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 : Reply Brief of Plaintiffs-Appellants

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

ELIZABETH IRENE REISER, by and through her Guardian, RICHARD E. REISER and ELEANOR REISER,

Plaintiffs-Appellants,

vs. Case No. 16,444

RICHARD LOHNER and HOWARD FRANCIS, Medical Doctors, and PROVO OBSTETRICAL AND GYNECOLOGY CLINIC, INC., a Professional corporation,

Defendants-Respondents.

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

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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Case No. 16,444

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

STATEMENT OF FACTS

It is important to clarify several characterizations of fact recited in respondents' brief.

Dr. Francis and Dr. Lohner both testified that the rotational system of seeing patients mandates that the "progress sheet" on each patient be properly filled out disclosing relevant information to the next doctor who might see the patient. The progress or cover sheet is a printed form supplied by a medical supply house (R.1231-32) which contains spaces for various notations to be made by the doctors during prenatal examinations. (R.1226). The form has a line stating "Rh negative" which Dr. Lohner circles when he has a patient who has that particular problem. (R.1231-32). It is undisputed that the fact that Mrs. Reiser was Rh negative was first

written on the chart by Dr. Lohner on June 24, 1971, Mrs. Reiser's thirty-eighth week of pregnancy. (R.1232).

As compared with the whole series of titer tests run on Mrs. Reiser during her previous pregnancy, the highest of which was 1:4, (R. 1727, 1753), Dr. Lohner, because of the failure to note her Rh sensitivity earlier, ran only one titer test during her thirty-eighth week of pregnancy which was 1:128, approximately thirty times higher than the highest test result obtained in her previous pregnancy. Dr. Lohner testified that he had seen severe involvement of the baby with a titer test as low as 1:8 or 1:16 (R.1510) and accordingly had induced labor in the previous pregnancy when the titer reached 1:4. (R.1727,1753). Because Dr. Lohner did not perform a series of titer tests, he was unable to determine how fast the antibodies were building up. It was because of that failure that the amniocentesis was performed.

The respondents do not take issue with the fact that Mrs. Reiser was not warned of all the possible adverse effects of the amniocentesis procedure (R. 1243, 1517-18), nor do respondents contend that there was any communication with Richard Reiser to inform him of the risks or to seek his assistance in persuading Mrs. Reiser to submit to induced labor. (R. 1244-45).

Dr. Lohner testified that the only risks of the amniocentesis procedure that were explained to Mrs. Reiser were the risks that the baby might be stuck with the needle and that the procedure might induce infection within the uterus.

(R. 1518). No explanation was made as to the risk of vaso-vagal syndrome or supine hypotensive syndrome although such a risk was known to Dr. Lohner and the nurses. (R.1218-19, 1222-1229).

As Mrs. Reiser was being prepared for the amniocentesis, Dr. Lohner testified that he took the blood pressure and it was low (R.1251), but because of the unexpected occurrences, he did not record the blood pressure on the chart. (R.1522). Dr. Lohner testified that it was his practice to record the measurements as he was leaving the room and before seeing another patient,although his nurse, Mrs. Nielson, testified that she ordinarily records and documents the doctors' examination findings while with the patient. (R.1163-1167). Nurse Nielson had no recollection of the blood pressure of Mrs. Reiser being taken on June 26, 1971. (R. 1163). As pointed out at trial, Dr. Lohner stated in his deposition of August 3, 1974, that he left Mrs. Reiser's room after the amniocentesis to examine another patient in another examining room, yet still did not record a blood pressure for Mrs. Reiser. (R.1522). In any event, no blood pressure was recorded.

Subsequent to the performance of the amniocentesis by Dr. Lohner, wherein Mrs. Reiser was on her back for a considerable period of time, she suffered a cardiac arrest. It is undisputed that the nurses did not start any resuscitative measures, instead, they left the room to look for smelling salts, which were never found. (R. 1178-1179). Mrs. Reiser

was cyanotic and was allowed by the nurses to remain in a supine position. Mrs. Nielson summoned Dr. Lohner who attempted to use, for the first time, an ambu bag. (R.1353). Dr. Lohner could not get a good seal around the mouth and accordingly discarded the apparatus which was capable of delivering significantly more oxygen to Mrs. Reiser than the use of mouth to mouth resucitation. (R.1317-18, 1535).

