2009

Jensen v. Cunningham : Brief of Appellant

Utah Court of Appeals

IN THE UTAH SUPREME COURT

PARKER JENSEN, a minor, by and through his parents and natural guardians, BARBARA and DAREN JENSEN; BARBARA JENSEN, individually; and DAREN JENSEN, individually, Appellants, vs. KARI CUNNINGHAM, in her individual capacity; RICHARD ANDERSON, in his individual and official capacities; LARS M. WAGNER, in his individual capacity; KAREN H. ALBRITTON, in her individual capacity; SUSAN EISENMAN, in her individual capacity, Appellees.	Case No. 20090277-SC

APPEAL FROM AN ORDER GRANTING SUMMARY JUDGMENT
HON. JOSEPH C. FRATTO, JR.
THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

BRIEF OF APPELLANTS

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LIST OF PARTIES TO THE PROCEEDINGS

All interested parties are identified in the caption on appeal.

When the case was initially filed, Intermountain Health Care (IHC) was a named defendant. However, upon stipulation of the parties that none of the defendants was an IHC employee, IHC was voluntarily dismissed from the case, and is not part of the case or this appeal. Three other original defendants, the State of Utah, Dr. Cheryl Coffin, and Dr. David Corwin, were dismissed from the proceeding by U. S. District Court Judge Paul Cassell. That dismissal has not been challenged by the Jensens, and those parties are not part of the case or this appeal.

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JURISDICTION

Jurisdiction is proper in this Court pursuant to Utah Code Ann. § 78A-3-102(3)(j).

ISSUES PRESENTED FOR REVIEW

1. Did the trial court err in ruling that there is no historical or textual basis for interpreting the Utah Constitution differently than the federal constitution? Interpretation of the Utah Constitution is a question of law reviewed for correctness. *Snyder v. Murray City Corp.*, 2003 UT 13, ¶ 17, 73 P.3d 325. This issue was preserved in the Jensens' opposition to the defendants' motions for summary judgment. (R. 1271.)

2. Did the trial court otherwise err in ruling that the federal court's ruling was res judicata as to the Jensens' state law claims? Whether res judicata bars an action presents a question of law reviewed for correctness. *Mack v. Utah State Dept. of Comm.*, 2009 UT 47, ¶ 26, --- P.3d ---. This issue was preserved in the Jensens' opposition to the defendants' motion for summary judgment. (R. 1271.)

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

> Utah Constitution, Art. I, § 1 – "All men have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; to worship according to the dictates of their consciences; to assemble peaceably, protest against wrongs, and petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right."
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> Utah Constitution, Art. I, § 7 – "No person shall be deprived of life, liberty or property, without due process of law."
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> Utah Constitution, Art. I, § 14 – "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized."

STATEMENT OF THE CASE

Nature of the Case, Course of Proceedings, and Disposition Below

On July 18, 2005, the Jensens filed an action asserting violations of the Utah and United States constitutions, wrongful initiation of process, and intentional infliction of emotional distress. (R. 1-70.) The defendants removed the action to federal court based upon the presence of the federal constitutional claims. (R. 106-108.)

On September 22, 2008, U. S. District Court Judge Ted Stewart granted summary judgment to all remaining defendants on the federal constitutional claims. (*See* Add. Exh. 3 (Memorandum Decision); *see also* R. 117-188.) That ruling is currently on appeal.

The federal court declined to exercise jurisdiction over the Jensens' state law claims, stating that "as [the Jensens'] Utah constitutional claims present important questions of state law, the Court declines to further exercise supplemental jurisdiction over the state law claims and will remand them to the Third Judicial District Court for Salt Lake County, State of Utah, from which this case was removed." *Id.*, p. 62.

On remand, the defendants filed motions for summary judgment on varying grounds. (R. 281, 947, 1012, 1089.) The trial court granted summary judgment to all defendants on the grounds that the federal court's dismissal of the federal claims was res judicata as to all of the Jensens' state law claims. (R. 4199; see Addendum Exhs. 1 and 2.) The Jensens timely appealed. (R. 4211.)

Statement of Facts[1]

The record includes the following evidence and reasonable inferences therefrom:

On April 30, 2003, Barbara Jensen of Sandy, Utah, took her son Parker to an oral surgeon to remove a small growth under Parker's tongue that the family dentist had diagnosed as a clogged saliva duct ten months earlier. (R. 2332-2334, 3278-79, 3283.)

The oral surgeon also diagnosed the growth as a clogged saliva duct, but sent a sample to LabCorp for testing per standard procedure. (R. 1711-12, 3275-76.) He subsequently received a call from a LabCorp doctor who said the sample was malignant, but he was "not sure of the cell type." (R. 1713-14, 3287.) LabCorp later issued a report stating a diagnosis of "poorly differentiated small round blue cell tumor." (R. 3285-86.) That diagnosis could encompass up to 40 different tumor types, for which treatments vary. (R. 1756, 2688-89, 2737, 2791, 3192.) It is critical to make an accurate diagnosis of a patient's cancer type, both for treatment and prognosis. (R. 2738, 3199, 3210.)

The oral surgeon told the Jensens about the call, and said he had arranged for them to see an ear, nose & throat specialist (Dr. Muntz) at Primary Children's Medical Center. (R. 2334-35, 1715.) Dr. Muntz noted that the tumor type was unknown, writing: "The unusual presentation and slow growth of this makes me less concerned re: rhabdomyosarcoma but such tumors as alveolar soft part sarcoma and leiomyosarcoma, etc are possibilities." (R. 2335, 3320.) He referred the Jensens to the oncology

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[1] In the federal court, the defendants' statements of fact totalled 194 pages; the Jensens submitted an additional 139 pages. Accordingly, this summary is significantly truncated. A full chronology is at R. 1130-1270.

department, where they met with defendant Lars Wagner, an assistant professor of pediatrics at the University of Utah. (R. 2336, 3147-48.) Wagner said he couldn't really do anything until he had his own facility's pathology report. (R. 2122, 3212-13.)

The pathologist on the case, Dr. Lowichik, began receiving unusually frequent phone calls from Wagner about Parker's case. (R. 2801-07.) Lowichik was not prepared to state definitely that the tumor was Ewing's, but she "did [her] best" to put it into a category. (R. 2793-95.) On May 20, 2003, she wrote that, from her examination, the results "suggest[ed] a diagnosis of Ewing's Sarcoma." (R. 2793-94, 2804, 3352-53.)

A number of factors militated against a finding of Ewing's, including:

- Only about 1 percent of all cancers are pediatric, of which Ewing's comprises only 3-5 percent. (R. 3269-70.)

- 80-90 percent of Ewing's patients have primary tumors in the bone, not soft tissue, and of the latter, most are in the deep soft tissue. (R. 2079-85, 3270.) Parker's growth was in the superficial soft tissue. (R. 2079-80, 2776, 3112.) Ewing's in the mouth would be even rarer. (R. 1520-21, 1790-91, 2078-79, 2808, 3259.)

- Ewing's is aggressive and fast-growing; Parker's was slow growing. (R. 1516, 1795, 2706-07, 3062, 3074, 3077.)

Lowichik's May 20 report stated: "DIAGNOSIS: SOFT TISSUE UNDER TONGUE, BIOPSY; EWING SARCOMA / PERIPHERAL PRIMITIVE NEUROECTODERMAL TUMOR (SEE COMMENT)." (Ewing's is often referred to as Primitive Neuroectodermal Tumor ("PNET") when located in the soft tissue. (R. 1521, 1751-52, 2047-48, 2092-2093.)) The "Comment" said, "In the event of excision of additional lesional tissue from this site, cytogenetic studies and freezing of tissue for possible molecular ancillary studies may be informative." (R 3352-53.)

The Jensens were informed that Parker had Ewing's Sarcoma. A "margin" (removal of remaining malignant tissue with a margin of clean cells) was scheduled, but later canceled. (R. 2123-24, 2340, 2383-84.) The Jensens were told that chemotherapy would begin the following Tuesday (R. 2125), and began preparing for the upcoming ordeal. Barbara's brother moved in from Idaho to tend the other children, and they planned structural changes to their house. (R. 2125, 2296, 2307-08, 2611-12, 3278-79.)

Wagner said that Parker needed to begin chemotherapy immediately, that "we had two weeks because it was so aggressive." (R. 2166-67, 2340, 2415-16, 2650-51.) The Jensens asked if there were any other tests that would help confirm the diagnosis of Ewing's. Wagner said no. (R. 2150.) That statement was false. Wagner knew that:

- Cytogenetic and molecular testing, which had not been done, were reliable diagnostic tests for Ewing's (R. 1501-02, 3360), were routinely performed at PCMC in cases of suspected Ewing's (R. 1500, 1758-60, 2730-33, 2798, 3167-68, 3208, 3170, 3210-11), and were inexpensive. (R. 1792, 2799.)[2]

- The only testing that had been done (immunohistochemical) cannot definitively diagnose Ewing's, as markers indicative of Ewing's can also manifest with other things, including healthy tissue. (R. 1752, 2058, 2807, 3203-4, 3153, 3166.) Immunohistochemical testing also cannot detect an 11;22 translocation. (R. 2060.)

Wagner later testified that he declined to request genetic or molecular testing because it was not necessary and was not technically required by a Clinical Trial (AEWS0031) of which Wagner was a co-investigator. (R. 3164-65, 3180.) Although the

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[2] Cytogenetic/molecular testing looks for a chromosomal translocation in which a specific gene (FLI1) within chromosome 11 has moved to chromosome 22, and a specific gene (EWS) within chromosome 22 has moved to chromosome 11. This "11;22 translocation" is found in 85-95 percent of Ewing's patients. (R. 2668, 3207, 3374.)

Clinical Trial says it "should NOT be used to direct the practice of medicine by any person or to provide individualized medical care, treatment, or advice to any patient or study subject" (emphasis in original), Wagner says that his handling of Parker's case was pursuant to the AEWS0031 protocol. (R. 3180-3184; Case No. 2:05-cv-00739, Doc. 18 (Wagner Mem. Supp. Motion to Dismiss, November 22, 2005, p. 15 ¶ 38).)

The AEWS0031 Clinical Trial was for patients with newly diagnosed Ewing's that had not metastasized (spread). (R. 3372.) Very few patients present with newly diagnosed, localized Ewing's. (R. 1485, 2734-35, 2738, 3262.) If Wagner wanted to enroll Parker in the AEWS0031 Trial, he had to do so within 30 days of the "diagnostic biopsy." (R. 0515, Ex. 65, p. 17.) Wagner calendared the date of biopsy as May 2. (R. 3378-79, 3382.) However, a medical article cited by Wagner measured the deadline from the date of diagnosis, which would have been May 20. (R. 3386.)

The AEWS0031 Trial "strongly recommended" molecular testing to confirm Ewing's. (R. 3375.) Genetic/molecular testing was a reasonable request, and would have been performed had Wagner requested it. (R. 1537-40, 2781-82, 2815.) Defendant Albritton is unaware of anyone at PCMC ever refusing such testing. (R. 1539-40.)

Wagner claims that a pathologist, Cheryl Coffin, told him that genetic/molecular testing was not necessary. However, Coffin testified that she considers such testing "incredibly useful," would not have been opposed if it had been requested, does not know why genetic/molecular testing was not done on Parker's tissue, and is not aware of

anyone who was opposed to such testing. (R. 1774-75, 1770, 1793.)

Removing additional tissue from Parker's mouth (an "oncologic" excision) to obtain a new sample would also have alleviated a concern of Albritton's, which was that there were still tumor cells in Parker's mouth. Wagner falsely told Albritton that he had recommended an oncologic procedure to the Jensens. (R. 1503-1506.) However, when the Jensens asked about the originally scheduled margin, Wagner told them that, rather than removing the remaining tumor from Parker's mouth immediately, a second surgery would not be performed until after twelve weeks of chemotherapy (which was a requirement of the AEWS0031 Clinical Trial protocol). (R. 2135-36, 2353-54.)

The Jensens were confused. They had read that the first thing to do with cancer is get all of the cancerous material out. (R. 2645-46.) Dr. Albritton testified that it is important to get all of the tumor out as soon as possible; she cannot think of any good reason to leave part of it in. (R. 1528-29.)

Barbara Jensen again asked Wagner if there was any other test that would help confirm the diagnosis of Ewing's, and he said no. (R. 2154-55.) At this point, all other tests (x-rays, CT and bone scans, blood tests, MRI) had come back normal. (R. 0515 (Ex. 12, pp. 49-61), 2131, 2376-78, 3275-76, 3278-79, 3318-20, 3325.)

Another of Barbara's brothers referred the Jensens to a cancer specialist he knew in Oklahoma. This doctor told the Jensens that the staging process for Ewing's would include blood tests, x-rays, bone, CT, and PET scans, MRIs, and other tests like genetic tests. (R. 2125-26, 2152-53, 2342-43, 2345, 2482, 2645-46.) The Jensens told Wagner they wanted all the tests that this doctor mentioned and that they saw on the National

Cancer Institute and other websites, which included genetic testing. (R. 2361-62.)

Wagner now claims that he did not know that the Jensens were questioning the diagnosis, or he would have requested genetic/molecular testing. (R. 3237-38.) However, on May 21, 2003, the Jensens had asked Wagner to send a "blind" sample to Harvard University for testing, which Wagner admits was because they had a question about the diagnosis. (R. 2306, 2365-67, 3239.)

Wagner sent Parker's slides to a pathologist at Harvard who was a fellow investigator for the AEWS0031 Clinical Trial (R. 3373, 3239). Instead of the blind second opinion the Jensens requested, however, Wagner sent an e-mail denigrating their request for a second opinion, and urging the pathologist to agree with the "confident" diagnosis by his "expert" pathologist as quickly as possible. He alerted his co-investigator that "the child was now 19 days post resection." (R. 3427-28.) Wagner also said that he did not want to "slow things down" by submitting a claim to the Jensens' insurer, and that the Jensens had agreed to pay for the testing personally. (R. 3428.)

