2007

Crescencio Alcazar and Monica Alcazar v. University of Utah Hospitals and Clinics, University of Utah Emergency Department, Jon Middleton, M.D., amd State of Utah : Brief of Appellant

Utah Court of Appeals

Matthew H. Raty; Law Office of Matthew H. Raty; Attorney for Appellants.
David G. Williams; Snow, Christensen and Martineau; Attorney for Appellees.

IN THE UTAH COURT OF APPEALS

CRESCENCIO ALCAZAR AND MONICA ALCAZAR, Plaintiffs/Appellants, v. UNIVERSITY OF UTAH HOSPITALS & CLINICS, UNIVERSITY OF UTAH EMERGENCY DEPARTMENT, JON MIDDLETON, M.D., and STATE OF UTAH, Defendants/Appellees.	**APPELLANTS' BRIEF** Appellate Case No. 20070067-CA District Court Case No. 030928457

Appeal from the Judgment of the Honorable John Paul Kennedy,
Judge of the Third Judicial District Court, Salt Lake County, State of Utah

Matthew H. Raty (#6635)
LAW OFFICE OF MATTHEW H. RATY, PC
9677 South 700 East, Suite D
Sandy, Utah 84070
Telephone (801) 495-2252
Facsimile (801) 495-2262
Attorney for Plaintiffs/Appellants

David G. Williams
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, Eleventh Floor
P.O. Box 45000
Salt Lake City, Utah 84145
Attorney for Defendants/Appellees

Appellants request oral argument and a published opinion.

IN THE UTAH COURT OF APPEALS

CRESCENCIO ALCAZAR AND MONICA ALCAZAR, Plaintiffs/Appellants, v. UNIVERSITY OF UTAH HOSPITALS & CLINICS, UNIVERSITY OF UTAH EMERGENCY DEPARTMENT, JON MIDDLETON, M.D., and STATE OF UTAH, Defendants/Appellees.	**APPELLANTS' BRIEF** Appellate Case No. 20070067-CA District Court Case No. 030928457

Appeal from the Judgment of the Honorable John Paul Kennedy,
Judge of the Third Judicial District Court, Salt Lake County, State of Utah

Matthew H. Raty (#6635)
LAW OFFICE OF MATTHEW H. RATY, PC
9677 South 700 East, Suite D
Sandy, Utah 84070
Telephone (801) 495-2252
Facsimile (801) 495-2262
Attorney for Plaintiffs/Appellants

David G. Williams
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, Eleventh Floor
P.O. Box 45000
Salt Lake City, Utah 84145
Attorney for Defendants/Appellees

Appellants request oral argument and a published opinion.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

JURISDICTION OF THIS COURT

Plaintiffs/Appellants Mr. and Mrs. Alcazar filed their original Notice of Appeal on January 17, 2007. The trial court vacated its original judgment and entered judgment on May 21, 2007. A timely First Amended Notice of Appeal was filed on June 4, 2007. *See* Order of The Utah Court of Appeals dated June 6, 2007. The Utah Court of Appeals has jurisdiction over this appeal pursuant to § 78-2-2(3)(j) and 4, Utah Code.

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Did the trial court err in declining to follow the holdings of the Utah Court of Appeals in *Barrett v. Peterson*, 868 P.2d 96, 98 (Utah Ct. App. 1993) and *Evans v. Doty*, 824 P.2d 460, 462 (Utah App. 1991), cert. denied, 836 P.2d 1383 (Utah 1992)? Do plaintiffs in medical negligence cases still have the right, established by these cases, to voir dire of potential jurors on their exposure to reports of medical negligence cases and the impact of medical negligence cases, including the purported detrimental effect that awards in these cases have on insurance premiums, the availability of insurance, and the ability and willingness of medical providers to practice medicine?

2. Does the trial court's disallowance of voir dire inquiry on the exposure of prospective jurors to reports about medical negligence cases constitute reversible error, where plaintiffs in a medical negligence action were unable to discover prospective jurors' exposure to and biases from such reports?

STANDARD OF REVIEW

Stare decisis is a cardinal principle of American jurisprudence, including the jurisprudence of the State of Utah. A lower court is bound to follow precedent established by a higher court.

Also, as set forth by the Utah Court of Appeals,

> We review challenges to the trial court's management of jury voir dire under an abuse of discretion standard. *Evans v. Doty*, 824 P.2d 460, 462 (Utah App. 1991), cert. denied, 836 P.2d 1383 (Utah 1992); *Doe v. Hafen*, 772 P.2d 456, 457-58 (Utah App. 1989). Generally, the trial court is afforded broad discretion in conducting voir dire, "but that discretion must be exercised in favor of allowing discovery of biases or prejudice in prospective jurors." *State v. Hall*, 797 P.2d 470, 472 (Utah App.), cert. denied, 804 P.2d 1232 (Utah 1990). *See also State v. James*, 819 P.2d 781, 797-98 (Utah 1991) (noting importance of voir dire process in eliminating bias and prejudice from trial proceedings). This court will overturn a trial court's discretionary rejection of voir dire questions only upon a showing that "the abuse of discretion rose to the level of reversible error." *Hall*, 797 P.2d at 472. A trial court commits reversible error when, "'considering the totality of the questioning, counsel [is not] afforded an adequate opportunity to gain the information necessary to evaluate jurors.'" Evans, 824 P.2d at 462 (quoting *State v. Bishop*, 753 P.2d 439, 448 (Utah 1988)).

