--or a procedure that was not medically indicated-- amniocentesis at 38 weeks--is immaterial. In either case they are simply conditions by which plaintiffs' claim of injury was possible through later intervening circumstances.

In Hunt v. Firestone Tire & Rubber Co., 448 P.2d 1018 (Okla. 1968), the plaintiff contended that certain defects were present in a tire manufactured by the defendant, such that those defects constituted a proximate cause of the plaintiff's injuries that he suffered from an automobile accident some 8,000 miles after the tire was sold. The court, in holding for the defendant, stated:

> It is our opinion that the scratches or cuts upon the side of the tire merely constituted a condition by which an injury was possible....
>
> * * *
>
> The proximate cause of any injury must be the efficient cause which sets in motion the chain of circumstances leading to the injuries; if the negligence complained of merely furnished a condition by which the injury was possible and a subsequent independent act caused the injury, the existence of such condition is not the proximate cause of the injury. 448 P.2d at 1023.

See also Stevenson v. Kansas City, 360 P.2d 1 (Kan. 1961), and Girard v. Monrovia City School District, 264 P.2d 115 (Cal. App.

1953).

3. The Injury To Plaintiff Was Not Reasonably Foreseeable.

One further reason why the omitted tests in the instant case cannot be a "proximate cause" of plaintiff's injuries is that any intervening act in the chain of causation that is not "reasonably foreseeable" will supersede and cut off the chain of causation. Prosser, Law of Torts, 4th Ed., p. 272; Hillyard v. Utah By-Products Co., 1 Utah 2d 143, 149-151.

It is undisputed from all of the testimony in this case that a cardiac arrest has never in medical history resulted from an amniocentesis procedure. (R. 1412) Further, it is undisputed that never in medical history has it been reported that a woman in the late stages of pregnancy and who has not been given a regional anesthesia suffered from supine hypotensive syndrome that went on to develop into a cardiac arrest. Plaintiffs' expert witness Dr. Edward Banner testified on that issue as follows:

> Q. Now, Doctor, in your experience, have you ever had a lady in late pregnancy -- have you ever known of one that you have been taking care of to develop this supine hypotension syndrome and then have it go on to a cardiac arrest?
>
> A. Never.
>
> Q. Have you ever heard of a cardiac arrest resulting following an amniocentesis?
>
> A. No, sir, I haven't.
>
> * * *
>
> Q. Have you in discussing with your

> colleagues ever heard of a cardiac arrest resulting from a supine hypotension syndrome?
>
> A. I have not, sir.
>
> * * *
>
> Q. Have you ever read about in any of the medical literature anything about a pregnant lady in the late stages of pregnancy developing supine hypotension syndrome and having that go on to a cardiac arrest?
>
> A. No, sir.
>
> * * *
>
> Q. (By Mr. Hanni) Is it fair to say then, Doctor, that if you are right in what you believe the cause of Mrs. Reiser's cardiac arrest is, is it fair to say so far as you know either from your own experience, from talking to your colleagues, from reading the medical literature, that this is the first time that a cardiac arrest has been caused or has followed a supine hypotension syndrome?
>
> A. Yes, that's true. (R. 1412-1414) (See also testimony of other expert witnesses, R. 1364-1369, 1685-1687, 1812)

It appears therefore that the causal connection relied on by plaintiff has never before occurred in medical history. Consequently, it is difficult to see how the defendants can be held to the duty to foresee or anticipate this chain of events. The evidence is clear that defendants did not expose Mrs. Reiser to an unreasonable risk of harm by placing her on her back for an amniocentesis procedure at 38 weeks, whether or not that procedure was contraindicated by reason of the earlier test omissions. Mrs. Reiser had been on her back on numerous times before for other standard office procedures, and would often wake up at

night finding herself having fallen asleep on her back during her pregnancies, and like millions of pregnant women throughout the world, she had never suffered from supine hypotensive syndrome or a cardiac arrest or any other physical problem. (R. 219) It is, therefore, difficult to see how the outcome of the instant case could have been "reasonably foreseen" by the defendants.

Plaintiffs argue that one of the explanations offered by an expert witness for defendants as to the cause of the cardiac arrest supports the causal connection between the failure to perform the earlier titers and amniocenteses and the injury to the infant plaintiff. Defendants' expert witnesses and the defendants, themselves, testified that there were various mechanisms that possibly could have caused the cardiac arrest including a reaction to the local anesthetic, (R. 1291, 1676), an amniotic fluid embolism, (R. 1677, 1814), and a vaso vagal reflex, (R. 1299, 1565, 1684, 1810).

Physicians at the trial also testified, however, that individuals with perfectly normal hearts can suddenly have a cardiac arrest for no explained reason. (R. 1067, 813)

Whatever the cause of the arrest, the evidence also demonstrated that the injury to plaintiff was unforeseeable and totally unexpected from an amniocentesis. (R. 1291, 1298, 1811, 1814)

4. <u>The End Result Would Have Been The Same</u>.

Defendants contend that the amniocentesis would have been performed at or about 38 weeks even if the earlier tests had been taken. Consequently the end result would have been the same, which is an additional reason why the omissions cannot be a

proximate cause of the injuries.

Any earlier titer tests would simply have measured the level of sensitivity in the mother, but would not measure the status of the baby (R. 1311-1333, 1429, 1510-1511). Any earlier amniocentesis procedures would simply have assessed the status of the infant at the time the test was performed, and the infant's condition cannot improve as the pregnancy continues.