Dr. Lohner performed both the mouth-to-mouth resuscitation and the heart massage and did not seek the help of either of the two nurses. (R. 1535). As explained by Dr. Banner, the plaintiff's expert, the procedure used by Dr. Lohner aggravated the anoxia of the baby unnecessarily, since there were medically trained persons in the office. Dr. Banner and Dr. Roach testified that when two persons work together, one on mouth-to-mouth and one on cardiac massage, the amount of oxygen exchange is greatly increased. (R. 1316-17, 1405-1406). At no time did Dr. Lohner place a pillow or other device under Mrs. Reiser to transfer the weight of the baby off of the inferior vena cava, in order to provide increased circulation.

The respondents make the statement that all of the experts in this case agree that never in medical history has the performance of an amniocentesis led to a cardiac arrest. But the respondents omit the important qualification that when an amniocentesis or surgical procedure is performed in late pregnancy, the patient is not laid supine on a hard table; instead, she is laid on the right side and cushions

are used to support the back. An obvious explanation for the absence of a similar occurrence in medical literature is that Dr. Lohner, in contravention of basic tenets of obstetrics, allowed the plaintiff to lay supine on a hard table for an extended period of time through the examination, amniocentesis and the resuscitation efforts. Hopefully, such errors in judgment and management are not common.

Further, Dr. Roach explained that in a short period of years the Rh disease has been identified, therapeutic modalities developed to treat it, and finally, medical treatment discovered to prevent it. (R. 1369-80). Accordingly, the use of the amniocentesis procedure in a Rh disease case became antiquated in a short time. The chance that that development would be coupled, in medical literature, with supine hypotensive syndrome or vasovagal syndrome and then again with cardiac arrest and be recognized and reported as such are slim although each is separately known to arise in similar circumstances. (R. 1369-70). The respondents' statement is analogous to researching a case where a man in a green shirt had a cardiac arrest while snow skiing. No one would doubt the authenticity or the possibility of their relation, but the chances of the report drawing all those factors out are slim.

There is no dispute that all the doctors recognized hypotensive syndrome, vasovagal syndrome and the other factors in this case as known, significant obstetrical occurrences.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE THAT A TITER TEST WAS NOT TAKEN PRIOR TO JUNE 24, 1971, AND THAT THE FIRST AMNIOCENTESIS WAS PERFORMED ON JUNE 26, 1971.

a. Evidence can never be excluded merely because it is not the proximate cause of an injury.

The respondents do not cite one case nor point to one rule of evidence that states that unless an act of the defendant is proven to the trial judge to be a proximate cause of an injury, evidence of that act may be excluded. The respondents do not take issue with the fact that the plaintiff's experts, if allowed to discuss the subject, would have testified to the causal connection between the failure to take a series of titers, the performance of a needless, ill-advised and dangerous amniocentesis at thirty-eight weeks and the subsequent hypotensive syndrome and cardiac arrest. (R. 1077-1078). Further, Dr. Banner would have testified that, because of the low blood pressure evident on June 24th, the failure to monitor the vital signs at the time of the performance of the amniocentesis on June 26th, was a departure from medical standards and was causally connected to the result. Dr. Banner would also have testified that the risk involved compared with the benefit to be derived from a single amniocentesis was so small that it was surely negligence to perform an amniocentesis under those circumstances. (R. 1078).

Once expert testimony is proffered on the subject, the question of proximate cause is a fact issue for the jury, which province the trial judge usurped by his ruling.

Simply put, Rule 45 of the Utah Rules of Evidence, as applied to this case, allows the exclusion of relevant evidence only if its admission creates substantial danger of undue prejudice or of confusing the issues or of misleading the jury. Federal cases interpreting Rule 403, which contains the same provisions of Rule 45, state that in deciding the question of admissibility, all doubt should be resolved in favor of admissibility (see, e.g., United States v. Alison, 447 F.2d 286 (5th Cir. 1973)) and, if the evidence has probative value, it is ordinarily admissible regardless of an imagined reaction of the jury. Travis v. United States, 266 F.2d 928, 939 (10th Cir. 1959), rev'd on other grounds 364 U.S. 631 (1961). The Court erred in adopting the test that evidence may be excluded if it is not proven to be the proximate cause of the injury and accordingly denied the plaintiff of the right to have the matter decided by the trier of fact.

b. The defendants' own theory of the case established the causal connection between the failure to take the previous titers and the injury.