Upon learning that Wagner had not honored their request for a blind second opinion, the Jensens decided to have the testing performed elsewhere. They did not have confidence that Wagner would obtain a truly independent opinion. (R. 2370-71, 2626.) The Jensens had believed the initial testing, but were starting to wonder both about the diagnosis and Wagner's insistence on immediate chemotherapy. Some red flags:

- The Jensens could find no reported cases of Ewing's in the mouth (R. 2164);
- The survival rates quoted by Wagner kept changing as he urged them to start chemotherapy (70, then 85, then 90 percent) (R. 2239-40, 2356, 2392-93, 2605-06), and Wagner seemed irritated by legitimate questions, such as why Parker

would need 45 weeks of chemotherapy if another biopsy at twelve weeks came back negative (R. 2357-58);

- Wagner had given them the names of the chemotherapy drugs that would be used by writing them on a napkin (R. 2400);

- A margin had been scheduled and then canceled, which seemed inconsistent with application of a standard procedure (R. 2124);

- Leaving a deadly tumor in Parker's mouth for another three months seemed counterintuitive (R. 2645-46);

- Wagner insisted that Parker must be experiencing eating and sleeping difficulties and losing weight, which the Jensens told him was not happening (R. 2378-79);

- The Jensens asked Wagner about Lowichik's comment that "cytogenetic" testing might be informative, but Wagner said it was unnecessary and did not explain why (R. 2372-75, 2395-96).

On May 28, 2003, the Jensens consulted with Dr. Judith Moore, a family doctor at the Modern Health Clinic in Bountiful that had successfully treated Barbara's father for prostate cancer. (R. 2225-26.) The Jensens told Moore that, if they had an objective confirmation of Parker's diagnosis, they would agree to chemotherapy. (R. 2960-61.) From Parker's records and the length of time involved, Moore told the Jensens that she was not convinced that Parker had Ewing's. (R. 1695, 2486, 2952-56, 2961.)

The Clinic's treatment of Barbara's father had been with a form of chemotherapy called Insulin Potentiation Therapy (IPT). (R. 2165, 2225-26.) The Jensens asked whether IPT might be a potential treatment if Parker had Ewing's, and requested information to take to their oncologist. (R. 1691, 1693-94, 1700-01.) At a May 29, 2003, meeting, the Jensens asked Wagner to "look into" IPT. (R. 2139-41, 3395.)

At the meeting, Barbara said, "There's got to be another test that can narrow it

down more than just maybe or invisible." Wagner said there was not. (R. 2150, 2183-85.) Moore had recommended a PET scan, which Wagner admits are positive in most patients with Ewing's, but Wagner refused the request. (R. 2380-81, 2947-48, 3218-20.)[3]

Daren expressed concern that treatment would not be effective unless the cancer were definitively identified, and said it seemed odd that the exact same treatment would be given to Parker as to someone with a large tumor in his leg. (R. 3395.) Daren's instincts were correct. Several years earlier, superficial soft tissue Ewing's had been identified as a prognostically favorable subset in which chemotherapy is not always administered. (R. 2080-83.) Parker's growth was superficial and in the squamous epithelium (the tissue beneath the tongue, essentially a form of skin). (R. 2049-50, 2063-65.)

Since the LabCorp and PCMC reports did not state the same diagnosis, the Jensens asked Wagner to test another sample from Parker's mouth, but Wagner refused. (R. 2401-02.) His response "floored" the Jensens, who thought, "why wouldn't you do additional testing, even if it was just as a safety point[?]" (R. 2577-78.) Daren explained that he was "just trying to get enough information so I can determine how to proceed with Parker." Wagner interrupted, "You don't have the decision on how we treat Parker. You can be a part of the decision." (R. 2402-03.)

Wagner told pathologist Lowichik that the Jensens had given him an article about

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[3] Moore then prescribed the PET scan, the results of which were normal. (R. 2947-48, 3525.) The PET scan did not show cancer in Parker's mouth, where the cancer cells supposedly were located. (R. 2965-66.)

IPT in which a Ewing's patient had gotten better. Rather than show her the article, Wagner told her that the article was quite old and that immunohistochemistry had not been performed. He asked Lowichik to speculate, without reading it, on whether the patient in the article might not have had Ewing's. (R. 2801.)

On June 2, 2003, a social worker working with Wagner called defendant Kari Cunningham, a DCFS case worker, with a "heads up" that DCFS might become involved. (R. 1873.) On June 5, Wagner called Daren, who was out of town, and demanded that he come in. Wagner said that if he did not, Wagner would "take his child" in "three days." (R. 2405-06.) A meeting was scheduled for June 9. (R. 0515 (Ex. 15, p. 20); 2410-11.)

At the meeting, the Jensens again asked if a new sample could be taken and tested, but the request was refused. (R. 2417, 2422-23.) According to Wagner's notes, the Jensens were asked about their plans regarding IPT, and "[f]ather indicated that he was still reviewing this information." (R. 2644, 3408.) The Jensens complained that PCMC was jumping into treatment when they were still asking about the diagnosis. (R. 2161.)

A PCMC risk management employee in attendance then "leaned forward in her chair like she was picking up a card off the table and showed it to us like this." She said she didn't want to, but "I have a card to play." She said she could report the Jensens to DCFS and "have your child in three days." The Jensens replied, "We're going to go find another hospital that will work with us. You're fired." (R. 2156-57, 2162, 2412.)

On June 12, Wagner went to DCFS liaison Dr. David Corwin, reporting, "patient with Ewing's sarcoma; family refusing conventional therapy and seeking unproven

alternative treatment methods." (R. 3378-79, 3396, 1810-11.) Wagner did not disclose that the Jensens were seeking confirmation of Parker's diagnosis. *Id.*

Dr. Corwin called Daren Jensen, who expressed concern about Wagner's refusal to run additional tests before starting chemotherapy. Daren stated that the Jensens had not decided that IPT was a solution for Parker, and mentioned that they were planning a margin to remove the surrounding tissue. (R. 1815, 1825, 2426-28, 2639.)

Daren agreed to another meeting. Dr. Corwin said he was going out of town for a few days, so a meeting was set for his return on Friday, which meeting it was believed Dr. Moore might attend. Corwin knew that the Jensens had confidence in Moore. (R. 1823-24, 1829, 1833, 2429, 2440.) Corwin told Wagner about the meeting, but Wagner said they could not wait that long. Corwin asked, "How much difference does a few days make?" but Wagner said it was "urgent." (R. 1824-1830.) Corwin told Wagner that the Jensens were planning another resection of the tumor, which made sense to Corwin, but Wagner said no, it should be left in. (R. 1826-27.) Corwin assumed that, if other diagnostic tests were available that had not been run, Wagner would have told him. (R. 1819-1820.) At Wagner's insistence, Corwin called Daren Jensen and canceled the meeting, stating that the Jensens would be reported to DCFS instead. (R. 2429.)

Meanwhile, Wagner falsely told his supervisor that he had provided all information he could to the family regarding the diagnosis, and that the Jensens had not given him any material on IPT. (R. 2754-55, 2760.) Wagner further said that Daren Jensen had canceled the meeting, and that "there were no further opportunities to meet with the Jensens[.]" (R. 2758-59, 2763, 2765.) Wagner also claimed to have discussed

numerous other things with the Jensens that he had not. (R. 2743-48, 2751-53.)

At a June 16, 2003, meeting, Wagner presented a "case summary" to DCFS that contained several material misrepresentations and omissions, including:

- that the May 20 biopsy results "confirmed" Ewing's, when Wagner knew that immunohistochemical staining cannot definitively diagnose Ewing's;
- that "[t]he Jensens requested a second opinion of the sample from Dana Farber Clinic at Harvard University. Dr. Wagner agreed to this, and the sample was sent to Boston," omitting that the sample was never tested at Dana-Farber, that he had denied a blind test, and that he had attempted to influence the outcome of the test;
- that "On May 21, 2003, Parker underwent a CT and bone scan," omitting that the results were normal;
- that "On May 29, 2003, Mr. and Ms. Jensen told Dr. Wagner that they wanted to use Insulin Potentiation Therapy as an alternative to chemotherapy," which was contrary to PCMC's own notes that the parents only asked Wagner to "look into" IPT, and also that "IPT therapy was listed on a website called Quackwatch," which he knew was untrue (R. 3395, 3398);
- that at the June 9 meeting, Wagner "asked the family if any more information would be helpful. The family declined." when the Jensens had in fact asked for testing of a new sample and been refused;
- that the Jensens had refused to meet again, when it was Wagner who refused.

Based upon Wagner's report, a referral was made to DCFS on June 16, 2003, and assigned to defendant Kari Cunningham, whose office was in a hallway at PCMC. (R. 1887-90, 2763-64, 3411). Cunningham did not want to be a social worker, and did not like doing investigations. (R. 1852, 1857-59.) She considered her workload too high, and the first thing she did with the Jensen case was unsuccessfully try to get another DCFS office to handle it. (R. 1859-60, 1865-68, 1899-1900.)

Cunningham knew that it was her duty to investigate Wagner's allegation of

medical neglect, and that the office of the Guardian ad Litem (GAL) would rely in part on her investigation. (R. 1557-58, 1560-61, 1862-64, 1869, 1960-62.) Instead, she simply assumed Wagner's allegations to be true and performed no investigation at all. (R. 1875-76, 1891, 1893-97, 1906-09, 1922-1927.) Although state law required Cunningham to contact the alleged victim's parents (R. 3431), she decided not to contact the Jensens, and instead to get their side of the story entirely from the person who was reporting them. (R. 1903-05) Cunningham took the position that, if a doctor's complaint seemed reasonable to her, she would not investigate it. She never once ran a medical neglect allegation past another doctor. (R. 1863, 1870-71, 1874-75.)

Cunningham never contacted Dr. Moore or considered letting the Jensens rely on her recommendations because Wagner said that Moore was not qualified to treat Parker. (R. 1883-84, 1913-14.) Wagner said it was an emergency, and that Cunningham needed to do something within days. (R. 1879-80.) He did not disclose that Parker's parents were questioning the diagnosis and had requested additional diagnostic tests, which Cunningham would have considered important. (R. 1879, 1881.) Wagner gave Cunningham the impression that he had done everything he could do diagnostically; he never mentioned the availability of genetic or molecular testing. (R. 1904-05, 1910-11.)

On June 17, 2003, Cunningham signed under oath a Verified Petition and Motion to Transfer Custody and Guardianship. (R. 3435-39.) The verified petition contained several factual misrepresentations, *e.g.*, that the Jensens had "indicated their intent to use IPT" when the Jensens had said they were reviewing the possibility; that "Dr. David Corwin was consulted for an independent assessment," when Cunningham knew that

Corwin was a psychiatrist consulted in connection with reporting the Jensens to DCFS, not for an "independent assessment" of Parker's medical condition; and that "the father [Daren]" canceled the Friday meeting, when it was Wagner. (R. 3435-39.) The petition also omitted material facts, including that she had not conducted any investigation; that the parents were questioning the diagnosis, that confirmatory tests had not been run, and that, if Parker did have Ewing's, it was a very unusual form. (R. 3435-39.)

DCFS filed a Motion for Expedited Hearing, specifying a hearing date of June 20, 2003. (R. 0515 (Ex. 10, pp. 0007-16).) The filings were dated June 17, but were not filed or served until June 18, *id.*, so the "three days" Wagner had touted turned out to be two.[4]

At about this time, Wagner e-mailed Cunningham a page from *Principles and Practice of Pediatric Oncology* by Pizzo and Poplack, "the primary pediatric solid tumor textbook," that discussed chemotherapy. (R. 2687, 2741-42, 3188-90.) Wagner omitted pages that said that "molecular diagnosis has become the gold standard" for diagnosing Ewing's, that an 11;22 translocation was definitive, and that repeatedly emphasized the superiority of genetic/molecular testing to confirm a Ewing's diagnosis. (R. 3358-63.)

Meanwhile, the Jensens scrambled to find an attorney. (R. 2329a-30.) Eventually,

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[4] The timing of the two-day hearing might not be coincidental. If the enrollment deadline were measured from the date of diagnosis, as in the *New England Journal of Medicine* article, Day 30 would have been June 20, 2003, which might explain why Wagner told Corwin he could not wait three days to meet with the Jensens on June 20 even though Corwin wanted to; why the DCFS filings were backdated so that the "three day" hearing could be held on June 20; and why Wagner told Cunningham at the June 16 staffing that Parker could be dead in "five days."

they found Frank Mylar, a former Assistant A.G. who had served as general counsel to the Utah Department of Health and to the Department of Corrections. (R. 3505-06.)

A friend told the Jensens that he had a connection with a cancer specialist in Vienna, Dr. Jeorg Birkmayer, whose resume said he had received a medical degree from the University of Munich, served as a visiting research fellow at several American universities and head of the Division of Tumor Oncology at the University of Munich, and was a member of the American Association of Cancer Research. (R. 3366.)

The Jensens faxed Parker's medical records to Dr. Birkmayer, who told them he questioned whether Parker had cancer. (R. 2170-71, 2485.) Birkmayer agreed to perform an independent evaluation, including new tests on the slides. (R. 2603-04.) Anticipating the consultation, the Jensens applied for a passport for Parker. (R. 3278-79, 3678.)

The Jensens also called the oral surgeon's office to schedule the margin. (R. 2434.) The surgeon immediately called Dr. Muntz, who said he did not object to repeating a biopsy. Muntz said that the Jensens were refusing chemotherapy, and asked the surgeon to encourage them to begin treatment. (R. 1717-19, 1721, 3288.)

The oral surgeon understood that the Jensens wanted "an objective second opinion," which seemed reasonable to him. (R. 1735-36, 1718.) However, instead of honoring the Jensens' request for a blind second opinion, he called a close friend pathologist at the University of Washington, who agreed to "help out." (R. 1705-06, 1724, 1740-44, 2117-18.) The surgeon mailed the new sample to his friend, underlining "Ewing's" as a reminder. (R. 1729, 3585.)

