

1991

Michel Lounsbury v. Neal C. Capel : Brief of Respondent

Utah Supreme Court

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BRIEF

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91-0584-C

IN THE SUPREME COURT OF THE STATE OF UTAH

MICHEL LOUNSBURY,

Plaintiff/Appellant,

BRIEF OF RESPONDENT

vs.

NEAL C. CAPEL, M.D.,

Defendant/Respondent.

91-0584-CA

Case No. [REDACTED]

APPEAL FROM THE FIFTH JUDICIAL DISTRICT COURT

RESPONDENT'S BRIEF

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Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

MICHEL LOUNSBURY,

Plaintiff/Appellant,

BRIEF OF RESPONDENT

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Case No. 900160

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STATEMENT OF JURISDICTION

Plaintiff appeals from the Fifth Judicial District Court's entry of judgment in favor of defendant Neal C. Capel, M.D. Jurisdiction is proper in this Court pursuant to Section 78-2-2(3) Utah Code Ann. (1953, as amended).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Does a patient's voluntary acquiescence to and acceptance of requested medical care constitute consent to treatment?
2. Is a wife's expressed, written consent for her spouse valid?
3. Were the plaintiff's constitutional rights violated by the defendant's reliance upon the plaintiff's acquiescence and acceptance of treatment and upon the written consent of the plaintiff's spouse?

TEXT OF AUTHORITIES

1. Utah Rules of Civil Procedure, Rule 61.

No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not effect the substantial rights of the party.

2. Utah Code Ann. § 78-14-2 (1953, as amended) (set forth as Addendum A).

3. Utah Code Ann. § 78-14-3 (1953, as amended) (set forth as Addendum B).

4. Utah Code Ann. § 78-14-5(1) (1953, as amended) (set forth as Addendum C).

5. Utah Code Ann. § 78-14-5(4) (1953, as amended) (set forth as Addendum D).

STATEMENT OF THE CASE

A. Nature of the Case.

This case is a medical malpractice action in which the plaintiff alleges Dr. Capel performed surgery on him without his consent. It is undisputed that the surgery Dr. Capel performed was medically indicated and was skillfully done. It is further undisputed that plaintiff was fully informed of the nature of the prospective surgery. It is also undisputed that plaintiff's wife signed a consent form authorizing the very surgery performed. Finally, there is no dispute that plaintiff was wholly unable to produce medical expert testimony establishing the surgery caused harm to plaintiff.

B. Course of Proceedings and Disposition in Court Below.

This action came on regularly for jury trial on January 29, 1990 before the Honorable Philip Eves, Fifth Judicial District Court. Both plaintiff and defendant appeared personally and by and through counsel. The parties selected a jury and presented opening statements. After the parties' opening statements, the

parties stipulated to proffer the evidence upon which the court could determine whether a sufficient factual and legal basis had been shown to submit the case to the jury. At the conclusion of the proffer, defendant made a motion to dismiss based on the insufficiency of the evidence presented in light of the applicable statutory requirements of the Health Care Malpractice Act, § 78-14-1 et seq., Utah Code Ann. (1953, as amended).

The trial court concluded plaintiff failed to establish the requisite elements of a cause of action for medical malpractice. Specifically, the facts indicated implied consent on the part of the patient authorized the surgery. Further, while written consent is not required, the hospital consent form signed by the plaintiff's wife specifically authorized the surgery performed by Dr. Capel. The court found Dr. Capel was authorized as a matter of law to rely on said implied and express consent in performing the surgery. Further, the court found that without expert testimony establishing physical damages were proximately caused by Dr. Capel's conduct, both a claim for lack of informed consent and a claim for medical malpractice failed as a matter of law. Accordingly, the court granted defendant's motion to dismiss with prejudice pursuant to Rule 41(b) of Utah Rules of Civil Procedure. (Findings of Fact, Conclusions of Law and Order, attached hereto as Addendum E).

C. Statement of Facts.

The plaintiff, Michel Lounsbury, was injured on the job on October 10, 1986. He reported walking across planking carrying a 700 pound laminated beam when the planking gave way, leaving plaintiff supporting the weight of the beam by himself. (Dixie Medical Center records [hereafter M.R.] p. 6; Tr. 47.) He was seen initially by Dr. Noel Robinson of Beaver. X-rays were taken revealing a fractured vertebrae and herniated disc. (Id.) Plaintiff later had a lumbar CT Scan on October 23rd and a myelogram on November 20th both of which confirmed the presence of a herniated disc at L5-S1 and a limbus fragment at the superior anterior margin on L4. (Tr. 48.)

Mr. Lounsbury remained totally disabled from his injuries despite conservative treatment; consequently, he sought care from two orthopedic surgeons, Dr. David Moore and Dr. Glen Momberger. (Tr. 62.) Both physicians concluded that surgery was necessary if Mr. Lounsbury wanted to improve. After receiving these reports, the Industrial Commission advised the plaintiff that he would either have to have surgery or would receive future benefits only for the degree of disability he would be expected to have following corrective surgery. When he learned that Dr. Momberger would not be available to perform the surgery, Mr. Lounsbury chose to go to Dr. Capel. (Exhibits 1, 2 and 3 to Michel Lounsbury's deposition.)

The plaintiff and his wife met Dr. Capel in April of 1987. The proposed surgery was discussed in detail and Dr. Capel reviewed the potential complications. Dr. Capel charted:

Patient has been given an explanation of the problem and its proposed treatment, has agreed with the course. Complications have been discussed and every efforts [sic] made to reduce the chance of these developing.

(M.R., p. 9.) Thus, prior to surgery, Dr. Capel obtained the patient's verbal consent to the proposed surgery. (Tr. 64.)

As is Dr. Capel's practice, a "fresh" or repeat myelogram and contrast CT scan were ordered in advance of the scheduled surgery. (Tr. 60.) Accordingly, the patient was admitted to the hospital the day before surgery. At this time, he signed an admission form acknowledging he was being admitted for back surgery. (M.R., p. 3.)

From the time of his admission to the hospital until the time he was discharged, Mr. Lounsbury voluntarily submitted, acquiesced and even assisted with each and every preoperative step undertaken by the hospital staff. Specifically, at 12:15 on May 14, 1987, he was admitted and oriented to his room. At 1300 he asked for and received medication for complaints of back pain. After receiving this and subsequent pain medication, the nurse charted that the plaintiff remained "awake and alert." (M.R., p. 52.)

At 1530 he was taken to radiology. The repeat myelogram confirmed the large central herniation of L5-S1 disc which had

worsened since the prior examination. (M.R., p. 27; Tr. 60.)

Dr. Capel testified it is his unvarying practice to discuss the results of such preoperative exams with his patients and he believes he did so with the plaintiff. (Depo. Dr. Capel, pp. 28-30.)