While the defendants argued that the evidence of the failure to take previous titers was not a proximate cause, the defendants' experts made the causal connection. In explaining causation, the defendants' experts advanced the

theory that the cardiac arrest was the result of a vasovagal reflex. The testimony of the defendants and their experts is set out on pages 20-24 of the appellants' initial brief.

The respondents totally misstate the evidence when they represent that "[I]t is admitted by plaintiffs that performing the amniocentesis procedure itself, i.e., insertion of the needles into the abdomen, had nothing to do with arrest." (Respondents' brief, p. 12). The whole thrust of the plaintiff's case is that the defendants' failure to take a series of titers during the course of Mrs. Reiser's pregnancy was the reason Dr. Lohner performed the unnecessary and ill-advised amniocentesis which is never performed in late pregnancy. The causal connection to that point is clear. The defendants' experts then testified that the actual performance of the amniocentesis caused the vasovagal syndrome which ended in a cardiac arrest. (R. 1810-11, 1292-93, 1298-99, 1675-77). The defendants' experts testified that the vasovagal syndrome was well known to medical experts and that most physicians are very much aware of its occurrence. (R. 1822, 1810-11). Further, Dr. Sharp testified that patients have been known to go into cardiac arrest as a result of the syndrome. (R. 1810-11).

Dr. Sharp then testified that a patient who had a blood pressure of ninety-two over forty-four (the blood pressure measured on Mrs. Reiser's prior visit) and was anxious and apprehensive (the symptoms observed by Dr. Lohner and the nurses) would be a fit candidate for the vasovagal syndrome.

(R. 1821-22). The causal connection between the mismanagement of the Rh condition, the needless amniocentesis and the cardiac arrest could not be clearer.

Dr. Sharp also testified he ordinarily took a blood pressure before performing an amniocentesis, that blood pressure can change within a few minutes, and that quite often when a woman in late pregnancy lies down, her blood pressure drops. (R. 1827-28). The experts' testimony establishes the defendants' negligence in failing to take previous titers, failing to take a blood pressure, performing the amniocentesis and failing to recognize and avoid vasovagal syndrome which was caused by the amniocentesis process.

The defendants' argument that the jury, in determining that there was no negligence in allowing Mrs. Reiser to stay on her back, removed a link from the chain of causation is totally specious. It was impossible for the jury to evaluate that precise point without the excluded evidence. The jury did not know that the plaintiff's and defendants' experts, if allowed to be questioned on the subject, would have testified that it was negligence not to perform a series of titers commencing during the early stages of pregnancy; that the results of one amniocentesis in late pregnancy is inadequate for any competent physician to reach a diagnostic conclusion concerning the involvement of the child; that they had never heard of an initial amniocentesis being performed at thirty-eight weeks, and that under the circumstances of this case, the amniocentesis was a useless, dangerous procedure that,

according to Dr. Sharp, caused the cardiac arrest. (R. 1070-74). The jury did not know that Dr. Banner and Dr. Roach would have testified that the failure to take a series of titers, to note her Rh problem initially, perform an amniocentesis in the earlier stages of pregnancy and otherwise manage the Rh pregnancy was a departure from acceptable medical standards and causally connected to the cardiac arrest. (R. 1076-78).

Finally, respondents indicate that Mrs. Reiser might have suffered the same result if she was undergoing a proper procedure such as a vaginal examination or induced labor. The critical difference is that in all such procedures, the doctors testified that the patient is turned slightly on her back and supported with cushions to avoid the problem created by Dr. Lohner.

c. The plaintiffs' theory of causation is sufficient to prove proximate cause.

Numerous state courts have adopted different requirements that a plaintiff has to meet in proving medical causation because medicine is not an exact science. The decision of the Pennsylvania Supreme Court in Hamil v. Bashline, 392 A.2d 1280 (Pa. 1978), is discussed on pages 24-26 of the appellant's brief.