Upon receiving the sample, the surgeon's friend called LabCorp to get their earlier results, ran a few tests that are facially inadequate to diagnose Ewing's, got a copy of Dr. Lowichik's report, wrote a report stating that a finding of a non-specific antigen (CD 99) "supported" the diagnosis (omitting the results of one key test that apparently turned out negative), signed her name and the name of another pathologist who had no involvement, and sent the report to the surgeon. (R. 0515 (Ex. 38), 2066-2070, 2075, 3291-93.)[5]

On June 19, the Jensens and their attorney consulted a doctor at LDS Hospital who told them that "he found no present evidence of Ewing's Sarcoma or any other cancer but that he was uncomfortable second-guessing the doctors at Primary." (R. 2494-95, 3508-09.) He predicted that the second pathology review might change the diagnosis, but that it would still be in the same "category" as Ewing's. (R. 3073-74.)

The Jensens appeared in juvenile court the next day. Representing DCFS was defendant Assistant A.G. Susan Eisenman (R. 1962-64), who assumed that Cunningham had performed the statutorily prescribed investigation. (R. 1960-62, 2030.) At the June 20 hearing, Mylar indicated that the Jensens were obtaining "further tests on the actual sample" (R. 0515, Ex. 33a, pp. 5-6). The juvenile court continued the case until July 10 in the hope that the parties would reach a resolution. (R. 3454-55.)

On June 23, 2003, Dr. Birkmayer sent Eisenman a letter stating that he had

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[5] The UW pathologist later received a request from a hospital for the second sample, but did not release it. That same day, she removed the uninvolved doctor's name from her report. (R. 3084-85, 3099-3100, 3602-04.) A later effort by a Boise doctor to get the second sample from this pathologist also proved unfruitful. (R. 2713.)

reviewed Parker's records and would be assuming care of Parker, giving a brief overview of his credentials and experience. (R. 3529.) Eisenman knew that Birkmayer's letter raised doubt about the diagnosis, and that the Jensens wanted confirmation of the diagnosis before beginning treatment. (R. 1994, 3459, 3506, 3509-10.)

On June 25, 2003, Daren called the oral surgeon to ask about the test results from UW. During the call, Christensen admitted that he had told the UW pathologist about the prior diagnosis, which frustrated Daren and Barbara. (R. 1740, 2119.)

Upon reviewing the UW report, Dr. Birkmayer told the Jensens, "What is going on over there? CD 99 is not definitive of Ewing's Sarcoma." (R. 2116, 2450, 2633.) Dr. Moore likewise reaffirmed her doubt as to whether Parker had Ewing's. (R. 2633, 2944-46, 2957-59, 2962.) However, Moore indicated that she was not interested in getting involved in a court case. (R. 2144-45, 2221-23, 2620-23, 2556-57.)

On July 2, 2003, defendant Eisenman e-mailed Dr. Birkmayer, inquiring whether the Jensens were planning on traveling to Vienna, asking for the name of doctors with whom he usually consulted in the United States, and asking if he was certified to practice in the United States. Eisenman cited some studies associated with his clinic that she had found on the internet and asked if he intended to employ the same treatment for Parker. She stated that the American Academy of Pediatrics had established a standard of care for pediatric cancer patients in the United States, asked whether there was something similar in Austria, and requested a copy. She asked Birkmayer for information concerning his clinical experience and experience with child patients. (R. 1990, 3535.)

Eisenman knew that the AAP guidelines, which did not come from Wagner or the

guardian ad litem (GAL), actually said that they were intended to suggest "state-of-the-art" care, and "do not indicate an exclusive course of treatment or serve as a standard of medical care." (R. 1982-83, 1991, 3231-33.)

In another letter dated July 9, Dr. Birkmayer said he was not convinced from the pathology reports that Parker had Ewing's, citing the lack of definitive testing, the slow growth rate, and the location, and suggesting "more precise testing of the tissue prior to proceeding with a 45-week chemotherapy regimen." (R. 3479-80.)

Eisenman recognized that Dr. Birkmayer had "questioned the diagnosis of Ewing's sarcoma." (R. 3546-47.) However, she told Mylar that she would not allow the Jensens to use Birkmayer because he was not licensed in the United States. (R. 2455-56, 3507.) Eisenman knew that the State could not legally prohibit parents from taking their child to another country for medical treatment. (R. 1987-89.)

Eisenman also began insisting to the Jensens' counsel that only a "board-certified pediatric oncologist" was qualified to treat Parker, and therefore she would not permit the Jensens to use any physician who was not so certified. (R. 3002-05, 3008-09, 3507-08, 3029-31.) Eisenman knew that the law did not require the Jensens to use a board-certified pediatric oncologist (R. 1992, 2016). She also knew that Wagner – the doctor who had reported the Jensens in the first place – was not a board-certified pediatric oncologist. (R. 1980-81.) (Neither was the head of pediatric oncology at PCMC. (R. 2728.))

Trying to find a pediatric oncologist that DCFS would accept, Nakamura called a pediatric radiologist he knew at the Children's Hospital of Los Angeles (CHLA). The

radiologist said that Ewing's in oral tissue would be highly unusual, and it would be prudent to do additional testing to confirm that it was Ewing's. (R. 2972-75, 2983-84.)

On July 10, 2003, the Jensens went back to juvenile court for a pre-trial conference. A stipulation was reached in which a Dr. Tishler at CHLA would conduct independent testing, and then make recommendations. (R. 2911-12, 3555.)[6]

After the conference, Eisenman e-mailed Cunningham that "I view today's hearing as a pretty strong indication from the Judge that he is not going to allow us to intervene with this family." (R. 1997, 3403.) Eisenman had an emotional tie to the case, telling Nakamura that she had had a personal situation in her family and she knew that the Jensens were just in denial. (R. 2993-96.) Eisenman knew, but never disclosed to the court, that genetic testing was usually done in Ewing's cases, and that other tests were available to confirm Parker's diagnosis. She admits that "the court might have been interested in that." (R. 1011 (Ex. 2, pp. 137-138).)

The Jensens arrived at CHLA on July 21, 2003. (R. 3603-04.) Dr. Tishler had not reviewed Parker's records, and left the room during the meeting to see whether the samples had arrived yet. He said that no, he had not seen anything yet, which the Jensens assumed meant that the tissue was not there yet. (R. 2120-21, 2302, 2608-09.)

Tishler admits that he indicated at this meeting that Parker needed chemotherapy based solely on the earlier pathology reports, not on evaluations by his own institution.

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[6] Nakamura advised the court of one problem that could affect the testing: PCMC had lost Parker's tissue. (R. 3545.) The samples were missing for nearly two weeks until "eventually" they were found. (R. 1784, 1974-75, 2813, 2881-82, 3512.)

He said that PCMC was a good hospital and he would be inclined to defer to it, even though he had not read all the documents yet. (R. 2193, 2232, 2464-66, 3088-89, 3098-99.) The Jensens were dismayed. They understood that the July 10 stipulation required a fresh evaluation, not a deferral to PCMC. (R. 2234, 2499-2500.) Their attorney and the GAL had the same understanding. (R. 2885-86, 2911-12, 3015-16.)

Although Tishler said he already had a recommendation based on PCMC's reports, he said he would have molecular testing done on Parker's tissue. (R. 3088-89, 3094-95, 3113.) Eisenman, meanwhile, was moving forward with removing Parker from his parents' custody. Even before the Jensens arrived in Los Angeles, she had drafted a warrant to take custody. (R. 3412.) Defendant Wagner (who had moved to Ohio) signed a July 22, 2003, affidavit for that purpose, repeating the misrepresentations and omissions from his earlier reports to Corwin and DCFS. (R. 3156-57, 3607-09, *see* p. 12-13, *supra*.)

Because Tishler had already expressed an inclination to defer to PCMC, Daren called another doctor to whom they had been referred, Dr. Charles B. Simone. (R. 2456-57, 2502.) From Simone's website, the Jensens concluded that he had served as a medical oncologist and tumor immunologist at the National Cancer Institute, helped organize the Office of Alternative Medicine of the National Institutes of Health, and had authored several books about cancer. (R. 3339-43.)

Simone said he would accept Parker in his care. He said that chemotherapy was a possibility, but that until he performed a full examination, he could not recommend a treatment. (R. 2190-02, 2461, 2504-05, 2617.) From Lowichik's original report, Simone

questioned whether Parker might have lymphoma, and recommended that the sample be sent to an expert at the National Cancer Institute. (R. 2507, 3063-64, 3612-13.)

On July 24, 2003, Tishler at CHLA sent Daren Jensen an e-mail stating, "I have asked Dr. Gonzales to perform the specific genetic testing we discussed on Tuesday. After we complete testing here we can release the tissue block to an outside consultant, either our colleagues or an institution of your selection." (R. 3617.)

The day before a July 28, 2003, court conference, Dr. Simone told the Jensens and Nakamura that he was not willing to become involved in a court battle. (R. 2188-89, 2618-19.) Before court the next day, the Jensens gave Simone's information to Eisenman. Because Simone only ruled out acting as Parker's primary physician if he were dragged into a court battle, the Jensens hoped that Eisenman would allow him as their physician because he was an oncologist. (R. 2246.)

In the July 28 conference, Tishler was conferenced in by phone. (R. 3103-04.) He said that CHLA's testing was "being done right now," and that it would be completed after the tissue blocks came back from NCI. (R. 3558.) Tishler had not seen any pathology report from his institution, and knew that the lab was still working on the genetic studies. (R. 3104.) He stated, "We will be doing the comprehensive testing and [treatment] is to occur when we are finished." He estimated he would have the test results and be prepared to make a final recommendation in ten days. He confirmed that he would not be issuing a final recommendation until he had those test results. (R. 0515 (Ex. 33c, pp. 23-24), 3481-82, 3560-62.) Based upon the prediction that CHLA's results and recommendations would be in within ten days, the juvenile court directed that

chemotherapy was to begin by August 8. *Id.*

When asked whether she could team up with Dr. Simone, defendant Albritton (Wagner's replacement in the case) stated, "My understanding of the fact is that he is not board certified in oncology, either pediatric or medical oncology." (R. 0515, Ex 33c, pp. 50-51.) At that time, Albritton knew, and did not disclose, that defendant Wagner was not a board-certified pediatric oncologist. (R. 1488, 1512, 1980-1981, 3246, 3263-65.) Cunningham testified that, had she known that Wagner was not a board-certified pediatric oncologist, she would have brought it to the court's attention at that time. (R. 1924-25, 1931.) The court said that Simone could not be Parker's primary physician. (R. 3562.)

The juvenile court indicated that CHLA's test results would be dispositive (R. 3481-82), and set an evidentiary hearing for August 20 on DCFS's petition for custody. (R. 2896, 2986-87, 3481-83.)

Tishler never notified anyone that the CHLA testing was complete. Between July 28 and August 8, the GAL called and e-mailed Tishler directly, but Tishler did not report any test results to her. (R. 2862-63, 2883-84, 2887-88, 3101-02.) On August 4, 2003, Dr. Tishler sent Eisenman an e-mail, which did not mention any results. (R. 3101, 3616.) Daren contacted CHLA several times to ask about test results, with no success. (R. 2516, 2607-08.) The Jensens never went back because "they never got back to us and told us that they had done the test and that he had [Ewing's]." (R. 2178, 3105.)

On July 31, 2003, the National Cancer Institute doctor expert issued a report that said in part: "The site of presentation would be very unusual for PNET. Furthermore,

FLI-1 protein expression is not specific as vascular tumors can also be positive. Molecular studies for the 11;22 translocation are being performed at Children's Hospital, and should be helpful in precise classification. However, the histological and immunophenotypic features are not those of lymphoma." (R. 3623.)

Because Simone as a primary care physician was no longer an option and CHLA had already indicated an inclination to defer to PCMC, the Jensens continued to look for someone who would perform the independent evaluation they wanted. (R. 2508, 2193.) They saw a story about a boy with a blastoma whose parents wanted to go to the Burzynski Clinic in Houston. (R. 2197.) From its website, it appeared that the Clinic had been studying and treating cancer since 1977, that its staff included a physician who was board-certified in internal medicine and hematology, and that it "work[ed] with other nearby medical providers to offer complete treatment for patients." (R. 3334, 3336-37.)

Daren called the Clinic to ask if it had a board-certified pediatric oncologist, and was told yes. (R. 2204-05, 2480-81, 3129.) (Nakamura was also informed that the Clinic had a qualified physician on staff who treated cancer (R. 2981-82.) PNET was on the list of diseases that the Clinic treated (R. 3134-38). The Jensens faxed Parker's records to the Clinic (R. 2196), and an appointment was made to admit Parker for an evaluation to begin August 12. (R. 2202, 2247-2248, 2264, 2648, 2658-59.)

The Jensens believed that, if Parker was not in chemotherapy by August 8, they would be permitted to explain why at the August 20 hearing. (R. 2194-95, 2259, 2288-89, 2466-67, 2508-11, 2515, 2521-22, 2543.) The Jensens' attorney considered that a reasonable belief in light of the proceedings to date. (R. 2986-87.) The Jensens, their

attorney, and the GAL all understood that, under the stipulation, the Jensens were not required to submit Parker to chemotherapy until an independent diagnosis had been rendered by CHLA based on the results of its testing (R. 2549-50, 2885-86, 2911-12, 3015-16), which had not been issued yet.

In anticipation of the upcoming tests in Houston, Parker suggested a get-together with extended family members, and a friend volunteered his cabin on the Idaho side of Bear Lake. (R. 2268-2270, 2521, 2567.) On the morning of August 8, the Jensens left with their children and boat for the cabin, where they met other relatives. They planned to leave their other children with Barbara's parents in Idaho and leave for the Clinic in Houston on Sunday. (R. 2269-72, 2275, 2518-19, 2526, 2533, 2567.)

Although Eisenman knew that the controlling test results from CHLA were not in yet, she proceeded with her plan to transfer custody of Parker. At 1 p.m. on August 8, she called a police officer, Travis Peterson, with whom she was acquainted and told him she would need help removing a child. (R. 1943-44, 2020-21, 3641.)