Barrett v. Peterson, 868 P.2d 96, 98 (Utah Ct. App. 1993).

STATEMENT OF THE CASE

In this medical negligence action, the trial court declined to follow the Utah Court of Appeals' precedents in *Barrett* and *Evans*, *supra*, and rejected the Alcazars' requested voir dire questions designed to elicit prospective jurors exposure to and biases from reports and discussions of medical negligence cases. The jury was then empaneled, and after trial between November 13-16, 2006, returned a defense verdict.

STATEMENT OF FACTS

1. At 1:40 a.m. on May 4, 2002, forty-six-year-old, Plaintiff Crescencio Alcazar presented to the University of Utah Emergency Department ("ED") complaining of chest pain. R. 3 ¶8, R. 13 ¶6.

2. Mr. Alcazar explained that he had been experiencing chest pain intermittently for the past three days. R. 3 ¶9, R. 313 ¶6.

3. The ED noted that Mr. Alcazar's pain was in the left chest, of a burning quality, associated with shortness of breath, and had reached a severity of 8-9/10. R. 3 ¶10, R. 13 ¶6.

4. The ED noted that Mr. Alcazar's chest pain occurred at rest, that there were no exacerbating or relieving factors, and that left arm tingling was an associated symptom. R. 3 ¶11, R. 13 ¶6.

5. Defendants failed to consider heart disease in their differential diagnosis and failed to perform laboratory tests to rule out an impending heart attack. *Id.* ¶14.

6. Defendants diagnosed Mr. Alcazar with "atypical chest pain" and sent him home. R. 3 ¶15, R. 13 ¶9.

7. Within 12 hours of being sent home, Mr. Alcazar suffered a heart attack. *Id.* ¶16

8. Mr. and Mrs. Alcazar commenced action on December 23, 2003. R. 1-6.

9. One week prior to the start of trial, the Alcazars submitted Plaintiffs' First Amended Requested Voir Dire of Potential Jurors. R. 359-363, Addendum 1.

10. The Alcazars' requested voir dire included the following questions designed to elicit potential jurors' exposure to reports and discussions about medical negligence cases and the so-called "medical malpractice crisis", including the purported detrimental effect that awards in these cases have on insurance premiums, the availability of insurance, and the ability and willingness of medical providers to practice medicine:

> Question No. 1. Do you believe a lawsuit is a proper method of resolving disputes concerning compensation for negligent medical care? *Ostler v. Albina Transfer Company, Inc.*, 781 P.2d 445 (Utah 1989). Please explain [in chambers].
>
> Question No. 2. Have any of you watched, read, or heard anything that suggests a "lawsuit crisis" or the need for "tort reform"? *Barrett v. Peterson*, 868 P.2d 101 (Utah App. 1993); *Evans v. Doty*, 824 P.2d 460 (Utah App. 1991). Please explain [in chambers].
>
> a. Do you think the article, program, etc. made some good points?
>
> b. Did you agree with the points made? Please explain [in chambers].

c. Would you be inclined to reduce the damage award, if any, in this case, because of what you have watched, read or heard? Please explain [in chambers].

Question No. 3. Have any of you watched, read or heard anything which suggests that jury verdicts are too high or unreasonable? What have you seen, heard or read? (To be asked of jurors in chambers.)

a. Do you personally believe that jury verdicts are unreasonable?

b. Do you believe that monetary limits should be placed upon the amounts which a jury can award to an individual who sues for personal injuries?

. . .

Question No. 5. Have any of you watched, read, or heard anything to indicate that jury verdicts for plaintiffs in personal injury or medical malpractice cases result in higher insurance premiums, effect the availability of insurance, or result in higher medical costs for consumers? *Barrett v. Peterson*, 868 P.2d 101 (Utah App. 1993); *Evans v. Doty*, 824 P.2d 460 (Utah App. 1991). Please explain [in chambers].

a. What do you remember about it? Please explain [in chambers].

b. Do you think the article, program, etc. made some good points? Please explain [in chambers].

c. Do you personally believe that jury verdicts for plaintiffs in personal injury cases result in higher insurance premiums or effect the availability of insurance? Please explain [in chambers]. *Barrett v. Peterson*, 868 P.2d 101 (Utah App. 1993); *Evans v. Doty*, 824 P.2d 460 (Utah App. 1991).

. . .

Question No. 8. Do any of you have any negative feelings about lawyers who seek compensation for those who have suffered medical malpractice? Please explain.

. . .

> Question No. 11. Have you or any of your close relatives or friends worked or do you or they now work in any aspect of the insurance industry (insurance salesman, employee of an insurance company, adjuster, underwriter, or anything similar)? Please explain. If yes, would that effect the way you might view this case? *Evans v. Doty*, 824 P.2d 460 (Utah App. 1991).
>
> . . .
>
> Question No. 15. Have you or a close friend or relative ever been sued in a medical malpractice lawsuit? Please explain.

R. 359-363, Addendum 1.

11. At a pretrial conference on November 7, 2006 the court reviewed and ruled on the Alcazars' requested voir dire of potential jurors. R. 560.

12. The court ruled that it would not give any of the Alcazars' questions designed to discover potential jurors' exposure to reports of medical negligence cases and a medical malpractice crisis, including the questions quoted above, Nos. 1, 2, 3, 5, 8, 11, and 15 and their sub-parts. R. 560, pp. 3-7, Addendum 2.

