

1988

Jeanna M. Dalley v. Utah Valley Regional Medical Center; IHC Hospitals, Inc., dba Utah Valley Regional Medical Center; Howard R. Francis, M.D.; Kent R. Gammett, M.D.; Provo Obstetrics And Gynecology Clinic; And James P. Southwick, M.D. : Brief of Respondent

Utah Supreme Court

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STATE SUPREME COURT

BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

JEANNA M. DALLEY,	:	
Plaintiff-Appellant,	:	Case No. 880360
vs.	:	
UTAH VALLEY REGIONAL MEDICAL	:	Category 14b
CENTER; IHC HOSPITALS, INC.,	:	
dba UTAH VALLEY REGIONAL	:	
MEDICAL CENTER; HOWARD R.	:	
FRANCIS, M.D.; KENT R. GAMMETT,	:	
M.D.; PROVO OBSTETRICS AND	:	
GYNECOLOGY CLINIC; and JAMES	:	
P. SOUTHWICK, M.D.	:	
Defendants-Respondents.	:	

BRIEF OF RESPONDENTS FRANCIS, GAMMETT, AND
PROVO OBSTETRICS AND GYNECOLOGY CLINIC

APPEAL FROM THE SUMMARY JUDGMENT OF THE
FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY, STATE OF UTAH
THE HONORABLE GEORGE E. BALLIF, PRESIDING

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**BRIEF OF RESPONDENTS FRANCIS,
GAMMETT, AND PROVO OBSTETRICS
& GYNECOLOGY CLINIC**

JURISDICTION AND NATURE OF PROCEEDINGS

This Court has jurisdiction pursuant to Utah Code Annotated §78-2-2(3)(i) (1987). The trial court granted defendants' Motions for Summary Judgment, the Order of Dismissal was entered on August 18, 1988 (R. 223-225). Plaintiff filed her Notice of Appeal on August 30, 1988 (R. 228-229).

STATEMENT OF ISSUES

1. Was plaintiff required to obtain competent expert testimony to establish the standard of care, the breach of the standard of care, and causation in order to make a prima facie case of medical malpractice under the circumstances of this case.

2. Were the circumstances of plaintiff's medical treatments, and the burn to plaintiff's leg the type of situation involving medical procedures within the common knowledge of laymen, thus alleviating the need for expert testimony on the issue of negligence.

3. Was the trial court correct in its ruling that the doctrine of res ipsa loquitur was not applicable to the circumstances of this case and that plaintiff's reliance on the doctrine of res ipsa loquitur and/or the "Nixdorf exception" was

insufficient in the absence of expert testimony on the issue of causation.

4. Is this Court's holding in Johnson v. Rogers, 763 P.2d 771 (Utah 1988) on the issue of negligent infliction of emotional distress retroactive and, therefore, applicable to plaintiff's claim.

STATEMENT OF THE CASE

A. NATURE OF THE CASE:

This case involves claims of medical malpractice against the defendant health care providers wherein plaintiff alleges physical injuries and mental anguish.

B. COURSE OF THE PROCEEDINGS:

On January 28, 1987, plaintiff filed her Complaint against the defendant health care providers, alleging medical malpractice and seeking damages. (R. 1-3).

On April 13, 1988, defendant James T. Southwick, M.D. filed a Motion for Summary Judgment. (R. 69-71).

On May 23, 1988, defendants Howard R. Francis, M.D., Kent R. Gammett, M.D., and Provo Obstetrics and Gynecology Clinic filed their Motion for Summary Judgment. (R. 100-102).

On June 10, 1988, defendant Utah Valley Regional Medical Center, IHC Hospitals, Inc. dba Utah Valley Regional Medical Center, filed its Motion for Summary Judgment.

The Motion for Summary Judgment of these respondents, Dr. Francis, Dr. Gammett, and Provo Obstetrics and Gynecology Clinic, was based upon the following:

(a) Plaintiff's failure to provide expert testimony on the issue of the standard of care applicable to these respondents, the breach of said standard of care, and that said breach proximately caused plaintiff's damages.

(b) That plaintiff's injury and alleged damages are not of the type that are within the common knowledge of the layman and that, therefore, expert testimony is required.