The amniocentesis test result on the 38th week in the instant case revealed that the infant was not severely involved with the Rh factor. (Plaintiffs' Exhibit 6; First Transcript of Proceedings, p. 647) The infant could very well have stayed in the womb for another week or two beyond 38 weeks until conditions were more favorable for induction of labor or until spontaneous delivery occurred. (First Transcript of Proceedings, p. 120-121, 576, 717) Consequently, if the baby was not severely enough involved to take it out of the uterus environment or to be given a blood exchange transfusion at 38 weeks, the same result would have been present at 20 or 25 weeks pregnancy, and a further amniocentesis would have been necessary around the 38th week. Therefore, the earlier tests would not have changed the fact that the amniocentesis would have been performed anyway at or about the 38th week, and presumably the cardiac arrest would still have occurred which led to the brain damage. Plaintiffs do not seem to contest this fact, but simply state that this particular amniocentesis should not have been performed and that labor should have been induced because of the unavailability of data from omitted earlier tests. (Plaintiff's Brief, p. 13-14;

R. 1073)

The same kind of situation was encountered in Dickinson v. Mason, 18 Utah 2d 383, 423 P.2d 663 (1967), wherein the infant plaintiff sustained a severe laceration on his right index finger and he was treated by defendant. Defendant bandaged the finger and four or five days later the bandage was removed by another doctor and it was discovered that the finger was black, without feeling or sensation, and an amputation of the finger was performed. Plaintiff alleged that defendant applied the bandage so tightly that it cut off the circulation and resulted in gangrene setting in. At the conclusion of plaintiff's evidence the trial court granted defendant's motion for an involuntary dismissal and on appeal the Supreme Court affirmed on the basis that the negligent acts complained of did not proximately cause the ultimate result of amputation. As support for their holding, the court referred to the testimony of plaintiff's own expert witness, who testified that in spite of the acts of defendant the end result would have been identical and that the hand would have been the same "as we now find it".

In the instant case plaintiffs refer to certain omissions that were below the standard of care of a practicing physician, but as noted in Dickinson, such errors or omissions can only lead to liability and recovery when they are a proximate cause of the plaintiff's injuries. In the instant case, whether the defendants would have performed the earlier tests or not, the end result would have been the same. See also Paull v. Zions First National Bank, 18 Utah 2d 183, 117 P.2d 759 (1966); Bonner v. Conklin, 62 F.2d 875 (D.C.Cir. 1932); and Wright v. Clement,

190 N.E. 11 (Mass. 1934).

B. Evidence That A Titer Test Was Not Taken And That An Amniocentesis Was Not Performed Prior To June 26, 1971, Would Be Highly And Unfairly Prejudicial Against The Defendants.

Assuming arguendo that the evidence of the failure to perform prior titers and amniocentesis procedures has some relevance or materiality to the issues of this lawsuit, any relevance or probative value can only be minimal when weighed against the prejudicial effects of such evidence. Because of the slight probative value and highly prejudicial nature of the evidence, the trial court judge excluded the evidence by way of an order in limine pursuant to Rule 45 of the Utah Rules of Evidence.

1. Evidence Can Be Excluded Under Rule 45 (U.R.E.)

Rule 45 of the Utah Rules of Evidence provides as follows:

> Rule 45. Discretion of judge to exclude admissible evidence.
>
> Except as in these rules otherwise provided, the judge may in his discretion exclude evidence if he finds that its probative value is substantially outweighed by the risk that its admission will (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or (c) unfairly and harmfully surprise a party who has not had reasonable opportunity to anticipate that such evidence would be offered.

The Rule clearly states that the decision of whether to exclude evidence is within the sound discretion of the trial court, and the Supreme Court of the State of Utah has recognized time and again that the trial court should be accorded a large

measure of discretion in this regard and should be reversed only when there is a clear abuse of that discretion, Martin v. Safeway Stores, Inc., 565 P.2d 1139 (Utah 1977), State v. Minnish, 560 P.2d 340 (Utah 1977).

Plaintiffs repeatedly argue that the failure of the defendants to take titer tests and to perform amniocentesis procedures prior to June 26, 1971, was not in conformity with the recognized standard of care in the treatment of the Rh factor in pregnant women. Assuming that such omissions were negligence, the probative value of the defendants' neglect in that instance is non-existent. However, if the jury is allowed to hear evidence of one area of neglect in treating the plaintiff's mother, Eleanor Reiser, it would be highly prejudicial to the defendants.

At the time that Judge Sawaya considered defendants' Motion in Limine prior to the second trial of this case, he had before him the transcript of proceedings in the original trial held in November of 1977. Even a cursory examination of the transcript of proceedings in that first trial illustrated how often plaintiffs' counsel attempted to get before the jury the evidence of the failure to perform the earlier tests in spite of the court's ruling at the beginning of the trial that such evidence was to be excluded. As part of the Memorandum in support of defendants' Motion in Limine, defendants cited for Judge Sawaya several parts of the original transcript of proceedings illustrating the various ways plaintiffs' counsel attempted to present these omissions to the jury. The Memorandum submitted to the court containing the quoted passages from the transcript are

part of this record on appeal. (R. 313-316)

Based on what happened at the first trial, defendants' counsel filed a Motion in Limine weeks in advance of the second trial and obtained an Order in Limine in writing requiring plaintiffs' counsel to refrain from bringing up the issue.

In spite of the ruling in limine, plaintiffs were able to present all relevant evidence as to the theories of negligence that allegedly brought about the injuries to the infant plaintiff.

However, Judge Sawaya held firm on his decision not to allow the evidence of the failure to perform the earlier titer and amniocentesis procedures. At one point in the trial, the court made it clear as to the basis for his ruling:

> THE COURT: I've already made a ruling in this matter and there is no point in debating it every time we come into Court or call a witness. It seems to me it's clear in my mind and I appreciate that we each have a different opinion about what this case is all about but I have already made a ruling on the issue and that is that evidence of the failure to take a prior titer and a prior amniocentesis is not proper evidence because of causation and I agree with defense counsel that letting it in would create a greater risk that this Jury would return a verdict on the basis of that act of negligence than the one that actually caused the injury.
>
> Now, it seems to me that this constant haranguing about it and constant argument about it isn't going to make it any different than it was back at the beginning.