After returning to his room at 1700, plaintiff complained of pain again and at 1710 another pain shot was given. At 2030 he was "awake and alert" with "no complaints of back discomfort." He was given coffee as he requested.

At 2200 preparations began for the surgery. A Fleets enema was given to which the patient expressed no objection. Mr. Lounsbury took a hibiclens shower using a specially treated soap to kill bacteria on his skin. At 2300, 11:00 p.m., the preoperative teaching was done and the patient was instructed that he could eat or drink nothing after midnight. The nurse charted that the plaintiff "voices his understanding" that he will be allowed nothing by mouth beginning at midnight and, accordingly, at one minute after midnight, the patient's water was removed from his room. (M.R., pp. 51-52.)

Mr. Lounsbury slept until 5:40 a.m. when he was awakened for surgery. At this point he hadn't received any pain medication for over six hours. The charting by the nurse on duty, Charlotte Chatterton, reflected that the patient fully cooperated with a lengthy and thorough surgical prep. (M.R., p. 53.) Had he voiced any objection or reluctance, the nurses would have

abruptly discontinued the preoperative procedure. (Tr. pp. 62-64.)

Here, with plaintiff's assistance, Nurse Chatterton shaved his back, sent him in for another shower instructing him to scrub his back carefully, and on his return she gave him a sterile scrub lasting 15 minutes and requiring his assistance. She then wrapped his back with sterile surgical wrap and put TED hose on his legs from his toes to his groin. At 6:10 the nurse charted that the patient was "relaxed" and that he has been NPO since 24:00. The nurse also charted that he was up to the bathroom to void. Not until 6:25 a.m. were the preoperative medications given. (M.R., p. 53.)

Because it was hospital policy at Dixie Medical Center to not allow any patient who had received pain medications to sign for surgery, the patient was instructed to call his wife early on the morning of surgery. (Tr. pp. 64-65.) He willingly complied. Mrs. Lounsbury was told by her husband to come in as he was being taken in for surgery. She hurried to the hospital, signed the consent form, and at 7:20, a full body sock was put on the patient. The nurses double-checked the preoperative check list and made sure it was complete, then wheeled the patient to the operating room on his bed. (Tr. 65; M.R. p. 53.)

Dr. Capel had nothing to do with obtaining the signature of either the patient or his spouse prior to surgery. This was a function performed by the Dixie Medical Center nursing personnel

out of Dr. Capel's presence and without his knowledge or involvement. (Tr. 76.)

As far as Dr. Capel was concerned, the plaintiff arrived in the surgical suite at 7:20 a.m. on the morning of May 15, 1987 for a scheduled surgery. From Dr. Capel's point of view, the plaintiff voluntarily went to the hospital; voluntarily complied with all of the preoperative steps; and verbally agreed to the surgery. Furthermore, a consent form had been signed by his wife in accordance with hospital policy and the preoperative myelogram confirmed the need for surgery. Thus, everything was completely in order and routine. (Tr. 97.) It is also important to note that it is uncontested that the surgery went well, that it was well-advised, and skillfully performed. (Tr. 54 and discussion pp. 81-89.)

After the surgery Mr. Lounsbury expressed no objections, concerns or problems about having received the operation. The nurses' notes indicate that Mr. Lounsbury was returned from surgery at 11:30 on the morning of May 15, 1987. By 1616 he reported that he was feeling better. At 2245, he was awake, alert and oriented, requesting coffee. He voiced no complaints or requests. By the next afternoon, the nurse noted that the patient was "in good spirits"; he was "voicing no complaints." (M.R., p. 56.) By 4:00 in the afternoon on the day after surgery, the nurse on duty charted: "Patient is very cheerful, optimistic and cooperative." (M.R., p. 57.) Incredibly,

assuming throughout this entire period of time, plaintiff was convinced unauthorized surgery had been performed, not once did he complain regarding the surgery -- up to and including his discharge from the hospital on May 21, 1987 at 1:30 p.m., a complete week after his admission. He also never voiced any protest or complaint to Dr. Capel during any of his postoperative visits with the defendant. He filed his Notice of Intent to Commence a Malpractice Action a year and a half after the surgery; this was the first time Dr. Capel learned Michel was dissatisfied.

Finally, there is no evidence in the record that the patient suffered any harm arising out of the health care rendered. No expert would testify that the surgery was the proximate cause of the patient's persistent pain. (Transcript, pp. 61-62, 77-79.) In a frank discussion before the court, plaintiff's attorney admitted that he could not prove the plaintiff was damaged by the operation. (Transcript, pp. 96-7 and 104.) In other words, there was no factual foundation establishing a causal connection between the operation and the plaintiff's suffering. The evidence from Dr. Capel and Dr. Reed Fogg, plaintiff's subsequent treating physician, indicated the surgery was "successful"; the largest component of any residual problems was psychological. (Tr. 67, 81 and 88-89.)

SUMMARY OF THE ARGUMENT

Plaintiff's sole argument on appeal is that Dr. Capel performed surgery on March 15, 1987 without his consent. Plaintiff does not claim the surgery was unnecessary; nor that there was anything improper with regard to the operative technique; nor that Dr. Capel failed to properly inform him regarding the prospective surgery.

Since the inception of this lawsuit, plaintiff has attempted to fashion the facts of this case into some theory of recovery. He has failed and should fail on this appeal because there was absolutely no tortious conduct on the part of the defendant.

The plaintiff alleges he did not consent to the procedure, but his conduct as a matter of law demonstrates that he did. The Utah legislature anticipated this type of occurrence and mandated that when a person submits to health care rendered by a health care provider, it is presumed that what the health care provider did was either expressly or impliedly authorized to be done. As a matter of public policy, a patient cannot keep his fingers crossed behind his back and thereby place in jeopardy those who rely on what he says and does.

In addition to the plaintiff's obvious implied consent to treatment, express consent was obtained. Again, by statute, in Utah a spouse is authorized to sign on behalf of a patient. It is important to note there is no requirement that written consent be obtained; nonetheless, in this case, a written consent was

properly obtained and was in full compliance with the provisions of the Utah Code which provides that such a written consent "shall be a defense to any malpractice action against a health care provider . . ." Section 78-14-5(2)(e), Utah Code Ann. (1953, as amended).

Next, plaintiff attempts to state a claim for a lack of informed consent, but he has never denied that he was properly informed and he has been unable to establish damages were proximately caused by defendant's surgery. Thus, as a matter of law, plaintiff fails to establish the requisite elements of a claim for lack of informed consent as outlined in § 78-14-5(1) and subparts (a) through (g), inclusive, Utah Code Ann. (1953, as amended).

Next, plaintiff attempts to create a claim for common law battery. This claim is similarly barred because consent was given. Furthermore, common law battery has been subsumed by the Utah Health Care Malpractice Act insofar as it can be applied to health care providers. In addition, the Utah Supreme court, under similar facts, has already rejected such a technical battery claim. Baxter v. Snow, discussed infra at page 13.