The United States Supreme Court dealt with the subject in Sentilles v. Inter-Caribbean Shipping Corp., 361 U.S. 107 (1959). In that case, the Court eschewed the hackneyed dogma that medical opinions on the issue of causation which

included the defense-minded litany "reasonable medical certainty." In what remains today a leading opinion, the Court held that the jury was entitled to consider all possible medical conditions aggravating the plaintiff's worsening health, and wrote:

> The jury's power to draw the inference that the aggravation of petitioner's tubercular condition, evident so shortly after the accident, was in fact caused by the accident, was not impaired by the failure of any medical witness to testify that it was in fact the case. Neither can it be impaired by the lack of medical unanimity as to the respective likelihood of the potential causes of the aggravation, or by the fact that other potential causes of the aggravation and were not conclusively negated by the proofs. The matter does not turn on the use of a particular form of words by the physicians in giving their testimony. The members of the jury, not the medical witnesses, were sworn to make a legal determination of the question of causation. They were entitled to take all of the circumstances, including the medical testimony, into consideration.

Sentilles, supra, at 107 (1959).

In commenting upon the trial Court's responsibility in these type of cases, the Court stated:

> Though this case involves a medical issue, it is no exception to the admonition that "it is not the function of the Court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on the theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury . . . . the very essence of its [the jury's] function is to select from among conflicting inferences and conclusions that which it considers

> most reasonable. . . Courts are not free to re-weigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable. [Citing cases.]

Sentilles, supra, at 110.

As stated by the Court in Hamil v. Bashline, supra, the degree of medical certitude demanded of expert testimony on the issue of causation is lower where the alleged negligence is failure to render proper medical treatment. The Court drew a distinction between the two classes of tort cases: those in which the defendant's acts or omissions set in motion a force which resulted in harm; and those, (as represented by the instant action), in which the defendant's acts or omissions breached a duty to protect against harm from another source. The Court stated that in the latter type of case, the "fact finder must consider not only what did occur but also what might have occurred. . ." had defendants performed the service properly.

See also Kostamo v. Marquette Iron Company, 405 Mich. 105, 132-133, 274 N.W. 2d 411, 423 (1970); Jeanes v. Milner, 428 F.2d 598 (8th Cir. 1970). See also Green v. Lilewood, 249 S.E. 2d 910 (S.C., 1978).

It is submitted that the plaintiffs causually connected the failure to take prior titers and the performing of an amniocentesis at thirty-eight weeks with the cardiac arrest. Both the plaintiff's and defendants' expert would have established the causation. The elimination of such a critical

and substantial portion of the plaintiff's case is not supported by the rules of evidence nor the controlling law of medical causation.

The respondent's claim that the injury to the plaintiffs was not reasonably "foreseeable" and thus the defendants' conduct could not be a "proximate cause" of the plaintiff's injury is misleading. (Respondents brief, pages 14-16). It is the respondents' contention that since a cardiac arrest had never, in medical history, resulted from an amniocentesis procedure, the defendant doctors should not be held to a duty to have forseen the potential risk.

The test for proximate cause has been variously defined by several courts, but as a general rule the test is defined as follows:

> A proximate cause has been defined as an efficient cause and generally speaking, it has been said that a cause is proximate when it is not so remote in efficiency as to be dismissed from consideration by the court. The test applied to determine whether negligent conduct was the efficient, or proximate, cause of an injury or loss suffered by the claimant is whether such conduct is a cause without which the injury would not have taken place, or is the efficient cause which set in motion the chain of circumstances leading up to the injury. In other words, a cause, to be efficient and proximate, need not be the sole cause of the injury; it is enough that it is a "proximate concurring cause." The fact that other causes concurred with the negligence of the defendant in producing an injury does not relieve him from liability unless it is shown that the other causes would have produced the injury independently of his negligence. The rule is that where an

> efficient adequate cause for injuries has been found, it must be considered as the true cause, unless another, not incident to it, but independent of it, is shown to intervene.

57 Am.Jur. 2d 401, Negligence §145.

A vital inquiry in any case involving proximate cause is whether the negligent act set in motion a natural and unbroken chain of events that led directly and proximately to the injury.