Plaintiffs correctly point out in their Brief that there is a distinct similarity between Rule 45 of the Utah Rules of Evidence and Rule 403 of the Federal Rules of Evidence. A review

of federal cases interpreting Rule 403 illustrates the numerous instances when highly prejudicial evidence was excluded from the jury. Yellow Bayou Plantation, Inc. v. Shell Chemical, Inc., 491 F.2d 1239 (5th Cir. 1974), Kilarjian v. Horvath, 379 F.2d 547 (2nd Cir. 1967); Rozier v. Ford Motor Co., 573 F.2d 1332 (5th Cir. 1978); Harless v. Boyle-Midway Div., American Home Products, 594 F.2d 1051 (5th Cir. 1979).

2. A Motion In Limine Was The Proper Way To Exclude The Evidence Because Of The Highly Prejudicial Effect.

The value of a motion in limine to exclude prejudicial evidence prior to trial is seen in the case of Troxel v. Otto, 287 N.E. 2d 791 (Ind. 1972). The plaintiff had brought an action against the husband of the deceased defendant for injuries arising out of an automobile accident. The defendant died from injuries suffered in a subsequent unrelated accident. At the trial plaintiff's attorney mentioned the subsequent automobile accident on several occasions to the jury as "one more instance . . . of her (defendant) not looking." The appellate court referred to the remarks of counsel as matters that he sought to be thrust into the lawsuit that were prejudicial. In its opinion, the court noted how the defendant's attorney could have prevented these remarks of counsel by a motion before trial:

> Alert counsel, however, may protect himself against possible misconduct by means of a pre-trial order determining admissibility whenever his trial preparations discloses evidence of a highly prejudicial nature which may or may not be admissible. Protective orders might conversely serve as a firm and advance admonition to counsel not to embark upon a path which might lead to a mistrial or

> reversal. Such pre-trial preparation and utilization of the available procedures is to be encouraged. 287 N.E.2d at 794.

The number of times that plaintiffs' counsel in the instant case at the first trial asked questions of witnesses concerning the failure to perform the earlier tests and the constant objections and requests to approach the bench by defense counsel clearly illustrates the need for an order in limine rather than to attempt to cure the problem as the questions were asked. Judge Sawaya could see the danger in attempting to exclude this kind of evidence as the questions are asked and the relative ineffectiveness of asking the jury to disregard the questions each time they are asked. In 63 A.L.R.3d 311, 313, the author states:

> It is commonly understood by trial lawyers that prejudice implanted or stimulated in the minds of jurors can win trials, but objecting to the prejudicial material may only emphasize it, and that traditional 'curative' actions taken by trial judges when prejudicial material is objected to are ineffective and unrealistic and may aggravate the potential harm.

A motion in limine in the instant case was therefore a proper procedure to exclude the irrelevant or minimally probative evidence of a failure to perform earlier titers and amniocentesis procedures, when such evidence would be highly and unfairly prejudicial against the defendants.

## POINT II.

THE TRIAL COURT DID NOT COMMIT ERROR IN SUBMITTING A SPECIAL VERDICT TO THE JURY AND THE VERDICT FORM SUBMITTED DID ADEQUATELY ALLOW THE JURY TO CONSIDER THE PLAINTIFF'S THEORY OF THE CASE.

As noted in plaintiff's brief, the trial court submitted a special verdict form to the jury, requiring the jury to answer special interrogatories, rather than having the jury respond to a general verdict. The special verdict form asked the following five questions: (1) Was defendant, Richard Lohner, negligent in allowing Mrs. Reiser to lie on her back for an excessive period of time? (2) If your answer to no. 1 is yes, was such negligence a proximate cause of the injury or damage to the plaintiff? (3) Was the defendant Richard Lohner negligent in the acts and efforts utilized or not utilized to resuscitate Mrs. Reiser during the time she was unconscious? (4) If your answer to no. 3 is yes, was such negligence a proximate cause of the injury or damage to the plaintiff? (5) If your answers to questions 1 and 2 are yes or to questions 3 and 4 are yes or the answer to all of the above questions are yes, then you are to answer the following question: What are the plaintiff's damages?

The jury returned a verdict to the court answering questions 1 and 3 "no", and having answered in that manner the other questions were not to be answered by the jury.

Rule 49(a) of the Utah Rules of Civil Procedure allows the trial court the option to have the jury complete a "special verdict". The rule states in part:

> The court may require a jury to return only a special verdict in the form of a special written finding upon each issue

> of fact. In that event the court may submit to the jury written interrogatories susceptible of categorical or other brief answer or may submit writtern forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate.

The Utah Supreme Court has consistently held that the decision of whether to submit the case on a "special verdict" is one for the sound discretion of the trial court, Cooper v. Evans, 1 Utah 2d 68, 262 P.2d 278 (1953); Milligan v. Capitol Furniture, 8 Utah 2d 383, 335 P.2d 619 (1959); Page v. Utah Home Fire Insurance Company, 15 Utah 2d 257, 391 P.2d 290 (1964); and Ewell & Son, Inc. v. Salt Lake City Corporation, 27 Utah 2d 188, 493 P.2d 1283 (1972). Further, in Hanks v. Christensen, 11 Utah 2d 8, 354 P.2d 564 (1960), this court held that: "It is elementary that there is no impropriety in submitting special interrogatories if the court so desires."

In plaintiff's brief the case of Barton v. Jensen, 19 Utah 2d 196, 429 P.2d 44 (1967), is cited as authority for the concept that a special verdict form which eliminates certain theories of plaintiff's case or severely restricts the issues upon which the jury can make a finding would constitute a clear abuse of discretion on the trial court. However, Barton stands merely for the concept that the court went beyond what is ordinarily considered as "polling the jury" and that as a result of the questioning in open court by the judge, some of the jury members may have changed their opinion as to the merits of the cause.