Defendant Cunningham signed an affidavit that she admits presented only the State's side of the story and contained misleading information. (R. 1937, 3440-46.) For example, Cunningham admits that she knew by then that testing had not been conducted at Harvard, that Parker's CT and bone scans were normal, and that the Jensens were not pursuing IPT, all of which was contrary to statements in her affidavit. She never spoke with a pathologist, as her affidavit claimed. She said the Jensens had consulted "a man" in Vienna, rather than naming Birkmayer or identifying him as a doctor. (R. 1935-40.) She claimed that Tishler had said "Parker should commence chemotherapy," when she

knew he had actually said that he would not be making final treatment recommendations until all of the testing was in, including genetic testing. *See* p. 22, *supra*.)[7]

Eisenman and Cunningham took an order and warrant down to court, where an off-the-record hearing occurred in chambers. (R. 2861, 3481-83.) The Jensens' attorney, Nakamura, was contacted by telephone, and told the court about the Jensens' arrangements with the Burzynski Clinic. (R. 2011, 2024.)

Cunningham paged defendant Albritton, who represented that Burzynski was "NOT a board certified oncologist-hematologist and that his clinic is well known for providing extremely controversial therapy." (R. 1943, 2024-25) (emphasis in original).) Albritton did not disclose that another doctor at the clinic was board-certified. She also represented that the Clinic was only conducting clinical trials of nonapproved FDA treatments of cancer not involving chemotherapy (R. 2012, 2863-64, 3032-34), which was untrue. The Clinic offered chemotherapy, and FDA trials were only one of its departments. (R. 3121-22, 3125, 3132-34.)

No one informed the court that the CHLA test results were not in yet. (R. 2863.) The judge signed Eisenman's order and warrant transferring custody of Parker to the State. (R. 2013, 2027, 3485-86.) Cunningham then went to the Jensens' house to execute the warrant. A neighbor said she thought they had gone water skiing, as they had taken their boat with them, and a note appeared to have had been left by another

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[7] Cunningham submitted another affidavit on August 18 to continue the custody warrant that repeated these misrepresentations. (R. 3440-46.)

neighbor. It was evident that the Jensens "had been gone all day." (R. 2866-68, 3642.)

At about 6 p.m., Daren was informed by Nakamura that a "pickup order" had been issued, and that Parker was to be placed in DCFS custody to start chemotherapy. (R. 2273, 2529.) After consulting with an attorney in Idaho, the Jensens concluded that the best action would be to get the evaluation and then bring Parker back for the August 20 evidentiary hearing. Otherwise, the State would take him and begin chemotherapy, and they would never get the second opinion they wanted. (R. 2278-79, 2532, 2535-39.)

The next day, Cunningham went back to the Jensens' home to execute the warrant, recording in her activity log that it was apparent that the Jensens had not returned home. (R. 3720.) Eisenman faxed a letter to the Burzynski Clinic prohibiting it from seeing Parker, and requesting that she be contacted immediately if the Jensens came there. (R. 2014-15, 2891-92, 3732.) On August 13, she made another report to Officer Peterson, who opened up a new case file. (R. 3658-61) She also arranged for a meeting with the Salt Lake County District Attorney's office. (R. 0515 (Ex. 33d, p. 12), 1946, 2904-05.)

Later that day, an unscheduled conference call took place with the juvenile court in which the August 20 evidentiary hearing was changed to a status/review hearing. (R. 0515 (Ex. 33d, pp. 12, 14).) During that call, Eisenman misrepresented that the Jensens "have not responded to phone calls left on their cell phone or home phone" (R. 0515 (Ex. 33d, p. 3)), when no such messages had been left. (R. 2545-47.)

Eisenman subsequently realized that no order had ever been entered on the July 28 hearing. (R. 2026.) (The minutes of the hearing had not been filed until August 11 (R. 3735-36).) Someone arranged for an order to be signed on August 15, 2003. (R. 3702-

04.) That same day, the meeting Eisenman had arranged was held with Deputy D.A. Angela Micklos. (R. 2919, 3744.) Based upon a (mis)representation by Eisenman that the Jensens had fled the state after the August 8 order transferring custody was issued, Micklos elevated the charges to felony child kidnapping. (R 2928-29.)[8] Warrants on the felony charges were activated nationwide, and extradition was initiated. (R. 2917-18, 2923-25, 3683, 3764-73, 3777, 3781.)

Eisenman knew that the Jensens had not fled the state after issuance of the custody order. Among other things, she had Cunningham's logs (R. 1961), which said the Jensens had not been home all day when Cunningham arrived with the warrant. It also seems inherently improbable that two people fleeing the state would haul their boat with them and their other children, who could have remained at home with Barbara's brother.

While still in Idaho, Barbara Jensen let Parker drive her Suburban down her parents' driveway to get the mail. He had an accident, and neighbors called the police. (R. 2280-83.) Daren Jensen was arrested on the child kidnapping warrant, and spent four days in jail until his father-in-law was able to post $5,000 bail. (R. 2569.)

Barbara left for Houston with Parker, another son, and her mother. (R. 2318, 2320.) Upon arrival, however, she received a message from the Clinic: Based upon Eisenman's letter, don't come here. (R. 2206-07.) Barbara and Parker could not return

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[8] Eisenman does not admit making the statement, but the only persons at the meeting with knowledge of the Jensens were Eisenman, Cunningham, and the GAL, and it was not the latter two. (R. 1946-48, 2905-08.) Around this same time, an assistant A.G. made the same statement to Attorney General Mark Shurtleff; Eisenman was the only

home; news reports flashed their photographs repeatedly and said they were the subject of a manhunt. (R. 2323-24.)

The August 20, 2003, review hearing proceeded without the Jensens. At the hearing, Eisenman made several factual misrepresentations, including:

- "to this date I have never received anything from Dr. Birkmayer other than a letter," when she had received three letters, and had told the Jensens they could not use Birkmayer;

- "From Dr. Simone I have never received anything other than a letter," failing to disclose her knowledge of a telephone call on July 30 from Simone to PCMC in which Simone stated a belief that he could convince the Jensens to have appropriate treatment for Parker. (R. 3620);

- "From the L.A. Children's Hospital I have received nothing except for the telephone information that I solicited from Dr. Tishler," failing to disclose the August 4 e-mail she had received from Tishler;

- "I'm going to state for the record that I did contact the Birkmayer Clinic to ask them what kind of treatment they had for Parker. Mr. Mylar sent me a letter asking me not to contact them further and I never heard a response." (R. 0515 (Ex. 33E, p. 22).) That was untrue. Mylar responded to all requests for information from Eisenman. (R. 3508.)

The court scheduled an evidentiary hearing for October 8-10, 2003. (R. 3569-70.)

On August 22, 2003, defendant Cunningham issued a finding that the medical neglect allegations against the Jensens were substantiated. (R. 1949-50, 3344-45.) At that time, her records reflected total activity on the case of 3 hours and 46 minutes, of which one hour consisted of a meeting between Parker and *the GAL* (not Cunningham). (R. 1919, 1921.) Cunningham later went back and padded her logs with nine more hours,

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AAG on the case, and she met with Shurtleff at about that time. (R. 2039, 3042-43, 3053-55.)

including non-existent activities (*e.g.*, recording time for a hearing that she did not attend). (R. 1915-1920, 1945.)

In September 2003, Eisenman left for a new job. (R. 2028-29.) At that time, she made a number of factual misrepresentations and omissions to her supervisor, including:

- Failing to disclose that DCFS/Cunningham had not investigated the reporting doctor's allegations, which he would have recognized as improper.
- Failing to disclose that the Jensens had asked for genetic testing and been refused.
- Misrepresenting that the Jensens had fled the state after the warrants were issued.
- Misrepresenting that the Jensens had chosen not to use Dr. Birkmayer.
- Misrepresenting that the Jensens had declined a second opinion from Harvard because their insurance would not pay for it.

(R. 3038-39, 3042-43, 3045-49, 3053-55.)

At the request of the Utah governor's office, DCFS director Richard Anderson flew to Idaho and met with Daren Jensen. (R. 1570-71, 2579-80, 3813-14.) Anderson told the Jensens that he would be running the case from then on. (R. 2583-84.)

Anderson relied in part on a factual timeline provided by Eisenman (R. 1551, 1972-73, 3813-14), which contained numerous misrepresentations and omissions. For example, Eisenman omitted the key fact that the Jensens were questioning the diagnosis, and instead represented that the Jensens were simply rejecting chemotherapy as a treatment. Eisenman's timeline also:

- Falsely indicated that the Jensens were pursuing IPT as of July 10, when she had been informed by the Jensens' attorney a week earlier that the Jensens were not committed to IPT. (R. 3509, 3515-16.)

- Misrepresented that a second opinion was not obtained from Harvard because the Jensens "declined to pay the consultation fee." (R. 2370-71, 2639.)

- Misrepresented that the LDS Hospital doctor had performed "a PET scan and other tests," when he had performed no tests at all (R. 3076), and that Eisenman had no records of this consultation, when the Jensens' attorney had given her a copy of a letter from him. (R. 3509.)

- Misrepresented that Wagner did not contact DCFS until after the June 9 meeting, when DCFS's own records showed contact on June 2.

- Misrepresented that the Jensens had canceled the Friday meeting, when it was Wagner who canceled.

- Misrepresented that PCMC oncologists did not know that a second excision was going to be performed on Parker's tissue, when Wagner was informed of it ahead of time, and the procedure itself was cleared with Dr. Muntz at PCMC.

- Misrepresented that the Jensens voluntarily chose not to use Dr. Birkmayer, when she had told them they could not use Birkmayer.

- Omitted the key fact that the Jensens were not required to begin treatment until CHLA completed genetic testing, the results of which had not been received by August 8 (which Eisenman knew, having received the most recent communication from Tishler on August 4, which did not mention any results);

- Implied that it was the police, rather than she, who contacted the District Attorney's office to pursue criminal charges.

At the meeting in Idaho, Anderson was impressed by the extent of the Jensens' research. (R. 1568, 1572, 1616, 3813-14.) He told Daren, "I understand you're a great parent. I can see that, but we can't let you go. We can't have it over. It's gone too far." He later reiterated to Barbara and Daren that he could tell they weren't neglectful parents, but that things had gone too far and he couldn't let them go. (R. 2293, 2581-82, 2585.)

Anderson concluded that the events to date were consistent with DCFS policy, because Cunningham had been told that Parker could die in "five days" if chemotherapy

did not begin, which triggered "emergency" procedures. (R. 1552-53, 1596, 1610-1611, 1681-82.) But for that representation, Anderson says, the Jensens would have received a "thorough pre-removal investigation," including a meeting with the caseworker to discuss concerns and options. (R. 1556-58, 1614-15, 1671.)

However, there is evidence that DCFS's custom and/or policy was not to investigate medical neglect reports made by a PCMC doctor. (R. 1676-77.) Thus, for example, DCFS usually obtained second opinions from PCMC on reports from outside doctors, but the reverse was not true. (R. 2031-33, 2831-32, 2836; *see also* p. 12-13, *supra*.) Furthermore, even under DCFS's emergency provisions, Cunningham was still required to, and did not, "meet with the parents, attempt to negotiate voluntary compliance with medical treatment pending or in lieu of court involvement, and assess and document the parents' reasons for refusal to treat." (R. 3431.)

Defendant Anderson had the authority to (and eventually did) authorize the dismissal of DCFS's medical neglect allegations against the Jensens. (R. 1564, 3018-19.) However, he was unwilling to do so even if a licensed physician assumed care of Parker, because it was his position that, if there were conflicting opinions between a parent's physician and a physician upon whom DCFS was relying, the parents could not make the choice; instead, DCFS would require them to go to court and have the court decide "the more credible or the best treatment that is going to happen from the recommendation of the State or the parents." (R. 1565-67, 1678.) Anderson also refused to authorize a dismissal unless Parker was treated by a board-certified pediatric oncologist. Although he says his hands were tied by prior court orders, he admits that he had the authority to

eliminate that requirement, and eventually did. (R. 1577-78.)

At the August 29, 2003, meeting, Anderson "agreed . . . to go back and get the warrants lifted." (R. 1575, 1594.) Barbara and Parker were then able to rejoin their family in Idaho. Immediately after a September 3 hearing, however, new warrants were issued. (Docket in Criminal Case, 09-03-03 entry.)

By this time, the Jensens were struggling financially. Daren had lost his job after the neglect proceedings began, and his health insurance had lapsed. (R. 2587.) Anderson initially said that the State would pay for additional testing, but only if the Jensens agreed to place Parker in foster care. (R. 2587-88.)

To meet Anderson's requirement of a board-certified pediatric oncologist, the Jensens agreed to have a Boise physician, Dr. Johnston, perform an independent evaluation, including new testing. (R. 0515 (Ex. 33h, p. 9).) Anderson understood that, under this September 5, 2003, stipulation, Johnston was not to make recommendations until the testing was completed. (R. 1586-87.) Contrary to the stipulation, however, Johnston informed Anderson that he had told the Jensens at their first meeting that he had a "strong inclination" and there was "every indication" that he was going to recommend chemotherapy. (R. 1588, 1598-99, 2473-74, 2669.)

At that first meeting, Dr. Johnston informed the Jensens that he had learned from CHLA that its genetic testing had been unable to document an 11;22 translocation. (R. 2474-75, 3090, 3303.) (This was the first time anyone heard any results from CHLA. (R. 2473.)) Speculating that CHLA's negative result resulted from degradation of the sample's RNA, Johnston had the sample sent to Sacred Heart Medical Center in Spokane

for molecular testing using DNA. (R. 3303.) Johnston then called Anderson and said that he was going to call the Jensens in two days and recommend chemotherapy, even though the genetic testing was not back yet. (R. 1601, 1604-06.) Anderson did not disclose that communication to the Jensens or the juvenile court.

On September 26, 2003, Dr. Johnston announced, "I learned yesterday that the cytogenetics lab at Sacred Heart Medical Center in Spokane has confirmed a t(11;22) translocation in Parker's tumor cells, confirming the diagnosis of Ewing's sarcoma." (R. 3807.) Johnston admits that this statement was not true. Sacred Heart reported "a" rearrangement involving the 22 chromosome, but could not confirm an 11;22 translocation. (R.2060, 2676-78, 2701-03, 3817-22.) Rearrangements of the 22 chromosome are not specific to Ewing's. (R. 2057-58, 2098-99, 3165-66, 3204-05.)[9]

It was evident to Dr. Johnston that all of the pathologists prior to his involvement had been reluctant to call Parker's condition Ewing's. (R. 1791-92, 2699; *also* 2696-2701 ("suggestion" and "consistent with" indicate uncertainty). Johnston's pathologist was also hesitant because the immunohistochemical testing was equivocal. Therefore, he and Johnston decided to defer to the original PCMC pathologist and call it Ewing's. (R. 1600, 2214-15, 2235-37, 2476, 2560-61, 2719-21, 3303, 3572-73, 3576-77.)