(c) That plaintiff's reliance on res ipsa loquitur or on Nixdorf, infra, does not alleviate the requirement of expert testimony on the issue of causation.

On June 14, 1988, plaintiff filed a Motion in Limine seeking a determination by the trial court that plaintiff's injury was of the type which does not occur in the absence of negligence and that expert testimony was, therefore, unnecessary. (R. 172-173).

All of the Motions were argued before the trial court on July 22, 1988. (R. 232-233). On August 1, 1988, the trial court issued a ruling granting all of the defendants' Motions for Summary Judgment. (R. 219-221; copy attached as Addendum No. 1).

The Court's Order granting the defendants' Motions for Summary Judgment and denying plaintiff's Motion in Limine was entered on August 18, 1988. (R. 223-225; copy attached as Addendum No. 2).

C. STATEMENT OF FACTS:

1. February 5, 1985--Plaintiff Jeanna Dalley underwent an elective Caesarean Section at Utah Valley Hospital, performed by Dr. Francis and assisted by Dr. Gammett. (R. 1-3).

2. On February 6, 1985, Dr. Francis observed a burn on Jeanna Dalley's leg and made the following notation on the hospital chart:

Does have what appears to be a 4-5 day old
burn rt. calf--pt. did not know about it.
It is asymptomatic.

(R. 114).

3. Plaintiff alleges that the burn took place in the operating room, that she has suffered physical and emotional damages as a result of said burn, and that the defendant health care providers are liable for her damages. (R. 1-3).

SUMMARY OF ARGUMENT

Under Utah law, in order to make a prima facie case in a medical malpractice action, a plaintiff must present expert testimony as to the standard of care of the defendant health

care provider, that the standard of care was breached, and that said breach proximately caused plaintiff's injuries and damages. Expert testimony is required because the nature of the medical treatment and circumstances surrounding said treatment are of the type not within the general knowledge and understanding of the average juror. Plaintiff failed and refused to provide any expert testimony in support of her claims.

The exception to the above-stated rule of law, as found in Nixdorf v. Hicken, 612 P.2d 348 (Utah 1980), that expert testimony is unnecessary to establish the standard of care where the propriety of the treatment received is within the common knowledge and experience of a layman, (hereafter termed the "Nixdorf exception") is not applicable to the circumstances surrounding plaintiff's claims.

Even if this Court finds that the "Nixdorf exception" does apply to the circumstances surrounding plaintiff's injury, plaintiff must still produce expert testimony on the issue of causation. Plaintiff failed and refused to do so, and Summary Judgment was appropriately granted.

Plaintiff's reliance on the doctrine of res ipsa loquitur in support of her claim that expert testimony is not necessary is likewise misplaced. Even if res ipsa loquitur applies to the circumstances of this case, plaintiff must still produce expert testimony on the issue of causation. Plaintiff

failed and refused to do so, and summary judgment was appropriately granted.

ARGUMENT

POINT I.

**PLAINTIFF CANNOT MAKE A PRIMA FACIE
CASE OF MEDICAL MALPRACTICE WITHOUT
COMPETENT EXPERT TESTIMONY THAT DR.
FRANCIS AND/OR DR. GAMMETT BREACHED
THE APPLICABLE STANDARD OF CARE.**

The law in Utah is that in order to make a prima facie case in a medical malpractice lawsuit, a plaintiff must present competent evidence by way of expert testimony establishing both the standard of care ordinarily exercised by other practitioners in the defendant's field of practice, and that the defendant departed from that applicable standard of care, and that said breach proximately caused plaintiff's injuries.

As to the requirement of expert testimony, this Court, in Nixdorf v. Hicken, 612 P.2d 348, 351-352 (Utah 1980), held:

In malpractice actions, generally the physician is held to the standard of skill employed by his contemporary in the same or similar communities. Therefore, before the plaintiff can prevail in a medical malpractice action, he must establish both a standard of care required of the defendant as a practicing physician in the community and the defendant's failure to employ that standard.

In the majority of medical malpractice cases, the plaintiff must introduce expert testimony to establish the standard of care.

Expert testimony is required because the nature of the profession removes the particularities of its practice from the knowledge and understanding of the average citizen.