As a last resort, plaintiff now asserts that the Utah Health Care Malpractice Act is unconstitutional. However, plaintiff's arguments are misplaced. The plaintiff was not required to submit to surgery; he, on his own volition, went to the hospital and he accepted each of the procedures which led to the operating

room. He never once made known to Dr. Capel any reluctance regarding surgery. He was not deprived of any right. He could have exercised his constitutional rights by putting on his shoes and walking out the door.

Finally, public policy dictates that physicians and hospitals must have the ability to obtain consent from someone other than a patient. Here, Dixie Medical Center did so only to insure that the patient would not come back later and say that he had been given pain medications and therefore his consent was improperly obtained. Hospitals all across America have similar guidelines requiring hospital staff to obtain signed consent from representatives of patients who have been given pain medications. Such a practice does not violate constitutional rights.

Consequently, none of plaintiff's attempts to recover against defendant for surgery he requested and obtained have any merit. There simply was no tortious conduct on the part of Dr. Capel.

ARGUMENT

POINT I

THE DEFENDANT WAS ENTITLED TO RELY UPON THE
CONSENT EXPRESSED BY THE CONDUCT OF PLAINTIFF
AND OBTAINED FROM PLAINTIFF'S WIFE.

A. Implied Consent.

When a person submits to health care, "it shall be presumed that what the health care provider did was either expressly or

impliedly authorized to be done." Utah Code Ann. § 78-14-5(1) (1953, as amended).

This statutory presumption had its inception in the early case of Baxter v. Snow, 2 P.2d 257 (Utah 1931). There, the patient claimed that the defendant doctor treated him without his consent. The court held that the patient's voluntary submission to an examination and to treatment by the doctor and his acquiescence in the doctor's acts impliedly authorized the doctor to diagnose the plaintiff's case and to use any reasonable treatment he deemed necessary. The voluntary submission by the plaintiff to the physician for care and treatment was deemed to have evidenced the patient's consent to the operation. Consequently, the court concluded it is erroneous to instruct the jury that surgery without consent is a technical battery.

In the present case, as in Baxter, the conduct of the patient evidenced consent to the surgery. Similar results were reached in Charley v. Cameron, 528 P.2d 1205 (Kan. 1974), which involved an obstetrical patient with a stated fear of forceps. Because neither she nor her husband stated a clear objection to their use during the delivery, the court found as a matter of law that consent to surgical treatment had been granted by the conduct of the patient. Further, once such implied consent has been given, there can be no recovery for battery. 528 P.2d at 1210-11.

In Grannum v. Berard, 422 P.2d 812 (Wash. 1967), the patient claimed pain medications given after admission to the hospital for planned surgery so clouded the patient's judgment that the written consent was invalid. The Washington Supreme Court was unpersuaded and held:

The rule is well established that in surgical cases, consent to such procedure must be obtained from either the patient, or, if the patient is under some disability, from a near relative capable of giving consent. Such consent to surgery may be manifested in a number of ways: as an express consent the patient may sign a formal written permission or agree orally; or he may give implied authority by his conduct, as in voluntarily submitting to an operation or by failing to object.

422 P.2d at 814, cites omitted. Thus, regardless of the question of express consent, the court determined implied consent authorized the surgery as a matter of law.

The court then concluded:

We do not believe there is room for reasonable minds to differ that the plaintiff has failed to overcome by clear, cogent and convincing evidence the presumption that he comprehended the nature, terms and effect of the consent given for the surgical operation.

Id. at 815. The court then affirmed the trial court's directed verdict in favor of the defendant.

Here, as in Grannum, plaintiff has failed to produce the required "clear, cogent and convincing evidence" necessary to rebut the statutory presumption that the health care rendered was authorized. Conversely, Dr. Capel, by statute and by Utah case

law directly on point, was absolutely entitled to rely on the implied consent of this patient.

Consequently, since both the Utah statutory provision for medical consent and case law recognize that consent to a medical procedure can be impliedly given and because such implied consent was given in the present case, the plaintiff cannot prevail upon any of his proposed causes of action.

B. Spousal Consent.

Section 78-14-5(4)(b) of the Utah Code specifically authorizes any married person to consent to health care for a spouse. (Addendum D.) Therefore, Dr. Capel was absolutely entitled to rely on Mrs. Lounsbury's express consent to her husband's surgery. (See "Admissions" set forth as Addendum F.)

Further, while there is no requirement written consent be obtained, the written consent form Mrs. Lounsbury signed complied fully with the statutory requirements of the Utah Health Care Malpractice Act. The form, once signed, became a complete defense absent circumstances not present here:

It shall be a defense to any malpractice action against a health care provider based upon alleged failure to obtain informed consent if: . . . (e) the patient or his representative executed a written consent which sets forth the nature and purpose of the intended health care and which contains a declaration that the patient accepts the risk of substantial and serious harm, if any, in hopes of obtaining desired beneficial results of health care and which acknowledges that health care providers involved have explained his condition and the proposed health care in a satisfactory manner and that all questions asked about the

health care and its attendant risks have been answered in a manner satisfactory to the patient or his representative . . .

§ 78-14-5(2)(e), Utah Code Ann. (Supp. 1976) (emphasis added).

Thus, along with impliedly authorizing the surgery by his conduct, the hospital staff properly obtained written express authorization. Dr. Capel was clearly entitled to rely on the patient's apparent and stated decision to proceed with scheduled surgery.

POINT II

PLAINTIFF CANNOT ESTABLISH A CLAIM OF LACK OF INFORMED CONSENT.

To establish "lack of informed consent," plaintiff must prove all of the statutory elements encoded in subsection (1) of § 78-14-5, Utah Code Ann. (1953, as amended). Burton v. Youngblood, 711 P.2d 245, 249 (Utah 1985). Thus, in order for the plaintiff to recover damages from the defendant based on the defendant's alleged failure to obtain consent, the plaintiff was required to have established:

- (a) That a provider/patient relationship existed between the patient and health care provider; and
- (b) the health care provider rendered health care to the patient; and
- (c) the patient suffered personal injuries arising out of the health care rendered; and
- (d) the health care rendered carried with it a substantial and significant risk of causing the patient serious harm; and

(e) the patient was not informed of the substantial and significant risk; and

(f) a reasonable, prudent person in the patient's position would not have consented to the health care rendered after having been fully informed as to all facts relevant to the decision to give consent. In determining what a reasonable, prudent person in the patient's position would do under the circumstances, the finder of fact shall use the viewpoint of the patient before health care was provided and before the occurrence of any personal injuries alleged to have arisen from said health care; and

(g) the unauthorized part of the health care rendered was the proximate cause of personal injury suffered by the patient.

Utah Code Ann. § 78-14-5(1) (1953, as amended).