Normally a titer is performed on the first visit of an expectant Rh mother to the doctor's office (R. 268). Mrs. Reiser had been seen by Dr. Francis from her first visit until her visit on June 24, 1971. At that point, Dr. Franci was unavailable so Dr. Lohner visited with Mrs. Reiser. During that visit, he discovered that the mother was Rh sensitized and that no titer had been performed to that date. Dr. Lohner immediately ordered a titer which he subsequently discovered was extremely high. On June 26th, he called Mrs. Reiser into his office and convinced her that an immediate amniocentesis was necessary to determine the degree of involvement of the child. It was during the performance of the amniocentesis on June 26th that Mrs. Reiser had the cardiac arrest which resulted in the injury to the child.

The respondents fail to realize that it was because of their prior failure to perform a titer and prior failure to perform an amniocentesis that Dr. Lohner panicked at the time of Mrs. Reiser's visit and ordered the immediate titer

and amniocentesis. Mrs. Reiser simply did not walk into Dr. Lohner's office and lay down upon the table in order to have an amniocentesis performed. She was there because the doctors had failed to make the proper test to diagnose the condition of the child prior to that date. As stated previously, the issue of causation could not be clearer. The defendants' own experts testified that the amniocentesis was the cause of the vasovagal syndrome which in turn caused the cardiac arrest. Further, it cannot be disputed, that Dr. Sharp and the other experts testified that the vasovagal syndrome and hypotensive syndrome was well known to physicians and that it had, in reported cases, led to a cardiac arrest.

Several other courts have dealt with similar cases. In Landeros v. Flood, 131 Cal. Rptr. 69, 551 P.2d 389 (1976), a minor plaintiff brought a malpractice action against the doctor for failing to diagnose battered child syndrome and his failure to report the diagnosis of intentionally inflicted injuries to the proper authorities. The Supreme Court of California held that the plaintiff stated a cause of action in alleging that the doctor's omission in reporting the first incident of child abuse was the proximate cause of the subsequent injuries and that the intervening assaults by the mother and her common-law husband were not superseding causes of the injuries since the behavior was forseeable by the doctor. In so ruling, the Court stated as follows:

> The second principal question in this case is proximate cause. Under the allegations of the complaint it is evident that the

> continued beating inflicted on plaintiff by her mother and Reyes after she was released from the San Jose Hospital and returned to their custody constituted an "intervening act" that was the immediate cause in fact of the injuries for which she seeks to recover. (Rest. 2d Torts, §441). It is well settled in this state, however, that an intervening act does not amount to a "superseding cause" relieving a negligent defendant of liability (Id., §440), if it was reasonably forseeable: "[A]n actor may be liable if his negligence is the substantial factor in causing an injury, and he is not relieved from liability because of the intervening act of a third person if such act was reasonably forseeable at the time of his negligent conduct. [Citing cases]. Moreover, under §449 of the Rest. 2d of Torts forseeability may arise directly from the risk created by the original act of negligence: "If the likelihood that a third person may act in an particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for the harm caused thereby. [citing cases].
>
> As we recently observed with respect to a determination of duty, however, "forseeability is a question of fact for the jury." [citing cases]. The same rule applies where the issue is whether the intervening act of a third person was forseeable and therefore did not constitute a superseding cause: In such circumstances "the forseeability of the risk generally frames a question for the trier of fact." [citing cases].

In Sanderson v. Moline, 7 Wash. App. 439, 499 P.2d 1281, (1972), a malpractice action against a dentist based upon alleged negligence diagnosis, care, and treatment which allowed the plaintiff's dental condition to deteriorate to an advanced stage of periodontal disease, the Court ruled

that it was error for the trial court to remove from the jury's consideration the evidence of the dentist's failure to properly monitor the progressive deterioration of the condition of plaintiff's teeth. The Court stated:

> We agree with plaintiff's objection to the trial court's removal from jury consideration of evidence of defendant's failure to chart home care instructions in the progressive deterioration of the plaintiff's condition. Although the Court's reason for the removal related to the question of proximate cause of the plaintiff's condition, which in isolation was arguably correct, the ruling disregarded the fact that the testimony could be significant in the jury's consideration of the defendant's negligence in the care, diagnosis and treatment of the plaintiff's disease.

In Purcell v. Zindelman, 18 Ariz. App. 75, 500 P.2d 335 (1972), the Court sustained a denial of the motion in limine by the defendant doctor to preclude the admissibility of evidence of filing prior malpractice suits against the surgeon. The Court ruled that the records were admissible since they tended to show the doctor's inability to properly treat the illness and his misconception of proper surgical treatment.

