2011

Buu Nguyen v. IHC Health Services, Inc., a Utah Corporation, dba Primary Chidren's Medical Center, University of Utah Hospitals and Clinics, University of Utah and State of Utah : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

BUU NGUYEN, Appellant and Plaintiff, v. IHC HEALTH SERVICES, INC., a Utah Corporation, dba PRIMARY CHILDREN'S MEDICAL CENTER, UNIVERSITY OF UTAH HOSPITALS AND CLINICS, UNIVERSITY OF UTAH and STATE OF UTAH, Appellees and Defendants.	**APPELLANT'S BRIEF** Appellate Case No. 20110152 District Case No. 030901469

Appeal from the Judgment of the Honorable Sandra N. Peuler,
Judge of the Third Judicial District Court, Salt Lake County, State of Utah

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JURISDICTION OF THIS COURT

Appellant/Plaintiff Buu Nguyen filed a Petition for Permission to Appeal Interlocutory Order, which was granted on April 14, 2011. The Utah Court of Appeals has jurisdiction over this appeal pursuant to § 78-2-2(3)(j) and 4, Utah Code.

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Did the trial court fail to adhere to the law of the case by entertaining and granting IHC's re-asserted motion for summary judgment, after the Utah Court of Appeals considered IHC's identical arguments on appeal and rejected them, reversing the trial court's first grant of summary judgment and ruling that IHC was subject to liability for failing to obtain informed consent? Standard of Review: Whether a district court complied with a mandate of an appellate court is a legal determination, which the appellate court reviews for correctness. *Utah Department of Transportation v. Ivers*, 2009 UT 56, ¶ 8.

Issue No. 1 was preserved for appeal at R. 3716-3848.

2. Did the trial court err in granting summary judgment to IHC by mis-interpreting Utah Code Ann. §§ 78B-3-406(1) and 78B-3-403(12) as not imposing a legal duty on IHC to obtain informed consent from Plaintiff? Standard of Review: The interpretation of a statute presents a question of law, which the appellate court reviews for correctness, affording no deference to the legal conclusions of the district court. *Utah Department of Transportation v. Ivers*, 2009 UT 56, ¶ 9. Also, the appellate court reviews a trial court's ultimate grant or denial of summary judgment for correctness, viewing the facts

and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party. *Orvis v. Johnson*, 2008 UT 2, ¶ 6, 177 P.3d 600.

Issue No. 2 was preserved for appeal at R. 3716-3848.

3. Did the trial court err in granting summary judgment to IHC by concluding that IHC did not assume a legal duty of care when it acknowledged a duty to obtain informed consent, and decided to obtain informed consent from parents of children on whom IHC proposed to use an experimental, sales demo ventilator? Standard of Review: The determination of a legal duty is a question of law. The appellate court reviews a trial court's legal conclusions and ultimate grant or denial of summary judgment for correctness, viewing the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party. *Orvis v. Johnson*, 2008 UT 2, ¶ 6, 177 P.3d 600.

Issue No. 3 was preserved for appeal at R. 3716-3848.

STATUTORY PROVISIONS OF CENTRAL IMPORTANCE TO THE APPEAL

Utah Code Ann. § 78B-3-406(1)

For a patient to recover damages from a health care provider in an action based upon the provider's failure to obtain informed consent, the patient must prove the following:

(a) that a provider-patient relationship existed between the patient and health care provider;
(b) the health care provider rendered health care to the patient;
(c) the patient suffered personal injuries arising out of the health care rendered;
(d) the health care rendered carried with it a substantial and significant risk of causing the patient serious harm;
(e) the patient was not informed of the substantial and significant risk;
(f) a reasonable, prudent person in the patient's position would not have consented to the health care rendered after having been fully informed as to all facts relevant to the decision to give consent; and
(g) the unauthorized part of the health care rendered was the proximate cause of personal injuries suffered by the patient.