In the present case, the plaintiff did not proffer any evidence proving that the operation performed by the defendant proximately caused any injury or damage to his person. In fact, the plaintiff's attorney was unable to find even one medical expert willing to testify that the operation more probably than not caused or increased the plaintiff's current physical problems.

In addition, the court found, based on the proffer of evidence, that plaintiff was fully informed regarding the surgery. Further, the court was not persuaded a reasonable person would have objected under the same circumstances--that is, months of pain and disability; unsuccessful attempts at conservative management; several concurring opinions regarding the need for surgery; the threat of losing disability benefits unless surgery was performed.

Consequently, the trial court properly ruled plaintiff had not presented sufficient facts to support a claim for lack of informed consent.

POINT III

PLAINTIFF CANNOT PREVAIL ON A CLAIM FOR BATTERY.

The Utah Health Care Malpractice Act specifically subsumes all torts which could conceivably arise within the context of a patient/physician relationship. Section 78-14-3 defines the following terms: "Health care" is defined as "any act or treatment performed or furnished, or which should have been performed or furnished, by any health care provider for, to, or on behalf of a patient during the patient's medical care, treatment, or confinement."

"Malpractice action against a health care provider" is defined as "any action against a health care provider, whether in contract, tort, breach of warranty, wrongful death, or otherwise, based upon alleged personal injuries relating to or arising out of health care rendered or which should have been rendered by the health care provider."

Finally, "tort" is defined as "any legal wrong, breach of duty, or negligent or unlawful act or omission proximately causing injury or damage to another."

Based on these statutory definitions, the plaintiff cannot avoid application of the Utah Health Care Malpractice Act to the

facts of this case by attempting to frame his complaint as a claim for battery. In other words, "labeling the act an intentional tort does not change the action from what it is, a species of medical malpractice." Sistrunk v. Hoshall, 530 So.2d 935 (Fla. Dist. Ct. App. 1988).

Generally, operating on a patient without the patient's consent is considered a form of medical malpractice, and not battery. Vargas v. Rosal-Arcillas, 438 N.Y.S.2d 986 (1981). For example, in Revord v. Russell, 401 N.E.2d 763, 766 (Ind. App. 1980), the court held that:

An action prefaced on the doctrine of informed consent is now considered as one based on negligence, not BATTERY, an intentional tort. See Natanson v. Kline, 1960 186 Kan. 393, 350 P.2d 1093, modified, 187 Kan. 186, 354 P.2d 670; Prosser, Torts (4th ed. 1971) 165, 166. Thus, as in any negligence case a plaintiff must show a duty owed to him and a breach of that duty (by falling below the set standard of care) which proximately causes a compensable injury. (Emphasis in original.)

Likewise, in Dries v. Gregor, 424 N.Y.S.2d 561 (N.Y.A.D. 1980), the Court noted that the conduct of the parties should be measured by a negligence as opposed to an assault and battery analysis in malpractice actions. The Dries court concluded:

We believe that medical treatment beyond the scope of a patient's consent should not be considered as an intentional tort or species of assault and battery as it has been viewed in the past. Other authorities note that "negligence standards which deal with the possession and use of skill and due care better accord with the realities of the physician-patient relationship." (1 Louisell and Williams, Medical Malpractice § 8.09.)

Dries, 424 N.Y.S.2d at 564.

For these reasons, the case of Eis v. Chestnut, 627 P.2d 124 (N.M. 1981), upon which the plaintiff heavily relies, is easily distinguishable. Furthermore, even New Mexico closely circumscribes the application of battery in the context of a medical malpractice action:

To defeat a battery claim, however, the information which must be disclosed is quite narrow in scope. A physician only has to inform the patient of the nature of the procedure; that is, what the doctor proposes to do to him.

Gerety v. Demers, 589 P.2d 180, 191 (N.M. 1978) (emphasis in original). The Gerety court added: "It is now generally held that an action involving lack of informed consent does not lie within the traditional concepts of battery." 589 P.2d at 192.

Thus, the only question relevant in a battery case, as recognized in New Mexico, is whether the patient was advised of and impliedly authorized the medical treatment which was going to be performed. In the present case it is undisputed that the plaintiff was informed of the nature of the procedure prior to the operation; therefore, even under New Mexico's law the plaintiff could not recover on a theory of battery.

POINT IV

NO CONSTITUTIONAL RIGHT HAS BEEN VIOLATED.

A. This Case is Distinguishable From Cases Involving Constitutional Rights.

Under the facts of this case, constitutional claims are not properly invoked. Here, Dr. Capel was acting in compliance with statutory law and case law; he was fully entitled to rely on such legal authority.

Furthermore, plaintiff's constitutional rights were not violated by the defendant's reliance on the patient's implied consent and on the wife's written consent. There is no justification or need for defendant to address the constitutionality of legislation from a hypothetical viewpoint.

The factor which distinguishes the cases cited by plaintiff from the present case is the voluntary nature of the conduct involved. The factual setting of this case is repeated daily in thousands of hospitals across the country. Patients who submit to care voluntarily are not being deprived of constitutional rights.

In contrast, the refusal to allow hospital personnel and medical doctors to rely upon written consent of others in this type of factual setting will have one of two consequences: (1) providers will be unfairly placed at risk if they proceed with care that may be life saving; or (2) they would let patients go without care, a potentially fatal consequence.

This Court need not venture into a discussion of constitutional issues because no such issues are involved. The factual setting presented here of a patient who consents by deed, if not by word, and of a spouse who consents after her husband has voluntarily received medication which impairs his legal capacity involves no constitutional violations.

Finally, the legislature acted properly and appropriately in addressing the issue of consent. It is not the function of this Court to evaluate the wisdom or practical necessity of legislative enactments. Redwood Gym v. Salt Lake City Com'n, 624 P.2d 1138, 1143 (Utah 1981).

B. Plaintiff Was Not Deprived of His Rights to Privacy.

Plaintiff, in order to establish his constitutional right to privacy was violated, must rebut the presumption that health care rendered by a health care provider was either expressly or impliedly authorized. Further, he must prove that he refused to consent to the surgery performed by Dr. Capel. Plaintiff must so prove by "clear, cogent and convincing evidence." Grannum, 422 P.2d at 815.

There is absolutely no evidence that the plaintiff advised defendant he objected to the medical care rendered. Despite the fact he had ample opportunity to convey his reluctance and withdraw his consent to surgery, there is simply nothing in the record to indicate he did so.

Thus, the plaintiff exercised his constitutional right to privacy by asking Dr. Capel to perform the surgery, by coming to the hospital as scheduled, by assisting with the preoperative steps. He could have as easily exercised his constitutional rights by standing up and walking out of the hospital. No one would have tried to stop him. No one wanted him to have surgery he did not choose to have.