More recently, in the case of Gildiner v. Thomas Jefferson University Hospital, 451 F.Supp. 692 (E.D. Penn. 1978), the Court was faced with the problem of whether the plaintiff parents had stated a cause of action for the negligence of a physician in performing an amniocentesis to determine whether an infant would be born with Tay-Sachs disease:

> The defendants further argue that the alleged negligence of the defendants, that of not properly administering or interpreting the amniocentesis, was not the proximate cause of the plaintiffs' damages. The defendants argue that the damage sustained by the plaintiff were caused by the affliction of Andrew Lane Gildiner with Tay-Sachs disease in that the defendants did not cause Andrew Lane Gildiner to become afflicted with the disease . . .
>
> Applying Pennsylvania law, we decline to follow Gleitman v. Cosgrove in similar cases. We hold that the relevant causal relationship is that between the defendants' negligence in performing or interpreting the amniocentesis and the subsequent birth of Andrew Lane Gildiner. The complaint states a sufficient causal relationship between the alleged negligence of the defendants and the failure of Mark and Linda Gildiner to obtain an abortion to defeat a motion for judgment on the pleadings based upon a lack of proximate cause.

Even apart from the proximate cause of injury, the failure of the doctors to take previous titers and amniocentesis was admissible as part of the medical record. It is axiomatic that all medical records in a medical malpractice action should be admitted since they "constitute a substantial portion of the information available" to the doctor upon which the doctor "partially bases his operative decisions and thus are material and relevant." Sandoval v. Daniels, 532 P.2d 759 (Colo. 1975).

The plaintiffs will not attempt to restate the testimony that the defendant doctors and the experts called to testify in this case all recognized hypertensive syndrome, vasovagal syndrome and the accompanying risk of cardiac arrest and

anoxia to be significant, known obstetrical occurrences. The vice of the respondents' statement and allowed argument to the jury to the effect that "never in medical history has a cardiac arrest followed from an amniocentesis," is twofold. First, the plaintiffs were precluded at trial from introducing evidence to show that amniocentesis are never performed in the late stages of pregnancy, and accordingly, no significant portion of the population has ever been subjected to the treatment imposed by these defendants and thus there is no recorded history. Secondly, the statement totally misconstrues and misstates the circumstances relating to the procedure.

In all of the medical literature, and from the testimony of every expert at trial, there has never been a case where an amniocentesis was initially performed at thirty-eight weeks to determine the effect of Rh negative antigens in the child's blood. In fact, the graph perfected by Dr. A. W. Liley and used by Dr. Lohner in this case, does not extend beyond thirty-seven weeks. Since Dr. Lohner, performed this first initial amniocentesis at thirty-eight and half weeks, he had to tape additional paper on the edge to plot his results because of the physical limitations of the graph. (R. 288). The overwhelming body of medical literature on the subject is all in the agreement that the defendants' use of the titers and amniocentesis was contrary to accepted medical procedure. (R. 288-290).

Even Dr. Stenchever, the defendants' expert, in his published articles adopting procedures contrary to those used

by the defendants. Of all the amniocentesis performed by Dr. Stenchever for study of the Rh factor, there were never less than two amniocentesis performed and none after thirty-six weeks. (R. 290). The plaintiff was prevented from cross-examining Dr. Stenchever in this regard.

Aside from the extremely unusual use of the amniocentesis in the late stages of pregnancy, it is important to understand that the amniocentesis process, as related to Rh involvement diagnosis, was very short lived and affected a minimal number of women. The process was not in general clinical use until approximately 1965. (R. 291, 1369-80). In 1968, the antedote Rhogam was clinically available, which is the process by which an Rh sensitized mother may, by innoculation, be immunized from further Rh negative contamination, consequently, only mothers who were Rh sensitized prior to 1968 are proper candidates for an amniocentesis procedure to determine Rh involvement of the fetus. (R. 291, 1369-80).

For the defendants to contend that there is no statistical record of cardiac seizure following an amniocentesis has no significance. Persons such as Mrs. Reiser fit within a small category because Rh negative sensitization affects only a limited number of people. Second, those few persons sensitized were not always given an amniocentesis as illustrated by Mrs. Reiser's fourth and fifth pregnancies. Third, none of those tested were tested in the thirty-eighth week (advanced pregnancy). Fourth, medical statistics

are not required to be kept or assembled.