Utah Code Ann. § 78B-3-403(12)

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

STATEMENT OF THE CASE

One-year-old Derek Nguyen died when IHC personnel, contrary to the rules of Primary Children's Medical Center ("PCMC" or "the hospital") and without parental consent, attached Derek to an untested, sales-demo ventilator; the sales-demo malfunctioned, and Derek suffocated. Derek's father, the plaintiff, sued, *inter alia*, for failure to obtain informed consent. In decision filed April 22, 2010, the Utah Court of Appeals reversed the trial court's entry of summary judgment, holding that all Defendants, including IHC, were subject to liability for failure to obtain informed consent. *See, Nguyen v. IHC Health Services, Inc.*, 2010 UT App. 85.

After remand, IHC moved, once again, for summary judgment on its failure to obtain informed consent, re-asserting the identical "no legal duty of care" argument that it had argued before the Utah Court of Appeals. Plaintiff moved, under the law of the case doctrine, to strike IHC's reasserted motion for summary judgment, which the trial court denied. The court entertained IHC's reasserted argument and reversed the ruling of the court of appeals in *Nguyen*. Plaintiff then petitioned for interlocutory review of the trial court's ruling, and the petition was granted on April 14, 2011.

STATEMENT OF FACTS

1. On April 22, 2010, the Utah Court of Appeals issued its decision in *Nguyen v. IHC Health Services, Inc.*, 2010 UT App. 85, reversing the summary judgment of the trial court and holding Defendant IHC Health Services, Inc., dba Primary Children's Medical Center (hereafter "IHC"), subject to liability for failing to obtain informed consent. *See*, *Nguyen*, ¶¶ 1, 16-19.

2. During the appeal, Defendant IHC argued to the court of appeals that it owed no legal duty of care to obtain informed consent from Plaintiff when it used and tested a sales-demo ventilator on his one-year-old son, Derek Nguyen. *See*, Addendum 2, R. 3742-3746, pp. 28-31; Addendum 3, R. 3748-3753, pp. 10-14.

3. After remand, Defendant IHC filed, once again, a motion for summary judgment, asserting the same "no legal duty of care to obtain informed consent" argument which it had presented to the Utah Court of Appeals. *See*, R. 3563-3715.

4. Plaintiff moved to strike Defendants' reasserted motion for summary judgment, under the law of the case doctrine, but the trial court denied the motion to strike. *See*, R. 3716-3848; Addendum 1, R. 5837-5840.

5. Derek Nguyen suffocated and died after IHC's employees attached him to an untested, sales-demo ventilator, which IHC was considering for purchase. R. 3514-15, 92:4-98:7; R. 1246-48, 103:7-113:10, R. 1263, 109:17-23; R. 1272, 42:7-14.

6. IHC was considering the sales-demo for purchase as a life-flight transport ventilator, and it was in the hospital for testing and evaluation purposes only, not for patient care. R. 1263, 109:17-231272, 42:7-14.

7. IHC's employees and agents were subject to rules governing use of the sales-demo while it was in the hospital, including that they were not to use it on any critically-ill or medically-unstable children; also, that parental informed consent would have to be obtained before using it on a child. R. 1262, 86:15-87:7; R. 1277, 58:7-17; R. 1331-32, 131:17-132:4; R. 1367-68, 121:13-123:1, R. 1291-93, 75:17-77:14.

8. Derek Nguyen was critically ill and medically unstable, and IHC's employees and agents did not obtain informed consent from Derek's father to attach him to the sales-demo ventilator. R. 1264, 120:9-121:7; R. 3514, 92:4-17;R. 1277, 58:11-17; R. 3502-03, 44:21-45:8; R.1288, 71:21-25.

9. Earlier in the same day that IHC's employees and agents attached Derek to the sales-demo, it was scheduled for testing in the hospital's pediatric intensive care unit ("PICU"). R. 1272, 41:16-42:14, R. 1243, 85:14-87:14.

10. At the time of the scheduled testing, IHC's employees and agents were unable to test the sales-demo on moderately-ill, stable children, since there were apparently no such children available in the PICU that day. R. 1243, 85:14-86:2; R. 1271, 39:2-18.

