

1989

# Lynn Nielsen v. Pioneer Valley Hospital, D.M. Dickson, George D. Vasey : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_sc1](https://digitalcommons.law.byu.edu/byu_sc1)

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Daniel Darger; Attorney for Plaintiff/Appellant; David Slagle; Elizabeth King Brennan; Snow, Christensen & Martineau; Attorney for Pioneer Valley Hospital.

Gary D. Stott; Michael A. Peterson; Richards, Brandt, Miller & Nelson; Attorney for D.M.; Dickson, M.D..

---

## Recommended Citation

Brief of Respondent, *Lynn Nielsen v. Pioneer Valley Hospital, D.M. Dickson, George D. Vasey*, No. 890247.00 (Utah Supreme Court, 1989).

[https://digitalcommons.law.byu.edu/byu\\_sc1/2617](https://digitalcommons.law.byu.edu/byu_sc1/2617)

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

BRIEF

FILE NO.

490247

---

IN THE SUPREME COURT OF THE STATE OF UTAH

---

LYNN NIELSEN,

Plaintiff/Appellant,

vs.

PIONEER VALLEY HOSPITAL, D.M.  
DICKSON, GEORGE D. VEASY,  
and DOES I through V, inclusive,

Defendants/Respondents.

\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*

Case No. 890247

[Priority 16]

DC C86-7731

---

RESPONDENT D.M. DICKSON'S BRIEF

---

Appeal From A Verdict and Final Judgment in Favor  
of Dr. D.M. Dickson in the Third District Court,  
Salt Lake County, State of Utah  
The Honorable Homer F. Wilkinson, Presiding

---

Gary D. Stott  
Michael A. Peterson  
RICHARDS, BRANDT, MILLER  
& NELSON  
Key Bank Tower, Suite 700  
50 South Main Street  
P.O. Box 2465  
Salt Lake City, Utah 84110  
Attorneys for Respondent  
D.M. Dickson, M.D.

Daniel Darger  
100 Commercial Club Building  
32 Exchange Place  
Salt Lake City, Utah 84111  
Attorney for Plaintiff/  
Appellant

David W. Slagle  
Elizabeth King Brennan  
SNOW, CHRISTENSEN & MARTINEAU  
10 Exchange Place, Suite 1100  
P.O. Box 45000  
Salt Lake City, Utah 84145  
Attorneys for Defendant Pioneer  
Valley Hospital

**FILED**

AUG 6 . 1990

---

Clerk, Supreme Court, Utah

---

IN THE SUPREME COURT OF THE STATE OF UTAH

---

LYNN NIELSEN,

Plaintiff/Appellant,

vs.

PIONEER VALLEY HOSPITAL, D.M.  
DICKSON, GEORGE D. VEASY,  
and DOES I through V, inclusive,

Defendants/Respondents.

\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*

Case No. 890247

[Priority 16]

DC C86-7731

---

RESPONDENT D.M. DICKSON'S BRIEF

---

Appeal From A Verdict and Final Judgment in Favor  
of Dr. D.M. Dickson in the Third District Court,  
Salt Lake County, State of Utah  
The Honorable Homer F. Wilkinson, Presiding

---

Gary D. Stott  
Michael A. Peterson  
RICHARDS, BRANDT, MILLER  
& NELSON  
Key Bank Tower, Suite 700  
50 South Main Street  
P.O. Box 2465  
Salt Lake City, Utah 84110  
Attorneys for Respondent  
D.M. Dickson, M.D.

Daniel Darger  
100 Commercial Club Building  
32 Exchange Place  
Salt Lake City, Utah 84111  
Attorney for Plaintiff/  
Appellant

David W. Slagle  
Elizabeth King Brennan  
SNOW, CHRISTENSEN & MARTINEAU  
10 Exchange Place, Suite 1100  
P.O. Box 45000  
Salt Lake City, Utah 84145  
Attorneys for Defendant Pioneer  
Valley Hospital

## TABLE OF CONTENTS

|  | <u>Page</u> |
|--|-------------|
| TABLE OF AUTHORITIES. . . . .  | ii          |
| JURISDICTION OF THE COURT AND NATURE<br>OF THE PROCEEDINGS . . . . .   | 1           |
| STATEMENT OF ISSUES PRESENTED ON APPEAL . . . . .  | 1           |
| STATEMENT OF THE CASE . . . . .  | 2           |
| A. Nature of the Action . . . . .  | 2           |
| B. Statement of Facts . . . . .  | 3           |
| SUMMARY OF ARGUMENT . . . . .  | 11          |
| ARGUMENT . . . . .   | 13          |
| POINT I  |             |
| THE TRIAL COURT PROPERLY INSTRUCTED THE<br>JURY REGARDING THE LEGAL STANDARDS AND<br>BURDEN OF PROOF APPLICABLE TO THE<br>PLAINTIFF'S RES IPSA LOQUITUR AND<br>NEGLIGENCE CAUSES OF ACTION . . . . . | 21          |
| A. Jury Instruction No. 16 was Perfectly<br>Consistent with Both the Res Ipsa<br>Loquitur and Simple Negligence<br>Theories of Recovery Advanced by the<br>Plaintiff at Trial . . . . .              | 21          |
| B. Jury Instruction No. 19 was Properly<br>Given in Light of the Simple Negligence<br>Theory Advanced by the Plaintiff at Trial . . .  | 25          |
| POINT II   |             |
| LYNN NIELSEN'S RELIEF REQUESTED ON APPEAL<br>MUST BE DENIED BECAUSE HER COUNSEL FAILED<br>TO PROPERLY OBJECT TO INSTRUCTIONS NO. 16<br>AND NO. 19 AT TRIAL . . . . .                                 | 31          |
| CONCLUSION . . . . .   | 34          |
| MAILING CERTIFICATE . . . . .  | 35          |
| ADDENDA . . . . .  | 36          |