The Jensens balked at Johnston's actions. Shortly afterward, defendant Anderson agreed to stop insisting on a board-certified pediatric oncologist, and allowed Parker to

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[9] Johnston says he does not know why he "misspoke," but admits that he became "wrapped up in this whole situation to the point that it became a bit of an obsession." (R. 2692.)

be treated by any licensed physician. He approved a motion to voluntarily dismiss the DCFS petition. (R. 1587-91.)

Criminal charges in Utah were still pending, on which the Jensens had been booked and released in September. (R. 3760, 3784.) The child kidnapping charges carried a mandatory minimum sentence higher than that for first-degree murder, and going to trial would have cost the Jensens thousands of dollars. (R. 3022-23, 3025.) In exchange for a dismissal of the first-degree felony charges, the Jensens were required to enter into a plea in abeyance on the misdemeanor custodial interference charges. (R. 3778-79, 3823-24.) The Jensens had to admit to factual elements necessary to support the prima facie elements of the misdemeanor offense, but were not required to disclaim the existence of defenses that could have been asserted at trial. (R. 2926-27.) The Jensens' pleas were not to be entered as a conviction. They would be held for 12 months, at the end of which they would be withdrawn, replaced with not-guilty pleas, and the case would be dismissed. (R. 2926-27, 3021-22.)

On October 31, 2003, the GAL forwarded an e-mail to Eisenman from Dr. Johnston in which Johnston said that he "spoke to Dr. Moore, who is taking care of Parker now. She actually sounds pretty reasonable." (R. 3413.) In November 2003, the Jensens had a margin performed on Parker. (R. 2114-15, 2216.) A Stanford University pathologist examined the tissue removed and reported no sign of cancer. (R. 2942-43.)

The Jensens took Parker to see Dr. Moore regularly, but eventually stopped because Moore said there was nothing to treat. (R. 2252, 2941-43.) Cunningham's neglect finding was changed from supported to unsupported, but the Jensens are still in

the DCFS system. (R. 1679-80, 1916-17.) Six years later, Parker is alive and well.

SUMMARY OF ARGUMENT

The trial court's ruling that res judicata bars the Jensens' state law claims is erroneous for several reasons. The court first erred in deferring to the federal court's interpretation of the federal constitution without undertaking any independent assessment of the Jensens' state law claims or the record. It is contrary to principles of state constitutional analysis to accept an interpretation of the federal constitution as the presumptive scope of state constitutional rights.

The court further erred in ruling that the Utah Constitution did not afford the Jensens any protections against the type of conduct reflected in the record. The inalienable rights recognized and guaranteed by Article I, § 1, include the fundamental right to make decisions regarding one's family, including health matters. Interference with those rights is presumptively unconstitutional, unless a defendant can prove that his actions were narrowly tailored to achieve a compelling state interest. None of the types of alleged misconduct here (misrepresentation and omissions, forcing the Jensens to follow the recommendations of a state-preferred physician rather than the physician of their choice, reporting the Jensens to DCFS because they refused to start chemotherapy without reasonably requested diagnostic testing, and failing to investigate medical neglect allegations before making them) satisfies either criterion.

Similarly, precedent form this Court and sister courts, clear and longstanding statutory prohibitions, and the background and intent of the Framers contradict the trial court's (implicit) ruling that the defendants' actions were not violative of the substantive

and procedural due process rights guaranteed in Article I, § 7.

With respect to Article I, § 14 (search and seizure), a state actor's making of material misrepresentations and omissions to a court and others to is inherently unreasonable. The Framers of the Utah Constitution had endured harsh consequences from the use of falsehoods by government actors, lending even greater force to the protections afforded by this section. In light of those same experiences, the Framers also would have intended the protections of Section 14 to extend to both custodial and non-custodial seizures.

Although its incorrect interpretation of the state constitution requires reversal in itself, the trial court's ruling is also erroneous because the defendants did not establish as a matter of law all of the elements of res judicata. There was no "earlier proceeding," the Jensens' state claims and issues were not finally adjudicated on the merits, and the state claims and issues are distinct from those decided by the federal court. Additionally, the policy considerations underlying res judicata are not present, reaffirmed by the federal court's declination to rule on state claims because of the "important" issues raised.

ARGUMENT

I. THE UTAH CONSTITUTION CONFERS BROADER PROTECTION THAN THE FEDERAL CONSTITUTION.

As noted above, the trial court's application of res judicata was based upon its conclusion that the Utah Constitution did not afford the Jensens any broader protections than the United States Constitution (as interpreted by Judge Stewart). Because Judge Stewart ruled that the federal constitution did not protect the Jensens at all from the defendants' actions, if this Court concludes that the Utah Constitution does afford such

protections, by necessity its protections are broader than those of its federal counterpart.

A. State constitutional analysis in general.

In earlier days, disposition of state constitutional claims typically began with an analysis of federal law, followed by an assessment of whether any reason existed to stray from whatever federal courts had opined at the time. This variation on the "lockstep" theory (in which state constitutions are presumed to have the same scope as their federal counterpart) was initially endorsed by this Court. *See, e.g.*, *State v. Earl*, 716 P.2d 803, 805-06 (Utah 1986) (recommending analytical process from *State v. Jewett*, 500 A.2d 233, 236-38 (Vt. 1985)); *see also State v. Gunwall*, 720 P.3d 808, 811-13 (Wash. 1986).

Over time, state courts began to recognize the inappropriateness of deferring the construction of their own state's constitution to a court charged with construing a national constitution. *See, e.g.*, *Davenport v. Garcia*, 834 S.W.2d 4, 16 (Tex. 1992) ("Our Texas Forbears surely never contemplated that the fundamental state charter, crafted after years of rugged experience on the frontier and molded after reflection on the constitutions of other states, would itself veer in meaning each time the United States Supreme Court issued a new decision"); *State v. Watts*, 750 P.2d 1219, 1221 n.8 (Utah 1988) ("choosing to give the Utah Constitution a somewhat different construction may prove to be an appropriate method for insulating this state's citizens from the vagaries of inconsistent interpretations given to the fourth amendment by the federal courts").

A state court construing its own constitution "do[es] not share the strong limitations perceived by [the U. S. Supreme Court] in its ability to enforce constitutional protections aggressively. Those limitations arise from the structure of our federal system,

the Court's role as final arbiter of at least the minimum scope of constitutional rights for a vastly diverse nation, and the Court's lack of familiarity with local conditions." *State v. Hunt*, 450 A.2d 952, 91 N.J. 338 (1982); *see also* John W. Shaw, "Principled Interpretations of State Constitutional Law–Why Don't the Primacy States Practice What They Preach," 54 U. PITT. L. REV. 1019, 1028 (1993) (primacy allows tailoring of state constitutional protections to the values of state residents, "rather than enforcing the lowest common denominator of broadly shared national values").

Factors in state constitutional analysis include: "legislative" history, structural and textual differences between the state and federal constitutions; whether the subject matter is of local interest; state history, traditions, and public attitudes; sister state law; and "the common law, our state's particular . . . traditions, and the intent of our constitution's drafters." *West v. Thomson Newspapers*, 872 P.2d 999, 1013 (Utah 1994); *Society of Separationists, Inc. v. Whitehead*, 870 P.2d 916, 921 n. 6 (Utah 1993); *Hunt*, *supra*.

B. "Legislative" history and intent of the Framers generally.

Relatively little history is available regarding the Declaration of Rights in the 1895 Utah Constitution. *Society of Separationists*, 870 P.2d at 929 ("There was little discussion or controversy regarding any of the provisions of the Declaration of Rights"). Those rights were so fundamental, so uncontroversial, that there was nothing to debate.

Convention delegates knew that noncompliance with Congress's expectations would put a 40-year quest for statehood at risk. "It is natural, under such circumstances, for men to proceed with caution." *State v. Norman*, 16 Utah 457, 52 P. 986, 990 (1898). Accordingly, the Framers borrowed heavily from the constitutions of other states that had

been approved by Congress. *Society of Separationists*, 870 P.2d at 928 (particularly Nevada, Washington, Illinois, and New York).[10]

From that fact, the suggestion has been made that it is difficult to say that the 1895 Constitution was written by Utahns for Utah. *See* C. Albert Bowers, "Divining the Framers' Intentions: The Immunity Standard for Criminal Proceedings under the State Constitution," 2000 UTAH L. REV. 135, 148 (summarizing contention). That does an injustice to the Framers. Rather than simply copying verbatim from a single constitution, delegates carefully selected and rejected portions of various documents as suited their intent. *See, e.g.*, 1 *Official Report of the Proceedings and Debates of the Convention ("Proceedings")* at 423 (1898) (B. H. Roberts, questioning adoption of Wyoming's provision on female suffrage rather than that of Virginia, New York, Ohio, or Indiana); 483 (John Murdock: "I don't wish to refer to what older states have done; they have done as they pleased, and I hope the people of Utah will do as their best judgment will dictate to them, and I am not afraid of innovation"); 776 (David Evans: mentioning constitutions of Kentucky, North Dakota, Maine, Colorado, and California).

Utah's Declaration of Rights is not identical to that in any of the other 44 state constitutions, copies of which had been provided to delegates. Choosing from among different options reflects intent, just as a court's choice of quotations from other cases is

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[10] *See also* John J. Flynn, "Federalism and Viable State Government–The History of Utah's Constitution," 1966 UTAH L. REV. 311 (Illinois, New York, Nevada, Washington, and Iowa); Paul Wake, Comment, "Fundamental Principles, Individual Rights, and Free Government: Do Utahns Remember How to Be Free?" 1996 UTAH L. REV. 661 (Washington); Wallentine, *supra* (Nevada, Iowa, Illinois, New York and Washington).

no less a statement of its own intent. Moreover, some Framers expressed a view that Utah was unlike any other state, and that their goal was to be more progressive than other states. *See, e.g., id.* at 433-34 (Andrew S. Anderson: urging delegates to "show to the world that Utah is in the advance march of progress and civilization, and in those life-endearing principles of liberty and justice"); 545 (Andrew Kimball: "the people of Utah through their circumstances are different to any other people in the United States").

At the time of the 1895 Convention, nearly 90 percent of Utah's population, and three-quarters of Convention delegates, were members of the LDS Church. Richard D. Poll, ed., UTAH'S HISTORY (Brigham Young University Press, 1978), p. 393; *Society of Separationists*, 870 P.2d at 928. It is thus appropriate to discuss the background and views of church members at the time of the convention. *See id.* at 929 n. 31; P. Bobbit, CONSTITUTIONAL FATE THEORY OF THE CONSTITUTION (1984) at 9-11 (relevant history includes prevailing sentiment at time of adoption).

LDS Church founder Joseph Smith had expressed concern about weak federal constitutional protections:

> The only fault I find with the Constitution is, it is not broad enough to cover the whole ground. . . . Its sentiments are good, but it provides no means of enforcing them. It has but this one fault. Under its provision, a man or a people who are able to protect themselves can get along well enough; but those who have the misfortune to be weak or unpopular are left to the merciless rage of popular fury.

Larry E. Dahl and Donald Q. Cannon, ed., ENCYCLOPEDIA OF JOSEPH SMITH'S TEACHINGS, p. 144 (quoting Sabbath address, Nauvoo, 15 October 1843).

When it came to basic human liberty, the Framers were unwilling to sacrifice their principles even at the cost of the great prize. Including women's suffrage in the state constitution would "dig a grave for statehood," Representative B. H. Roberts warned. 1 Proceedings at 425-28. Such concerns could "go to the dogs," delegates declared. "[I]f Utah is to be immolated for standing by her principles, for enlarging the borders of liberty, let the sacrifice be made, let her be bound upon the altar, let the high priest of tyranny come forth and plunge the knife into her breast. She cannot perish in a nobler cause than that of freedom and equal rights." *Id.* at 738 (Orson F. Whitney); *id.* at 499 (Alma Eldredge) ("[D]o I want statehood at the sacrifice of honor?").

The Framers of the state constitution did not see their months-long labor as makework, as it would be if construction of the federal Constitution were dispositive. They viewed and intended the state constitution to be the supreme, fundamental law of this state. *See id.* at 434 (Samuel Thurman); 479-80 (Charles Varian); 502 (Eldredge); 561 (Karl G. Maeser); 572 (Charles Crane); 737 (Whitney); *State v. Norman*, 16 Utah 457, 52 P. 986, 987 (1898); *State v. Eldredge*, 27 Utah 477, 76 P. 337, 339 (1904).[11]

Consistent with that intent, this Court has repeatedly stated that the federal constitution sets the floor, but not the ceiling, of constitutional protections for Utahns.

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[11] The assumption that the state constitution would provide the primary basis of protection for Utah residents is reinforced by the fact that, at the time of the Convention, none of the protections of the Bill of Rights had been applied to the states through the Fourteenth Amendment. The first to be applied (takings) was in 1897. *Chicago B. & O.R.R. v. Chicago*, 166 U.S. 226 (1897). First Amendment protections, for example, were not held applicable to the states until 1925, *Gitlow v. New York*, 268 U. S. 652 (1925); the Fourth Amendment not until 1949. *Wolf v. Colorado*, 338 U.S. 25 (1949).

Anderson v. Provo City Corp., 2005 UT 5, ¶ 17, 108 P.3d 701; *Society of Separationists*, 870 P.2d at 940; *West*, 872 P.2d at 1007 ("Above this floor, states may balance the need to redress injuries to reputation with guarantees of free expression in a distinct way, thereby accounting for the unique history, needs, and experiences of their residents").

For these reasons, the lower court should have reviewed the Jensens' state constitutional claims independently of their federal claims. *See West*, 872 P.2d at 1007 (adopting "primacy" approach in free speech claim under state constitution). That is particularly true where the family and a state's judicial process are matters of local interest. *In re Burrus*, 136 U.S. 586, 10 S.Ct. 850 (1890); *Hunt*, 450 A.2d at 366. In any event, however, the trial court erred when it ruled that the Utah Constitution did not afford broader rights to the Jensens than the federal constitution.

