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**IN THE THIRD JUDICIAL DISTRICT COURT**

**IN AND FOR SALT LAKE COUNTY, STATE OF UTAH**

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| PATRICIA ANN PETERSON,<br><br>Plaintiff,<br><br>vs.<br><br>MARK N. MUELLER, M.D. AND SAM WILSON, M.D.,<br><br>Defendants. | **PLAINTIFF'S TRIAL BRIEF ON THE "REASONABLY PRUDENT PERSON" STANDARD AS APPLIED TO PHYSICIANS**<br><br>Case No. 970906998MP<br><br>Judge Timothy R. Hanson |

Dr. Mueller's representatives are expected to contend that physicians often fail to communicate in the way plaintiff contends Dr. Mueller should have communicated and therefore his failure to communicate cannot be negligence. They will contend that the concept of determining negligence by the "ordinarily prudent person" standard applies to everyone except doctors. I.e. the only standard doctors need meet is what other doctors customarily do or fail to do. That notion is not and should not be the law.

Nearly a century ago Justice Holmes declared:

> What usually is done may be evidence of what ought to be done, but ought to be done is fixed by a standard of reasonable prudence, whether it is usually complied with or not.

Texas & Pac. Ry. v. Behymer, 189 US 468, 470, 23 S. Ct. 622, 623, 47 LEd.905 (1903). For the Utah Supreme Court's express adoption of this principle, see Peterson v. Hansen-Niederhauser, 374 P.2d 513, 515-16 (Ut. 1962).

Thirty years later, Justice Hand stated:

> In most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of [appropriate safeguards]. . . . [T]here are precautions so imperative that even their universal disregard will not excuse their omission.

In The T. J. Hooper, 60 F.2d 737, 740 (2d cir. 1932).

This principle has been applied in modern medical malpractice cases. See, e.g. Helling v. Carey, 519 P.2d 981(Wash. 1974) and Guilbeau v. St. Paul Fire and Marine Insurance Co., 325 So.2d 395 (La. App. 1975); While adherence to a usual practice by which a local medical community deals with a problem may ordinarily be a good defense to a charge of negligence, "everybody does it" is no excuse if "it" is in fact a sloppy or careless practice. See Guilbeau, *supra*.

Justice Holmes' statement for the United States Supreme Court in the Texas & Pac. Ry Co. case has long been recognized as setting the standard in Utah, for our

Supreme Court expressly found that it "clearly, succinctly and, we think, correctly states the law" in Peterson v. Hanson-Neiderhauser, Inc. , 13 Utah 2d 355, 374 P.2d 513 at 515-516.

Many courts have now expressly recognized that physicians are not exempt from the "reasonable man" or ordinarily prudent person standard and cannot escape liability by reliance on evidence that other physicians often or customarily make the same mistakes they do. For example, in 1974 the Washington Supreme Court held that an ophthalmologist was negligent as a matter of law in failing to administer a simple glaucoma test to a patient despite uncontradicted expert testimony that it was the universal practice of ophthalmologists not to administer glaucoma tests to patients under age 40 because the incidence of glaucoma at younger ages was so small. Helling v. Carey, 519 P.2d 981 (Wash. 1974).

In 1989, a Texas appellate court reversed a grant of summary judgment against a patient who had sued a blood bank for negligently failing to conduct a surrogate test which could indicate the presence or likelihood of hepatitis. Summary judgment had been granted based on evidence that the defendant had complied with federal and state licensing standards. The decision was reversed because:

> Such evidence does not *usually* conclusively establish that a health care provider fulfilled its duty of care to its patients and it does not necessarily preclude a finding of negligence. [Citations omitted] Rather, evidence of such standards performs the same functions as does evidence of custom, in

> that it is only one factor to consider when determining good, prudent medical care.

Hernandez v. Nueces County Medical Soc., 779 SW2d 876, 871 (Tex. App. - Corpus Christi 1989).

The court in Hernandez then went on to quote from both the Helling decision and Justice Hand's oft quoted statement that common prudence is never the measure of *reasonable prudence* for "a whole calling may have unduly lagged in the adopting of new and available devices. . . . Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission".

In the Matter of T.J.Hooper, 60 F.2d 737, 740 (2nd Cir. 1983).

Among decisions which have expressly rejected the notion that what doctors normally do sets the standard of care regardless of whether the normal practice is careless or dangerous include Harris v. Robert C. Groth, M.D., Inc., P.S., 663 P.2d 113 (Wash. 1983). It deserves study. It squarely faced the issue: Whether the conduct of a healthcare provider is to be measured against the standard of care practiced by the profession or against a standard of reasonable prudence. It held that healthcare providers are governed by a standard of reasonable prudence and **not** an "average practitioner" standard.

> The standard of care against which a healthcare provider's conduct is to be measured is that of a reasonably prudent practitioner possessing the degree of skill, care, and learning

> possessed by other members of the same profession . . . . The degree of care actually practiced by members of the profession is only some evidence of what is reasonably prudent - it is not dispositive.

663 P.2d at 120.

Custom should not establish reasonable prudence in the medical profession any more than it does in any other field of endeavor. Plaintiff's requested jury instructions on standard of care should be given.

Respectfully submitted this _____ day of July, 2000.

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## CERTIFICATE OF SERVICE

I certify that on the _____ day of July, 2000, I delivered via the method indicated below, a copy of the foregoing to the following:

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