13. When the Alcazars attempted to persuade the court to give the questions, arguing their need and the right, under Utah appellate court law, to discover potential jurors' exposure to reports of medical negligence cases, the court declined to follow that law, expressing a different philosophical approach to voir dire. R. 560, pp. 7-10, Addendum 2.

14. During voir dire, prospective jurors were not questioned about their exposure to reports or discussions of medical negligence cases, including the purported

detrimental effect that awards in these cases have on insurance premiums, the availability of insurance, and the ability and willingness of doctors to practice medicine. R. 758, pp. 3-122.

15. The jury was then empaneled and the case tried between November 13 - 16, 2006, which resulted in a defense verdict. R. 419-20.

SUMMARY OF ARGUMENTS

POINT I.

The trial court erred during voir dire of the matter at bar, by declining to follow the holdings of the Utah Court of Appeals in *Barrett v. Peterson*, 868 P.2d 96, 98 (Utah Ct. App. 1993) and *Evans v. Doty*, 824 P.2d 460, 462 (Utah App. 1991), cert. denied, 836 P.2d 1383 (Utah 1992). These cases establish the right of plaintiffs in medical negligence actions to discover exposure of prospective jurors to reports and discussions of medical negligence cases (a.k.a. "medical malpractice crisis"), including the purported detrimental effect these cases have on insurance premiums, the availability of insurance, and the ability and willingness of medical providers to practice medicine.

Rejecting the requested voir dire that the Alcazars had prepared pursuant to *Barrett* and *Evans*, the trial court believed the better approach was not to ask such questions so as not to suggest anything to prospective jurors about these much-discussed issues. However, under the doctrine of stare decisis, the trial court did not have discretion to ignore the Utah Court of Appeals' precedents and follow its own philosophy on jury selection.

POINT II.

The trial court's failure to give the Alcazars' requested voir dire or otherwise elicit prospective jurors' exposure to reports and discussion of medical negligence cases was prejudicial error, since the Alcazars' right to the informed exercise of their peremptory challenges was substantially impaired. *Barrett* at 103. The voir dire performed by the trial court did not compensate for this failure.

ARGUMENT

POINT I

STARE DECISIS REQUIRED THAT THE TRIAL COURT QUESTION PROSPECTIVE JURORS ON THEIR EXPOSURE TO REPORTS OF MEDICAL NEGLIGENCE CASES AND THEIR EFFECT.

Under the doctrine of stare decisis, a trial court errs when it fails to abide by the precedents established by a higher court in the jurisdiction. The trial court erred in the matter at bar by declining to follow the precedents established by the Utah Court of Appeals in *Barrett* and *Evans*. These cases hold that plaintiffs in medical negligence cases must be allowed to discover whether prospective jurors have read, seen, or heard information on the impact of medical negligence cases or tort reform:

> We hold only that in cases such as this one, the plaintiff is entitled during voir dire to elicit information from prospective jurors as to whether they have read or heard information generally on medical negligence or tort reform, and to follow up with appropriate questions if affirmative responses are received.

> The trial court's failure to ask prospective jurors threshold questions sufficient to elicit information on the jurors' possible exposure to tort-reform and medical negligence information prevented appellant from detecting possible bias and from intelligently exercising his peremptory challenges. The trial court's limitation of voir dire questioning substantially impaired appellant's right to the informed exercise of his peremptory challenges, and therefore constitutes reversible error. The judgment in favor of appellee is reversed, and the case is remanded for a new trial.

Barrett v. Peterson, 868 P.2d 96, 101 (Utah Ct. App. 1993). *See also*, *Evans v. Doty*, 824 P.2d 460, 467(Utah Ct. App. 1991).

Prior to selection of the jury in the case at bar, the Alcazars submitted requested voir dire questions to the court, based upon the holdings in *Barrett* and *Evans*, to discover prospective jurors' exposure to published reports and discussions of medical negligence cases, and the possible biases resulting therefrom. R. 359-362, Addendum 1. However, the court rejected all of the Alcazars' proposed voir dire in this regard. R. 560, pp. 3-7, Addendum 2. Explaining its rejection, the court stated its view that such questions were calculated to improperly influence the jury pool. R. 560, p. 8. When the Alcazars attempted to remind the trial court of their right to such voir dire and to explain the need for such voir dire, the court expressed a different philosophical approach, which meant remaining silent on the topic:

> MR. RATY: Could I – and I don't want to argue with you on this point, Your Honor –
> THE COURT: Well then don't.
> MR. RATY: Then don't? Can I say one last thing.

> THE COURT: If you want to make a record, go ahead.
>
> MR. RATY: Okay, just very briefly, I think there's a fine balance between suggesting things to the jury pool and discovering prejudices and biases, which would allow us to intelligently exercise our peremptory challenges, and I think that case law, Your Honor, and I've cited several of those cases, support the need, especially in our present climate so much discussion about doctors going out of business because of medical malpractice cases, and –
>
> THE COURT: I mean do you want to tell the panel, are you worried about doctors going out of business because of medical malpractice? Is that the kind of thought you want to put in their mind?
>
> MR RATY: Well, what I'm afraid of is this –
>
> THE COURT: You want to put in their mind that your medical costs are going to go up because of, you know, it's like saying to a kid don't put beans in your ears, you know, they're going to say, "Hey, that's an idea", you know, and that's what you're doing, and I think it can hurt the plaintiff as much as it can hurt the defendant and it makes, it creates kind of a random damage outcome that you can't predict, and again I've seen enough juries over the last 40 years, that you know, I think I know how they generally react and I think in this instance, as I said before, you will know which people to challenge peremptorily by the time we get to that point.