As grounds for their statement that the submission of a special verdict was error, plaintiffs argue that several theories of negligence were not allowed to be considered by the jury. An understanding of plaintiffs' overall theories of negligence and causation, however, which were presented to the jury by questions 1 through 4 of the verdict form, reveals that every one of the claimed allegations of negligence which plaintiff indicates were not submitted to the jury, were in fact presented and encompassed within the verdict form. For example, the allegation of the failure of the doctor and nurses to properly attend to Mrs. Reiser, the allegation of the failure to monitor Mrs. Resier, and the allegation of the failure on the part of the doctor to adequately train his nursing staff to recognize the symptoms of supine hypotensive syndrome, are all encompassed in the question of whether Dr. Lohner was negligent in allowing Mrs. Reiser to lie on her back for an excessive period of time. Each of the stated allegations of negligence referred to by plaintiffs suggest that if the doctor was at all times doing what he should have done, Mrs. Reiser would not have been allowed to lie on her back for an excessive period of time.

Further, the allegations of failing to have oxygen present and failing to have the nurses participate in the resuscitative efforts are each incorporated in the general question of, "Was the defendant Richard Lohner negligent in the acts and efforts utilized or not utilized to resuscitate Mrs. Reiser during the time she was unconscious?" The implication of not having oxygen present and not having the nurses participate in the resuscitative efforts simply goes to the question of whether

the acts and efforts utilized by Dr. Lohner were what they should have been given the standard of care.

Plaintiffs further argue in their brief that they were precluded from presenting the issue that defendants were negligent in "failing to induce labor when they obtained the initial titer of 1:128." Plaintiffs fail to point out, however, that plaintiffs' counsel agreed and indicated to the court that the issue of failing to induce labor rather than perform an amniocentesis at 38 weeks should not go to the jury.

In the very beginning of the trial plaintiffs' counsel stated that in light of the court's order in limine plaintiffs would not present the issue of the failure to induce labor. In fact, plaintiffs' counsel specifically told the court that he was not going to argue that doing the amniocentesis at 38 weeks rather than inducing labor was a negligent act:

> THE COURT: But are you going to argue that doing it at thirty-eight weeks was a negligent act?
>
> MR. HOWARD: No. I'm going to argue having her on her back at thirty-eight weeks for any operation, any procedure was negligence.
>
> THE COURT: If you are not going to claim that doing it at that period of her pregnancy was an act of negligence then I don't see any point of raising it.
>
> MR. HOWARD: Not the amniocentesis. Any procedure. If he had had her on her back to take her temperature and had her there for eight minutes, it would have been negligence. This is under the ruling of this Court. (R. 1094)

In spite of the above representation, plaintiffs' counsel in opening statement and through testimony of expert wit-

nesses did refer to the failure to induce labor rather than perform an amniocentesis as negligence. The court later in the trial inquired of plaintiffs' counsel whether there was an issue that the doing of the amniocentesis in this particular case was negligence, and after plaintiffs' counsel reported that was not an issue, the court removed it from the jury. Part of the dialogue between the court and counsel in that regard is as follows:

> THE COURT: The question is whether or not it was negligent to have her on her back --
>
> MR. HOWARD: That's right.
>
> THE COURT: (continuing) -- for an extended period of time.
>
> I'll submit that as a special interrogatory but I will not submit as a special interrogatory the question of whether or not it was negligent to perform an amniocentesis at thirty-eight weeks.
>
> MR. HOWARD: I'll agree. That's perfectly all right. (R. 1487-1488)

In light of the representations of plaintiffs' counsel, it would appear that plaintiffs waived any right to have this issue presented to the jury, in effect agreeing that the giving of an amniocentesis rather than inducing labor at 38 weeks was not part of plaintiffs' theory of the case, which simply related to whether the defendants had left the patient on her back for an excessive period of time, for whatever reason. The reason she was on her back was not related to the injury as has been thoroughly discussed earlier.

From all of the foregoing it appears that the special verdict form submitted adequately covered the theories of negli-

gence that the plaintiff presented and the trial court did not abuse its discretion in failing to submit a general verdict form.

## POINT III.

### THE TRIAL COURT DID NOT COMMIT ERROR IN FAILING TO GIVE TO THE JURY THE ISSUE OF INFORMED CONSENT.

Plaintiffs argue in their brief that "because of the ruling of the court on the motion in limine, plaintiffs were precluded from having their medical experts testify that the doctor's alleged mismanagement and failure to take timely tests would be an essential part of any informed consent." Plaintiffs further state that because of the motion in limine the court was forced to reject plaintiffs' requested instruction on informed consent, "even though the court recognized that there was an issue on informed consent." (Plaintiffs' Brief, p. 37)

The truth of the matter is that the court never recognized that there was an issue on informed consent with or without the order in limine. The record clearly reveals this:

> THE COURT: I can't see this problem, I'm sorry, no matter how you argue it.
>
> Informed consent. Okay. She should have been told there was risk involved in the procedure she underwent on June 26th. Beyond that, why would she have to be told they were doing it because they didn't do it on prior occasions? That doesn't make any sense to me at all.
>
> Informed consent simply means that she has to know all the risks involved in the procedure she is about to undertake.
>
> Now, having failed to do prior procedures has nothing to do with whether or not she is informed of what's going to happen with this procedure.

A. Defendant's Duty To Obtain An Informed Consent Extends Only To Informing The Patient Of Substantial, And Significant, Risks.

In plaintiffs' jury instruction requesting the issue of "informed consent", plaintiffs recognize that the defendants must inform the patient of the "risks involved in the procedure performed". (R. 192) (Emphasis added)

This duty is further defined by the recent Utah statute which, although not applicable directly because the statute was not in effect in 1971, is still very instructive on the kind of information that is considered necessary to disclose to a patient. U.C.A. §78-14-5, as it became effective in 1976, requires that the physician need only inform the patient of the "substantial" and "significant" risks of the procedure to be performed.

The procedure performed in the instant case was an amniocentesis which carried certain minor risks, including sticking the baby with a needle and infection.

Plaintiffs cannot and do not contend that the failure to perform prior amniocentesis procedures or prior titer tests were in any way a risk associated with the performance of the amniocentesis at 38 weeks. Plaintiffs' only argument for claiming error on the issue of informed consent is that the omission of the earlier tests was information that should have been supplied to the patient, Mrs. Reiser, in deciding whether to have the amniocentesis performed at the 38th week. This does not appear to be the kind of information that is necessary to obtain an informed consent under Utah law. See also Ficklin v.