See also, Malmstrom v. Olsen, 400 P.2d (Utah 1965); Kim v. Anderson, 610 P.2d 1270 (Utah 1980); Jennings v. Stoker, 652 P.2d 912 (Utah 1982); and, Farrow v. Health Services Corp., 604 P.2d 474 (Utah 1970).

On February 24, 1987, Dr. Francis and Dr. Gammett served Interrogatories and Requests for Production of Documents upon plaintiff requesting, inter alia, the names, addresses, and qualifications of each person whom plaintiff intends to call as an expert witness to testify against Dr. Francis and/or Dr. Gammett at trial.

In plaintiff's Answers to Interrogatories dated April 24, 1987, plaintiff identified Blaine L. Hirshe, M.D. as an expert. However, plaintiff stated that Dr. Hirshe is in actuality a factual witness and will not testify in a "expert" capacity against Dr. Francis and/or Dr. Gammett, but that his testimony would be limited to "treatment of the plaintiff, involving skin graft surgery." Plaintiff further states in her Answers to Interrogatories: "Other experts who may be called to testify are unknown at this time." Plaintiff has failed to produce any expert testimony imputing any negligence or other fault to Dr. Gammett or Dr. Francis, or any testimony as to causation of plaintiff's injury.

At the time the defendants' Motions for Summary Judgment were argued before the trial court, there was a total absence in the record of any expert testimony imputing negligence on the part of Dr. Francis and/or Dr. Gammett. All references as to these defendants' treatment of the plaintiff, and all evidence before the Court at the time the Motions for Summary Judgment were argued, was that Dr. Francis and Dr. Gammett did not deviate from the standard of care.

Dr. Francis filed an Affidavit (R. 114), which states, in relevant part, as follows:

On February 5, 1985, I performed an elective low-transverse cervical Caesarean Section on Jeanna Dalley at Utah Valley Regional Medical Center.

. . .

4. On February 6, 1985, I observed the burn on Jeanna Dalley's leg and made the following note on the hospital chart:

"Does have what appears to be a 4-5 day old burn rt. calf--pt. did not know about it. It is asymptomatic."

5. Based upon my observation of Jeanna Dalley's leg on February 6, 1985, it is my belief that the burn was incurred by her prior to her admission to the hospital.

6. I am not aware of any instrumentality which was near the patient's legs during the time of the surgery in question that could have caused or resulted in the burn on the patient's lower right leg.

7. From my review of the medical records and based upon my experience and expertise

in the field of obstetrics and gynecology, it is my opinion that the medical treatment and care that I rendered to Jeanna M. Dally complied in all respects with the standard of professional care, learning, skill, and treatment ordinarily possessed and used by professionals in my field in good standing in this and similar communities in 1985.

Dr. Gammett filed an Affidavit (R. 118), and stated, in relevant part, as follows:

2. On February 5, 1985, I assisted in the performance of an elective low-transverse cervical Caesarean Section on Jeanna Dalley at Utah Valley Regional Medical Center.

. . .

4. I have no knowledge as to whether the burn on the patient's lower right leg was incurred prior to hospitalization. In addition, I have no knowledge or reason to believe that the burn was incurred during Jeanna Dalley's hospitalization.

5. I am not aware of any instrumentality which was near the patient's legs during the time of the surgery in question that could have caused or resulted in the burn on the patient's lower right leg.

6. From my review of the medical records, and based upon my experience and expertise in the field of obstetrics and gynecology, it is my opinion that the medical treatment and care that I rendered to Jeanna M. Dalley complied in all respects with the standard of professional care, learning, skill, and treatment ordinarily possessed and used by professionals in my field in good standing in this and similar communities in 1985.

The testimony of Dr. Gammett and Dr. Francis was and still remains unchallenged and uncontroverted. Plaintiff could

not rely on the mere allegations of her Complaint to controvert the Affidavits filed by Dr. Francis and Dr. Gammett.

This Court, in Freed Fin. Co. v. Stoker Motor Co., 537 P.2d 1039 (Utah 1975), held:

A party may not rely upon allegations in the pleadings to counter Affidavits made upon personal knowledge, stating facts contrary to the allegations of the pleadings.

See also, Thornick v. Cook, 604 P.2d 934 (Utah 1979); and Celotex Corp. v. Cartrett, 106 Sup. Ct. 2548 (1986).

The granting of Summary Judgment by the trial court was proper and should be affirmed.