R. 560, pp. 9:2-10:6.

What the Alcazars' counsel was afraid of and tried to express to the court before being cut off, was that the so-called "medical malpractice crisis" has been so widely reported in the news media and so heavily discussed during political campaigns, that prospective jurors had likely already been exposed to such reports and information, and perhaps had developed the biases which seem so prevalent in society. It was important, and frankly, under *Barrett* and *Evans*, the Alcazars had the right to know whether prospective

jurors had read, heard, or seen such reports, and, if so, what the reports said, and what the prospective jurors thought about them. This information, as acknowledged by *Barrett* and *Evans,* was critical to allow the Alcazars to intelligently exercise their peremptory challenges and possibly secure excuses for cause. *Barrett* at 102, *Evans* at 467. In *Evans*, the court explained,

> In tort cases, and more particularly in medical malpractice cases, we cannot ignore the reality that potential jurors may have developed tort-reform biases as a result of an overall exposure to such propaganda. Accordingly, in cases such as this one, the plaintiff has a legitimate interest in discovering which jurors may have read or heard information generally on medical negligence or tort reform. . . .
>
> Reason suggests that exposure to tort-reform propaganda may foster a subconscious bias within certain prospective jurors, and, had [plaintiff] been able to identify those jurors exposed to such propaganda, she could have more intelligently exercised her peremptory challenges.

Evans at 467. (Citations omitted). In *Barrett,* the court added,

> In light of the pervasive dissemination of tort-reform information, and the corresponding potential for general exposure to such information by potential jurors, a plaintiff is entitled to know which potential jurors, if any, have been so exposed. Plaintiff is entitled to such information absent any particular showing of specific campaigns, advertisements, or literature offered for the purpose of showing potential prejudice. Failure to ask such questions ignores the plaintiff's "need to gather information to assist in exercising . . . peremptory challenges."

Barrett at 101. (Citations omitted).

True to its expressed intention, the court did not elicit any information from the prospective jurors about their exposure to reports and discussion of medical negligence cases. The court rejected all of the Alcazars' requested voir dire. The Alcazars' protestations apparently did, however, lead the court to ask one token question on the topic: "Has any of you or a close friend or relative personally formed an opinion either in favor of or opposed to tort reform or been a member of any organization that has?" R. 57:10-12. This, of course, was not the type of threshold question required by *Barrett* and *Evans* to discover what the prospective jurors had heard, read, or seen by way of reports and discussion of medical negligence cases and tort reform. It only asked jurors if they had formed an opinion in favor or opposed to tort reform. Not surprisingly, the only prospective-juror response elicited from asking the esoteric term "tort reform" in isolation was, "What is tort reform?" R. 758, p. 57: 13. However, rather than explain what the term meant and then ask prospective jurors regarding their exposure to reports of a medical malpractice crisis, the court said simply, "I thought we'd get questions. If you don't know what it is, you don't need to worry about it, okay?" R. 758, p. 57:14-16. Thus ended the court's inquiry on prospective juror exposure to reports of medical negligence cases and their effect, and the Alcazars were left without any information on these important matters to intelligently exercise their peremptory challenges in their medical negligence case.

The trial court violated stare decisis and erred by declining to engage in the voir dire required by *Barrett* and *Evans*. The court also abused whatever discretion it may

have had on the matter since "'that discretion must be exercised in favor of allowing discovery of biases or prejudice in prospective jurors.'" *State v. Hall*, 797 P.2d 470, 472 (Utah App.), cert. denied, 804 P.2d 1232 (Utah 1990). *See also State v. James*, 819 P.2d 781,797-98 (Utah 1991). The trial court's approach was the opposite, keeping biases and prejudices secret.

POINT II

THE TRIAL COURT'S DISALLOWANCE OF VOIR DIRE QUESTIONING ON ISSUES OF MEDICAL NEGLIGENCE CASES IS REVERSIBLE ERROR SINCE IT SUBSTANTIALLY IMPAIRED THE ALCAZARS' RIGHT TO THE INFORMED EXERCISE OF THEIR PEREMPTORY CHALLENGES.

In *Barrett*, the court of appeals reversed the trial court's judgment and remanded the case for a new trial. *Barrett* at 104. Rejecting the standard requirement that plaintiff show that an absence of error would have resulted in a different outcome, the court ruled that in the context of voir dire questioning, prejudicial error is shown if the plaintiff's right to the informed exercise of peremptory challenges has been substantially impaired:

> An appellant claiming that the trial court's unreasonable limitation of voir dire substantially impaired his ability to exercise peremptory challenges simply cannot prove, in the traditional way, that prejudice resulted from the error. Appellant cannot show with any certainty that had certain questions been asked, particular responses would have been received; that certain jurors would then have been challenged for cause or peremptorily; and that particular, more favorably predisposed jurors would have been seated instead, who would have deliberated to a different result. Accordingly, in this context, we apply the test enunciated in *Hornsby*: Prejudicial error is shown

> if the appellant's right to the informed exercise of peremptory challenges has been "substantially impaired." 758 P.2d at 933.

Barrett at 103.