Macfarlane, 550 P.2d 1295 (Utah 1976).

The injury received by the infant plaintiff in the instant case was a result of "anoxia", which is the condition caused by the cardiac arrest suffered by Mrs. Reiser after the amniocentesis procedure was performed. Plaintiffs cannot and do not contend that the possibility of obtaining a cardiac arrest from the amniocentesis procedure was a risk that should have been explained to her. All of the evidence at the trial confirmed the fact that a cardiac arrest has never resulted from an amniocentesis procedure before and that a cardiac arrest has never resulted from the condition known as supine hypotensive syndrome, which plaintiffs claim brought about the cardiac arrest. (R. 1364-1369, 1412-1414, 1685-1687, 1812)

Dr. Lohner testified that he did inform Mrs. Reiser of the major risks associated with the giving of the amniocentesis, including striking the baby with the needle and infection. (R. 1518)

B. Any Failure To Inform Mrs. Reiser Of The Omission Of The Earlier Tests Or Of The Risks Of Performing An Amniocentesis Cannot Be A Proximate Cause Of Plaintiff's Injuries.

Any failure to inform Mrs. Reiser of test omissions cannot be a proximate cause of the injuries to the Reiser baby. The infant was not injured as a result of the Rh factor or a breakdown of the infant's blood from the attack of the mother's antibodies. This has been thoroughly discussed in Point I of this brief.

It is a well-settled principle that the physician's failure to adequately inform must be a proximate cause of the

damage to the patient in order to hold defendants liable. Canterbury v. Spence, 464 F.2d 772, 790; Wales v. Barnes, 261 So.2d 201 (Fla.App. 1972); Vara v. Drago, 264 N.Y.S.2d 660 (N.Y. 1965), U.C.A. §78-14-5(1)(g), and plaintiffs' requested jury instructions (R. 192).

It is interesting to note that the plaintiffs cite the case of Gates v. Jensen, 595 P.2d 919 (Wash. 1979), as a case where the doctrine of informed consent has been recently "well stated". Gates is clearly distinguishable, however, from the instant case on the issue of causation, in that the problem developing from the lack of information given to the patient was directly related to the actual injury ultimately received. In the instant case, however, and as has been noted again and again, the infant plaintiff's injuries had nothing to do with the Rh factor and a failure to perform the earlier tests and acquaint Mrs. Reiser with that failure was simply not a cause of the injuries.

The causal relationship is also missing in any claim that Dr. Lohner did not inform Mrs. Reiser of the usual and expected risks of an amniocentesis. The baby was not injured as a result of a needle striking it or from infection introduced into the amniotic cavity. There is no contention by plaintiffs that there are any other usual and expected risks of an amniocentesis.

C. Husband Consent Not Required For The Performance of An Amniocentesis.

Plaintiffs argue that the infant plaintiff's father, Richard Reiser, should have been consulted concerning the

amniocentesis procedure. Plaintiffs have incorrectly cited Hope v. Nielsen, 523 P.2d 211 (Wash. 1974), as authority for the proposition that a physician must have an informed consent from both parents for a procedure affecting an unborn fetus. (Plaintiff's brief, p. 40) In that case, the court simply required an informed consent from the "parents" concerning a cesarean section, but did not discuss the right of the "father" and the "mother" both to give such an informed consent.

The Utah informed consent statute addresses this subject more directly and specifies the individual who has the right to give the "informed consent" in a situation involving a pregnancy:

> (4) The following persons are authorized and empowered to consent to any health care not prohibited by law:
>
> * * *
>
> (f) Any female regardless of her age or marital status, when given in connection with her pregnancy or childbirth. U.C.A. §78-14-5(4)(f).

A case directly on point from the Second District Court of Appeals in California is Rosenburg v. Feigin, 260 P.2d 143 (Cal.App. 1953), wherein the plaintiff was a husband of a patient treated by defendant during the course of her pregnancy, and plaintiff contended that he did not give consent to the defendant's treatment, which amounted to malpractice, and resulted in a miscarriage. In affirming the judgment of dismissal against the husband, the court stated:

> The defendant as physician for the wife of plaintiff had a right and duty to give her the care and treatment that she required and consented to, according to accepted standards of his profession, and is not liable to the husband because he did not notify the husband of the nature

> and possible effect of the care which he contemplated and regarded as necessary, and did not secure the huband's consent. 260 P.2d at 144.

See also Nishi v. Hartwell, 473 P.2d 116 (Haw. 1970).

Based on all the foregoing, it appears clear that the trial court did not err in failing to present the issue of informed consent to the jury.

POINT IV.

> THE TRIAL COURT DID NOT COMMIT ERROR IN DISMISSING PLAINTIFFS' FIRST CAUSE OF ACTION BY REASON OF THE EXPIRATION OF THE STATUTE OF LIMITATIONS.

On January 23, 1976, Judge Allen B. Sorensen granted a summary judgment against plaintiff Eleanor Reiser upon the first cause of action of plaintiffs' complaint. (R. 762-763) The Minute Entry and Ruling of January 16, 1976, of Judge Sorensen indicates that the first cause of action was barred by reason of the expiration of the statute of limitations, 78-12-28(3), U.C.A., (1953).

A. A Separate Trial On The Applicability Of The Statute Of Limitations Is Not Required When There Is No Dispute Of The Applicable Facts.

Plaintiffs argue that Utah Code Annotated §78-12-47 (in effect at the time) is a party's right to have the statute of limitations issue in a medical malpractice case tried by a jury. Plaintiffs' argument, in effect, would deny a trial court from granting a summary judgment on the basis of the expiration of the medical malpractice statute of limitations. The statute cited, however, does not extend to the limits implied by plaintiffs' argument. Section 78-12-47 states merely that, "the issue raised

thereby may be tried separately before any other issues in the case are tried." (Emphasis added) It does not state that the limitations issue must be tried in a separate action and the statute on its face does not take from the trial court the prerogative to dismiss a claim on the basis that there are no material issues of fact concerning the expiration of the statute of limitations.