## TABLE OF AUTHORITIES

### Cases

|   | <u>Page</u> |
|---|-------------|
| <u>Anderton v. Montgomery</u> , 607 P.2d 828 (Utah 1980) . . . . .                            | 23          |
| <u>Beehive Medical Electronics, Inc. v. Square D Co.</u> , 669 P.2d 859 (Utah 1983) . . . . . | 32, 33      |
| <u>Bigler v. Mapleton Irr. Canal Co.</u> , 669 P.2d 434 (Utah 1983) . . . . .                 | 17          |
| <u>Dalley v. Utah Valley Regional Med. Ctr.</u> , 791 P.2d 193 (Utah 1990) . . . . .          | 23          |
| <u>Ewel &amp; Son, Inc. v. Salt Lake City Corp.</u> , 493 P.2d 1238 (Utah 1972) . . . . .     | 17          |
| <u>Gill v. Timm</u> , 720 P.2d 1352 (Utah 1986) . . . . .                                     | 33          |
| <u>Goode v. Dayton Disposal, Inc.</u> , 738 P.2d 638 (Utah 1987) . . . . .                    | 17, 25      |
| <u>Hillier v. Lamborn</u> , 740 P.2d 300 (Utah App. 1987) . . . . .                           | 25          |
| <u>Hoopiiaina v. Intermountain Health Care</u> , 740 P.2d 270 (Utah App. 1987) . . . . .      | 26          |
| <u>Kusy v. K-Mart Apparel Fashion Corp.</u> , 681 P.2d 1232 (Utah 1984) . . . . .             | 14, 23      |
| <u>Marsh v. Pemberton</u> , 347 P.2d 1108 (Utah 1959) . . . . .                               | 25          |
| <u>Miller v. Kennedy</u> , 588 P.2d 734 (Wash. 1978) . . . . .                                | 21, 22      |
| <u>Moore v. James</u> , 297 P.2d 221 (Utah 1956) . . . . .                                    | 23          |
| <u>Morgan v. Quailbrook Condo. Co.</u> , 704 P.2d 573 (Utah 1985) . . . . .                   | 33          |
| <u>Nixdorf v. Hicken</u> , 612 P.2d 348 (Utah 1980) . . . . .                                 | 5, 25       |
| <u>Roylance v. Rowe</u> , 737 P.2d 232 (Utah App. 1987) . . . . .                             | 14, 26      |
| <u>Taylor v. Johnson</u> , 414 P.2d 575 (Utah 1966) . . . . .                                 | 17          |
| <u>Voss v. Bridwell</u> , 364 P.2d 955 (Kan. 1961) . . . . .                                  | 22          |

### Statutes and Rules

|  |              |
|--|--------------|
| Utah Code Ann. § 78-2-2(3)(j) (1989) . . . . . | 1            |
| Utah Rule of Civil Procedure 51 . . . . .      | 2, 13, 31-34 |

---

IN THE SUPREME COURT OF THE STATE OF UTAH

---

|                                  |   |                 |
|----------------------------------|---|-----------------|
| LYNN NIELSEN,                    | * |                 |
|                                  | * |                 |
| Plaintiff/Appellant,             | * |                 |
|                                  | * | Case No. 890247 |
| vs.                              | * |                 |
|                                  | * | [Priority 16]   |
| PIONEER VALLEY HOSPITAL, D.M.    | * |                 |
| DICKSON, GEORGE D. VEASY,        | * | DC C86-7731     |
| and DOES I through V, inclusive, | * |                 |
|                                  | * |                 |
| Defendants/Respondents.          | * |                 |

---

RESPONDENT D.M. DICKSON'S BRIEF

---

JURISDICTION OF THIS COURT AND NATURE OF THE PROCEEDINGS

The Utah Supreme Court has jurisdiction over this appeal pursuant to Utah Code Annotated § 78-2-2(3)(j) (1989). The final order appealed from is comprised of the trial court's Jury Verdict Judgment dated May 11, 1989, entered in favor of the defendants, and the trial court's order denying the Plaintiff's Motion for a New Trial dated July 20, 1989.

STATEMENT OF ISSUES PRESENTED ON APPEAL

The issues on appeal are:

1. Whether the trial court's Jury Instruction No. 16 was properly given to the jury in order to advance the jurors' understanding of the legal standards and burden of

proof pertinent to the plaintiff's res ipsa loquitur and simple negligence causes of action.

2. Whether the trial court's Jury Instruction No. 19 was properly given to the jury in order to advance the jurors' understanding of the burden of proof pertinent to the plaintiff's simple negligence cause of action.

3. Whether the appellant failed to preserve her right to assign error to the trial court's Jury Instructions Nos. 16 and 19 because she did not properly object to those instructions pursuant to Rule 51 of the Utah Rules of Civil Procedure.

#### STATEMENT OF THE CASE

##### A. Nature of the Action.

The above-captioned lawsuit is a medical malpractice action. The appellant alleges that the respondents negligently caused damage to her bridgework while she was undergoing (and/or recovering from) surgery on her left knee at Pioneer Valley Hospital. In prosecuting her actions at trial, the appellant relied upon both res ipsa loquitur and simple negligence theories of recovery. After listening to the evidence, and having been appropriately instructed regarding the legal standards and burden of proof pertinent to appellant's two theories of recovery, the jury concluded that

the respondents could not be held responsible for the damaged bridgework.

Appellant now assigns prejudicial error to the trial court's reading of two standard jury instructions. As Respondent Dickson's brief demonstrates, no such error occurred, and even if it had, appellant's counsel did not properly object to the two instructions.

**B. Statement of Facts.**

**Pretrial Proceedings**

On October 9, 1986, appellant Lynn Nielson filed a complaint against Dr. D. M. Dickson, and other named defendants, alleging that her teeth and bridgework had been damaged due to the named defendants' negligence, before, during and/or after an operation on her left knee. (Trial Record--hereinafter "R."--2.) Appellant specifically alleged that her broken teeth and damaged bridgework were a direct and proximate result of Dr. Dickson's negligence in administering anesthesia to the appellant. (R. 2, paras. 13 & 34.) Appellant also alleged that Dr. Dickson, and the other named defendants, must be deemed presumptively negligent, under the doctrine of res ipsa loquitur, in their treatment of Lynn Nielsen. (R. 2, para. 28.)

During the proceedings below, counsel for appellant Lynn Nielsen elected not to name an anesthesiologist expert qualified to testify as to Dr. Dickson's alleged negligence in this case. Counsel for Dr. Dickson secured the expert opinion of Lawrence E. Reichmann, M.D., a board certified anesthesiologist, who is familiar with the facts surrounding the treatment received by Ms. Nielsen during and after her above-mentioned surgery. (R. 107.) Based upon his review of the medical records pertinent to the care of Ms. Nielsen on February 27, 1985, Dr. Reichmann concluded that "the care provided by D. M. Dickson, M.D., as an anesthesiologist, to the patient, Lynn Nielsen, did not fall below the standard of care required of anesthesiologists. The medical care he rendered is appropriate and met the standard of care required." (R. 108.)

Based upon the above developments, respondents D. M. Dickson, M.D. and Pioneer Valley Hospital filed a joint motion for summary judgment on the grounds that the appellant was unable to meet her burden of establishing by competent medical expert testimony that the respondents had breached the duty of reasonable care they owed to the appellant. (R. 98 and 130.) This joint motion came on for hearing before the Honorable Homer F. Wilkinson on March 18, 1988. (R. 191.) On April 4, 1988, Judge Wilkinson entered his Order and Summary Judgment granting the respondents' motions. (R. 200.)

The plaintiff appealed the summary judgment dismissal of her Complaint, and on September 16, 1988 her motion to the Utah Supreme Court for Summary Disposition was granted. (R. 211.) In granting the motion, the Utah Supreme Court indicated (1) that the trial court's summary judgment ruling was inappropriate because issues of material fact existed, and (2) that because Nixdorf v. Hicken, 612 P.2d 348 (Utah 1980) controlled the issue of res ipsa loquitur in the case, expert evidence would not be necessary to establish the applicable standard of care under the first prong of the three-part res ipsa loquitur test. (R. 211.) The Supreme Court remanded the case for trial, and this trial was conducted before a jury on April 17, 18 and 19, 1989. (R. 465, 466 and 467.)