In reversing the trial court in *Barrett*, the court of appeals distinguished *Evans*, where the court had determined the trial court's error in limiting voir dire harmless. *Evans* at 468. The court noted that *Evans* must have been a "close call" and that the factors which must have permitted the *Evans* court to determine the voir dire problems there harmless, were not present in *Barrett*. *Barrett* at 103. These included the fact that the trial court in *Evans* actually mentioned articles and television programs to jurors and asked jurors whether they had strong feelings about lawsuits against doctors:

> Now, many of you have heard and read articles, and there have been television programs, with regard to negligence on the part of doctors. Do any of you have any strong feelings as a result of seeing or reading anything about medical negligence that would make it so that you couldn't be fair and impartial here today? Now do any of you have any strong feelings about anyone bringing a lawsuit against a doctor?

Evans at 463. Significantly, in response to this questioning, two potential jurors indicated they could not be impartial, and they were excused for cause. *Id.* at 468. *Barrett* then noted,

> The record in this case, by contrast, reveals that despite appellant's submission of supplemental voir dire questions accompanied by a supporting memorandum, no pertinent questions regarding tort-reform and medical negligence issues were asked, even indirectly, nor were such matters even touched upon by the trial court. In view of our earlier Conclusion that appellant was denied an opportunity to ferret out jurors who had been exposed to tort-reform material, and was prevented from further questioning of such jurors, appellant's ability to

> intelligently exercise his peremptory challenges was substantially impaired. The factors which permitted the *Evans* court, in what must have been a close call, to determine that the voir dire problems there were harmless, are simply not present here. In the instant case, the overall voir dire was much less extensive. Moreover, in contrast to *Evans*, the trial court did not so much as mention the subject of articles and programs on medical negligence, nor did it verbalize the concept of lawsuits against doctors prompting discernible emotions.

Barrett at 103. (Emphasis added).

As in *Barrett*, in the case at bar, the trial court asked no meaningful question that would elicit disclosure by prospective jurors of exposure to information on medical negligence cases and their effect. Like *Barrett*, the court did not even comment about articles and television programs on medical negligence nor "verbalize the concept of lawsuits against doctors prompting discernible emotions." The court made clear its intention that no such matters be suggested to prospective jurors and it enforced that intention. It rejected all of Plaintiffs' proposed voir dire regarding what the jurors had read, heard, and/or seen about articles and programs on medical negligence, of doctors leaving the practice of medicine, or of rising malpractice and health insurance costs. Also, at side bar at the end of the court's in-court voir dire, the court again rebuffed the Alcazars' last-ditch pleas for *Barrett* and *Evans* voir dire. R. 650, ¶ 12. The court's approach violated the Utah Court of Appeals' holdings in *Barrett* and *Evans,* and substantially impaired the Alcazars' ability to the informed exercise of their peremptory challenges.

Undoubtedly, Appellees will respond that the trial court engaged in a thorough voir dire that should make up for rejection of the Alcazars' *Barrett* and *Evans* voir dire. This is not the case. The trial court's in-court voir dire was brief, and, more importantly, did not attempt to elicit, and did not elicit, anything about what the prospective jurors had read seen or heard on issues of medical negligence cases. R. 758, pp. 3-68. The court then had many of the prospective jurors back in chambers on an individual basis, to discuss myriad issues, including health problems of the jurors and their loved ones, hardships in serving, prejudices against smokers, prejudices against Hispanics, a fiance's conviction of a crime, satisfaction or disatisfaction of medical care received, experience with legal matters, and employment in the medical field. R. 758, pp. 70-122.

Near the end of the individual interviews, one prospective juror, Mr. Oldham acknowledged that his wife worked for a pediatrician. R. 758, p. 115:21-24. Given that, the Alcazars' counsel, with trepidation, did venture to ask whether she had expressed any negative feelings about medical malpractice cases and whether he had any feelings about that one way or another. Id. 115:25-116:5. Mr. Oldham, however, did not sit as a juror. In fact, none of the empaneled jury were asked or revealed anything about their exposure to reports or discussion of medical negligence cases. R. 758 p. 132:6-12. Only one of the jurors, Bradley Heaton, was even brought back to chambers for individual questioning. *Id.* and 116:18-122:12. Thus, a whole jury was allowed to sit in judgment of a medical negligence

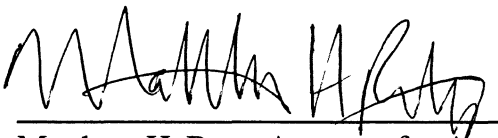
case without plaintiffs having any knowledge of the jurors' exposure to reports of a medical malpractice crisis.

CONCLUSION

The trial court violated stare decisis and erred by declining to follow the holdings in *Barrett* and *Evans*. Given the prevalence of reports and discussions of medical negligence cases and their impact, the Utah Court of Appeals established the right of plaintiffs to voir dire that elicits information about prospective jurors' exposure to and biases from such reports. The trial court rejected the Alcazars' *Barrett* and *Evans* voir dire and determined that the jury would not be exposed to such questioning. The trial court's error was prejudicial since the Alcazar's right to intelligent exercise of their peremptory challenges was substantially impaired.

WHEREFORE, the Alcazars respectfully request that the Utah Court of Appeals reverse the judgment of the trial court and remand the case for a new trial.

DATED AND SUBMITTED this 30th day of November, 2007.