The authority of a trial court to grant a summary judgment when there is no substantial issue of fact involved on the issue of the statute of limitations is well settled. 51 Am.Jur.2d, Limitation of Actions, 927 §470, 61 A.L.R.2d 341, 342.

Judge Sorensen correctly determined that there was no triable issue of fact as to the expiration of the statute of limitations by virtue of the extensive deposition testimony cited in defendants' memorandum in support of the motion for summary judgment. (R. 822-827)

B. Plaintiff Eleanor Reiser Filed Her Lawsuit Two Years After The Date That She Discovered Her Injury Or Through The Use Of Reasonable Diligence Should Have Discovered Her Injury And Her Cause Of Action Was Therefore Barred Under The Provisions Of U.C.A. §78-12-28(3).

The applicable statute of limitations for medical malpractice actions in effect at the time plaintiffs filed this matter was U.C.A. §78-12-28(3) which stated that an action against a physician must be filed "two 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, whichever occurs later. . . ."

Since plaintiffs filed their lawsuit on May 1, 1974, th foregoing statute would require that plaintiff Eleanor Reiser must have discovered her injury after May 1, 1972, in order for the cause of action to be valid.

Numerous testimony from the depositions of plaintiff Eleanor Reiser and plaintiff Richard Reiser, as well as physicia treating Mrs. Reiser, is cited in the memorandum in support of defendants' motion for summary judgment. (R. 823-827) All of this testimony clearly revealed that Mrs. Reiser experienced memory, balance, and visual problems almost immediately after th cardiac arrest which she experienced on June 26, 1971.

The Utah Supreme Court has recently announced the opinion of Foil v. Ballinger, 601 P.2d 144 (1979), wherein the court held that the statute of limitations for medical malpractice claims begins to run, "when an injured person knows or should know that he has suffered a legal injury." 601 P.2d at 147.

There are several distinguishing features between the instant case and Foil, which would suggest a different result from that obtained in the Foil decision. In Foil, the plaintiff originally sustained a back injury in May of 1967. She was treated with good results and was gainfully employed until December, 1971, when she again injured her back. A surgeon then performed additional surgery. Because of continued back pain, plaintiff was given injections of caudal anesthesia as well as various medications and subcutaneous electrical stimulation, fro November 30th to December 15, 1973. She was then later readmitted to the hospital on January 18, 1974, and received a

"subarachnoid phenol block."

Plaintiff next suffered from a rectal and bladder disorder resulting in major surgery in December, 1975. Her health problems persisted, and she eventually received a report from the Workmen's Compensation Medical Panel indicating that the rectal and bladder problems resulted from the causative agents of the "block" administered in January of 1974. It was at that point that the court held plaintiff Foil had discovered her "legal injury."

In Foil, one can plainly see that it would have been difficult for plaintiff to have established any causal relationship between the treatment of the defendant physician who administered the "block" and the rectal and bladder disorder. This subsequent problem could have been totally unrelated to any medical treatment received, and by the time defendant had treated plaintiff, she had already received so much medical attention that it would have been difficult to isolate any specific act that could have been negligence.

In the instant case, however, there is no question but that plaintiff Eleanor Reiser experienced loss of memory, balance and visual problems that she was told was a direct result of the cardiac arrest. (R. 823-827) Consequently, if plaintiff had a claim for malpractice that was incident to the cardiac arrest, the only medical treatment to suspect would be that given by Dr. Lohner on June 26, 1971. With that in mind, it is incumbent upon plaintiff to exercise the reasonable diligence to discover whether there may have been any negligence. Plaintiff cannot sit

by and wait until someone tells them there may be malpractice before the time commences for the applicable statute of limitations. This relationship of the responsibility of the plaintiff to make reasonable inquiry with the running of the discovery statute of limitations in a medical malpractice action is required by many courts throughout the country. In Mock v. Santa Monica Hospital, 9 Cal. Reptr. 555 (1960), the court affirmed a summary dismissal of plaintiff's case stating:

> This brings into play the rule so frequently announced in this state that as the means of knowledge are equivalent to knowledge, if it appears that the plaintiff had notice or information of circumstances which would put him on an inquiry which, if followed, would lead to knowledge, or that the facts were presumptively within his knowledge, he will be deemed to have had actual knowledge of these facts. 9 Cal. Reptr. at 561-62.

See also Hemingway v. Waxler, 274 P.2d 699 (Cal. 1954).

Defendants contend that this standard should apply to malpractice actions of the kind involved in this case and that based on the amount of knowledge that Mrs. Reiser had of her "injury" that the trial court summary judgment should be affirmed.

## POINT V.

### THE TRIAL COURT DID NOT COMMIT ERROR IN DISMISSING PLAINTIFFS' THIRD CAUSE OF ACTION BECAUSE THE CLAIM FOR EMOTIONAL DISTRESS DOES NOT STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Plaintiff's third cause of action of their complaint alleged "emotional damage" by reason of the injuries to their daughter. (R. 930) The trial court dismissed this cause of action by summary judgment for the reason that such a cause of

action is not recognized in Utah. In so ruling, the trial court correctly held that Utah has not extended recovery for negligent infliction of emotional distress.

In Jeppsen v. Jensen, 47 Utah 536, 155 P. 429 (1916), and Samms v. Eccles, 11 Utah 2d 289, 358 P.2d 344 (1961), both of which were cases involving "intentional" infliction of emotional distress, the Supreme court specifically stated that emotional damages could not be recovered for mere negligence. In Samms, the court stated:

> Our study of the authorities, and of the arguments advanced, convinces us, that conceding such a cause of action, may not be based upon mere negligence, the best considered view recognizes an action for severe emotional distress, though not accompanied by bodily impact or physical injury, where the defendant intentionally engaged in some conduct toward the plaintiff. . . . (Emphasis added) 358 P.2d at 346-47.