### **Trial**

The evidence elicited at trial revealed that on February 27, 1985, appellant Lynn Nielsen underwent surgery on her left knee while a patient at Pioneer Valley Hospital. (R. 465 at p. 90.) The surgery was performed by George D. Veasy, M.D. (R. 2, para. 10.) The anesthesia required for appellant's knee surgery was administered by respondent D. M. Dickson, M.D., a board certified anesthesiologist. (R. 2, para. 10.) (R.91-92.)

Prior to the commencement of the knee operation, the appellant and Dr. Dickson talked at some length about the

appellant's bridgework and about the precautions that would need to be taken in order to protect that bridgework. (R. 465-66 at pp. 92-93, 319, 321-330.) Subsequent to the appellant's intake interviews with Dr. Dickson and her other health care providers, the appellant was taken to surgery; upon emerging from surgery and regaining some level of consciousness in the recovery room, the appellant discovered that various of her bridgework teeth had been broken. (R.456 at pp. 95-96.)

In her pretrial deposition testimony, the appellant (along with her husband, Mr. Elwood Nielsen) testified that Dr. Dickson told the appellant in the recovery room that he had no idea how the bridgework had been damaged. (R. 465 at pp. 137-38). At trial, however, the plaintiff and her husband chose to testify that Dr. Dickson told them he had broken the dental work with a metal spatula (also known as a laryngoscope). (R. 465 at pp. 98-99, 126, 130-43.) This laryngoscope or "metal spatula" theory of simple negligence was expressly advanced against Dr. Dickson by appellant's counsel in his opening remarks to the jury. (R. 465 at p. 62.)

Appellant's counsel attempted to further his client's simple negligence theory of recovery against Dr. Dickson by eliciting testimony from the Pioneer Valley Hospital nursing staff regarding what they saw with respect to Dr. Dickson's handling of the laryngoscope. (R. 466 at pp. 248, 289.) Appellant put on the opinion testimony of her dentist, Dr. Reed

Jorgensen, with regard to the causation of the bridgework damage and with regard to what the dentist believed would have been the best way to protect the teeth in question. Dr. Jorgensen concluded that the plastic airway inserted in the appellant's mouth by Dr. Dickson was not the instrumentality that caused the damage to the appellant's bridgework. (R. 465-66 at pp. 180-81, 208-11, and 222.) In indicating that the oral airway placed by Dr. Dickson could not have been the instrumentality that caused the damage to appellant's bridge-work, Dr. Jorgensen even went so far as to indicate that the teeth may have been broken by use of the spatula or laryngoscope. (R. 466 at p. 222.) On cross-examination, Dr. Jorgensen did admit, however, that there was no evidence of any trauma, on the day following the surgery in question, to the plaintiff's mouth, lips, gums or tongue, and that it was possible for the damage to the front teeth of the bridgework to have occurred as the appellant was biting down on the oral airway. (R. 466 at pp. 227-28.)

The nurse attending to Mrs. Nielsen as she was regaining consciousness in the recovery room was Pioneer Valley Hospital Nurse Joanne Henschke. (R. 466 at p. 258.) Nurse Henschke testified at trial that as the appellant was regaining consciousness, she was clamping down hard on the airway that had been inserted by Dr. Dickson. (R. 466 at p. 270.)

Respondent Dr. Dickson testified at trial that he had used an oral airway rather than an intubation technique in order to carefully protect the appellant's bridgework. (R. 466 at p. 321.) Dr. Dickson indicated that he had had absolutely no difficulty in placing the oral airway. (R. 466 at p. 322.) Dr. Dickson stressed that at no time had he ever used a laryngoscope or metal spatula in any of his anesthetic treatment of the appellant. (R. 466 at pp. 322, 329-30, 364.) In fact, Dr. Dickson testified that he had carefully tilted the appellant's head during the initial administration of anesthetic, so as to prevent the appellant from swallowing her tongue, while he had an opportunity to administer further anesthetic with which to relax the appellant's jaw so that the oral airway could be inserted. (R. 466 at pp. 332, 384, and 399.)

Following the knee surgery, and as the appellant was being wheeled into the recovery room, Dr. Dickson examined the appellant's front teeth by pulling the airway back. He found the teeth to be in perfect condition. (R. at pp. 333, 337-38.) Dr. Dickson testified that he did not know how the bridgework in question had been broken, but that he had told the appellant in the recovery room that the teeth may have been broken because of the appellant's clamping down on the airway. (R. 466 at pp. 348.) Both Dr. Dickson and his medical expert witness, Dr. Lawrence Reichmann, testified that teeth can be

broken when a patient bites down on an oral airway, and that such damage can obviously occur without any negligence whatsoever on the part of the anesthesiologist. (R. 466 at pp. 363, 377, 445-46, 449.)

In his presentation of evidence and closing statements to the jury in this case, plaintiff's counsel stressed that the plaintiff was entitled to recover money damages under either a simple negligence theory of recovery or under a res ipsa loquitur theory of recovery. (R. 465-66 at pp. 98-99, 126, 130-143, 222.) Indeed, in his closing remarks to the jury, appellant's counsel stated:

. . . I'd like to set forth once again the theories of law that my client is going under against these defendants. It's important because they are a little bit separate. And if you agree with one theory, then some of the judge's instructions may not apply to the other theory.

The first theory is the ordinary negligence theory against Dr. Dickson.

. . .

Now, our other theory is the theory that the judge referred to as a res ipsa loquitur theory. This is against Pioneer Valley Hospital and Dr. Dickson.

. . .

So the judge read you some jury Instructions in which he stated that you are not permitted to use your own standard and your own experience with physicians in determining negligence. That is true for the common, for the ordinary negligence

theory that we are going under, that the doctor was just ordinarily negligent as a doctor. [Emphasis added.]

(R. 467 at pp. 477-78, 480.)

Dr. Dickson's counsel proffered Jury Instruction No. 19 because the plaintiff expressly and unequivocally relied upon a simple negligence theory of recovery (i.e., the "metal spatula" theory) in advancing her case at trial. (R. 319.)

Appellant's counsel never objected in open court to Jury Instructions No. 16 and No. 19. In fact, Mrs. Nielsen's counsel never brought to the Court's attention any objection he had to Jury Instructions No. 16 and No. 19. After the Court had sent the jury out to deliberate and the judge had retired to his chambers, plaintiff's counsel took the court reporter aside and made a record, outside of the court's hearing, of his objections to Instructions No. 16 and No. 19. (R. 467 at pp. 541-42.)

The jury returned a verdict of no cause of action on April 19, 1989. (R. 467 at pp. 543-44.) The jury verdict order was entered by the trial court on May 11, 1989, (R. 376) and the plaintiff's motion for a new trial was denied on July 20, 1989 (R. 461.) The plaintiff filed her Notice of Appeal in the case on June 9, 1989, and subsequently filed her Docketing Statement on June 29, 1989.