POINT II.

THE NATURE AND CIRCUMSTANCES OF PLAINTIFF'S INJURY AND DAMAGES ARE NOT OF THE TYPE WITHIN THE COMMON KNOWLEDGE OF LAYMEN.

Plaintiff has alleged that under this Court's ruling in Nixdorf, supra, that her claim of sustaining a burn during surgery falls within the exception to the rule requiring expert testimony in medical malpractice cases. In Nixdorf, supra, this Court held:

Expert testimony is unnecessary to establish the standard of care owed to plaintiff where the propriety of the treatment received is within the common knowledge and experience of the layman.

The defendant doctor in Nixdorf lost a cutting needle inside the plaintiff's body and failed to disclose this fact to

the plaintiff. This Court held that jurors could determine the standard of care that a physician was required to follow without expert testimony because it was within common knowledge that reasonable medical practitioners would not leave surgical instruments inside their patient's bodies and keep it a secret. The Court held that expert testimony would shed little light on the "propriety of the treatment". (Nixdorf, supra, at 352-353).

The circumstances of plaintiff's alleged injuries and damages, however, do not fall within the "Nixdorf exception". The record in this case is silent as to specifically how or why the plaintiff's burn occurred. It is unknown when the burn occurred. It is unknown what instrumentality, if any, caused the burn. It is unknown which of the defendants or other persons who are not defendants had control of any instrumentality which may have caused the burn. The proceedings in a surgical operating room and the elective Caesarean surgery, and circumstances surrounding said surgery which plaintiff underwent at the time she alleges the burn occurred are all of the type and nature not within the general knowledge and understanding of a layman juror.

Expert testimony was therefore necessary. Plaintiff produced no expert testimony and Summary Judgment was appropriately granted by the trial court.

POINT III.

**EVEN IF THE "NIXDORF EXCEPTION" APPLIES
TO THE CIRCUMSTANCES OF PLAINTIFF'S
INJURIES, PLAINTIFF MUST STILL PRODUCE
EXPERT TESTIMONY ON THE ISSUE OF CAUSATION.**

Should this Court find that plaintiff's circumstances and her alleged injury and damages do fall within the "Nixdorf exception" and that, therefore, expert testimony is not necessary as to the issue of negligence, plaintiff is, nevertheless, required to produce expert testimony on the issue of causation.

In plaintiff's Brief, plaintiff cites cases from North Carolina, Iowa, Wisconsin, New York, and Arizona, in support of her position. Plaintiff, however, ignores a recent holding by the Utah Court of Appeals, which clearly sets forth the rule of law that the plaintiff must produce expert testimony on the issue of causation, even if no expert testimony is needed on the issue of negligence.

In Chadwick v. Nielsen, M.D., 763 P.2d 817, 821, 822 (Utah App. 1988), the Court held:

Due to the technical and complex nature of a medical doctor's services, expert medical testimony must be presented at trial in order to establish the standard of care and proximate cause--except in unusual circumstances. [Citations omitted]. For example:

"Expert testimony is unnecessary to establish the standard of care owed the plaintiff where the propriety of the treatment received is within the common knowledge and experience of the layman."

Nixdorf v. Hicken, 612 P.2d 348, 352 (Utah 1980).

. . .

Chadwick also misinterprets the scope of the Nixdorf exception. That exception expressly obviates the need for expert testimony only in establishing the standard of care and breach of that standard by the doctor. The medical malpractice plaintiff must still ordinarily provide expert testimony, as did the Nixdorf plaintiff, to establish that the doctor's negligence proximately caused plaintiff's injury.

Nixdorf, 612 P.2d at 354 N.17. See Anderson v. Nixon, 104 Utah 262, 139 P.2d 216, 220 (1943). In other words, while it may be common knowledge that a reasonable medical practitioner would not leave a needle in a patient's body, it requires expert testimony to establish that the lost needle is causing, for example, plaintiff's headaches. (Emphasis added).

Even if plaintiff is correct in her claim that the circumstances of her injuries and damages fall within the "Nixdorf exception" and that, therefore, expert testimony was unnecessary on the issue of the standard of care and the breach thereof, Utah law requires that plaintiff must nevertheless produce expert testimony on the issue of causation. Plaintiff failed to do so, and summary judgment was appropriately granted.