There is evidence in the record from which a jury could find that the defendants (1) made material misrepresentations and omissions in order to remove Parker from his parents' custody and force chemotherapy upon him; (2) refused to let the Jensens choose between conflicting recommendations of two licensed physicians (*i.e.*, imposed a "comparative unfitness" standard) and reported the Jensens when they continued to request diagnostic testing that all witnesses concede was reasonable; (3) failed to investigate, by choice, custom, and/or policy, the medical neglect allegations, including corresponding failures to train and supervise. *See* Statement of Facts, *supra*.[12]

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[12] *See, e.g.*, pp. 5, 6, 7, 8, 10, 11, 12, 13, 15 (Wagner misrepresentations / omissions), 14, 15, 25 (Cunningham), 18, 19, 20, 25, 26, 27, 28, 29, 30, 31 (Eisenman), 22, 26 (Albritton), 32-33 (imposition of comparative fitness standard by Anderson) 14 (same by

From the time of its ratification, this Court has held that the Utah Constitution "is not to be interpreted on narrow or technical principles, but liberally, and on broad, general lines, in order that it may accomplish the object of its establishment, and carry out the great principles of the government." *North Point Consolidated Irrigation Co. v. Utah & Salt Lake Canal Co.*, 14 Utah 155, 46 P. 824 (1896); *Shields v. Toronto*, 16 Utah 2d 61, 395 P.2d 829, 830 (1964) (court must "give recognition in the highest possible degree to all of the rights assured by all of the Constitutional provisions"). In this case, the nature of the misconduct, the state's common law and legal precedent, the intent of the Framers, and the history and attitudes of the state, all compel a finding that these actions (if found by the jury) violated Article I, Sections 1, 7, and 14 of the Utah Constitution.

1. Article I, § 1 (right to enjoy and defend lives and liberty).

Article I, § 1 of the Utah Constitution provides: "All men have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; to worship according to the dictates of their consciences; to assemble peaceably, protest against wrongs, and petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right."

This "inalienable rights" provision has appeared in each version of the state constitution, beginning with the 1849 Constitution of the State of Deseret ("In Republican Governments, all men should be born equally free and independent, and

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Cunningham), 13, 14, 29, 31, 32 (Cunningham/Anderson's failure and/or policy not to

possess certain natural, essential, and inalienable rights; among which, are those of enjoying and defending their Life and Liberty; acquiring, possessing and protecting property; and of seeking and obtaining their safety and happiness.").

There is no comparable provision in the U. S. Constitution. *See* 1 Bernard Schwartz, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 319, 762-65, 840; Bruce Kempkes, "The Natural Rights Clause of the Iowa Constitution: When the Law Sits Too Tight," 42 DRAKE L. REV. 593, 605.) The closest language is in the Fifth Amendment, which states, "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ," but does not mention "inherent and inalienable" rights, or the right to "defend . . . lives and liberties" recognized in Article I, § 1.

The right to enjoy and defend lives and liberties as guaranteed by a state constitution "includes the right of privacy, the right to marital privacy and choice . . . [and] the right to protect one's health." 16A C.J.S. CONSTITUTIONAL LAW § 737 (citations omitted); *see also Jarvis v. Levine*, 418 N.W.2d 139, 148-149 (Minn. 1988) (right to make decisions regarding one's health recognized in state constitution has been rooted in the law "for centuries"); *Sojourner v. New Jersey Dept. of Human Services*, 177 N.J. 318, 828 A.2d 306, 330 (2003). As articulated by this Court, Article I, § 1

> forbids the abridgment by the state of the privileges and immunities of all citizens. Under its mandate no person can be deprived of life, liberty, or property without due process of law, and every person is entitled to the equal protection of the laws, and may acquire property, possess and protect it, as well as defend his life and liberty. These are inherent and inalienable rights of citizens, and are constitutional guaranties.

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investigate).

Block v. Schwartz, 27 Utah 387, 76 P. 22, 24 (1904); *see also Golding v. Schubach Optical Co.*, 93 Utah 32, 70 P.2d 871, 875 (1937) ("The Constitution declares in Article I, § 1, men are by nature free and independent, and have certain inalienable rights among which are the pursuing and obtaining of happiness, and safety, and property.").

"Liberty," as encompassed within Section 1, is "a term of comprehensive scope. It embraces not only freedom from servitude and from imprisonment and arbitrary restraint of person, but also all our religious, civil, political, and personal rights[.]" *Block*, *supra*, at 24-25. The right to "life, liberty and the pursuit of happiness, and as a corresponding and accompanying right, the right to privacy in his own home," is a "just claim, God given, or innate as a human." *State v. Kent*, 20 Utah 2d 1, 432 P.2d 64, 69 (1964). In this case, each type of alleged misconduct (misrepresentations and omissions, imposition of a comparative fitness standard / refusal to permit reasonably requested testing, and failure to investigate medical neglect allegations) are protected by Section 1.

a. Misrepresentations and omissions

It has long been recognized that interference with fundamental rights by a state actor employing material misrepresentations or omissions is wrongful. *See, e.g.*, *Meyer v. Board of County Commissioners of Harper County*, 482 F.3d 1232, 1243 (10th Cir. 2007); *Snell v. Tunnell*, 920 F.2d 673, 691-692 (10th Cir. 1990); *Malik v. Arapahoe County Dep't. of Social Services*, 191 F.3d 1306 (10th Cir. 1999); *Pierce v. Gilchrist*, 359 F.3d 1279, 1292 (10th Cir. 2004), and cases cited; *see also Merchants' Nat. Bank of Kansas City v. Robison*, 8 Utah 256, 30 P. 985 (1892) (person who signs a certificate of

stock containing false information is liable; "[t]hese views are so fundamental, and so consonant with honesty and fair dealing, that they need no authority in their support").

This proposition is self-evident, because interference with fundamental rights can be justified only if a state actor proves that his actions were narrowly tailored to achieve a compelling state interest. *See, e.g.*, *Thurnwald v. A.E.*, 2007 UT 38, ¶¶ 28, 35, 163 P.3d 623. There can never be a compelling need to intentionally or recklessly fabricate, omit, or distort evidence in order to take someone's child and force potentially unneeded medical treatment on him, or to obtain warrants or other judicial orders, nor can such conduct be "narrowly tailored." *See, e.g.*, *P.J. ex rel Jensen v. State of Utah, et al.*, 2006 WL 1702585 **10, 16, 19 (J. Cassell, 2006) (state actor may not "threaten the Jensens, refuse to perform confirmatory tests, or make false, incomplete, or misleading statements to Utah courts[.]").

b. Refusal to allow parents to choose between licensed physicians or to seek reasonably requested testing.

Section 1 is implicated when a subject is prevented from exercising the rights guaranteed by it. *See, e.g.*, *Golding*, 70 P.2d at 875 (Section 1 rights "are invaded when one is not at liberty to contract with others respecting the use to which he may subject his property (or use or employ his time or talents), or the manner in which he may enjoy it").

As noted above, the rights guaranteed by Section 1 include the right to make decisions regarding personal health or, in this case, to make decisions for one's child. Defendants Anderson and Cunningham interfered with these rights by requiring the Jensens to follow the recommendations of the reporting doctor, rather than a licensed

physician of their own choice (who, incidentally, turned out to be right). Not only is there no compelling state interest in forcing a parent to use a particular doctor, but the unconstitutionality of such interference is widely recognized. (To avoid duplication, the discussion of comparative fitness at pp. 50-56, *infra*, is incorporated herein.) Similarly, Wagner, interfered with the Jensens' rights by refusing to perform reasonably requested diagnostic testing, and reporting the Jensens for medical neglect when they continued to insist on such testing before starting chemotherapy.[13]

c. Failure / refusal to investigate

Finally, Cunningham's (and Anderson's) failure to investigate medical neglect allegations also violates Section 1. With apologies for the double negative, there is no compelling state interest in not investigating allegations of parental neglect before curtailing a parent's liberty by making such allegations. Indeed, state statutes expressly required Cunningham to investigate – to at least *ask* the parents – even in a so-called emergency. Choosing not to do so violated Section 1 on its face.

2. Article I, § 7 (due process)

Article I, § 7 provides: "No person shall be deprived of life, liberty or property, without due process of law." This due process clause, the wording of which is similar to

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[13] Whether Wagner felt that such testing was *necessary* is immaterial, as all witnesses in the case agree that it was a *reasonable* request by the parents. The federal court (J. Cassell) held that a refusal by a state actor to perform confirmatory tests reasonably requested by a parent states a claim for violation of the right to familial association and procedural and substantive due process. *P.J. ex rel Jensen v. State of Utah, et al.*, 2006 WL 1702585 **10, 16, 18-19, which would be particularly true if a jury found that Wagner did so in order to meet a timetable for a clinical trial.

that in the federal constitution, affords two types of constitutional protections. First, it guarantees substantive due process rights, *Wells v. Children's Aid Soc. of Utah*, 681 P.2d 199, 204 (Utah 1984), including "the inherent and retained right of a parent to maintain parental ties to his or her child[.]" *In re J.P.*, 648 P.2d 1364 (Utah 1982); *see also In the Matter of the Adoption of B.B.D.*, 1999 UT 70, ¶ 10, 984 P.2d 967.

Interference with these rights is subject to strict scrutiny: a governmental actor must establish the means utilized are "narrowly tailored" to achieve "a compelling state interest." *Wells*, 681 P.2d at 206-07; *Thurnwald*, 2007 UT 38, ¶¶ 28, 35. *See also Jones v. Moore*, 61 Utah 383, 213 P. 191 (1923) (recognizing similar right of children in familial association).

Section 7 also affords procedural rights, "notably, notice and opportunity to be heard, which must be observed in order to have a valid proceeding affecting life, liberty, or property." *Wells*, 681 P.2d at 204 (citations omitted). "The general test for the validity of such rules, the test of procedural due process, is fairness." *Id.*

Although this Court has construed the state and federal due process clauses as substantially the same in some contexts, *see, e.g.*, *Bailey v. Bayles*, 2002 UT 58, ¶ 11, 52 P.3d 1158, that "does not indicate that this court moves in 'lockstep with the United States Supreme Court's due process analysis or foreclose our ability to decide in the future that our state constitutional provisions afford more rights than the federal Constitution." *Id.* Indeed, at the time of the Constitution's adoption, the Court observed that the two due process clauses are not co-extensive:

The constitution of the United States cannot, as to the states, be held to be

> the sole unbending rule as to the method of procedure, when dealing with the life, liberty, and property of individuals in the several states. Such a rule would deprive the states of their right to regulate its procedure, laws, and rules of practice in their own courts, so as to protect life, liberty, and property by such due process of law as should be enacted with reference to the constitution of the United States which was framed for an undefined and expanding future, and for people gathered, and to be gathered, from many nations and many tongues.

In re McKee, 19 Utah 231, 57 P. 23, 26-27 (1899); *State v. Briggs*, 199 P.3d 935, 2008 UT 83, ¶ 24 ("While the text of the two provisions is identical, we do not presume that federal court interpretations of federal Constitutional provisions control the meaning of identical provisions in the Utah Constitution. In fact, we have not hesitated to interpret the provisions of the Utah Constitution to provide more expansive protections than similar federal provisions where appropriate.")(internal citations omitted).

a. Misrepresentations and omissions.

The making of misrepresentations and omissions by a state actor is a violation of both forms of due process. As this Court recognized in *Walker v. State*, 624 P.2d 687, 690 (Utah 1981), "[I]t is an accepted premise in American jurisprudence that any conviction obtained by the knowing use of false testimony is fundamentally unfair and totally incompatible with 'rudimentary demands of justice.'" That principle applies equally to the use of such tactics to interfere with the parent-child relationship. *See also* p. 46-47, *supra*.[14]

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[14] It is for this reason that collateral estoppel cannot be based upon rulings tainted by fraud. *Cooke v. Cooke*, 67 Utah 371, 248 P. 83, 107 (1926); *Kennedy v. Burbidge*, 54 Utah 497, 183 P. 325, 327-28 (1919) (conviction procured through "perjury, fraud, or other undue means" is "worthless" to show probable cause in malicious prosecution suit);

b. Refusal to allow the Jensens to choose their own physician or to conduct reasonably requested tests.

As noted above, defendant Anderson admits taking the position that, if a parent's licensed physician had a different medical opinion than a licensed physician consulted by the State, the parent did not get to choose. Defendant Cunningham admits this also, in a different way: She admits that she did not consider allowing the Jensens to rely on Dr. Moore's recommendations because the person accusing the Jensens of medical neglect told her that Dr. Moore was not qualified to care for Parker. By disqualifying a physician solely on the say-so of a reporting doctor, Cunningham *de facto* imposed her choice of physicians on the Jensens.

Particularly when viewed in light of the common law, this Court's precedent, the history of the state and the intent of Convention delegates, these admitted actions of Anderson and Cunningham plainly violated the Jensens' state constitutional rights. Under the common law, no relationship was afforded greater protection than that of parent and child. A right that has "strong roots in the common law" suggests greater protection under the state constitution. *West*, 872 P.2d at 1013; *see also* Utah Code Ann. § 62A-4a-201(1) (2003) ("The right of a fit, competent parent to raise his child has long been protected by the laws and Constitution of this state and of the United States."); *American Bush v. City of South Salt Lake*, 140 P.3d 1235, 2006 UT 40, ¶ 43, 48 (the Framers intended that the common law be employed to interpret the state constitution);

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see also Pierce, supra, 359 F.3d at 1292 (prohibition against misrepresentations is known and obvious).

Deseret Irr. Co. v. McIntyre, 16 Utah 398, 52 P. 628, 629 (1898) (same).