### SUMMARY OF ARGUMENT

Lynn Nielsen's appeal is based on the assertion that the trial court erred when it read to the jury Instruction No. 16 pertaining to impermissible presumptions in a medical malpractice case and Instruction No. 19 pertaining to the determination of the relevant standard of care in simple negligence cases. Appellant's assignment of error fails to provide a basis for a successful appeal for three reasons.

Jury Instruction No. 16 was perfectly consistent with both the res ipsa loquitur and the simple negligence theories advanced by the plaintiff at trial. Instruction No. 16 is no more than a standard cautionary instruction given in all medical malpractice cases regardless of whether the plaintiff proceeds against a defendant physician on a theory of res ipsa loquitur or on a theory of simple negligence. The cautionary instruction merely informs the jury that a physician can never be deemed to be a guarantor of successful results, and that when adverse results from a physician's course of treatment do arise, those results in and of themselves do not allow the jury to presume that the defendant physician was negligent. The case law pertaining to Jury Instruction No. 16 makes it quite clear that the instruction can and should be given in both simple negligence and res ipsa loquitur medical malpractice actions. The cautionary instruction, designed to

bring home to jurors that physicians are no more than human practitioners of the medical art, is perfectly consistent with the standard *res ipsa loquitur* instruction (which was given in the present case). Together, Instruction No. 16 and the standard *res ipsa loquitur* instruction informed the jury that a three-part test must be met before an inference of negligence arises. The caution contained in Instruction No. 16, which mandates that no inference of negligence may arise from the occurrence of a bad result alone, is perfectly consistent with the requirement that the jury find (1) the bad result was of a kind which in the ordinary course of events would not have happened had the defendant physician used due care, (2) the instrumentality or thing causing the injury was at the time of the accident under the management and control of the defendant physician, and (3) the accident happened irrespective of any participation at the time by the plaintiff. Clearly, Jury Instruction No. 16 given in the present case is fully compatible with, and in fact reinforces, the standard *res ipsa loquitur* instruction that sets forth the three-part finding which is a threshold to the inference of negligence.

Similarly, Jury Instruction No. 19 was perfectly consistent with, and was necessitated by, appellant's simple negligence theory of recovery presented at trial. In plaintiff's counsel's presentation of evidence at trial and closing statements to the jury, counsel indicated that the

plaintiff should recover money damages based upon either a simple negligence theory or upon a res ipsa loquitur theory. Once the plaintiff's counsel advanced a simple negligence theory at trial, the defendants had no choice but to request that the trial court give the jury Instruction No. 19 so that the jury would fully understand the plaintiff's burden of proof on that theory.

Even if the trial court did error in reading the jury Instructions No. 16 and/or No. 19, the appellant's requested relief must be denied because appellant's counsel failed to bring to the trial court's attention any objection he had to those instructions as is required by Rule 51 of the Utah Rules of Civil Procedure. Plaintiff's counsel gave the Court no opportunity to assess any possibility of error and take proper corrective measures while the jury was still seated. By failing to raise an adequate objection to the instructions, plaintiff's counsel failed to preserve any assignment of error pertaining to those instructions.

## A R G U M E N T

### THREE PRELIMINARY OBSERVATIONS

Before reviewing the case law pertinent to the propriety of Jury Instructions No. 16 and No. 19, it is important to bear in mind three preliminary observations.

1.

First, there is absolutely no dispute in the record on appeal that the plaintiff proceeded at trial with the presentation of evidence and with argumentation that advanced both a simple negligence and a res ipsa loquitur theory of recovery. Appellant's counsel did an admirable job at trial in walking the fine line of presenting just enough negligence evidence so as not to ruin his client's res ipsa loquitur case. See Roylance v. Rowe, 737 P.2d 232 (Utah App. 1987); Kusy v. K-Mart Apparel Fashion Corp., 681 P.2d 1232 (Utah 1984) (a plaintiff may proceed on both res ipsa loquitur and ordinary negligence theories, and have the jury instructed on each theory, so long as the plaintiff's evidence of negligence doesn't "fully explain the cause of the injury by positive evidence revealing all of the facts and circumstances"). As the Statement of Facts outlined above indicates, Lynn Nielsen's counsel attempted to prove his client's simple negligence theory of recovery when he presented evidence through his client (R. 465 at pp. 98-99, 126, 130-143) and through Mr. Elwood Nelson (R. 465 at pp. 152-53), indicating that Dr. Dickson had negligently caused the appellant's bridgework damage with a metal spatula. Appellant's counsel attempted to further this "metal spatula" simple negligence theory of recovery by presenting the testimony of dentist Reed Jorgensen, who stated that the damage to the appellant's bridgework was

caused by an instrumentality other than the airway inserted in the appellant's mouth by Dr. Dickson. (R. 465-66 at pp. 180, 208-211, 222.) Finally, appellant's counsel unequivocally admitted that he was advancing both a res ipsa loquitur and simple negligence theory of recovery at trial when, in closing argument, he stated to the jury:

. . . I'd like to set forth once again the theories of law that my client is going under against these defendants. It's important because they are a little bit separate. And if you agree with one theory, then some of the judge's instructions may not apply to the other theory.

The first theory is the ordinary negligence theory against Dr. Dickson.

. . .

Now, our other theory is the theory that the judge referred to as the res ipsa loquitur theory. This is against Pioneer Valley Hospital and Dr. Dickson.

(R. 467 at pp. 477-78.) There can be no question that the appellant proceeded with her case below based upon the two theories of recovery referred to in her counsel's closing remarks. The Court's Jury Instructions No. 16 and No. 19 were entirely appropriate and consistent with these two theories of recovery.

2.

Second, the question is raised on page 11 of the Appellant's Brief as to precisely what it was the Utah Supreme Court remanded to the trial court by virtue of the Supreme Court's September 16, 1988 reversal of Judge Wilkinson's summary judgment ruling. (See the Utah Supreme Court reversal Order attached as Addendum "A".) The appellant maintains that this Court's Order and remand applied only to her *res ipsa loquitur* theory of recovery. On its face, however, the Supreme Court's Order of reversal states that "The trial court was manifestly in error in granting summary judgment since material facts are in dispute." In referring to the trial court's summary judgment order, the Utah Supreme Court presumably referred to the entire summary judgment order. Indeed, the Supreme Court's reversal and remand appears to have been based on two independent findings: first, that the trial court's ruling was made in the presence of disputed issues of fact, and second, that the ruling as it pertained to *res ipsa loquitur* was incorrect because the Supreme Court's review of the case revealed no need for expert testimony relative to that theory. Accordingly, the Supreme Court's reversal of Judge Wilkinson's summary judgment ruling can clearly be construed as a reversal of the entire summary judgment order and remand of all of the plaintiff's original

causes of action "for further proceedings." Whether all of the appellant's original causes of action contained in her initial Complaint were remanded for trial or not, however, this Court must not lose sight of the fact that appellant's counsel expressly chose to advance both a theory of simple negligence recovery and a theory of res ipsa loquitur recovery while presenting evidence and making closing remarks at the trial below. Appellant has had her day in court with an opportunity to recover on two different theories. A jury has spoken and the verdict should be upheld. Two bites at the apple is enough.