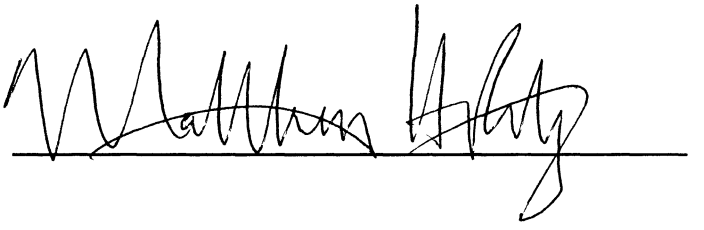


Matthew H. Raty, Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing **APPELLANT'S BRIEF** was served upon appellee's counsel at the address listed below, by depositing the same in the United States mail, postage pre-paid on the 30th day of November, 2007.

Attorney for Appellees
David G. Williams
10 Exchange Place, Eleventh Floor
P.O. Box 45000
Salt Lake City, Utah 84145



Q \Alcazar\P\Appeal\Appellants brief

ADDENDUM

Addendum 1: R. 359-363, Plaintiffs' First Amended Requested Voir Dire of Potential Jurors.

Addendum 2: R. 560, pp. 3:6-4:19, 7:24-10:10, Trial Court's oral ruling on Plaintiffs' requested voir dire.

Tab 1

Mark C. McLachlan (#2207)
MARK C. McLACHLAN & ASSOCIATES, L.C.
Matthew H. Raty (#6635)
LAW OFFICE OF MATTHEW H. RATY, PC
New England Professional Plaza
9677 South 700 East, Suite D
Sandy, Utah 84070
Telephone: (801) 495-2252
Fax: (801) 495-2262
Attorneys for Plaintiffs

THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY
STATE OF UTAH

CRESCENCIO ALCAZAR AND MONICA ALCAZAR, Plaintiffs, v. UNIVERSITY OF UTAH HOSPITALS & CLINICS, UNIVERSITY OF UTAH EMERGENCY DEPARTMENT, JON MIDDLETON, M.D., and STATE OF UTAH, Defendants.	**PLAINTIFFS' FIRST AMENDED REQUESTED VOIR DIRE OF POTENTIAL JURORS** Case No. 030928457 Judge: John Paul Kennedy

Plaintiffs propose the following *Voir Dire* questions, assuming the court conducts *Voir Dire*. If the court allows attorney *Voir Dire*, then counsel may ask variations of the following questions:

Question No. 1. Do you believe a lawsuit is a proper method of resolving disputes concerning compensation for negligent medical care? *Ostler v. Albina Transfer Company, Inc.*, 781 P.2d 445 (Utah 1989). Please explain [in chambers].

Question No. 2. Have any of you watched, read, or heard anything that suggests a "lawsuit crisis" or the need for "tort reform"? *Barrett v. Peterson*, 868 P.2d 101 (Utah App. 1993); *Evans v. Doty,* 824 P.2d 460 (Utah App. 1991). Please explain [in chambers].

a. Do you think the article, program, etc. made some good points?

b. Did you agree with the points made? Please explain [in chambers].

c. Would you be inclined to reduce the damage award, if any, in this case, because of what you have watched, read or heard? Please explain [in chambers].

Question No. 3. Have any of you watched, read or heard anything which suggests that jury verdicts are too high or unreasonable? What have you seen, heard or read? (To be asked of jurors in chambers.)

a. Do you personally believe that jury verdicts are unreasonable?

b. Do you believe that monetary limits should be placed upon the amounts which a jury can award to an individual who sues for personal injuries?

Question No. 4. Would you be hesitant to award compensation for any of the following elements of damages, provided you first find that the plaintiff sustained his burden of proof to be entitled to damages:

1. Past medical expenses?

2. Pain and suffering including loss of enjoyment of life?

Question No. 5. Have any of you watched, read, or heard anything to indicate that jury verdicts for plaintiffs in personal injury or medical malpractice cases result in higher insurance premiums, effect the availability of insurance, or result in higher medical costs for consumers? *Barrett v. Peterson,* 868 P.2d 101 (Utah App. 1993); *Evans v. Doty*, 824 P.2d 460 (Utah App. 1991). Please explain [in chambers].

a. What do you remember about it? Please explain [in chambers].

b. Do you think the article, program, etc. made some good points? Please explain [in chambers].

c. Do you personally believe that jury verdicts for plaintiffs in personal injury cases result in higher insurance premiums or effect the availability of insurance? Please explain [in chambers]. *Barrett v. Peterson*, 868 P.2d 101 (Utah App. 1993); *Evans v. Doty*, 824 P.2d 460 (Utah App. 1991).

Question No. 6. Do you have any negative thoughts or feelings towards those who smoke?

Question No. 7 Would you be less inclined to award damages to someone who suffered a heart attack from medical malpractice if that person had been a smoker?

Question No. 8. Do any of you have any negative feelings about lawyers who seek compensation for those who have suffered medical malpractice? Please explain.

Question No. 9. Do you believe that as a juror you should be able to disregard the law and decide a case based on your own beliefs? Please explain.

Question No. 10. Have you or any of your family ever been, or are you now, a patient of Dr. Middleton, Dr. Hartsell or the University of Utah Hospital? If yes, explain who was a patient and when?

Question No. 11. Have you or any of your close relatives or friends worked or do you or they now work in any aspect of the insurance industry (insurance salesman, employee of an insurance company, adjuster, underwriter, or anything similar)? Please explain. If yes, would that effect the way you might view this case? *Evans v. Doty*, 824 P.2d 460 (Utah App. 1991).

Question No. 12. Have you or any close relatives or friends been involved, or are you or they now involved in any way in the health-care industry (e.g., doctor, nurse, employed by a clinic, etc.)? Please explain. If yes, would that in any way tend to influence your judgment in this case? Explain.