Unlike any other state in the West, "Utah was settled primarily by two-parent families . . . ." Carrie Hillyard, "The History of Suffrage and Equal Rights Provisions in State Constitutions," 10 BYU J. PUB. L. 117, 122 (1996). At the time of the constitution, Utah recognized a presumption that a parent will fulfill his duties

> by reason of the love and affection he holds for his offspring and out of regard for the child's future welfare. . . . Indeed, the common law based the right of the father to have custody and dominion over the person of his child upon the ground that he might better discharge the duty he owed the child and the state in respect to the care, nurture, and education of the child. Before the state can be substituted to the right of the parent it must affirmatively be made to appear that the parent has forfeited his natural and legal right to the custody and control of the child by reason of his failure, inability, neglect, or incompetency to discharge the duty and thus to enjoy the right.

Mill v. Brown, 88 P. 609, 613 (Utah 1907); *see also* 2 Proceedings at 450 (Richards: "In the brute world we find the mother's love for offspring more strong than the instinct for self preservation. This is an unfailing passion throughout the whole course of organic life, whether brute or human").

Prior to ratification of the constitution, a child could be removed from the home in Utah only upon a showing of his parent's "habitual intemperance, and vicious and brutal conduct, or from vicious, brutal and criminal conduct towards said minor child." Laws 1851 to 1870, Chapter XVII, § 9. This standard was re-enacted by the first state legislature, Rev. Stat. 1898, Title 3, § 82, indicating that it was consistent with the Framers' intent. *P.I.E. Employees Federal Credit Union v. Bass*, 759 P.2d 1144, 1147 (Utah 1988) (noting that many of the first legislators were convention delegates); *Salt Lake City v. Christensen Co.*, 34 Utah 38, 95 P. 523, 526 (1908) (reenactment of statute

is evidence that framers intended the law to remain as it was).

In Washington, to which the Framers looked when drafting the 1895 Constitution, the supreme court had reaffirmed a year earlier the principle that a child can be removed from a home only if the parents are affirmatively unfit, not merely because the state would prefer they make different choices. *Lovell v. House of the Good Shepherd*, 9 Wash. 419, 37 P. 660, 661 (1894) ("courts must exercise great charity and forbearance for the opinions, methods, and practices of all different classes of society; and a case should be made out which is sufficiently extravagant and singular and wrong to meet the condemnation of all decent and law-abiding people, without regard to religious belief or social standing, before a parent should be deprived of the comfort or custody of a child").

Consistent with common law and statutory history, this Court held long ago that, to be constitutional, removal of a child from his parent's custody requires an affirmative showing of unfitness. *Mill*, 88 P. at 613; *Cooke v. Cooke*, 67 Utah 371, 248 P. 83 (1926) ("[T]he unfitness which deprives a parent of the right to the custody of the child must be positive and not merely comparative, or merely speculative"); *In re B.R., et al.*, 2006 UT App 354, ¶ 87, 144 P.3d 231 (under Utah Constitution, "a parent is entitled to a showing of unfitness, abandonment, or substantial neglect before his or her parent rights are terminated"), *rev'd on other grounds*, *In re B.R.*, 2007 UT 82, 171 P.3d 435.

It is thus long settled that state actors cannot interfere with a parent's choice between licensed medical practitioners merely because they think one physician is "better" than the other, or because there is a conflict in medical opinion between the two. *See, e.g., In the Matter of Hofbauer*, 393 N.E.2d 1009, 1014 (1979) (The analysis of a

parent's rights to direct medical care "cannot be posed in terms of whether the parent has made a 'right' or a 'wrong' decision, for the present state of the practice of medicine, despite its vast advances, very seldom permits such definitive conclusions. . . . Rather, in our view, the court's inquiry should be whether the parents, once having sought accredited medical assistance and having been made aware of the seriousness of their child's affliction and the possibility of cure if a certain mode of treatment is undertaken, have provided for their child a treatment which is recommended by their physician and which has not been totally rejected by all responsible medical authority."); *State v. Perricone*, 181 A.2d 751 (N.J. 1962) (parents rejecting for religious reasons unanimous medical opinion as to need for blood transfusions; "[h]ad there been a relevant and substantial difference of medical opinion about the efficacy of the proposed treatment or if there were substantial evidence that the treatment itself posed a significant danger to the infant's life, a strong argument could be made in favor of appellants' position"); *In re CFB*, 497 S.W.2d 831, 835 (Mo. App. 1973) (clinic's report of neglect for mother's withdrawal of child as patient was baseless; "Whether the mother's reasons for that dissatisfaction [with the clinic] were correct or incorrect is not the point. The mother had a right to choose between different doctors or institutions for the purpose of this type of care. So long as the mother was willing and intended to provide appropriate care in some manner, no finding can stand that she was guilty of neglecting the child"); *In re Tony Tuttendario*, 21 Pa. D. 561, *3 (Pa. Q. 1912) (court could not substitute its medical judgment for that of parents absent showing of unfitness; even if defective judgment were a basis for superseding parents' decision, neglect was not shown where "the science of

medicine and surgery, notwithstanding its enormous advances, has not yet been able to insure an absolutely correct diagnosis in all cases, and still less an absolutely correct prognosis"). *Cf.* *Custody of a Minor*, 733, 379 N.E.2d 1053, 1064 (Mass. 1978) ("no dispute" as to diagnosis and need for chemotherapy; emphasizing that parent's refusal "was not based on the parents' view that another medically effective form of treatment could be found," but merely upon 'hope' of child's recovery).

Utah's constitutional framers would have been especially concerned about this aspect of Anderson and Cunningham's conduct. For decades, LDS Church members had experienced what they viewed as persecution by a government intent on imposing its own values on the Mormon family structure, culminating in the famed polygamy prosecutions. *See* *State v. DeBooy*, 2000 UT 32, ¶ 32, 996 P.2d 546 (mentioning prosecutions in construing Section 7).

> "[M]any of Utah's constitutional convention delegates had either been pursued by federal authorities or were well acquainted with people who had. Because of widespread newspaper coverage, the vast majority of Utah's population was aware of the prosecutions, and the delegates to the constitutional convention had an intimate awareness of the problems posed by systematic oppression by the federal government. . . . Prior to becoming a state, the framers of the Utah Constitution suffered heavily at the hands of the federal government. These memories were fresh in the minds of the framers . . . ."

Bowers, *supra*, 2000 UTAH L. REV. at 151, 169.

The anti-polygamy campaign was directed at the disruption of families. Fathers, mothers, and sometimes children were imprisoned. Children were left without support when their parents were jailed or forced into hiding. Conditions were harsh for those targeted by the government. *See* Martha S. Bradley, "'Hide and Seek': Children on the

Underground," 51 UTAH HISTORICAL QUARTERLY (1953), pp. 133-153.

In 1882, as such deprivations were on the rise, a new provision was added to the state's draft constitution, declaring that "The blessings of free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality and virtue, and frequent recurrence to fundamental principles." This language was restated in the 1887 version. Significantly, when its inclusion was questioned in 1895, Heber Wells stated the committee's view that it was needed in light of abuses "in the past." 1 Proceedings at 362.

That the Framers would have been repulsed by a state actor forcing a specific health care provider on a parent is further supported by the writings of the Hon. Thomas Cooley of the Michigan Supreme Court, considered "the foremost constitutional authority in the world, perhaps," by the drafters. 1 Proceedings at 447 (Richards), 464 (Roberts), II Proceedings at 1739 (Evans); *American Bush*, 2008 UT 40 at ¶¶ 13, 49 n.16, 51.

In *Van Deusen v. Newcomer*, 40 Mich. 90, 128 (1878), Judge Cooley had concurred in ordering a new trial regarding a patient whose family had committed her to an insane asylum, stating: "I cannot admit that because one is a practitioner of medicine, it is therefore proper or safe to suffer him to decide upon mental disease, and consign people to the asylum upon his judgment or certificate." If "differences of opinion among those who are called to give scientific evidence" exist, he wrote, it would be intolerable for the patient's fate to hinge on whether "one physician rather than another happened to be called in as the adviser." *Id.* at 132.

Cunningham and Anderson's requirement that the Jensens follow the recommendations of Wagner (and, later, a board-certified pediatric oncologist in this country) instead of a licensed physician of their choosing thus violated Section 7 rights. Additionally, as discussed above, the Jensens had a right to request reasonable diagnostic testing, regardless of whether Dr. Wagner felt a need for it. Accordingly, Wagner's actions in reporting the Jensens to DCFS when they refused to commence chemotherapy without such testing violated their rights under Section 7.

c. Failure to investigate

The third type of state action evidenced by the record, Cunningham's failure to investigate medical neglect allegations (and Anderson's policy or practice permitting it) also violated Section 7 rights. These rights require that the subject of a judicial or administrative proceeding receive an opportunity to be heard "in a meaningful way." *Worthen v. Buckley*, 926 P.2d 853, 876 (Utah 1996).

No argument is, or can be, made that the Jensens had any opportunity to be heard in the DCFS proceeding before DCFS accused the Jensens of medical neglect and sought custody of Parker. Cunningham cannot claim that she did not know how to give the Jensens this opportunity. Aside from common sense (pick up a phone), state statute spelled it out for her. *See, e.g.*, Utah Code Ann. §§ U.C.A. § 62A-4a-409(1)(a) (2003) (requiring, *inter alia*, a "thorough investigation," UTAH ADMIN. R. 512-201-1 & -201-4 (2003) (outlining required investigation). If Wagner indeed told her that it was an emergency, then Cunningham knew she had to at least ask the parents for their side of the story before seeking to remove their son from their custody. *See* p. 13-14, *supra*.

Cunningham admits that none of this was done, by which the Jensens' Section 7 rights were violated as a matter of law.

3. Article I, Section 14 (search and seizure)

Article I, § 14 of the Utah Constitution states: "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation . . . ." This right is "'the right to be let alone–the most comprehensive of rights and the right most valued by civilized men' that demands an independent and proper judicial determination." *DeBooy*, *supra*, 2000 UT 32, ¶ 32.

On several occasions, this Court has found the protections afforded by Section 14 to be greater than those afforded by the similarly worded Fourth Amendment to the United States Constitution. *See, e.g., id.*, ¶ 12; *State v. Larocco*, 794 P.2d 460 (Utah 1990); *see also* Bowers, *supra* at 147 ("several unique facets of Utah's history" suggest that state constitutional requirements for testimonial immunity do not mirror the federal).

"Mormon delegates likely viewed the territorial government–controlled by federally appointed non-Mormons–as oppressive. They had experienced the attempted control and suppression of their religious beliefs and practices by the federal government, often operating through territorial officials. . . . Both groups of delegates could claim that some form of authority, be it federal or local, had denied them freedom of conscience, and both were acutely aware of the threat government power presented to that freedom." *Society of Separationists*, 870 P.2d at 935.

The employment of falsehoods by government officials, as alleged here, would

have been uniquely disturbing to Utah's Framers. From their perspective, LDS Church members had suffered extraordinary harm as the result of false testimony. In 1838, for example, Missouri governor Lilburn Boggs issued the notorious "extermination" order expelling Mormons from the state three days after the execution of a false affidavit by Thomas B. Marsh and Orson Hyde that claimed, among other things, that Joseph Smith intended to conquer the United States. Gary J. Bergera, "The Personal Cost of the 1838 Mormon War in Missouri: One Mormon's Plea for Forgiveness," MORMON HISTORICAL STUDIES (Spring 2003), p. 139. A month later, Missouri officials used the affidavit as a basis to jail Smith for treason. *Id.*

Seven years later, Smith was again pursued by government officials, this time in Illinois. In reliance upon a promise of security by Governor Ford, Smith and other Mormon leaders voluntarily surrendered. Instead, Smith and his brother Hyrum were allowed to be murdered in their jail cell in Nauvoo. *See* Whitney, HISTORY OF UTAH, Vol. 1, pp. 228-30; The Church of Jesus Christ of Latter-day Saints, HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS (Deseret News: 1932), Vol. VII, p. 172 (Smith was arrested through "false pretense").

In 1857, William Drummond, an appointee to the territorial supreme court, falsely reported to the attorney general that Brigham Young had murdered territorial leaders, and that the Mormons had burned territorial records and committed treason. *See* Andrew L. Neff, *History of Utah* (ed. Leland H. Creer, Salt Lake City: Deseret News, 1940), Vol. 1, pp. 448-51. President Buchanan, with whom church leaders were already at strife, cited Drummond's assertions as evidence that the Mormons were in rebellion, and dispatched

the Army to Utah to replace Young as governor by force. *Id.*

Young issued a proclamation decrying, again, deception by government officials: "For the last twenty five years we have trusted officials of the Government, from Constables and Justices to Judges, Governors, and Presidents, only to be scorned, held in derision, insulted and betrayed." Proclamation, August 5, 1857; *id.* ("We know these aspersions are false, but that avails us nothing"). More than 30,000 Mormons evacuated northern Utah in anticipation of invading forces. Hubert Howe Bancroft, HISTORY OF UTAH 1540-1886 (San Francisco, The History Company: 1889), p. 535.

In 1871, Brigham Young was indicted by territorial officials for an 1857 murder based upon the false affidavit of a man named William Hickman, who was "in collusion with the crusading officials to bring trouble upon his former brethren." Whitney, HISTORY OF UTAH, pp. 629-640. Young was denied bail and spent four months under house arrest; two of his alleged co-conspirators spent six months in jail. Bancroft, pp. 663-64.

Apart from the Framers' intent, there is a more basic reason why Section 14 protected the Jensens from the defendants' actions: By its plain language, Section 14 prohibits "unreasonable" searches and seizures, and the issuance of warrants not based upon oath or affirmation. The use of material misrepresentations and omissions to effectuate a seizure is inherently unreasonable. Similarly, obtaining a warrant or court order through false oath or affirmation cannot satisfy the requirements of Section 14.

The federal court rejected the Jensens' argument that non-custodial (non-physical) seizures are encompassed within the Fourth Amendment of the federal constitution, but

there is no question that Section 14's protections extend to such seizures. Indeed, if there is one state where that would be true, it is Utah.

A custodial seizure is, as the term suggests, a physical restraint of liberty. Daren Jensen underwent a custodial seizure when he was arrested and incarcerated in Idaho in August 2003, and Barbara and Daren Jensen were both seized when they were booked and released in Utah in September 2003.