3.

Finally, in reviewing the propriety of Instructions No. 16 and No. 19, this Court should be cognizant of the well-established principle that jury instructions given at trial must be read as a whole when any particular instruction, or any part of a particular instruction, is being reviewed for error. Goode v. Dayton Disposal, Inc., 738 P.2d 638 (Utah 1987); Bigler v. Mapleton Irr. Canal Co., 669 P.2d 434 (Utah 1983); Ewel & Son, Inc. v. Salt Lake City Corp., 493 P.2d 1238 (Utah 1972) (the fact that a plausible argument as to error could be made by singling out certain portions of instructions did not justify upsetting a verdict and judgment where the instructions considered together gave the jury a fair understanding of the issues of fact to be determined and the

law applicable thereto); Taylor v. Johnson, 414 P.2d 575 (Utah 1966). In her brief, appellant is particularly fond of picking out the first sentence from the trial court's Jury Instruction No. 16, and parading that sentence as evidence of error, without fairly reading the first sentence of the instruction within the context of the rest of the language contained in the instruction and within the context of the trial court's jury instructions as a whole. When this Court reads Instructions No. 16 and No. 19 within the context of the entire set of trial instructions, and particularly within the context of the plaintiff's evidence and argument at trial, the Court will have no difficulty upholding the propriety of the instructions.

The jury instructions of particular importance in this appeal read as follows:

**INSTRUCTION NO. 16**

A physician is not a guarantor of successful results, and therefore, no presumption of negligence arises from the fact of an adverse event occurring during a defendant's treatment. The measure of duty owed by the defendant physician to the patient is that degree of care, skill and diligence ordinarily possessed and exercised, under similar circumstances, by other physicians in the same practice and profession. The physician must use ordinary and reasonable care and diligence in providing medical care to the patient. If you find from the evidence in this case that the doctor provided care in compliance with the standard as defined in these

instructions then you must find for the defendant physician.

If complications or adverse results occur in connection with a doctor's treatment of a patient, such facts, in and of themselves, do not prove that the doctor was negligent. [Emphasis added.]

#### INSTRUCTION NO. 19

In determining whether the physician properly fulfilled his duty imposed upon him as a physician, in his treatment and care of plaintiff, you are not permitted to use a standard derived from your own experience with physicians, nor any other standard of your own.

The standard of professional care by which the physician is to be judged by you is that degree of learning, care and skill ordinarily possessed and used by other physicians undertaking the care of a patient under similar circumstances in the same field of practice at the time such treatment and care was rendered.

The only way you may properly learn such standard and thus determine whether or not the physician in this case conformed to it, is through evidence presented during this trial by physicians in the same field of practice testifying as expert witnesses who knew of that standard as it existed at that time. [Emphasis added.]

#### INSTRUCTION NO. 22

The Court instructs you that in certain situations it is not necessary for the plaintiff in a medical malpractice action to present evidence of the defendants' negligence by expert testimony. Specifically, where the propriety of the treatment received is within the common knowledge and experience of the layman,

expert testimony is unnecessary to establish the standard of care owed to the plaintiff. The plaintiff must, however, establish by the evidence that:

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 the plaintiff.

If you find from a preponderance of the evidence that all three of the above criteria have been met, then you may find an inference of negligence from those circumstances. This does not mean that negligence is necessarily established, it merely creates an inference which may be rebutted by the defendant or defendants.

#### INSTRUCTION NO. 27

If in these instructions any rule, direction or idea has been stated in varying ways, no emphasis thereon is intended, and none must be inferred by you. For that reason, you are not to single out any certain sentence, or any individual point or instruction, and ignore the others, but you are to consider all the instructions as a whole, and to regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance. [Emphasis added.]

## POINT I

### THE TRIAL COURT PROPERLY INSTRUCTED THE JURY REGARDING THE LEGAL STANDARDS AND BURDEN OF PROOF APPLICABLE TO THE PLAINTIFF'S RES IPSA LOQUITUR AND NEGLIGENCE CAUSES OF ACTION

A. Jury Instruction No. 16 was Perfectly Consistent with Both the Res Ipsa Loquitur and Simple Negligence Theories of Recovery Advanced by the Plaintiff at Trial.

The appellant's contention in her brief with regard to Jury Instruction No. 16 is that the cautionary instruction is somehow inconsistent with the evidence presented and argument made by appellant's counsel during trial. It is too well-settled, however, to be disputed that a cautionary instruction like Jury Instruction No. 16 can and should be given in all medical malpractice cases regardless of whether the theory advanced by the plaintiff is res ipsa loquitur or simple negligence or both.

In Miller v. Kennedy, 588 P.2d 734 (Wash. 1978), the Washington Supreme Court dealt with the precise issue at hand and concluded that in the context of a res ipsa loquitur case, a cautionary instruction like Jury Instruction No. 16 can and should be given when requested by defense counsel. In so holding, the court reasoned that:

The [cautionary instruction] states that a bad result of treatment in itself is not evidence of negligence. Appellant contends this is erroneous and conflicts with the

doctrine of res ipsa loquitur, as accurately set forth in another instruction. Res ipsa loquitur is a doctrine allowing a trier of fact to draw an inference the defendant was negligent when certain circumstances are present. Where the agency or instrumentality causing the injury was in control of the defendant, and the injury is of a type which would not ordinarily result if the defendant were not negligent, a jury may infer from the fact of the injury that the defendant was negligent. This relieves the plaintiff of the necessity of proving the defendant's actual negligent act. The doctrine does not allow the jury to infer a defendant was negligent from the facts of the injury alone, however. The plaintiff must show the other elements were present -- that is, the control by the defendant over the instrumentality, and the nature of the injury as ordinarily resulting only from negligence. The instruction challenged here accurately states that a bad result or injury in itself is not evidence of negligence. . . . Instruction No. 5 [the cautionary instruction] is neither erroneous nor misleading, and the court did not err in giving the instruction to the jury. [Emphasis added.]

588 P.2d at 737.

Similarly, in Voss v. Bridwell, 364 P.2d 955 (Kan. 1961), the Kansas Supreme Court endorsed the giving of a cautionary instruction, like Instruction No. 16 in the present case, where a plaintiff advances both res ipsa loquitur and simple negligence theories in a medical malpractice action against a physician. In such a case, the Court ruled, it is a "basic principle" that " a physician is not a guarantor of good

results, and civil liability does not arise merely from bad results." Id. at 963, 970.