Finally, to require more of Dr. Capel under the circumstances of this case would be unfair and unworkable. He should not be expected to read minds. Public policy dictates surgeons should be entitled to rely on conduct evidencing consent and on hospital policies which require spouses to sign for patients who have received pain medication. Further, public policy would endorse the legislature's prerogative to identify those people who have capacity to sign for and give consent on behalf of another individual. Doctors should not be required to proceed at their own risk; rather, they should be entitled to rely on methods for a patient to be informed and to evidence consent which are legally enforceable in a court of law.

C. Utah's Informed Consent Provision Is Constitutional.

Utah courts have strongly and consistently upheld the constitutionality of the provisions of the Utah Health Care Malpractice Act. Allen v. Intermountain Health Care, Inc., 635 P.2d 30, 31-32 (Utah 1981). See, also, Yates v. Vernal Family

Health Center, 617 P.2d 352 (Utah 1980); McGuire v. University of Utah Medical Center, 603 P.2d 786 (Utah 1979); and Vealey v. Clegg, 579 P.2d 919 (Utah 1978).

Furthermore, Utah's Health Care Malpractice Act, in particular the informed consent provision of that Act, is not unique. Many states have similar statutory provisions. E.g., Fla. Stat. Ann. § 766.103 (1990 Supp.); Ga. Code Ann. § 31-9-2 (1985); Idaho Code § 39-4303 (1985); N.C. Gen. Stat. § 90-21.13 (1985 & 1989 Supp.). Moreover, contrary to the plaintiff's assertion, courts have addressed the constitutionality of informed consent statutes similar to Utah's and have found them to be constitutional. E.g., Parikh v. Cunningham, 493 So.2d 999 (Fla. 1986); Dixon v. Peters, 306 S.E.2d 477 (N.C.App. 1983). No case could be found holding an informed consent provision unconstitutional.

D. The Open Courts Provision Has Not Been Violated.

As stated above, plaintiff could not prevail on a battery claim even if he could raise it. Nonetheless, the plaintiff suggests that section 78-14-5 of the Medical Malpractice Act is unconstitutional because it denies him a remedy for common law battery in a malpractice claim. However, courts have held the legislature may abolish a common law cause of action regardless of the "open courts" provision. Hartford Fire Ins. v. Lawrence, 740 F.2d 1362 (6th Cir. 1984).

The legislature has the power to abrogate old laws and create new ones. Berry v. Beech Aircraft, 717 P.2d 670 (Utah 1985), this court stated:

. . . neither the due process nor the open courts provision constitutionalizes the common law or otherwise freezes the law governing private rights and remedies as of the time of statehood. It is, in fact, one of the important functions of the Legislature to change and modify the law that governs relations between individuals as society evolves and conditions require.

Id. at 676. Berry does, however, recognize some limits to the legislature's ability to change or modify the law. Id.

Specifically, Berry imposed a two-part test for determining whether or not a legislative enactment violates the open courts provision of the Utah Constitution. Under the Berry test, Art. I, Section 11 of the Utah Constitution is satisfied if:

(1) the law provides the injured person an effective remedy "by due course of law;" or

(2) if there is no substitute or alternative remedy provided, abrogation of the remedy or cause of action may be justified only if:

(a) a social or economic evil is eliminated; and

(b) the elimination of an existing remedy is not an arbitrary or unreasonable means for achieving the objective. Id. at 680.

To begin with, section 78-14-5 provides the plaintiff with a reasonable alternative to the common law tort of battery. The

plaintiff contends that since the elements of the statutory alternative differ from those of the common law tort, the substitute remedy is not substantially equal to the one at common law. Under such a rule, no law could ever be modified; any new statutory provision could only be a re-enactment of the common law.

Obviously, as society changes, and as advancements in technology are made, the law must change. Furthermore, the modifications or changes in the law need to address current societal problems. This is just what the legislature did when it enacted the Utah Health Care Malpractice Act. The legislators addressed a current societal problem: the medical malpractice insurance crisis. See, Section 78-14-2, Utah Code Ann. (1953, as amended).

Consequently, because the express declaration of the Act's purpose set forth in Section 78-14-2 satisfies the second prong of the Berry test, the Act does not violate the open courts provision of the State Constitution. Moreover, since the statute is a substitute for the common law tort of battery, the first prong of the Berry test is also met. Thus, the Utah Health Care Malpractice Act satisfies the open courts provision of the State Constitution.

E. Substantive Due Process Claims Do Not Apply.

The Due Process Clause prohibits the taking of "property" without due process of law. The plaintiff contends that his due

process rights were violated because the common law cause of action for battery in context of a malpractice claim was abrogated when it was subsumed into the Utah Health Care Malpractice Act.

However, what the plaintiff fails to realize is that he does not have a property interest in a cause of action until it becomes "vested" by virtue of an injury having been done. See Gibbes v. Zimmerman, 290 U.S. 326 (1933); Masich v. United States Smelting, Refining & Mining Co., 191 P.2d 612, 624 (Utah 1948); Hunter v. School District, 293 N.W.2d 515 (Wis. 1980). In Munn v. Illinois, 94 U.S. 113 (1977), the Supreme Court indicated:

A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is not more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed the great office of statutes is to remedy defects in the common law as they are developed and to adapt it to the changes of time and circumstances.

94 U.S. at 134.

In addition, even if the plaintiff had a vested or property interest in the abrogated battery claim, his due process rights were not violated since the legislature provided a substitute cause of action, or quid pro quo, in return. See, Masich, 191 P.2d at 624; Simon v. St. Elizabeth Medical Center, 355 N.E.2d 903, 910 (Ohio 1976). Furthermore, it does not matter that this quid pro quo does not benefit the plaintiff individually, as long

as society as a whole benefits therefrom. Masich, 191 P.2d at 624 (Utah 1948).

CONCLUSION

There is no cause of action which supports plaintiff's claims for relief and there should not be. To allow a plaintiff to recover under the facts of this case would make it impossible to render medical care to patients. It would require surgeons to be mind-readers and allow patients to accept medical treatment but keep their fingers crossed behind their backs regarding their "true" intentions. It would allow patients to recover whenever the desired benefits of care were not achieved even though the care was skillfully and appropriately rendered. No rights have been violated. No tortious act has been committed. The only injustice would be if self-serving claims unsupported by any evidence, such as the claims presented by Mr. Lounsbury, were somehow ratified by the legal system. Dr. Capel did as he was asked and did it well.

DATED this 21st day of September, 1990.