11. IHC's employees and agents that decided to use the sales model on Derek included IHC employee Tammy Bleak, an IHC life-flight nurse and chairperson of the

IHC committee assigned to test, evaluate, and acquire a new life-flight transport ventilator, and Madeline Witte, M.D., a member of IHC's committee and Director of Primary Children's Medical Center ("PCMC") life-flight program. R. 1237, 51:7-9, 33:19-41:10, 22:18-24, 23:3-4, 14:3-21, 19:2-7. Additional IHC employees assigned to the committee by Tammy Bleak and who used the sales model and/or allowed the sales model to be used on Derek Nguyen were several neo-natal life-flight nurses, including Kathy Bolte, IHC respiratory therapist Kevin Crezee, and IHC clinical engineer Ramsey Worman. R. 1233-35, 33:19-41:10.

12. In addition to holding chair of the committee, IHC employee Tammy Bleak was IHC's Children's Services Equipment Specialist. R. 1226-27, 8:9-9:2, R. 1233-35, 33:19-41:10, R. 1237, 51:7-9.

13. Tammy Bleak admitted, that as IHC's Children's Services Equipment Specialist, she had the duty to ensure reliability of the sales-demo ventilator through completion of the testing and evaluation process (called the CTM process), before allowing its use on a patient outside the testing and evaluation parameters. R. 1242,72:10-73:18; R. 1231-32, 24:24-31:21; R. 1232, 29:23-30:5, R. 1233, 33:13-15.

14. At the time of Derek Nguyen's admission at PCMC, Dr. Witte was PCMC's Medical Director of Pediatric Life-Flight, for which she was paid $20,000 per year; she reported to PCMC's Medical Director of Life-Flight Services and to an IHC administrator, and she spent all of her work time at PCMC, eighty-five to ninety percent on

clinical practice at PCMC, and the other ten to fifteen percent in performing her duties as PCMC's Medical Director of Pediatric Life-Flight. R. 3808-3809, pp. 21:18-25:18.

15. As Medical Director of Pediatric Life-Flight at PCMC, Dr. Witte reviewed patient-care practices provided by the life-flight team, provided education for the flight teams, reviewed the flights of the flight team, and performed all other services that PCMC reasonably asked of her. *Id.*

16. Dr. Witte worked at PCMC for at least sixteen-and-a-half years, and did not tell patients that she is not an employee of IHC or PCMC. *Id.*

17. Derek Nguyen, as a patient in the PICU at PCMC was assigned a multi-disciplinary health-care team, and Dr. Witte was one of the physicians on that team. R. 1264, 118:16-18; R. 1257, 50:23-52:21; R. 1258, 61:3-16; R. 1245, 99:7-23.

18. Shortly after it appeared that the clinical evaluation could not proceed, Tammy Bleak and Dr. Witte decided to use, and the other IHC employees listed above, agreed to use the sales-demo, in violation of the hospital rules, to transport Derek for a CT scan, from the PICU to the radiology department on another floor of the hospital. R. 1243, 85:14-86:16; R. 1245, 97:3-104:13.

19. Dr. Witte called Tammy Bleak, indicating that they could use the sales-demo on Derek Nguyen. R. 1243, 87:15-88:3; R. 1255, 42:15-43:25. Tammy Bleak testified:

Q: Okay. Do you know why Dr. Witte called you? Did you have possession of the ventilators which were to be clinically evaluated?

A: She would have–I don't recall if I had possession. She would have called me because I was over the committee, so I could mobilize whatever we needed.

Q: Meaning you could mobilize–you lost me there. What could you mobilize?

A: As I told you earlier, I was the one who had contact with the vendors, with Paul, ***so she would have called me as the chair of the committee to say, we have a patient we could use this on. That's why I was called.***

R. 1243, 87:15-88:3. (emphasis added).

20. IHC's employees and agents used Derek Nguyen to test the sales-demo ventilator. R. 1245, 98:9-100:17; R. 1247, 107:11-108:16, R. 1243, 87:10-14, R. 3249.

21. IHC personnel assigned to test and evaluate the sales-demo ventilator gathered to observe the sales-demo on Derek. R. 1244-45, 94:8-100:17, R. 1233, 34:10-23; R. 1234, 40:3-10.

22. Paul Astle, the sales-demo vendor, attended to answer any questions IHC's officers, employees, and agents had, as they used the sales-demo to on Derek Nguyen. *Id.*

23. IHC's officers, employees, and agents knew, given Derek's condition, that he could not tolerate even a brief interruption in his ventilation, and they were aware that the sales-demo ventilator was untested and could fail. R. 1263, 112:10-12; R. 1264,120:5-

11; R. 1261, 82:23-84:15; R. 1243, 86:8-11, 87:10-14; R. 1247,108:17-25; R. 1269, 25:11-18.