POINT IV.

PLAINTIFF MAY NOT RELY ON THE DOCTRINE OF RES IPSA LOQUITUR IN THE ABSENCE OF EXPERT TESTIMONY ON THE ISSUE OF CAUSATION.

It should first be noted that the defendants have alleged, and the trial court so ruled, that the doctrine of res

ipsa loquitur is inapplicable to the circumstances of plaintiff's case. In its ruling, the trial court stated:

Here, plaintiff has failed to establish sufficient foundation for the application of res ipsa loquitur and has failed to produce expert medical testimony, and since this is not an exceptional case, res ipsa loquitur does not apply...

(R. 220-221; Addendum No. 1).

Should this Court find that the doctrine of res ipsa loquitur is applicable to the circumstances of plaintiff's claim, plaintiff is, nevertheless, required to produce expert testimony on the issue of causation.

In Robinson v. Intermountain Health Care, 740 P.2d 262 (Utah App. 1987), the plaintiff underwent surgery for tonsillitis at LDS Hospital. As part of her treatment, she received three injections into her left hip. The day after surgery, the plaintiff experienced extreme pain and inflammation at the injection site and serious septic shock (bacterial poisoning of the blood), resulting in further surgery, removal of the infected hip tissue and muscle, and three weeks in the hospital recovering from said infection and surgery. Robinson filed suit and the defendant health care providers subsequently filed Motions for Summary Judgment supported by Affidavits. Robinson did not file counter Affidavits opposing the Motion for Summary Judgment; instead, relied on the doctrine of res ipsa loquitur, claiming that under said doctrine, her case did not require

expert testimony to contradict the affidavits, and claiming, as does plaintiff herein, that her type of injury is the kind that a layman knew did not occur in the absence of negligence.

The court in Robinson, supra, discussed the application of the doctrine of res ipsa loquitur, as follows:

In some exceptional circumstances, the plaintiff is permitted to use the doctrine of res ipsa loquitur to carry the burden of establishing these two elements, because expert testimony would add nothing to common knowledge that the injury was the result of negligence. The evidentiary doctrine establishes an inference of negligence from the circumstances incident to the medical treatment. Nixdorf v. Hicken, 612 P.2d at 352. The loss of surgical instruments in patients, as in Nixdorf, is a classic example of those exceptional cases.

The mere invocation of the doctrine, however, does not result in its automatic application. In order to rely on res ipsa loquitur, the plaintiff must first establish a sufficient evidentiary foundation to support application of the doctrine and its inference of negligence.

. . .

Generally, this requires the introduction of expert medical testimony to establish the fact that the outcome is more likely the result of negligence than some other cause. This testimony would be necessary to provide the evidentiary basis from which the jury could conclude the result is more probably than not due to the negligence of the attending physician.

. . .

The fact that plaintiff's disability resulted from an uncommon or rare occurrence does

not relieve him from the burden of establishing causation. An inference of negligence cannot be permitted solely upon the basis that the plaintiff developed a rare complication while undergoing medical and surgical treatment. The doctrine of res ipsa loquitur has no application unless it can be shown from past experience that the occurrence causing the disability is more likely the result of negligence than some other cause.

. . .

The evidence in this case, even when viewed most favorably to Robinson, does not present sufficient foundation for the application of res ipsa loquitur. There is no expert testimony in the record from which it could reasonably be concluded that Robinson's infection ordinarily would not happen in the absence of negligence.

In order to create a genuine factual dispute on this point, Robinson thus had to come forward with evidence to counter Dr. Burke's Affidavit opinion--that non-negligent causes of her infection were probable--with expert testimony to the effect that Robinson's infection most likely resulted from negligence, assuming it was possible to find an expert who could and would make such a statement.

. . .

We agree the trial court should be extremely cautious in granting summary judgment for a defendant on the basis that plaintiff has failed to secure expert testimony to support a medical negligence action, but appellant contends that a plaintiff suing on a theory of res ipsa loquitur is always entitled to a trial on the merits so that summary judgment is always inappropriate. Such an argument miscomprehends the purpose and application of the doctrine as well as the pre-trial responsibilities of a plaintiff faced with a summary judgment motion....