Jury Instruction No. 16 given in the present case, particularly as as this instruction is summed up in its last sentence, is clearly endorsed by cases like Miller and Voss. The instruction is also implicitly endorsed by the Utah Supreme Court's long line of cases requiring that the standard three-part test be met before a jury may infer negligence in a res ipsa loquitur case. See e.g., Dalley v. Utah Valley Regional Med. Ctr., 791 P.2d 193 (Utah 1990) (the doctrine of res ipsa loquitur requires plaintiff to establish an evidentiary foundation which includes the following: the accident was of a kind which in the ordinary course of events, would not have happened had the defendant used due care; the instrument or thing causing the injury was at the time of the accident under the management and control of the defendant; and the accident happened irrespective of any participation at the time by the plaintiff); Kusy v. K-Mart Apparel Fashion Corp., 681 P.2d 1232 (Utah 1984); Anderton v. Montgomery, 607 P.2d 828 (Utah 1980); Moore v. James, 5 Utah 2d 91, 297 P.2d 221 (Utah 1956).

Instruction No. 16 simply stands for the well settled principle that, whether a doctor is sued on a theory of simple negligence or res ipsa loquitur, adverse results occurring in connection with the doctor's treatment can never in and of

themselves prove that a doctor was negligent or give rise to a presumption of such negligence. The instruction read in its entirety fully comports with and explicates a standard caution that should and must be given to jurors in medical malpractice cases to ensure that those jurors realistically view physicians as human practitioners of a medical art who cannot guarantee against the occurrence of all potential mishaps that may crop up during the course of any given treatment.

It is important to observe that the trial court in the present case provided the jury with Instruction No. 27 indicating that the jury had a duty to read all of the Court's instructions as a whole. (R. 357.) When the task of reading the trial court's jury instructions as a whole is performed, there is no question that Jury Instruction No. 16 is not only completely compatible with the Court's *res ipsa loquitur* instruction (Instruction No. 22), but it is also clear that Instruction No. 16 reinforces the principle set forth in the *res ipsa loquitur* instruction. Instruction No. 16 stands for the simple proposition that a presumption of negligence in a medical malpractice case cannot arise from the occurrence of an adverse result alone. This proposition is picked up by, and elucidated in, Instruction No. 22 which indicates that the jury must find that a three-part test has been met before an inference of negligence can arise. Instruction No. 16 and Instruction No. 22 work together to precisely define the

circumstances that must exist before an inference of negligence can arise in a medical malpractice case. Because Jury Instruction No. 16 is completely compatible with, and in fact reinforces, Jury Instruction No. 22 requested by the appellant, the appellant has no basis for assigning any error to the giving of Instruction No. 16.

**B. Jury Instruction No. 19 was Properly Given in Light of the Simple Negligence Theory Advanced by the Plaintiff at Trial.**

**a.**

As indicated in the Statement of Facts above, and on pages 14-17 of this brief, appellant's counsel attempted to persuade the jury during the presentation of evidence and in closing statements that the plaintiff should recover money damages if the plaintiff was able to prove either (a) her simple negligence case, or (b) her *res ipsa loquitur* case. Since the plaintiff chose to advance these dual theories of recovery at trial, defense counsel had no choice but to insure that the jury was properly instructed on all elements of the plaintiff's burden of proof with respect to each theory. Goode v. Dayton Disposal, Inc., 738 P.2d 638 (Utah 1987); Hillier v. Lamborn, 740 P.2d 300 (Utah App. 1987).

Dr. Dickson's counsel had an obligation to ensure that the jury was read Instruction No. 19 because of the well-settled principle in this jurisdiction that a plaintiff

cannot prove an ordinary negligence claim of medical malpractice unless a plaintiff has expert testimony with which he or she can establish "(1) the requisite standard of care, Marsh v. Pemberton, 10 Utah 2d 40, 347 P.2d 1108, 1110 (1959); (2) defendant's failure to comply with that standard, Nixdorf v. Hicken, 612 P.2d 348, 351 (Utah 1980); and (3) that defendant caused plaintiff's injuries, Huggins v. Hicken, 6 Utah 2d 233, 310 P.2d 523, 526 (1957)." Hoopiiaina v. Intermountain Health Care, 740 P.2d 270 (Utah App. 1987). While this Court's remand order dated September 16, 1988, may have eliminated the need for expert evidence with regard to the standard of care applicable to appellant's claim against Dr. Dickson, the remand order is completely silent with regard to whether expert testimony is necessary to prove the breach and causation elements of the simple negligence theory advanced by the appellant at trial.

Because the appellant chose to put on evidence indicating that Dr. Dickson had negligently caused appellant's bridgework damage by mishandling a metal spatula used to insert the airway in Mrs. Nielsen's mouth, the appellant had the express obligation to put on the testimony of anesthesiologists familiar with the handling of such metal spatulas in order to show how Dr. Dickson had inappropriately used the spatula so as to have breached the relevant standard of care. Roylance v. Rowe, 737 P.2d 232 (Utah App. 1987). The appropriate (and

inappropriate) handling of the metal spatula, which anesthesiologists are trained to use in a particular manner under particular circumstances, is a technical aspect of an anesthesiologist's treatment of a patient. Whether a given anesthesiologist makes proper or improper use of a metal spatula in inserting an airway, particularly in light of the fact that different patients react to various anesthetics in different ways, is a technical medical question beyond the ken of lay jurors. The trial court appropriately drew this conclusion, and properly read the Jury Instruction No. 19 so that the jurors would understand the nature of the evidence they could appropriately consider when deliberating upon the issue of whether Dr. Dickson breached the duty he owed to the appellant.

Additionally, because respondent Dickson had come forward with the expert testimony of Dr. Lawrence E. Reichmann, indicating that Dr. Dickson had fully complied with the standard of care required of anesthesiologists, the trial court was persuaded that the appellant had an obligation to come forward with similar expert testimony on the highly technical question of whether Dr. Dickson had somehow breached the pertinent standard of care and whether that breach had caused the appellant's damages.

Not only did Dr. Reichmann's testimony make it clear to the trial court that a technical medical question arose when

the appellant chose to advance her "metal spatula" theory of ordinary negligence, but the trial court was also concerned that the plaintiff's witness, Dentist Reed Jorgensen, would be regarded by the jury as an expert on the technical question of whether Dr. Dickson made appropriate use of the metal spatula. When Dr. Jorgensen testified that he did not believe the airway inserted in the appellant's mouth by Dr. Dickson could have caused the bridgework damage in question, his testimony was clearly being used by the appellant to advance the "metal spatula" theory of ordinary negligence. In reading the Jury Instruction No. 19, the trial court not only set forth the appropriate legal standard applicable to the breach of due care issue, but the court also ensured that the jury would not extend Dr. Jorgensen's opinion regarding causation into the realm of the jurors' deliberation upon the breach of due care issue.