Question No. 13. Has any juror here been a party to a civil lawsuit? As a result of that experience do you believe that you would be more sympathetic to one party or the other?

Question No. 14. Is there anyone who cannot put aside private views and concerns and deliberate this case using solely the law given to you by the court and the evidence presented by the parties?

Question No. 15. Have you or a close friend or relative ever been sued in a medical malpractice lawsuit? Please explain.

Question No. 16. Is there any juror who feels that his or her religion, expressly or impliedly, forbids or discourages a lawsuit brought for money damages as a result of personal injuries? [Pursue questions in chambers.]

Question No. 17 Do you have any negative thoughts or feelings towards individuals from Mexico who are living in the United States?

Question No. 18 Would it be more difficult for you to render a verdict in this case because the defendants are the University of Utah Hospitals and Clinics and the State of Utah?

Question No. 19 If you were either of the parties in this case, would you be comfortable knowing that someone like you would be sitting on the jury.

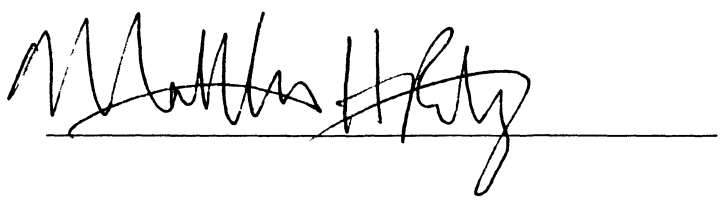
DATED this 7th day of November, 2006.

MATTHEW H. RATY
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the **PLAINTIFFS' REQUESTED VOIR DIRE OF POTENTIAL JURORS** was served upon Defendants' counsel via hand delivery, at the addresses listed below, on this 7th day of November, 2006.

David G. Williams
Snow, Christensen & Martineau
10 Exchange Place, Eleventh Floor
P. O. Box 45000
Salt Lake City, Utah 84145



Q \Alcazar\P\VoirDireReq PotentialJurors

Tab 2

IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE CITY

SALT LAKE COUNTY, STATE OF UTAH

CRESCENCIO ALCAZAR, et al.,	
Plaintiff,	Case No. 030928457 MP
vs.	Appellate Case No. 20070067-CA
UNIVERSITY OF UTAH HOSPITALS, et al.,	
Defendant.	With Keyword Index

PRETRIAL CONFERENCE NOVEMBER 7, 2006

BEFORE

THE HONORABLE JOHN PAUL KENNEDY

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER
1775 East Ellen Way
Sandy, Utah 84092
801-523-1186

would make it difficult for you to serve, we ask them about hardship. And number 17, we would allocate that one in substance. Number 18, we will explain to them what the nature of the case is and we'll ask them also if there's a reason they can't serve.

So that's what I'm going to do with those. Let's see here, I thought we had some from the plaintiff and I apparently don't have those with me here for some reason.

MR. RATY: Can I bring you some, Your Honor?

THE COURT: Yeah, if you have a set, bring them up here and I'll run through them.

MR. RATY: In fact I made just a few additions to the list I gave you before. So I'm going to give you our amended one.

THE COURT: Okay.

MR. RATY: It's almost entirely the same.

THE COURT: Okay. Number one, I usually give one, or ask a question that's similar to that. So probably give that one in substance. Number two, I don't give that instruction. Number three, or two b, and c, I wouldn't give those either as a followup. Number three, I wouldn't give that one either and I wouldn't give number four, although, I give an instruction, or I give, I think there's an instruction as well as a voir dire question that asks them something like, you know, do you have any reason why you

wouldn't be able to award damages if you found that there was negligence or words to that effect. Number five, I wouldn't give that one. Number six, that, that I think is an addition, isn't it? I don't remember seeing that one before.

MR. RATY: Right.

THE COURT: I probably would give that one in this case. I don't think I would give number seven. I won't give number eight, but I do give an instruction that tells them that the lawyers are not on trial here. And we give them an instruction on number 9 as well as a voir dire question that asks them if they feel they couldn't follow the instructions. So give that one in substance. Number 10, we'll ask them if they have any familiarity with the defendants, including Jon Middleton, the doctor in this case who as I understand it who's no longer in the case. I'm not going to give number 11. I will ask them if they have any experience with the medical profession, and same thing with number 12, I ask that question in substance, and the same thing with number 13, number 14, number 15. I ask a question on number 16 that doesn't focus on religion, but it says do you have any feelings or beliefs, I think is how it's worded.

Number 17, the problem with that question is this: people are going to say in answer to it, well, it depends on whether they're here illegally or not. There's some people who are going to say that and we can't ask the defendant - or

the plaintiff in this case whether they're here illegally or not, and because of what the answer is likely to be. So I don't, I don't want to ask a question that I can't resolve. I don't want to leave it open and it'll, I think it'll create more problems than it will resolve.

MR. RATY: Could we fashion something [inaudible] I believe he's here legally. [inaudible]

THE COURT: I wouldn't count on it.

MR. RATY: We've got a -

THE COURT: Have you talked to him about it?

MR. RATY: We've got -

THE COURT: Have you seen his papers?

MR. RATY: We've got a State of Utah identification card for him.