(Emphasis added). See also, Talbot v. Groves Latter-Day Saints Hosp., 21 Utah 2d 73 440 P.2d 872 (1968).

Under Utah law, invoking the doctrine of res ipsa loquitur does not relieve a plaintiff of the burden of producing expert testimony as to the issue of causation. Without expert testimony, the jury, under the guise of the doctrine of res ipsa loquitur, and without any factual basis, would be forced to guess and speculate as to when the injury may have occurred, whether or not it was caused by an instrumentality that may have been under the exclusive control of any or all of the defendants, and if so, which instrumentality and which defendant, etc.

Utah law is clear. The doctrine of res ipsa loquitur notwithstanding, the plaintiff must produce expert testimony on the issue of causation. Plaintiff failed to do so, and Summary Judgment was appropriately granted.

V.

THIS COURT'S RECENT RULING IN JOHNSON v. ROGERS, AS TO NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS, IS NOT RETROACTIVE.

Although these respondents respectfully submit that the matters discussed above, in support of affirmation of the trial court's granting of Summary Judgment, dispose of this matter in toto, it should be noted that plaintiff also claims

that should this matter come to trial, plaintiff would be entitled to proceed with the claim of negligent infliction of emotional distress, based upon this Court's recent ruling in Johnson v. Rogers, 763 P.2d 771 (Utah 1988), wherein §313 of the Restatement (2d) of Torts was adopted.

The court's holding in Johnson, supra, does not state that the new judicially-created and recognized tort of negligent infliction of emotional distress, a matter substantive in nature, is to be applied retroactively. Accordingly, the trial court's dismissal of plaintiff's claim for emotional distress, based upon the state of the law at such time, should also be affirmed.

CONCLUSION

Plaintiff cannot make a prima facie case of medical malpractice without obtaining competent expert testimony. Plaintiff failed and refused to obtain any expert testimony, and further failed to put forth any evidence contravening the Affidavits of Dr. Francis and Dr. Gammett.

The circumstances of plaintiff's injury are not of the type which would fall within the "Nixdorf exception"; that is, the type of injury and circumstances surrounding the same, which are within the common knowledge and understanding of a lay jury.

Even if this Court should find that the "Nixdorf exception" applies, thus alleviating plaintiff's need for expert testimony on the issue of negligence, expert testimony is still necessary on the issue of causation.

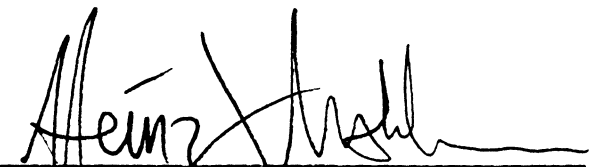
Finally, should this Court find that the doctrine of res ipsa loquitur applies to the circumstances of this case, expert testimony is again necessary as to the issue of causation.

Plaintiff has provided no expert testimony. Summary Judgment was appropriately granted and should be affirmed.

DATED this 27th day of January, 1989.

KIPP AND CHRISTIAN, P.C.


WILLIAM W. BARRETT


HEINZ J. MAHLER
Attorneys for Respondents
Francis, Gammett, and Provo
Obstetrics & Gynecology Clinic

CERTIFICATE OF MAILING

MAILED, postage prepaid this 30th day of January, 1989, four true and correct copies of the foregoing Brief of Respondents Francis, Gammett, and Provo Obstetrics & Gynecology Clinic, to each of the following:

Charles W. Dahlquist
Sherene T. Dillon
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A handwritten signature in cursive script, appearing to read "Paul W. Combs", is written over a horizontal line.

ADDENDUM NO. 1

FILED
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CLERK

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

JEANNA M. DALLEY,)	Case Number: CV 87-206
Plaintiff,)	
vs.)	RULING
UTAH VALLEY REGIONAL HOSPITAL, et al.,)	
Defendants.)	

This matter is before the court on defendants' motions for summary judgment. Plaintiff opposes the motions, and all parties have filed memo of points and authorities in support of their respective positions. The court having carefully considered the motions and the accompanying memo, and having heard oral argument, now enters its:

RULING

Defendants' motions for summary judgment are well taken and are hereby granted.

The motions are based on two grounds: First the doctrine of res ipsa loquitur does not apply here; second, there is no cause of action for negligent infliction of emotional distress.