SNOW, CHRISTENSEN & MARTINEAU

By Elizabeth King
Elliott J. Williams
Elizabeth King
Attorneys for Defendant

EKB469

ADDENDA

Addendum A	Legislative Purpose Behind Enacting the Health Care Malpractice Act - § 78-14-2
Addendum B	Statutory Definition of Terms - § 78-14-3
Addendum C	Statutory Presumption of Implied Consent - § 78-14-3
Addendum D	Spouse Authorized to Consent - § 78-14-5(4)
Addendum E	Findings of Fact and Conclusions of Law
Addendum F	Answers to Request for Admissions

- Section
78-14-7. Ad damnum clause prohibited in complaint.
- 78-14-7.1. Limitation of award of noneconomic damages in malpractice actions.
- 78-14-7.5. Limitation on attorney's contingency fee in malpractice action.
- 78-14-8. Notice of intent to commence action.
- 78-14-9. Professional liability insurance coverage for providers — Insurance commissioner may require joint underwriting authority.
- 78-14-9.5. Periodic payment of future damages in malpractice actions.
- 78-14-10. Actions under Utah Governmental Immunity Act.
- 78-14-11. Act not retroactive — Exception.
- 78-14-12. Department of Commerce to provide panel — Exemption — Procedures — Statute of limitations tolled — Composition of panel — Expenses — Department authorized to set license fees.
- 78-14-13. Proceedings — Authority of panel — Rights of parties to proceedings.
- 78-14-14. Decision and recommendations of panel — No judicial or other review.
- 78-14-15. Evidence of proceedings not admissible in subsequent action — Panelist may not be compelled to testify — Immunity of panelist from civil liability.
- 78-14-16. Proceedings considered a binding arbitration hearing upon written agreement of parties — Compensation to members of panel.

78-14-1. Short title of act.

This act shall be known and may be cited as the "Utah Health Care Malpractice Act." 1976

78-14-2. Legislative findings and declarations — Purpose of act.

The legislature finds and declares that the number of suits and claims for damages and the amount of judgments and settlements arising from health care has increased greatly in recent years. Because of these increases the insurance industry has substantially increased the cost of medical malpractice insurance. The effect of increased insurance premiums and increased claims is increased care cost, both through the health care providers passing the cost of premiums to the patient and through the provider's practicing defensive medicine because he views a patient as a potential adversary in a lawsuit. Further, certain health care providers are discouraged from continuing to provide services because of the high cost and possible unavailability of malpractice insurance.

In view of these recent trends and with the intention of alleviating the adverse effects which these trends are producing in the public's health care system, it is necessary to protect the public interest by enacting measures designed to encourage private insurance companies to continue to provide health-related malpractice insurance while at the same time establishing a mechanism to ensure the availability of insurance in the event that it becomes unavailable from private companies.

In enacting this act, it is the purpose of the legislature to provide a reasonable time in which actions may be commenced against health care providers while limiting that time to a specific period for which professional liability insurance premiums can be reasonably and accurately calculated; and to provide

other procedural changes to expedite early evaluation and settlement of claims.

78-14-3. Definitions.

As used in this act:

(1) "Audiologist" means a person licensed to practice audiology under Chapter 41, Title 58.

(2) "Certified social worker" means a person licensed to practice as a certified social worker as provided in Section 58-35-5.

(3) "Chiropractic physician" means a person licensed to practice chiropractic under Sections 58-12-50 through 58-12-56, the Chiropractic Improvements Act.

(4) "Commissioner" means the commissioner of insurance as provided in Section 31A-2-102.

(5) "Dental hygienist" means a person licensed to practice dental hygiene as defined in Section 58-7-1.1.

(6) "Dentist" means a person licensed to practice dentistry as defined in Section 58-7-1.1.

(7) "Future damages" includes damages for future medical treatment, care or custody, loss of future earnings, loss of bodily function, or future pain and suffering of the judgment creditor.

(8) "Health care" means any act or treatment performed or furnished, or which should have been performed or furnished, by any health care provider for, to, or on behalf of a patient during the patient's medical care, treatment, or confinement.

(9) "Health care provider" includes any person, partnership, association, corporation, or other facility or institution who causes to be rendered or who renders health care or professional services as a hospital, physician, registered nurse, licensed practical nurse, nurse-midwife, dentist, dental hygienist, optometrist, clinical laboratory technologist, pharmacist, physical therapist, podiatrist, psychologist, chiropractic physician, naturopathic physician, osteopathic physician, osteopathic physician and surgeon, audiologist, speech-language pathologist, certified social worker, social service worker, social service aide, marriage and family counselor, practitioner of obstetrics, or others rendering similar care and services relating to or arising out of the health needs of persons or groups of persons and officers, employees, or agents of any of the above acting in the course and scope of their employment.

(10) "Hospital" means a public or private institution licensed under the Hospital Licensing Act.

(11) "Licensed practical nurse" means a person licensed to practice as a licensed practical nurse as provided in Section 58-31-10.

(12) "Malpractice action against a health care provider" means any action against a health care provider, whether in contract, tort, breach of warranty, wrongful death, or otherwise, based upon alleged personal injuries relating to or arising out of health care rendered or which should have been rendered by the health care provider.

(13) "Marriage and family therapist" means a person licensed to practice as a marriage therapist or family therapist as provided in Section 58-39-6.

(14) "Naturopathic physician" means a person licensed to practice naturopathy as defined in Section 58-12-22.

ADDENDUM A

ADDENDUM B

(15) "Nurse-midwife" means a person licensed to practice nurse-midwifery as provided in Section 58-44-7.

(16) "Optometrist" means a person licensed to practice optometry as defined in Section 58-16-11.

(17) "Osteopathic physician" means a person licensed to practice osteopathy under Sections 58-12-1 through 58-12-7, the Utah Osteopathic Medicine Licensing Act.

(18) "Patient" means a person who is under the care of a health care provider, under a contract, express or implied.

(19) "Pharmacist" means a person licensed to practice pharmacy as provided in Section 58-17-2.

(20) "Physical therapist" means a person licensed to practice physical therapy as provided in Section 58-24-6.

(21) "Physician" means a person licensed to practice medicine and surgery under Sections 58-12-26 through 58-12-43, the Utah Medical Practice Act.

(22) "Podiatrist" means a person licensed to practice podiatry under Chapter 5, Title 58.

(23) "Practitioner of obstetrics" means a person licensed to practice as a physician in this state under Sections 58-12-26 through 58-12-43, the Utah Medical Practice Act.

(24) "Psychologist" means a person licensed to practice psychology as defined in Subsection 58-25a-2(3).

(25) "Registered nurse" means a person licensed to practice professional nursing as provided in Section 58-31-9.

(26) "Representative" means the spouse, parent, guardian, trustee, attorney-in-fact, or other legal agent of the patient.

(27) "Social service aide" means a person licensed to practice as a social service aide as provided in Section 58-35-5.

(28) "Social service worker" means a person licensed to practice as a social service worker as provided in Section 58-35-5.

(29) "Speech-language pathologist" means a person licensed to practice speech-language pathology under Chapter 41, Title 58.

(30) "Tort" means any legal wrong, breach of duty, or negligent or unlawful act or omission proximately causing injury or damage to another.

1999

78-14-4. Statute of limitations — Exceptions — Application.