The conclusion that must be drawn with regard to Jury Instruction No. 19 is that the appellant herself brought the instruction into play when she chose to specifically allege that Dr. Dickson had caused the bridgework damage in question by mishandling his metal spatula. By making this specific allegation of ordinary negligence, and by advancing this theory in tandem with her *res ipsa loquitur* theory, the appellant imposed upon her own case the significant burden of coming forward with expert anesthesiologist testimony in order to

demonstrate the way in which Dr. Dickson mishandled the metal spatula so as to have breached the pertinent standard of care. By altering her pretrial deposition testimony (where the appellant and her husband indicated that Dr. Dickson had told the appellant he did not know how the bridgework had been broken) to allege for the first time at trial that Dr. Dickson had admitted to breaking the bridgework with his metal spatula, the appellant ran the grave risk of being totally impeached on the witness stand. More importantly, however, in altering her testimony, the appellant also effectively asked that Instruction No. 19 be read to the jurors so they would understand that the manner in which Dr. Dickson used his metal spatula must be assessed by his medical peers in order for a fact finder to determine whether any duty owed to the appellant by Dr. Dickson had been breached. Jury Instruction No. 19 was entirely appropriate in light of the appellant's tactical decision to go forward with a simple negligence theory of recovery.

**b.**

Jury Instruction No. 19, just like Jury Instruction No. 16, can be read as entirely consistent with the trial court's Jury Instruction No. 22 (the *res ipsa* instruction) when all of the court's instructions are read as a whole. Instruction No. 22, by its own terms, is simply a court

approved exception to Instruction No. 19 with regard to the establishment of a standard of care in the case.

Appellant's counsel fully explained to the jury, in both his opening and closing remarks, precisely how the three part res ipsa loquitur test operated both generally and within the confines of the evidence elicited in the present case. (R. 465 and 467 at pp. 56-59, 480.) With the jury's attention keenly focused upon the res ipsa loquitur requirements as being the appellant's primary theory of recovery at trial, the jury well understood that the appellant did not need to come forward with expert evidence in order to prove the standard of care applicable to her case. (R. 465 and 467 at pp. 57-58, 480.) The jury had no rational alternative, therefore, but to relegate Instruction No. 19 to the negligence cause of action which appellant's counsel referred to as a second and completely separate theory of recovery relied upon by the appellant. (R. Id.) Indeed, in his closing remarks to the jury, appellant's counsel expressly stated:

So the judge read you some jury Instructions in which he stated that you are not permitted to use your own standard and your own experience with physicians in determining negligence. That is true for the common, for the ordinary negligence theory that we are going under, that the doctor was just ordinarily negligent as a doctor. [Emphasis added.](R. 467 at p. 480.)

Even though appellant's counsel failed to tell the jury in his closing remarks that Jury Instruction No. 19 should only be considered within the confines of the appellant's simple negligence cause of action, in light of the plain language on the face of Instructions Nos. 19 and 22, and in light of the appellant's repeated statements to the jury that expert evidence was not required in appellant's *res ipsa loquitur* case, it is difficult to see how the jury could possibly been confused by the two instructions.

#### POINT II

#### LYNN NIELSEN'S RELIEF REQUESTED ON APPEAL MUST BE DENIED BECAUSE HER COUNSEL FAILED TO PROPERLY OBJECT TO INSTRUCTIONS NO. 16 AND NO. 19 AT TRIAL.

A review of the record on appeal reveals that at no time during the trial in the above-captioned case did appellant's counsel draw the Court's attention to any objection he had to Jury Instructions Nos. 16 and 19. The only time plaintiff's counsel took exception to these instructions was when he took the court's reporter aside, after the jury had retired to deliberate, and made the record attached hereto as Addendum "B". (R. 467 at pp. 54-42.) The judge was not present when this record was made. (R. 467 at p. 540.) Such an objection constitutes no objection at all and fails to provide any basis whatsoever for an Appeal.

Rule 51 of the Utah Rules of Civil Procedure  
(attached as Addendum "C") mandates that:

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

The Utah Supreme Court recently had occasion to articulate the purpose of Rule 51 and to identify the parameters of a proper objection made under the Rule. In Beehive Medical Electronics, Inc. v. Square D Co., 669 P.2d 859 (Utah 1983), the Court stated that:

This court has interpreted the foregoing Rule to require that an objection lodged to an instruction be specific enough to give the trial court notice of the very error in the instruction which is complained of....

. . .

[T]he purpose of the Rule ... is to put the trial court on notice of error in the instructions and thereby afford the court an opportunity to correct the error before the case is presented to the jury.

Id. at 860-61.

This Court's opinion in Beehive Medical clearly establishes that one of the prerequisites to an adequate Rule 51 objection is direct notice to the trial court that error is being ascribed to a given instruction before the jury retires to deliberate. In the present case, appellant's counsel's essentially silent objection, voiced only to the court reporter, in no way served to comply with the requirements set forth in Beehive Medical. If the appellant

had wanted to preserve the improper jury instruction issue for the purpose of an appeal, an appropriate objection would have to have been voiced directly to the trial judge before the case was given to the jury to decide. Id; Gill v. Timm, 720 P.2d 1352 (Utah 1986) ("The court must be afforded a timely opportunity to correct its error, or the objecting party will have waived its right to argue the objection on appeal.") It is incumbent upon trial counsel, for the purpose of preserving appellate issues, to timely object to perceived trial court error in a manner that provides the court actual notice of the basis for the objection. Id. It has never been the responsibility of trial judges to ensure that trial counsel follow the procedures necessary to preserve issues for appeal.

In addition to being untimely, the phrasing of appellant's late objection indicated no more than a generalized opinion that Instructions No. 16 and No. 19 are "improper statement[s] of the law on the case of res ipsa loquitur." (R. 467 at p. 542.) This is the same generalized language that the court in Beehive Medical denounced as failing to serve the purpose of Rule 51. Id. at 861. See also, Morgan v. Quailbrook Condominium Co., 704 P.2d 573, 579 (Utah 1985) ("Our rules of civil procedure requires that to preserve an objection for appeal, a party must object with specificity at trial.) Accordingly, just as in the Beehive Medical case,

the plaintiff in the present case cannot assign any error to the giving of Instructions No. 16 and No. 19.

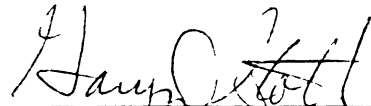
Under the standards set forth in Rule 51 and the case law cited above, Lynn Nielsen's counsel wholly failed to apprise the trial court of his objections to Instructions No. 16 and No. 19. Appellant afforded the trial court no opportunity to correct any potential jury instruction error and cannot, therefore, now attempt to assign error to the giving of Instructions No. 16 and No. 19 in order to trump up a basis for an appeal.

#### CONCLUSION

The plaintiff's relief requested on appeal must be denied because: (1) the jury instructions allegedly causing prejudicial error were perfectly consistent with the simple negligence and res ipsa loquitur theories of recovery advanced by the plaintiff at trial; and (2) the appeal is based upon the giving of jury instructions which appellant's counsel failed to adequately object to at trial.

DATED this 7 day of August, 1990.