24. Dr. Witte opined that the interruption in Derek's ventilation from failure of the sales-demo led to significant deterioration, from which Derek was not able to recover, and, as a result, he died. R. 1264, 120:5-9.

25. Ramsey Worman, a member of the CTM committee and a clinical engineer at PCMC, testified that he felt that IHC had not fulfilled its duty of care with regard to inspecting and ensuring reliability of the sales demo before using it on a sick patient. R. 1372, 42:15-49:24. He disagreed with the hospital's decision to test it on any patients, let alone critically-ill patients. *Id.*

26. Before using the sales-demo on Derek Nguyen, IHC's employees and agents had never previously used it to transport anyone, nor even attached it to any patient, let alone to transport a critically-ill, medically-unstable child, and had not even given the sales-demo a trial run to see if it would function properly on a trip between the PICU and the radiology department. R. 1247, 108:17-25.

27. At the time of Derek Nguyen's admission, IHC had a "patient and family rights," posted and in effect at the hospital, stating,

> Primary Children's Medical Center is dedicated to meeting your health care needs, and to treating you and your child with the respect and consideration you deserve.
>
> You and your child have the following rights:
>
> . . .

- ***To participate in your child's plan of care and other decisions about your child's health care, including how to manage your child's plan.***

. . .

- ***To be told if any proposed treatment is for the purpose of research, and to be able to consent or refuse to participate*** without your decision affecting your child's care.

. . .

- ***To be informed of hospital rules that apply to you and your child.***

R. 3847-3848. (emphasis added).

29. Prior to transporting Derek via the sales demo, IHC's employees and agents did not inform Derek's father that the ventilator was a sales demo, that it was in the hospital for testing, that hospital rules prohibited its use on a patient in Derek's condition, that it had never previously been used to transport anyone, attached to anyone, nor even taken on a trial run; nor did they inform Derek's father that, given Derek's condition, he was unlikely to survive a malfunction of the sales demo. R. 3514, 92:4-17.

30. During transport, the untested sales demo malfunctioned and, as a result, Derek died. R. 1246-48, 103:7-113:10, R. 1264, 120:5-9.

SUMMARY OF ARGUMENTS

Reversing the first summary judgment entered by the trial court, in *Nugyen v. IHC Health Services, Inc.*, 2010 UT App. 85, the Utah Court of Appeals ruled that IHC is subject to liability to Plaintiff for failing to obtain informed consent when it experimentally used a sales-demo ventilator on his son. After remand, contrary to the law of the case and the mandate of the court of appeals, the trial court reversed the court of appeals' ruling, after

entertaining a second motion for summary judgment from IHC. This second summary judgment motion reasserted the identical "no legal duty" argument considered and rejected by the court of appeals. The trial court had no authority to entertain IHC's reasserted argument, nor to reverse the ruling of the court of appeals. The court of appeals should reverse the trial court again, enforcing its mandate from *Nguyen*.

The court of appeals in *Nguyen* quoted Utah Code Ann. § 78B-3-406(1), which imposes a legal duty upon health care providers to obtain informed consent. IHC is a health care provider, as defined by Utah Code Ann. § 78B-3-406(1). IHC, by and through its officers, employees, and agents, used the sales-demo ventilator on Derek Nguyen and owed Plaintiff a duty to obtain informed consent.

In the event the court of appeals decides to reconsider its rulings in Nguyen, the court should not only hold IHC to its statutorily imposed legal duty, but should also find that IHC assumed a legal duty to obtain informed consent. IHC represented to parents that they had the right to be informed of and decline care, including experimental care. Also, IHC specifically decided to seek and obtain informed consent from parents upon whose children they proposed to use the sales demo ventilator.

ARGUMENT

POINT I

THE TRIAL COURT FAILED TO ADHERE TO THE LAW OF THE CASE BY REVERSING THE RULING OF THE UTAH COURT OF APPEALS.