(1) No malpractice action against a health care provider may be brought unless it is commenced within two years after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered the injury, whichever first occurs, but not to exceed four years after the date of the alleged act, omission, neglect or occurrence, except that:

(a) In an action where the allegation against the health care provider is that a foreign object has been wrongfully left within a patient's body, the claim shall be barred unless commenced within one year after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered, the existence of the foreign object wrongfully left in the patient's body, whichever first occurs; and

(b) In an action where it is alleged that a patient has been prevented from discovering misconduct on the part of a health care provider because that health care provider has affirmatively acted to fraudulently conceal the alleged misconduct, the claim shall be barred unless commenced within one year after the plaintiff or patient discovers, or through the use of reasonable diligence, should have discovered the fraudulent concealment, whichever first occurs.

(2) The provisions of this section shall apply to all persons, regardless of minority or other legal disability under Section 78-12-36 or any other provision of the law, and shall apply retroactively to all persons, partnerships, associations and corporations and to all health care providers and to all malpractice actions against health care providers based upon alleged personal injuries which occurred prior to the effective date of this act; provided, however, that any action which under former law could have been commenced after the effective date of this act may be commenced only within the unexpired portion of time allowed under former law; but any action which under former law could have been commenced more than four years after the effective date of this act may be commenced only within four years after the effective date of this act.

1979

78-14-4.5. Amount of award reduced by amounts of collateral sources available to plaintiff — No reduction where subrogation right exists — Collateral sources defined — Procedure to preserve subrogation rights — Evidence admissible — Exceptions.

(1) In all malpractice actions against health care providers as defined in Subsection 78-14-3(29) in which damages are awarded to compensate the plaintiff for losses sustained, the court shall reduce the amount of such award by the total of all amounts paid to the plaintiff from all collateral sources which are available to him; however, there shall be no reduction for collateral sources for which a subrogation right exists as provided in this section nor shall there be a reduction for any collateral payment not included in the award of damages. Upon a finding of liability and an awarding of damages by the trier of fact, the court shall receive evidence concerning the total amounts of collateral sources which have been paid to or for the benefit of the plaintiff or are otherwise available to him. The court shall also take testimony of any amount which has been paid, contributed, or forfeited by, or on behalf of the plaintiff or members of his immediate family to secure his right to any collateral source benefit which he is receiving as a result of his injury, and shall offset any reduction in the award by such amounts. No evidence shall be received and no reduction made with respect to future collateral source benefits except as specified in Subsection (4).

(2) For purposes of this section "collateral source" means payments made to or for the benefit of the plaintiff for:

(a) medical expenses and disability payments payable under the United States Social Security Act, any federal, state, or local income disability act, or any other public program, except the federal programs which are required by law to seek subrogation;

(b) any health, sickness, or income disability insurance, automobile accident insurance that provides health benefits or income disability coverage, and any other similar insurance benefits,

except life insurance benefits available to the plaintiff, whether purchased by the plaintiff or provided by others;

(c) any contract or agreement of any person, group, organization, partnership, or corporation to provide, pay for, or reimburse the costs of hospital, medical, dental, or other health care services, except benefits received as gifts, contributions, or assistance made gratuitously; and

(d) any contractual or voluntary wage continuation plan provided by employers or any other system intended to provide wages during a period of disability

(3) To preserve subrogation rights for amounts paid or received prior to settlement or judgment, a provider of collateral sources shall serve at least 30 days before settlement or trial of the action a written notice upon each health care provider against whom the malpractice action has been asserted. The written notice shall state the name and address of the provider of collateral sources, the amount of collateral sources paid, the names and addresses of all persons who received payment, and the items and purposes for which payment has been made.

(4) Evidence is admissible of government programs that provide payments or benefits available in the future to or for the benefit of the plaintiff to the extent available irrespective of the recipient's ability to pay. Evidence of the likelihood or unlikelihood that such programs, payments, or benefits will be available in the future is also admissible. The trier of fact may consider such evidence in determining the amount of damages awarded to a plaintiff for future expenses.

(5) No provider of collateral sources is entitled to recover the amounts of such benefits from a health care provider, the plaintiff, or any other person or entity as reimbursement for collateral source payments made prior to settlement or judgment, including any payments made under Chapter 19, Title 26, except to the extent that subrogation rights to amounts paid prior to settlement or judgment are preserved as provided in this section. All policies of insurance providing benefits affected by this section are construed in accordance with this section. 1985

78-14-5. Failure to obtain informed consent — Proof required of patient — Defenses — Consent to health care.

(1) When a person submits to health care rendered by a health care provider, it shall be presumed that what the health care provider did was either expressly or impliedly authorized to be done. For a patient to recover damages from a health care provider in an action based upon the provider's failure to obtain informed consent, the patient must prove the following:

(a) that a provider-patient relationship existed between the patient and health care provider; and

(b) the health care provider rendered health care to the patient; and

(c) the patient suffered personal injuries arising out of the health care rendered; and

(d) the health care rendered carried with it a substantial and significant risk of causing the patient serious harm; and

(e) the patient was not informed of the substantial and significant risk; and

(f) a reasonable, prudent person in the patient's position would not have consented to the health care rendered after having been fully in-

formed as to all facts relevant to the decision to give consent. In determining what a reasonable, prudent person in the patient's position would do under the circumstances, the finder of fact shall use the viewpoint of the patient before health care was provided and before the occurrence of any personal injuries alleged to have arisen from said health care; and

(g) the unauthorized part of the health care rendered was the proximate cause of personal injuries suffered by the patient.

(2) It shall be a defense to any malpractice action against a health care provider based upon alleged failure to obtain informed consent if:

(a) the risk of the serious harm which the patient actually suffered was relatively minor; or

(b) the risk of serious harm to the patient from the health care provider was commonly known to the public; or

(c) the patient stated, prior to receiving the health care complained of, that he would accept the health care involved regardless of the risk; or that he did not want to be informed of the matters to which he would be entitled to be informed, or

(d) the health care provider, after considering all of the attendant facts and circumstances, used reasonable discretion as to the manner and extent to which risks were disclosed, if the health care provider reasonably believed that additional disclosures could be expected to have a substantial and adverse effect on the patient's condition or

(e) the patient or his representative executed a written consent which sets forth the nature and purpose of the intended health care and which contains a declaration that the patient accepts the risk of substantial and serious harm, if any, in hopes of obtaining desired beneficial results of health care and which acknowledges that health care providers involved have explained his condition and the proposed health care in a satisfactory manner and that all questions asked about the health care and its attendant risks have been answered in a manner satisfactory to the patient or his representative; such written consent shall be a defense to an action against a health care provider based upon failure to obtain informed consent unless the patient proves that the person giving the consent lacked capacity to consent or shows by clear and convincing proof that the execution of the written consent was induced by the defendant's affirmative acts of fraudulent misrepresentation or fraudulent omission to state material facts.

(3) Nothing contained in this act shall be construed to prevent any person eighteen years of age or over from refusing to consent to health care for his own person upon personal or religious grounds.