THE COURT: Yeah, yeah. Okay. The, you're just digging the hole deeper basically when you start going into stuff like that. And you're, and you're telling the defendants to start to investigate this guy and find out what they can find out. I just don't think it's productive one way or the other. There, there are enough here and we may even have some on the jury panel. I don't know. We've had in the past, from, who are Hispanic origin and maybe here even illegally. Although, they're supposed to be citizens in order to serve. But I just ask them if you, you know, are you a citizen and if they answer yes, I don't probe it, and -

MR. RATY: Your Honor, what about a question like do you have any negative thoughts or feelings towards those of the Hispanic race and towards Hispanics?

THE COURT: Well, we're gonna ask them if they are, if they're free from any prejudice, bias, or sympathy, if they feel that they meet that standard and I'm going to instruct them on that, and I think that the more you focus on the issue, the more you make it an issue, I think. So I, if, if you have any concern during voir dire that someone may have some bias or prejudices, including a national origin or any other kind of prohibited bias or prejudice, I'd like you to raise that and we can call somebody in specifically and talk to them separately, ask them point blank if you want to even how they would feel about that. But, you know, my sense is that you're just going to create problems by starting to go into this area in a generic kind of way.

And the same thing with number 18, we're basically, we're identifying who the parties are, asking if they have any connection or any experiences involving the parties and so, and then we're asking them if they feel they can, you know, render a verdict that would be un-influenced by prejudice or sympathy or bias. So I think we ask that question. What I would be afraid of is you get somebody from BYU who raises his hand on that one because he doesn't like the 'U' or something. I, you know, and I don't, I don't know

that it would matter when it comes down to the ultimate decision.

And question 19, I ask that in substance. So -

MR. RATY: May I ask about a couple others real quick?

THE COURT: Sure.

MR. RATY: And are we on the record, or -

THE COURT: Yeah, we're on the record.

MR. RATY: Okay, I don't know if we identified ourselves. I'm Matthew Raty for the plaintiff.

THE COURT: Okay, yes, thank you. Go ahead. Let's have the appearance of the defendants as well.

MR. WILLIAMS: David Williams and Brad Black for defendants.

THE COURT: Thank you.

MR. RATY: The first question I had, I didn't hear you say what you're going to do with number 15.

THE COURT: Number, which number?

MR. RATY: Fifteen.

THE COURT: I'm going to ask them if they've ever been a plaintiff or a defendant in a lawsuit, or had a close friend or relative. So we're going to cover a lot more than malpractice. We'll cover everything.

MR. RATY: Okay, and then, Your Honor, on the first, first part questions, which get at prejudice regarding

medical malpractice cases.

THE COURT: I don't know that they get into prejudice. I think they end up raising issues that most people don't know about and, and it makes, and suggest things to people that they may not have considered and I think the suggestions are not appropriate, so that's why I don't give them. I don't give them either - they'll submit it typically by plaintiffs or by defense because I think they're calculated to try to influence the jury and I don't, I don't feel that I want to do that. I think you will find as we go through the questions that I will ask them and they give their answers that you will be able to tell if there is some bias or prejudice that would be, that would reflect the kind of thing that you're concerned about in asking these questions. So I've never had a lawyer yet who hasn't felt that he's been able to, or she's been able to ferret that out.

So I'm, as I said before, when I talked to you before about your voir dire questions that there's certain questions that I just don't give that I think are calculated to influence the jury or to kind of till the soil for you to sow seeds and I know a lot of lawyers like to do that and I think there are probably seminars that tell you how to do that and I'm just telling you that in this case, and other cases that you might have with me in the future, I won't do

that.

MR. RATY: Could I - and I don't want to argue with you on this point, Your Honor -

THE COURT: Well then don't.

MR. RATY: Then don't? Can I say one last thing.

THE COURT: If you want to make a record, go ahead.

MR. RATY: Okay, just very briefly, I think there's a fine balance between suggesting things to the jury pool and discovering prejudices and biases, which would allow us to intelligently exercise our peremptory challenges, and I think that case law, Your Honor, and I've cited several of those cases, support the need, especially in our present climate so much discussion about doctors going out of business because of medical malpractice cases, and -

THE COURT: I mean do you want to tell the panel, are you worried about doctors going out of business because of medical malpractice? Is that the kind of thought you want to put in their mind?

MR. RATY: Well, what I'm afraid of is this -

THE COURT: You want to put in their mind that your medical costs are going to go up because of, you know, it's like saying to a kid don't put beans in your ears, you know, they're going to say, "Hey, that's an idea", you know, and that's what you're doing, and I think it can hurt the plaintiff as much as it can hurt the defendant and it makes,

it creates kind of a random damage outcome that you can't predict, and again I've seen enough juries over the last 40 years, that you know, I think I know how they generally react and I think in this instance, as I said before, you will know which people to challenge peremptorily by the time we get to that point. We're going to spend all morning doing that, probably, and by the end of the, the end of the morning you're going to know and you'll be able to exercise your challenges, I think, very intelligently and wisely and I think it goes for both sides.

MR. RATY: And on that point, Your Honor, are you -

THE COURT: What I'll do at the end of these questions I'll say to you come up here. You'll come up and I'll say now are there any questions you want to ask that you feel you haven't had a chance to really get a reaction, and almost inevitably the lawyers will say no at that point. Occasionally they'll say, well, juror number 15 said something about a brother-in-law working for a law office, could we go into that, or something and we'll pursue that item. I will often pursue those questions as we're going along. But if I don't, you can come up and tell me you'd like to ask somebody about something. So I, you know, don't be overly concerned about that and I would, you know, again, I've told you my view on it. So -

MR. RATY: Can I ask you about your methodology on-