In Preece v. Baur, 143 F.Supp. 804 (E.D. Idaho 1956), the U.S. District Court in the Eastern District of Idaho applied Utah law in holding that a parent could not recover for mental distress or anxiety when his child had been put in peril by the negligence of a third party.

This is the general rule that is supported throughout the country, as is articulated in 32 A.L.R.2d 1078, §7:

> The rule has been recognized in a number of later cases that there can be no recovery by a parent in an action for injuries to a minor child, for the pain, suffering, or other distress caused the parent by the injuries of the child.

The exception to this general rule that has been adopted in some jurisdictions would permit recovery for emotional

distress when such distress results in physical injury to the plaintiff and where the plaintiff is either within the "zone of danger" or where there has been contemporaneous observance of a sudden and immediate injury to a close member of the plaintiff's family. Dillon v. Legg, 69 Cal. Reptr. 72, 441 P.2d 912 (1968), 77 A.L.R.3d 447.

The landmark decision of Dillon v. Legg, supra, from the California Supreme Court clearly did not extend recovery for emotional distress to parents in situations like the instant case where the injury to the child was not a result of a "single traumatic incident", and where the emotional distress to the parents caused by the injury to the child did not result in actual physical injury to the parents. In the later California decision of Capelouto v. Kaiser Foundation Hospitals, 98 Cal. Reptr. 631 (1971), aff'd 103 Cal. Reptr. 856, 500 P.2d 880 (1972), the parents were attempting to recover for emotional distress caused as a result of a salmonella bacteria infection transferred to their infant daughter as a result of negligence by the hospital where the infant was born. Symptoms of the daughter's disease lasted off and on over a period of 9 to 12 months. In rejecting any recovery for emotional distress, the Appellate Court stated:

> We believe Dillon does not apply to the circumstances of the case at bench. Dillon involved a single traumatic accident, observable and contemporaneously observed. Here the 'accident' was the unobservable transmission of an infection, and the shock came only from viewing the lengthy unfolding of the symptoms of the infection. Moreover, Dillon was limited

> to a case in which the shock resulted in physical injury. 98 Cal.Rptr. at 635.

(The California Supreme Court in this same case affirmed the fact that Dillon did not extend to mental distress that does not result in physical injury, 500 P.2d 800, 882, footnote 1.)

In the recent case of Keck v. Jackson, 593 P.2d 668 (Ariz. 1979), the Arizona Supreme Court held that evidence of physical injury would be required resulting from emotional distress in order to provide recovery to the parents. The court reasoned as follows:

> In order for there to be recovery for the tort of negligent infliction of emotional distress, the shock or mental anguish of the plaintiff must be manifested as a physical injury. Damages for emotional disturbance alone are too speculative. 593 P.2d at 669-670.

For other recent cases requiring the allegations of actual physical injury resulting from claims of emotional distress, see Aragon v. Spellman, 491 P.2d 173 (N.M. 1971); Archibald v. Braverman, 79 Cal.Rptr. 723 (Cal.App. 1969); and Owens v. Children's Memorial Hospital, 480 F.2d 465 (8th Cir. 1973).

The facts of the instant case clearly do not support recovery for emotional distress to the plaintiff parents as a result of the alleged negligent infliction of injuries upon their infant daughter. Although plaintiffs cite two lower court opinions from other jurisdictions as support for this claim, the overwhelming majority of cases throughout the country would not provide recovery. The third cause of action in the complaint clearly shows that plaintiff, Mr. Reiser, has not suffered any physical injuries whatsoever, and the physical injuries incurred

by Mrs. Reiser are not alleged to have been caused by the actual emotional distress that she incurred as a result of the injuries to her child. Further, the injuries to the infant daughter did not involve a single traumatic observable accident.

## POINT VI.

### IN THE ALTERNATIVE TO POINTS IV AND V, PLAINTIFFS RICHARD AND ELEANOR REISER'S CLAIMS ARE BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL.

Even if the parents' claims in the instant case are not barred by reason of the expiration of the statute of limitations or by reason of a failure to properly state a claim upon which relief can be granted, the parents are "collaterally estopped" from pursuing their claims against the defendants. The doctrine of collateral estoppel, which is either a part of or a cousin to the doctrine of res judicata, is said to reflect the refusal of the law, "to tolerate a multiplicity of, or needless, litigation". 46 Am.Jur.2d, Judgments, 561 §395. While certain aspects of the res judicata doctrine have the effect of precluding a plaintiff from relitigating the same cause of action against the same defendant, the doctrine of collateral estoppel precludes the relitigation, in a second action, of an issue that has been actually and necessarily litigated and determined in a prior matter which was based on a different cause of action. 46 Am.Jur.2d, Judgments, 563-567, §396-398; Restatement of the Law, Judgments, §45, comment (c); In re West Jordan, Inc., 7 Utah 2d 391, 326 P.2d 105 (Utah 1958).

A. All Issues Have Been Litigated and Resolved in Favor of Defendants.

The general rule is that the doctrine of collateral estoppel only applies when a question of fact essential to and determinative of the judgment is actually litigated and determined by a valid or final judgment which is conclusive as between the parties to a subsequent action on a different cause of action. In re West Jordan, 7 Utah 2d at 394, 46 Am.Jur.2d, Judgments, 591 §422.

There should be no dispute in the instant case that the issues of liability against defendants that would be raised in a new trial by the plaintiff parents, would simply be a relitigation of the same issues already tried. If the plaintiff Eleanor Reiser has a claim for personal injuries, it is based on the same theory as the claim for personal injuries on the part of the infant plaintiff, Elizabeth. Furthermore, the claim for emotional distress on the part of the father, Richard Reiser, is somewhat derivative in nature and could not be based on any issue of liability against the defendants that has not already been fully litigated in the prior action.