(4) The following persons are authorized and empowered to consent to any health care not prohibited by law:

(a) any parent, whether an adult or a minor, for his minor child;

(b) any married person, for a spouse;

(c) any person temporarily standing in loco parentis, whether formally serving or not, for the minor under his care and any guardian for his ward;

(d) any person eighteen years of age or over for his or her parent who is unable by reason of age.

ADDENDUM C

ADDENDUM D

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IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR
WASHINGTON COUNTY, STATE OF UTAH

MICHEL LOUNSBURY,
Plaintiff,

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER

vs.

NEAL C. CAPEL, M.D.,
Defendant.

Civil No. 89-2550
Judge J. Philip Eves

This action came on regularly for jury trial on January 29, 1990, before the above-entitled Court, the Honorable J. Philip Eves presiding. The plaintiff appeared personally and by and through his counsel, Floyd W. Holm, Esq. of Chamberlain & Higbee, and defendant appeared personally and by and through his counsel, Elliott J. Williams, Esq. and Elizabeth King Brennan, Esq. of Snow, Christensen & Martineau. The parties selected a jury and presented opening statements.

After the parties' opening statements, the parties stipulated that plaintiff could present a proffer of evidence which the Court could then rely upon to determine whether a

sufficient factual and legal basis had been shown to submit the case to the jury. Plaintiff, through his counsel, presented a proffer on the record of evidence he anticipated his witnesses would offer should they be called to testify. At the conclusion of the proffer, defendant made a Motion to Dismiss based on the insufficiency of the evidence presented in light of the statutory requirements of the Health Care Malpractice Act, §78-14-1, et seq., Utah Code Ann. (1953, as amended).

The Court now makes the following:

FINDINGS OF FACT

1. The plaintiff, Michel Lounsbury was injured in an industrial accident on October 10, 1986.
2. Plaintiff was admitted to Dixie Medical Hospital for surgery on May 14, 1987.
3. On the morning of surgery, a consent form authorizing surgery was signed by plaintiff's wife.
4. The surgical consent form authorized surgery by Dr. Capel for Michel Lounsbury.
5. The surgery authorized was the surgery performed by Dr. Capel.
6. There is no evidence of fraudulent concealment or fraudulent omission to state material facts on the part of Dr. Capel.

From the foregoing Findings of Fact, the Court draws the following:

CONCLUSIONS OF LAW

1. This action is a medical malpractice action against a health care provider which is governed by the Utah Health Care Malpractice Act, §78-14-1 et seq., Utah Code Ann. (1953 as amended).

2. Mrs. Lounsbury was authorized and empowered by the provisions of Section 78-14-5(4)(b) to consent to health care rendered to her husband.

3. The consent form the plaintiff's spouse, Janet Lounsbury, signed on her husband's behalf complied with the provisions of Section 78-14-5(2)(e), Utah Code Ann. (1953, as amended).

4. Dr. Capel was authorized as a matter of law to rely on said consent in performing the surgery.

5. When a person submits to health care rendered by a health care provider, it is presumed that what the health care provider did was either expressly or impliedly authorized to be done. Section 78-14-5(1), Utah Code Ann. (1953, as amended).

6. The consent form executed by the plaintiff's spouse provides a complete defense to plaintiff's claim of alleged failure to obtain his consent to the surgery.

7. Plaintiff also failed as a matter of law to establish the other elements of a claim for lack of informed consent as outlined in Section 78-14-5(1), Subsections (a) through (g). To prevail on a claim for lack of informed consent, plaintiff must establish each and every element of said section. However, in this case plaintiff offered no evidence that he suffered personal injuries arising out of the health care rendered, as required by subsection (c); nor that a reasonable prudent person in the patient's position would not have consented to the health care rendered after having been fully informed as to all the facts relevant to the decision to give consent as required by subsection (f); nor that the unauthorized part of the health care rendered was the proximate cause of personal injuries suffered by the plaintiff, as required by subsection (g).

8. Further, by failing to produce evidence of physical damages which were proximately caused by Dr. Capel's conduct, plaintiff's claim for lack of informed consent fails as a matter of law.

9. In a negligence action against a health care professional, plaintiff must establish, usually through expert testimony, that the defendant's conduct deviated from recognized and accepted standards and that said conduct was a proximate cause of the damages as alleged by the plaintiff. Based on plaintiff's proffer, the court finds as a matter of law that the

evidence does not establish negligence on the part of the defendant, nor that defendant's conduct proximately caused physical damages.

10. The plaintiff in this medical malpractice action cannot recover for emotional or psychological damages because there is no evidence establishing proximate causation. Thus, defendant Dr. Capel can not be held accountable for unforeseeable psychological consequences of his surgery, whether it be successful or unsuccessful.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law as well as on the Stipulation and evidence proffered by the parties, the court grants the defendant's Motion to Dismiss and orders that plaintiff's Complaint be, and the same is hereby, dismissed with prejudice pursuant to Rule 41(b) Utah Rules of Civil Procedure, with each party to bear its own costs.

DATED this 21st day of March, 1990.

BY THE COURT:

151 J. Philip Eves

J. Philip Eves
District Court Judge

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9 IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR
10 WASHINGTON COUNTY, STATE OF UTAH
11

12 MICHEL LOUNSBURY,)
13)
14 Plaintiff,) ANSWERS TO REQUEST
15) FOR ADMISSIONS
16 vs.)
17)
18 NEAL C. CAPEL, M.D.,) Civil No. 89-2550
19)
20 Defendant.)

21 STATE OF UTAH)
22) :ss.
23 COUNTY OF SALT LAKE)

24 I, MICHEL S. LOUNSBURY, being first duly sworn upon oath depose
25 and say that I am the Plaintiff in the above entitled action, that I have read
the following Answers to Request for Admissions and that the same are true
and correct to the best of my knowledge, information and belief.

REQUEST NO. 1: Admit that the document entitled "Consent to
Operation, Anesthetics, and Other Medical Services" (hereinafter referred to
as the "Consent form") attached hereto as Exhibit "A" is genuine and is a
true and accurate copy of the original.

ANSWER TO REQUEST NO. 1: Admitted.

REQUEST NO. 2: Admit Janet Lounsbury signed the Consent form on
May 15, 1987, at approximately 7:00 a.m.

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed a full, true and correct copy of the foregoing ANSWERS TO REQUEST FOR ADMISSIONS to Elliot J. Williams, Esq. at SNOW, CHRISTENSEN & MARTINEAU, P.O. Box 45000, Salt Lake City, Utah 84145, by first class mail, postage fully prepaid on this 11th day of July, 1989.

Jana Hoyt
Secretary

MAILING CERTIFICATE

I hereby certify that four true and correct copies of the foregoing were mailed to appellant, postage prepaid, this 21st day of September, 1990.

Elizabeth King
Elizabeth King