It is established that supine hypotensive syndrome is so commonly known that there is no record of a competent physician allowing, let alone requiring, his patient to lie flat on her back, on a hard table, for more than five minutes when in her thirty-eighth week of pregnancy. Finally, statistical evidence as related to cardiac seizure under circumstances such as presented in this case is not recorded under the title "amniocentesis," but is noted under other topics. There is a plethora of authorities for cardiac seizure following and during anesthetic procedures with accompanying supine hypotensive syndrome. Simply put, when respondents say that there is no history of cardiac seizure from an amniocentesis at thirty-eight weeks, they might also say that there is no history of an amniocentesis ever being performed for Rh negative sensitation for the first time at thirty-eight weeks.

POINT II

THE COURT ERRED IN SUBMITTING A SPECIAL VERDICT TO THE JURY AND THE VERDICT FORM DID NOT ADEQUATELY ALLOW THE JURY TO CONSIDER PLAINTIFFS' THEORY OF THE CASE.

In their original brief, the appellants set out the evidence supporting the issues of negligence that should have been submitted to the jury. In that brief, the appellants list nine questions, many with subparts, that the plaintiffs had a right to submit to the jury. (Appellants brief, pages 30-36). The respondents make essentially two responses.

First, it is their contention that the two negligence questions submitted by the court to the jury properly present all of the issues to the jury. The respondents do not claim that the appellants did not have the right to present the various issues to the jury, but only that those issues were encompassed into the two negligence questions submitted to the jury or were waived.

It seems incredible that the respondents would have this Court believe that the question "Was defendant, Richard Lohner, negligent in allowing Mrs. Reiser to lie on her back for an excessive period of time?", was to be interpreted by the jury as including, 1) were the nurses negligent in failing to timely recognize Mrs. Reiser's symptoms;2) were the nurses negligent in failing to take timely steps to relieve the symptoms; 3) were the nurses negligent in failing to seek the assistance of the doctor rather than tamper with a developing emergency; 4) did Mrs. Reiser suffer from a vasovagal syndrome as suggested by Dr. Sharp and Dr. Lohner and if so, was it negligence not to anticipate such an occurrence and be prepared with counter measures; and 5) did Mrs. Reiser suffer from a hypotensive syndrome and if so, was it negligence not to anticipate such an occurrence, to lay the patient on her side and be prepared with counter measures?

Further, the respondents would have this Court believe that the question "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?", encompassed the issues: 1) were the defendants negligent in failing to have adequate and operative resuscitative equipment on the premises such as drugs, oxygen, inhalers, and intubation equipment; 2) were the defendants negligent in not maintaining a ready emergency or crash guard--fully equipped with drugs, oxygen, etc.; 3) were the defendants negligent in failing to train and prepare the nursing staff in emergency resuscitation measures; and 4) was Dr. Lohner negligent in failing to utilize the assistance of nurses in the rescue measures taken when the proof indicated that two or more persons can provide significantly more resuscitation than one man attempting chest pressure and mouth-to-mouth resuscitation at the same time?

There can be no question that the issues of whether or not Dr. Lohner was negligent in allowing Mrs. Reiser to reject induction under the circumstances of the case and whether the defendants were negligent in failing to initially and periodically consult with Dr. Reiser to discuss the nature of the problem and their urgent concern, were clearly issues not encompassed, in any degree, within the interrogatories submitted to the jury. Further the issues of informed consent and the issues relating to the excluded evidence were also not given to the jury in any fashion.

The only other response made by the defendants is that the plaintiffs waived the right to present those issues to the jury. Such an argument totally misconstrues the under-

standing of court and counsel. Counsel indicated to the court, that because of the granting of the motion in limine, excluding significant portions of the plaintiffs case, the issues which could be submitted to the jury were greatly restricted. At no time did counsel make any waiver of the right to submit all the issues to the jury and any argument to the contrary is a gross misconstruction of the record. (R. 1865, 1087-1090).

POINT III

THE TRIAL COURT ERRED IN FAILING TO GIVE TO THE JURY THE ISSUE OF INFORMED CONSENT.