In *Nguyen v. IHC Health Services, Inc.*, 2010 UT App. 85, the Utah Court of Appeals ruled that IHC is subject to liability to Plaintiff for failing to obtain informed consent when it experimentally used a sales-demo ventilator on Plaintiff's son. *Nguyen*, at ¶¶ 1, 16-19. The court of appeals thus reversed the trial court's entry of summary judgment. *Id.* After remand, the trial court reversed the ruling of the court of appeals, entering summary judgment, for a second time, of Plaintiff's claim that IHC failed to obtain informed consent. *See*, Addendum 1. In so acting, the trial court violated the law of the case. The Utah Court of Appeals should reverse the trial court again, upholding the law of the case.

The law of the case doctrine holds that rulings by an appellate court bind a lower court, and on remand must be obeyed. *See e.g., Gilda v. Guardian Title Company of Utah*, 2001 UT 75 ¶ 9, *Thurston v. Box Elder County*, 892 P.2d 1034, 1038 (Utah 1995) ("*Thurston II*"). In *Thurston v. Box Elder County*, 835 P.2d 165 (Utah1992) ("*Thurston I*"), the Utah Supreme Court reversed the trial court's summary judgment in favor of defendant Box Elder County, and remanded for a determination of whether the County violated the County Personnel Management Act ("the Act") when making its decision to terminate plaintiff Thurston's employment. *Thurston II*, at 1035, 1036. While on remand, the County

sought to introduce evidence that it was not bound by the Act, because the Act was optional for counties with fewer than 130 employees. *Id.*, at 1037. The trial court, however, refused to consider the argument, stating that *Thurston I*, which was the law of the case, mandated the County's compliance with the Act. *Id.* The trial court then ruled that the County had improperly considered factors beyond those enumerated in the Act in terminating plaintiff Thurston. *Id.*, at 1036. On a second appeal to the supreme court, the County argued that evidence proffered at trial was uncontroverted that the County was not subject to the Act when it terminated Thurston, and that the the trial court erred by ignoring it. *Id.* The supreme court disagreed, explaining that the law of the case precluded the trial court from considering the county's evidence:

> The County's argument is without merit. The trial court ruled that the County was bound to follow the Act because *Thurston I* so held "and that is the law of the case and is binding." The trial court was precluded from considering the Act's applicability by reason of the law of the case and properly refused to consider the County's evidence on that issue.
>
> The "law of the case" is a legal doctrine under which a decision made on an issue during one stage of a case is binding in successive stages of the same litigation. The doctrine was developed in the interest of economy and efficiency to avoid the delays and difficulties involved in repetitious contentions and reconsideration of rulings on matters previously decided in the same case.
>
> Law of the case terminology has been applied to a number of distinct sets of problems, each with a separate analysis. ***One branch of the doctrine, often called the mandate rule, dictates that pronouncements of an appellate court on legal issues in a case become the law of the case and must be followed in subsequent proceedings of that case. The lower court must not depart from the mandate, and any change with respect to the legal issues governed by the mandate must be made by the appellate court that established it or by a court to which***

> ***it, in turn, owes obedience.*** In addition, ***the lower court must implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces.***
>
> The application of the mandate rule lacks the flexibility found in other branches of the law of the case doctrine. ***The mandate must be followed even though the lower court subsequently addressing the issue may believe that the issue could have been better decided in another fashion. This serves the dual purpose of protecting against the reargument of settled issues and of assuring adherence of lower courts to the decisions of higher courts.***

Thurston II, at 1037-38. (citations omitted, emphasis added).

Like in *Thurston II*, in the matter at bar, the trial court was obligated to adhere to the law of the case established by the court of appeals' decision in *Nguyen*, even though the trial court believed that the issue "could have been better decided in another fashion". The mandate to the trial court from *Nguyen* was that IHC is subject to liability to Plaintiff for failure to obtain informed consent. *Nguyen*, at ¶¶ 1, 16-19. On remand, it was not for the trial court to ignore that mandate and take up the issue of whether IHC owed a legal duty to Plaintiff. Note that in *Thurston II*, even where uncontroverted evidence was proferred to the trial court that the Act did not apply, since the supreme court had already remanded for a determination of whether the County had violated the terms of the Act, the issue of whether it applied became moot. Likewise, in the case at bar, since the court of appeals ruled that IHC is subject to liability, the issue of whether IHC owed Plaintiff a legal duty was not an issue for trial court consideration.