RICHARDS, BRANDT, MILLER  
& NELSON

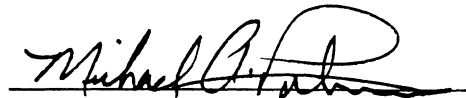
  
\_\_\_\_\_  
GARY D. STOTT  
MICHAEL A. PETERSON  
Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was mailed, first class, postage prepaid on this 7 day of August, 1990, to the following counsel of record:

Daniel Darger, Esq.  
100 Commercial Club Building  
32 Exchange Place  
Salt Lake City, Utah 84111

David W. Slagle, Esq.  
Elizabeth King Brennan, Esq.  
10 Exchange Place, Suite 1100  
P.O. Box 45000  
Salt Lake City, Utah 84145



NIELSEN/MPW  
sm/to090390  
9152-026

A D D E N D A

A D D E N D U M   A

IN THE SUPREME COURT OF THE STATE OF UTAH

-----000000-----

Regular May Term, 1988

September 16, 1988

Lynn Nielsen,  
Plaintiff and Appellant,

REMITTITUR  
No. 880170  
District No. C86-7731

v.  
Pioneer Valley Hospital,  
D.M. Dickson, George D. Veasy  
and Does I Through V, inclusive,  
Defendants and Appellees.

---

Appellant's motion for summary disposition of this matter is hereby granted. The trial court was manifestly in error in granting summary judgment since material facts are in dispute.

Nixdorf v. Hicken, 612 P.2d 348 (Utah 1980) is controlling on the issue of res ipsa loquitur. Expert evidence is not necessary to establish the applicable standard of care in this case, as it appears no medical technicalities are involved.

The Summary judgment is reversed and this case is remanded for further proceedings.

Issued: September 26, 1988

Record: None

*no record transmitted*  
*no record remitted*

FILED IN CLERK'S OFFICE  
Salt Lake County Utah  
SEP 26 1988  
H. Dixon-Haley, Clerk 3rd Dist. Court  
B. J. [Signature]  
Deputy Clerk

A D D E N D U M   B

1 to give requested -- the following requested jury  
2 instructions: Failure to give requested Jury  
3 Instruction No. 12, as 12 is an appropriate and correct  
4 statement of the law.

5 Failure to give requested Instruction No. 13  
6 for the reason that it's an appropriate statement of the  
7 law. Exception to the Court's failure to give all of  
8 Instruction No. 15 as it also represents an appropriate  
9 statement of the law.

10 Exception is taken to the Court's failure to  
11 give requested Instruction No. 17. 17 is an accurate  
12 statement of the law as it pertains to the question of  
13 professional services and medical negligence.

14 And failure to give requested Instruction  
15 No. 18 for it, too, is an appropriate statement with  
16 regard to what the law is concerning the question of  
17 professional services and medical negligence.

18 One last exception is failure to give  
19 requested Instruction No. 19 because it is also  
20 supported by the law and is an appropriate statement and  
21 is important to this case with regard to the claims that  
22 were made by the plaintiff as to res ipsa.

23 No other exceptions.

24 MR. DARGER: All right. Plaintiff Lynn  
25 Nielsen takes exception to Instruction 16 given by the

1 Court because it indicates that there should be no  
2 presumption of negligence arising from adverse events  
3 occurring during the defendants' treatment. And this is  
4 an improper instruction in a res ipsa loquitur case.

5 And plaintiff also takes exception to  
6 Instruction No. 19 where it indicates that the jury is  
7 not permitted to use a standard derived from their own  
8 experience with physicians, nor any of their own  
9 standards. Because again this is an improper statement  
10 of the law on the case of res ipsa loquitur,  
11 particularly the common knowledge exception applicable  
12 to that rule and applicable in this case.

13 Those are all of the exceptions I have.

14 (Off the record.)

15

16

17

V E R D I C T

18 (Reached at 12:00 noon, but court assembled at  
19 12:30 p.m. after all had arrived.)

20 THE COURT: The record may show that all  
21 members of the jury are present.

22 Members of the jury, have you met and  
23 selected one of your group as foreperson?

24 JUROR 2: Yes.

25 THE COURT: And Dr. Bevan, are you the forema

## ADDENDUM C

## COLLATERAL REFERENCES

**Am. Jur. 2d.** — 46 Am Jur 2d Judgments §§ 106 to 151, 75 Am Jur 2d Trial § 463 et seq.

**C.J.S.** — 49 C J S Judgments §§ 59 to 61, 88 C.J.S Trial §§ 249 to 265.

**A.L.R.** — Dismissal, nonsuit, judgment, or direction of verdict on opening statement of counsel in civil action, 5 A L R 3d 1405

Propriety and prejudicial effect of counsel's argument or comment as to trial judge's re-

fusal to direct verdict against him, 10 A L R 3d 1330.

Right to voluntary dismissal of civil action as affected by opponent's motion for summary judgment, judgment on the pleadings, or directed verdict, 36 A L R 3d 1113

**Key Numbers.** — Judgment ⇨ 199; Trial ⇨ 167 to 181.

**Rule 51. Instructions to jury; objections.**

At the close of the evidence or at such earlier time as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in said requests. The court shall inform counsel of its proposed action upon the requests prior to instructing the jury; and it shall furnish counsel with a copy of its proposed instructions, unless the parties stipulate that such instructions may be given orally or otherwise waive this requirement. If the instructions are to be given in writing, all objections thereto must be made before the instructions are given to the jury; otherwise, objections may be made to the instructions after they are given to the jury, but before the jury retires to consider its verdict. No party may assign as error the giving or the failure to give an instruction unless he objects thereto. In objecting to the giving of an instruction, a party must state distinctly the matter to which he objects and the grounds for his objection. Notwithstanding the foregoing requirement, the appellate court, in its discretion and in the interests of justice, may review the giving of or failure to give an instruction. Opportunity shall be given to make objections, and they shall be made out of the hearing of the jury.

Arguments for the respective parties shall be made after the court has instructed the jury. The court shall not comment on the evidence in the case, and if the court states any of the evidence, it must instruct the jurors that they are the exclusive judges of all questions of fact.  
(Amended effective Jan. 1, 1987.)

**Amendment Notes.** — The 1986 amendment, in the first paragraph, deleted "during the trial" following "time" in the first sentence, made a minor punctuation change in the second sentence, and inserted "of" in the next-to-last sentence, and substituted "jurors" for "jury" in the second sentence in the second paragraph

**Compiler's Notes.** — This rule varies substantially from Rule 51, F R C P, after which it is patterned

**Cross-References.** — Exceptions unnecessary, Rule 46.

## NOTES TO DECISIONS

## ANALYSIS

Comments on evidence.  
—Allowed and disallowed  
—Proper  
—Accurate statement of facts.  
Copy of instructions.  
—Delay.  
Meaning.

—Entire context  
Necessity of objections  
—Failure to object  
—Appellate review  
—Burden of overcoming  
—Court's failure to instruct  
—Waiver  
—Opportunity to object.  
—Effect of denial