B. The Plaintiff Parents Are in Privity With the Infant Plaintiff.

It is well settled that the doctrine of collateral estoppel or the doctrine of res judicata binds only those who were parties to the original proceedings or those who were in "privity" with the parties to the original proceedings. Glen Allen Mining Co. v. Park Galena Mining Co., 77 Utah 362, 296 P. 231 (1931); Ruffinengo v. Miller, 579 P.2d 342 (Utah 1978).

The United States Supreme Court in Chicago R.I.&P. Ry. Co. v. Schendel, 270 U.S. 611, 70 L.Ed. 757 (1926), characterized the necessary relationship for res judicata and collateral estoppel purposes as "substantial identity", rather than privity, between the parties. Under the Schendel doctrine, the true test is whether the person whose interest is represented in the two suits is the same. The substantial interest test described in the Schendel case appears to be somewhat the same as the definition that the Utah Supreme Court gave to the concept of privity in Glen Allen Mining Co. v. Park Galena Mining Co., supra.

This identity of interest has been found to be present in several cases involving separate actions brought by husband and wife or separate actions brought by parent and child. In Wilkey v. Southwestern Greyhound Lines, Inc., 322 P.2d 1058 (Okla. 1957), three separate lawsuits were filed against defendant based on injuries and death occurring incident to a bus/truck accident. The driver of the truck filed two wrongful death actions on behalf of his wife and daughter, and a separate action for his own injuries and for property damage to his vehicle. The wrongful death action on behalf of his wife was brought to trial first and a verdict was rendered in favor of defendant. The defendant then sought to have the first judgment rendered conclusive as to the other two lawsuits filed and the lower court granted defendant's motion. The Oklahoma Supreme Court affirmed the lower court, holding that plaintiffs were "collaterally estopped" from litigating the same issues of liability against the defendant.

Further in Laws v. Fisher, 513 P.2d 876 (Okla. 1973), the court applied collateral estoppel to a husband's action brought after the wife of plaintiff had previously brought an action against the same defendant, and a judgment had been granted for defendants, for damages arising from injuries to her in an automobile accident. The husband, as driver of the vehicle, was asserting the claim for loss of the wife's services, society and companionship, consortium and other damages to himself, and also for damages to and loss of use of his automobile. In granting defendant's motion for a judgment as a matter of law in favor of defendant, the court held that the husband and wife were "in privity" and there appeared to be no "adversity of interest" between the two. 513 A.2d at 878.

In the instant case any further litigation on the part of the parents against defendants would in fact be a litigation of the same issues by parties who are in "privity" with the plaintiff in the earlier action determined in favor of defendants. There should be little doubt that the interests of the parents are substantially identical to those of the infant plaintiff in pursuing their claims.

C. The Plaintiff Parents Controlled and Participated Fully in the Litigation.

One generally recognized exception to the requirement that the parties be tne same or in privity is found in the situation where an individual who is not a party to the litigation participates in the case to such a degree that the policies underlying the privity requirement are not applicable and res judicata or collateral estoppel will be applied to any subsequent

action. In the instant case, the parents should be collaterally estopped because they participated fully in the litigation with their daughter as plaintiff and in fact controlled the litigation to such a degree that the parents cannot claim a denial of due process or that they did not have their "day in court".

The leading case applying this general exception referred to is Souffront v. Campagine Des Sucreries, 217 U.S. 475, 54 L. Ed. 846 (1910), and it has been very recently applied by the United States Supreme Court in the case of Montana v. United States, 440 U.S. 147, 99 S. Ct. 970, 59 L. Ed. 2d 210 (February 22, 1979).

In Cauefield v. Fidelity & Cas. Co., 378 F. 2d 876 (5th Cir. 1967), the defendants had cleared some of their land and in the process allegedly desecrated a cemetery as well. A suit was brought by one individual claiming damages as a result of the desecration of the cemetery, a trial was held, and the jury found that the desecration had not occurred. A later suit was brought by different plaintiffs and the trial court held as a matter of law that an estoppel would work to defeat the second lawsuit. The circuit court affirmed applying the general rule of non-party participation in the litigation.

In a Law Review note that analyzed Cauefield and other similar cases, the author discusses the merits of the Cauefield opinion:

> In Cauefield v. Fidelity & Cas. Co., for example, the interest of the litigant in not being estopped on the basis of a prior action to which he was not a party is hardly compelling. The plaintiff's claim of cemetery desecration was iden-

> tical to the claim litigated in the prior action, his attorney was also the attorney in that action. The plaintiff not only knew of the prior action at the time it took place, but even testified, as did all the other potential plaintiffs. Moreover, the plaintiff conceded that he could produce no new evidence, and the simplicity of the factual questions and governing legal propositions made it unlikely that a different strategy or set of arguments, if pursued, would make much difference. In light of these factors, the plaintiff's interest in Cauefield in being free to relitigate the issue of liability is not of paramount importance. 87 Harvard L. Rev., "Collateral Estoppel of Non-parties", p. 1485.

As in Cauefield, the plaintiff parents in the instant case were actually in control of the litigation. The attorney hired to represent the parents was the same attorney that represented the interests of the infant plaintiff. Further, the parents testified at both trials and were in attendance during most of the trials wherein it was ultimately determined that defendants were not liable, and it is difficult to see how the parents could produce any further evidence that was not already presented.

The participating non-party rule has been recognized widely throughout the country and should apply as a matter of public policy to a case of this nature. Restatement of Judgments, §84; 50 C.J.S., Judgments, 317, §782; Ritchie v. Landau, 475 F.2d 151 (2nd Cir. 1973); Kreager v. General Electric Co., 497 F.2d 468 (2nd Cir. 1974), cert. denied 95 S.Ct. 111, (1974); Kamstra v. Bolles, 434 P.2d 539 (Alas. 1967).

## CONCLUSION

The lower court did not err in granting defendants' motion in limine, in refusing to present the issue of informed consent to the jury, and in presenting the special verdict form.

Further, the lower court did not err in granting the summary judgment for Mrs. Reiser's alleged personal injuries and for the parents' claim for emotional distress.

Respectfully submitted this 9 day of June, 1980.

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## MAILING CERTIFICATE

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