As directed by the supreme court in *Thurston II*, in the matter at bar the trial court was to implement "both the letter and the spirit of the mandate, taking into account the

appellate court's opinion and the circumstances it embraces". *Id.* Those circumstances include the fact that an appellate court reviews entry of summary judgment *de novo*, and considers any grounds presented to uphold entry of summary judgment. *White v. Deseelhorst*, 879 P.2d 1371, 1376 (Utah 1994). During the first appeal, IHC presented, and the court of appeals considered the identical "no duty of care" argument that IHC reasserted in moving, once again, for summary judgment after remand. *See*, R. 3716-3848; Addenda 2 and 3.

Further, the language of the opinion demonstrates that the court of appeals viewed IHC as owing a legal duty, since it held that no expert testimony was required to establish the standard of care applicable to IHC's legal duty. After citing Utah Code Ann. § 78B-3-406(1), which establishes a health care provider's legal duty to obtain informed consent, the court of appeals explained why no expert testimony was required to establish the standard of care:

> ***[I]n this case, Nguyen bases his claim not on perceived deficiencies in the disclosures made, but on the complete absence of any disclosure about the untested nature of the ventilator and the risks of its use***. If Nguyen's theory had been that disclosures were made to him but the disclosures were misstated or did not include material information, such as the fact that FDA approval was relatively recent or that there was a possibility a screw might come loose and cause the ventilator to malfunction, then it may well be that Nguyen would need an expert to establish exactly what information he was entitled to have disclosed to him. *See* Chadwick, 763 P.2d at 821 n.4. ***Instead, Nguyen claims that he was entitled to know one basic fact, the obvious importance of which does not require an expert to explain–i.e., that this ventilator was unproven and was being tested by the hospital to determine if it should be purchased.***
>
> . . . .

> ***An expert is not needed to establish that Nguyen should have been informed that the ventilator was in the hospital on a trial basis for experimental purposes; that it was still under evaluation; that it was actually intended for "life flight" transport; and, most importantly, that the ventilator had not once been used on a patient.*** Cf. *Id.* at 352 ("[E]xpert testimony is unnecessary to establish the standard of care owed the plaintiff where the propriety of the treatment received is within the common knowledge and experience of the layman. The loss of a surgical instrument or other paraphernalia, in the operating site, exemplifies this type of treatment.")

Id., ¶¶ 17, 18. (emphasis added, footnotes omitted). The court also noted that Defendant IHC gave Plaintiff some "general information about the need for Derek to be transported to receive a CT scan and 'that there was a risk involved with this process' . . . ***[h]owever, it appears even from Defendants' account that no information was given to Nguyen regarding the fact that the ventilator was not regular hospital equipment and that it was being tested by PCMC so it could evaluate whether the ventilator should be purchased.*** *Id.*, n. 9. (emphasis added). The court then reversed the grant of summary judgment, finding "a total absence of any disclosure about the ventilator's experimental status" and determining that no expert testimony was required to establish the standard of care. *Id.*, ¶ 18.

Thus, the letter and spirit of the court of appeals' mandate, especially considering the circumstances of the appeal and the language of the opinion, did not open the door for the trial court to reconsider IHC's argument. Nevertheless, the trial court justified its entertainment of IHC's reasserted argument, on the basis of the court of appeals' statement that the trial court's "'sole rationale . . . for granting summary judgment was the absence of expert testimony.'" *See*, Addendum 1, p. 2, ¶ 2. This argument, however, is a

non-sequitur and inconsistent with the mandate rule of the law of the case doctrine. The fact that the court of appeals noted the trial court's sole basis for summary judgment does not mean that the court of appeals sole consideration in reversing summary judgment was the fact that no expert testimony was necessary. Again, on appeal in *Nguyen*, IHC argued not only the expert testimony issue, but the legal duty issue. *See*, Addenda 2 and 3. Also, conspicuously absent from *Nguyen* is any statement by the court of appeals directing the lower court to address, on remand, whether IHC owes a legal duty of care. Customarily, appellate court decisions explicitly direct lower courts to address specific issues presented on appeal, that the appellate court defers to the lower court to address. Such was not the case here. Rather than seek a way around the ruling, the trial court should have honored the mandate of the court of appeals.