The appellants will rely on their initial brief to support their contention except to comment that Mrs. Reiser surely should have been advised that 1) an amniocentesis is never performed at thirty-eight weeks and, 2) the risks of hypertensive syndrome and vasovagal syndrome.

POINT IV

THE LOWER COURT ERRED IN DENYING PLAINTIFFS FIRST AND THIRD CAUSES OF ACTION.

a. The plaintiffs should have been granted a trial on the applicability of the statute of limitations.

In its initial brief, plaintiffs cited U.C.A. 78-12-47 for the proposition that applicable Utah law grants either party to a medical malpractice action the right to a trial on the issue of the statute of limitations. Defendants have countered by saying that the statute is permissive in nature, and not mandatory. Although it is possible that a

literal interpretation of the statute might yield such a conclusion, several factors militate against it.

If, as defendant seems to claim, application of the statute of limitations is primarily a question of law to be decided by the court, then the statute has virtually no effect and is surplusage to the Code. Such is not the case. It is obvious that the legislature recognized the difficult factual problems involved in applying the statute of limitations to medical malpractice actions, and therefore carved out a special exception. It is true that the specific language of the statute is that the issue "may" rather than "must" be tried separately, but it is obvious from the mere existence and general tenor of the statute, that the legislature recognized the importance and difficulty of the statute limitations in malpractice actions, and sought to preclude a mechanical application thereof by a court acting without a jury.

Furthermore, 78-12-47 is a reinforcement of the Utah Supreme Court's stand on the nature of summary judgment. First, upon motion for summary judgment, the trial court is required to consider all relevant facts and their reasonable inferences in a light most favorable to the party against whom the motion is made. The Utah Supreme Court noted in Controlled Receivables Inc. v. Harman, 17 Utah2d 420, 413 P.2d 807 (1966) as follows:

> A motion for summary judgment is a harsh measure, and for this reason plaintiff's contentions must be considered in a light most to his advantage and all doubts resolved in favor of permitting him to go to trial; and only if when the whole matter is so viewed, he could, nevertheless, establish no right to recovery, should the motion be granted.

Second, if the facts and their reasonable inferences when viewed in a light most favorable to the non-moving party are in dispute, summary judgment is simply improper. In Holbrook Co. v. Adams, 542 P.2d 191 (Utah 1975) the Utah Supreme Court stated:

> It is not the purpose of the summary judgment procedure to judge the credibility of the averments of the parties or witnesses or the weight of the evidence. Neither is it to deny parties the right to a trial to resolve disputed issues of fact. Its purpose is to eliminate the time, trouble and expense of trial when upon any view taken of the facts as asserted by the party ruled against, he would not be entitled to prevail.

Plaintiffs, in connection with their Memorandum in Opposition to the Motion for Summary Judgment, (R. 790-791) submitted affidavits containing facts that substantially controverted those submitted by defendants. Those facts put the statute of limitations in dispute as a material issue of fact. The lower court apparently ignored the fact that a genuine dispute existed and granted defendants' motion. Such action was clearly error, violating the spirit of U.C.A. 78-12-47, and the letter of Rule 56(c) URCP (summary judgment).

b. The lower court erred in dismissing the plaintiffs' cause of action for Emotional Distress to the Parents.

Defendant has cited a variety of cases for the proposition that no cause of action arises for negligently inflicted emotional distress. Counsel for plaintiff would reiterate the position taken in his initial brief, i.e., that the Utah cases denying recovery for emotional distress are inapplicable, that justice requires that relief be afforded, and that this Court should recognize such a cause of action.

CONCLUSION

It is clear that the court erred in granting the defendants' Motion in Limine, and, consequently, the court erred in failing to properly treat the issue of informed consent and in failing to submit a proper verdict to the jury. In addition, the court erred in granting the defendants' Motion for Summary Judgment on Mrs. Reiser's cause of action for her own personal injuries, and on the parents cause of action for emotional distress.

Respectfully submitted this 5th day of November, 1980.

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MAILING CERTIFICATE

I hereby certify that I mailed two (2) copies of the foregoing Brief of Appellants to Mr. Glenn C. Hanni, 604 Boston Building, Salt Lake City, Utah 84111; and to Mr. Rex J. Hanson, 702 Kearns Building, Salt Lake City, Utah 84101, this 5th day of November, 1980.

Julie Keeler
Secretary