To apply the doctrine of res ipsa loquitur requires the establishment of evidentiary foundation. The elements of the evidentiary foundation are: (1) the accident was of a kind which, in the ordinary course of events, would not have happened had the defendant(s) used due care, (2) the instrument or thing causing the injury was at the time of the accident under the management and control of the defendant(s), and (3) the accident happened irrespective of any participation at the time by plaintiff.

Nixdorf v. Hicken, 612 P.2d 352-53 (Utah 1980). It is undisputed that plaintiff, nor defendant(s), cannot identify the offending instrumentality to say nothing of management or control thereof.

In addition, in medical malpractice cases, plaintiff is required to produce expert medical testimony, except in exceptional cases (of which this may be one if an instrumentality could be found) to establish that the outcome was more likely the result of negligence than some other cause. Robinson v.

Intermountain Health Care Inc., 740 P.2d 262 (Utah App. 1987).

Here, plaintiff has failed to establish sufficient foundation for the application of res ipsa loquitur, and has failed to produce expert medical testimony, and since this is not an exceptional case, res ipsa loquitur does not apply. Even assuming the jury would infer negligence by some body, if they believe that plaintiff had no burn when she arrived at the hospital, the failure to show what instrumentality caused the

burn, and which defendant(s) controlled that instrumentality would still leave us without any specific culpable party or parties. Therefore, the application of res ipsa loquitur in this matter is inappropriate.

The failure to show what caused the injury also precludes maintaining an action for negligent infliction of emotional distress.

Based on the foregoing analysis, defendants' motions for summary judgment are hereby granted.

DATED in Provo, Utah this 1st day of August, 1988.



GEORGE E. BALLIF, JUDGE.

ADDENDUM NO. 2

FILED
FOURTH JUDICIAL DISTRICT COURT
OF UTAH COUNTY, STATE OF UTAH

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WILLIAM F. HUNTER, CLERK
DEPUTY

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IN THE FOURTH JUDICIAL DISTRICT COURT FOR UTAH COUNTY
STATE OF UTAH

JEANNA M. DALLEY,	:	
	:	<u>O R D E R</u>
Plaintiff,	:	
	:	
vs.	:	
	:	
UTAH VALLEY REGIONAL MEDICAL	:	Civil No. 87-206
CENTER, I.H.C. HOSPITALS, INC.	:	
dba UTAH VALLEY REGIONAL	:	
MEDICAL CENTER, HOWARD R.	:	
FRANCIS, M.D., KENT R.	:	
GAMMETTE, M.D., PROVO OBSTETRICS	:	
AND GYNECOLOGY CLINIC, and JAMES	:	Judge George E. Ballif
P. SOUTHWICK, M.D.,	:	
	:	
Defendant.	:	

The defendants' Motions for Summary Judgment and the plaintiff's Motion in Limine having come on for hearing before the Honorable George E. Ballif, the plaintiff being represented by S. Rex Lewis; defendant James P. Southwick, M.D. being represented by attorney Elizabeth King Brennan; defendants Dr. Howard R. Francis, M.D. and Kent R. Gammette, M.D. and Provo

Obstetrics and Gynecology Clinic being represented by William W. Barrett; and defendants Utah Valley Regional Medical Center and IHC Hospitals, Inc. being represented by Charles W. Dahlquist, II, the Court having heard full argument on the motions pending and, in addition, having reviewed, in camera, the records of a subsequent patient at Utah Valley Regional Medical Center whom the plaintiff had claimed received a burn on the leg in a similar manner, and the Court being fully advised in the premises,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, pursuant to the Ruling of the Court dated August 1, 1988, the Motions for Summary Judgment of each of the defendants is hereby granted, the plaintiff's Motion in Limine is denied, and this matter is hereby dismissed with prejudice as to all defendants, the parties to bear their own respective costs.

DATED this 17th day of August, 1988.

BY THE COURT:


GEORGE E. BALLIF
District Judge

CERTIFICATE OF MAILING

Pursuant to Rule 2.9 of the Rules of Practice in the District Courts of the State of Utah, I hereby certify that on the 4th day of August, 1988, I mailed a true and correct copy of the foregoing Order by first class mail to the following:

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Sandra A. Fisher

X