A non-custodial seizure is one that results from state-imposed conditions that significantly, but not physically, restrict liberty. See *Albright v. Oliver*, 510 U.S. 266, 278, 114 S.Ct. 807 (1994) (Ginsburg, J., concurring) (a citizen may be subject to state imposed conditions that restrict liberty, including conditions of bail, mandatory court appearances, restrictions on freedom to travel, diminishment of employment prospects, reputational harm, and "the financial and emotional strain of preparing a defense." *See also id.* at 307 (Justices Souter and Stevens concurring in Justice Ginsberg's view of continuing seizure).

The Framers unquestionably had such seizures in mind when they adopted Article I, § 14 of the Utah Constitution. Many members of the Church had been forced into hiding or to abandon their families during the 1880s, which was no less an infringement of their physical liberty than an arrest. (LDS Church President John Taylor had died while in hiding in 1887, less than a decade before the constitution was adopted.) The Framers were very aware that a deprivation of freedom by the government can take forms beyond physical restraint.

In this case, the Jensens were unable to return to their home state without the

threat of arrest and removal of their child. They were unable to take their child for an evaluation in Houston, or to other physicians of their choosing. They were subjected to mandatory court appearances. They were ordered to give up their passports. Daren Jensen lost his job, and was exposed to diminishment of other employment prospects, both because he was terminated from his previous job, and because he had to devote his time, finances, energy and efforts to attempting to protect his and his family's rights. The Jensens were held up to public ridicule and contempt, and subjected to media scrutiny.

These facts rise to the level of a seizure under Article I, § 14 of the Utah Constitution. *See also* *Murphy v. Lynn*, 118 F.3d 938, 945 (2nd Cir. 1997) (post-arraignment order prohibiting an arrestee from leaving the State of New York and requiring that he attend court appointments amounted to a "seizure" under Fourth Amendment); *Evans v. Ball*, 168 F.3d 856, 860-61 (5th Cir.1999) (overruled on other grounds by *Castellano v. Fragozo*, 352 F.3d 939 (5th Cir.2003)) (holding that a plaintiff had alleged Fourth Amendment seizure where, in addition to being summoned to appear and answer to charges, plaintiff was forced to sign personal recognizance bond, and was required to report regularly to pretrial services and obtain permission before leaving the state); *Gallo v. City of Philadelphia*, 161 F.3d 217, 222 (3rd Cir.1998) (finding seizure where plaintiff was required to post $10,000 bond, attend all court hearings, maintain weekly contact with pretrial services, and refrain from traveling outside New Jersey and Pennsylvania); *Sassower v. City of White Plains*, 992 F.Supp. 652, 656 (S.D.N.Y.1998).

II. RES JUDICATA IS INAPPLICABLE TO THE JENSENS' STATE CLAIMS FOR ADDITIONAL REASONS.

Res judicata is an affirmative defense, and thus the defendants bore the burden of proving that each of the elements was present as a matter of law. *Timm v. Dewsnup*, 851 P.2d 1178, 1184 (Utah 1993). Apart from the trial court's error in concluding that the state constitution did not afford broader protections than the federal, addressed *supra*, the trial court's application of res judicata was error for additional reasons.

"[R]es judicata has two branches: claim preclusion and issue preclusion." *Murdock v. Springville Mun. Corp.*, 1999 UT 39, ¶ 15, 982 P.2d 65. In their motions below, the defendants argued that the Jensens' state claims were barred under both prongs. In ruling that "res judicata" applied, the trial court did not identify a particular branch; accordingly, both are addressed.

A. Claim preclusion does not apply.

"In general terms, claim preclusion bars a party from prosecuting in a subsequent action a claim that has been fully litigated previously." *Brigham Young University v. Tremco Consultants, Inc.*, 2005 UT 19, 110 P.3d 678. When a party seeks the application of claim preclusion based upon a prior federal judgment, Utah courts apply federal res judicata law. *See Massey v. Board of Trustees of Ogden Area Community Action Comm.*, 2004 UT App 27, ¶¶ 6-7, 86 P.3d 120.

Under federal law, claim preclusion applies only if the party asserting the doctrine establishes three elements: "(1) a final judgment on the merits in an earlier action; (2) identity of parties or privies in the two suits; and (3) identity of the cause of action in both suits." *Pelt v. Utah*, 539 F.3d 1271 (10th Cir. (Utah) 2008). One or more of those elements is not present in this case.

1. There was no earlier action.

Claim preclusion looks to the causes of action that were filed in an *earlier* proceeding. *Pelt*, *supra*, at 1281; *Oman*, 2008 UT 70, ¶ 31. Here, there was no "earlier proceeding." All of the claims were filed in the same lawsuit in the same court at the same time. Defendants' removal of the case to federal court did not convert this single case into two cases. *See Payne for Hicks v. Churchich*, 161 F.3d 1030, 1037 (7th Cir. 1998) ("this situation does not involve two separate lawsuits, one in state court and another in federal court. Rather, it involves *one suit* that originated in state court and that was removed to federal court."); *McIlravy v. Kerr-McGee Coal Corp*., 204 F.3d 1031 (10th Cir. 2000) ("Res judicata does not speak to direct attacks in the same case, but rather has application in subsequent actions.")

2. There was no "final judgment on the merits" on the Jensens' state law claims.

Res judicata does not apply if a court dismissed prior claims for want of jurisdiction, or other grounds not going to the merits. *Hughes v. United States*, 4 Wall. 232, 71 U.S. 232, 18 L.Ed. 303 (1866); *Park Lake Res. Ltd Liab. Co. v. USDA*, 378 F .3d 1132, 1136 (10th Cir. 2004); *Snyder v. Murray City Corporation*, 73 P.3d 325, 2003 UT 12, ¶ 36 (where a federal court dismisses a plaintiff's state constitutional and common law claims without prejudice and declines to exercise supplemental jurisdiction, neither claim or issue preclusion applies). In this case, the federal court went out of its way *not* to rule on the Jensens' state law claims, which it said included "important" state constitutional issues that should be decided by a state court.

3. The Jensens' state claims are separate and distinct from the claims ruled upon by the federal court.

The appellees argued below that, because the Jensens rely on the same underlying facts to support their claims under the Utah Constitution as were relied upon in federal court, their state and federal claims must be identical, warranting the application of claim preclusion to the state claims. However, the Jensens have demonstrated how and why the rights afforded in the Utah Constitution protected them from the alleged misconduct, which necessarily distinguishes the claims from those under the federal constitution (as construed by Judge Stewart, who found no protection under the latter). *See* pp. 37-62, *supra*. (Additionally, the federal court did not purport to address the Jensens' state common law claims, which are inherently distinct from constitutional claims.)

4. The policy justifications behind the doctrine of claim preclusion are not present in this case.

"The fundamental policies underlying the doctrine of res judicata (or claim preclusion) are finality, judicial economy, preventing repetitive litigation and forum-shopping, and 'the interest in bringing litigation to an end.'" *Plotner v. AT & T Corp.*, 224 F.3d 1161 (10th Cir. 2000). These policies are not implicated in this case. First, any policy related to finality is not implicated by the procedural stance of this case, because the Jensens' state law claims have been pending since the inception of the case, and have never been ruled upon by any court.

Nor is judicial economy at risk. The Jensens do not seek to waste judicial resources; they ask only for their day in court on their state law claims. No judicial energy was expended on the state law claims by the federal court, as the claims were not

addressed. As to the policy of preventing repetitive litigation and forum shopping, the Jensens have filed only one action in one court. It was not the Jensens who removed this case to federal court (a tactic more akin to "forum shopping"), but the defendants. Finally, the policy related to "bringing litigation to an end" is inapplicable here, because the Jensens' state law claims have been pending since the inception of this case, and were never considered by the federal court.

B. Issue preclusion

Defendants also argued below that the second prong of res judicata, issue preclusion, barred the Jensens' state claims. "Collateral estoppel, or, in modern usage, issue preclusion, 'means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.'" *Schiro v. Farley*, 510 U.S. 222, 232, 114 S.Ct. 783, 127 L.Ed.2d 47 (1994). Again, however, this component of res judicata does not apply because there is no "future lawsuit"; it is the same case in which the claims were originally filed.

The elements of issue preclusion would not be met in any event. As noted earlier, federal res judicata law applies if a party is attempting to bind a state court to a federal court ruling. Under Tenth Circuit law, a party arguing issue preclusion must establish four elements as a matter of law:

> (1) the issue previously decided is identical with the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party, or in privity with a party, to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the

issue in the prior action.

Burrell v. Armijo, 456 F.3d 1159 (10th Cir. 2006).

1. The issues presented for review in this action are not identical to the issues decided by the federal court.

The legal issues before this Court are different than the legal issues considered and applied in the federal court proceeding. The federal court applied federal law of absolute immunity, qualified immunity, substantive and procedural due process under the Fourth and Fifth Amendments to the United States Constitution, and malicious prosecution under the Fourth Amendment to the United States Constitution. Here, this Court is applying state law, including Article I, Sections 1, 7 and 14 of the Utah Constitution, and the common law of this state applicable to intentional infliction of emotional distress and wrongful initiation of civil and criminal process.

Furthermore, the factual issues that were considered by the federal court are not identical to the issues in the state claims. Factual issues are necessarily measured by reference to legal standards. In other words, without reference to a law or legal standard, it is impossible for a Court to determine whether a particular fact is material or not. (For example, a statement might be material to a claim for defamation, while immaterial to a claim for breach of contract.) When dealing with causes of action arising under a distinct legal theory and source of right, the factual issues implicated are likewise distinct.

The trial court also should not defer to federal court rulings that would be impermissible in state court. Under Utah law, for example, a party's intent is generally regarded as an issue of fact. *See, e.g.*, *Lysenko v. Sawaya*, 7 P.3d 783, 2000 UT 58, ¶ 17;

see also *IHC Health Services, Inc. v. D & K Management, Inc.*, 196 P.3d 588, 2008 UT 73, ¶ 18 (Utah 2008) (citations omitted) (state court may not grant summary judgment "if the facts shown by the evidence on a summary judgment motion support more than one plausible but conflicting inference on a pivotal issue in the case . . . particularly if the issue turns on credibility or if the inferences depend upon subjective feelings or intent.").

Thus, for example, the federal court's findings that misrepresentations by defendants Wagner and Cunningham were not made "deliberately" (*see, e.g.*, Exh. 3 at 38, 40, 46, 52, 55) would be impermissible on summary judgment in state court. (That finding also did not address the Jensens' alternative argument that the misrepresentations were made recklessly.)

Similarly, the federal court's finding that one or more of the defendants acted "reasonably" as a matter of law (*see, e.g.*, Exh. 3 at 38, 42) is inconsistent with Utah law, under which "questions of reasonableness necessarily pose questions of fact which should be reserved for jury resolution." *Ilott v. University of Utah*, 2000 UT App 286, ¶ 18, 12 P.3d 1011, citing *Williams v. Melby*, 699 P.2d 723, 727-28 (Utah 1985).

The federal court's factual findings improperly resolved credibility issues in favor of the defendants, and construed evidence in favor of the moving party. For example, the district court made a finding of fact that "Dr. Corwin and Mr. Jensen unsuccessfully attempted to schedule a further meeting to discuss the situation" (Exh. 3 at 6), when both Dr. Corwin and Daren Jensen testified that they had scheduled a meeting, but that Dr. Wagner nixed it. *See* p. 12, *supra*. This finding is important because, not only does it imply that the Jensens were unwilling to have further discussions about PJ's situation, but

this meeting would have been an opportunity for the Jensens to explain their position to the DCFS liaison (who was operating under an erroneous assumption that Wagner had run all available confirmatory testing), and potentially for Dr. Moore to explain her questions about the diagnosis.

Another example of the federal court construing evidence in a light most favorable to the defendants is observed in its acknowledgement that fresh tissue was available in Parker's mouth for new testing, followed by: "However, this would have required further surgery to obtain a sample." (Exh. 3 at 4). This characterization reflects an effort to excuse Dr. Wagner's unprecedented refusal to seek such testing, ignores Dr. Albritton's testimony that removing the remaining tissue would have alleviated her concerns that the tumor might spread, exaggerates the minor outpatient procedure of snipping additional tissue, and downplays the alternative that might be avoided (45 weeks of chemotherapy). *See* p. 8, *supra*. The federal court's ruling is replete with such defense-friendly characterizations, which would be improper in state court on summary judgment.

2. The "prior action" was not "finally adjudicated on the merits."

As discussed above, there was no "prior action" but rather a single case, so this threshold element of issue preclusion fails. Moreover, again there was no final adjudication on the merits, at least with respect to plaintiffs' state law claims, because the federal court never reached those claims.

3. Policy considerations militate against applying the doctrine of collateral estoppel.

The Tenth Circuit recognizes that in certain instances issue preclusion should not be applied, for example, where the application of issue preclusion "would 'do[ ] nothing to vindicate two primary policies behind the doctrine, conserving judicial resources and protecting parties from 'the expense and vexation' of relitigating issues that another party previously has litigated and lost.'" *Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Com'n*, 327 F.3d 1019, 1030 (10th Cir. 2003).

In addition, this Court has recognized that "collateral estoppel can yield an unjust outcome if applied without reasonable consideration and due care." *Buckner v. Kennard*, 2004 UT 78, ¶ 15, 99 P.3d 842. Accordingly, courts "must carefully consider whether granting preclusive effect to a prior decision is appropriate. . . . Collateral estoppel 'is not an inflexible, universally applicable principle[.] . . . Policy considerations may limit its use where . . . the underpinnings of the doctrine are outweighed by other factors.' " *Id*. (alterations in original) (citation omitted).

Such policy considerations are present in this case. The Utah Constitution is the "supreme law" of the state of Utah. Under the primacy approach, this Court typically examines state constitutional issues first, and considers federal law of no more persuasive weight than case law from a sister state. *State v. Tiedemann*, 162 P.3d 1106, 2007 UT 49 ¶ 33; *State v. Worwood*, 164 P.3d 397, 2007 UT 47, ¶ 15. Deferring to a federal court is detrimental to, not consistent with, state policy.

CONCLUSION

For the reasons set forth above, plaintiffs/appellants respectfully request the Court reverse the trial court's judgment and remand the case for trial.

RESPECTFULLY SUBMITTED this _____ day of September, 2009.

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CERTIFICATE OF SERVICE

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