Of course, as the supreme court went on to explain in *Thurston II*, the law of the case doctrine does not mean that a considered issue cannot be raised again, only that it would have to be raised through a petition for rehearing before the appellate court, not on remand to the trial court:

> By the foregoing, we do not suggest that a decision of this Court may never be reconsidered. Rule 35 of the Utah Rules of Appellate Procedure provides a mechanism whereby a party may petition this court for rehearing. The County did not petition for rehearing of *Thurston I*. The County was thus bound by the decision of *Thurston I* on remand of this case in all further proceedings below.

Thurston II, at 1037-38.

In the case at bar, if IHC really believed that the Utah Court of Appeals had ignored its "no duty of care" argument, then IHC had the opportunity to petition the court of

appeals for rehearing. However, IHC chose not to petition for rehearing, rather it chose to wait to reassert its argument at the lower court level, where it had previously found success. This is precisely the type of maneuver the law of the case doctrine prohibits, to "avoid the delays and difficulties involved in repetitious contentions and reconsideration of rulings on matters previously decided in the same case." *Thurston II*, at 1037. Because it failed to petition the court of appeals for rehearing, IHC is bound by the decision in *Nguyen* in all subsequent proceedings.

The supreme court in *Thurston II* did identify a second way in which an appellate decision may be reconsidered:

> In addition, under limited circumstances a court may reconsider its own prior decision. While the County does not identify reconsideration of *Thurston I* as an issue on this appeal, in essence that is what the County seeks. In its brief the county states, "Because that evidence was uncontroverted, this Court is free to, and should, render the legal determination that the [Act] did not govern Thurston's termination."

Id., at 1038. However, the supreme court, while recognizing that "*Thurston I* overstated the applicability of the Act to the County's personnel policies and procedures," declined to reconsider its ruling, for reasons of efficiency and consistency. *Thurston II*, at 1038-39. For these same reasons, the court of appeals should decline to reconsider its prior decision in *Nguyen*.[1]

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[1]Should the court of appeals decide to reconsider its ruling in *Nguyen*, then Plaintiff would anticipate and respectfully request that the court reconsider all of its rulings, including its dismissal of Plaintiffs other causes of action. *See, e.g.*, Judge Thorne's dissent in *Nguyen* at ¶¶ 21-26.

The trial court failed to adhere to the law of the case in reversing the ruling of the Utah Court of Appeals in *Nguyen*. The court of appeals should now, again, reverse the trial court, upholding the mandate of *Nguyen* that IHC is subject to liability to Plaintiff for failing to obtain informed consent.

POINT II

THE UTAH CODE ESTABLISHES THAT IHC OWED PLAINTIFF A LEGAL DUTY TO OBTAIN INFORMED CONSENT.

Even were the court of appeals to reconsider its ruling in *Nguyen*, as demonstrated in the first appeal, Utah law establishes that IHC owed Plaintiff a legal duty to obtain informed consent. *See*, Addendum 3. In ruling that IHC was subject to liability in *Nguyen*, the court quoted from the Utah Code, which establishes the duty of a "health care provider" to obtain informed consent. *See*, *Nguyen*, n. 8 and ¶ 16., Utah Code Ann. §78B-3-406(1). The Code defines "Health care provider" as follows:

> (12) ***"Health care provider" includes*** any person, partnership, association, ***corporation, or other facility or institution*** *who causes to be rendered or who renders health care or professional services as a* ***hospital, health care facility*** *. . . and* ***officers, employees, or agents*** *of any of the above acting in the course and scope of their employment.*

Utah Code §78B-3-403(12). (emphasis added). Thus, by its plain language, the Utah Code establishes that IHC Health Services Inc., dba Primary Children's Medical Center, is a health care provider that owes a legal duty of care to obtain informed consent for health care or

professional services it renders or causes to be rendered in its facility, including that rendered or caused to be rendered by IHC's officers, employees, or agents.[2]

The evidence in the case, especially when viewed in the light most favorable to Plaintiff, as it must be, demonstrates that IHC, by and through its officers, employees, and agents rendered health care or professional services and caused health care or professional services to be rendered to Derek Nguyen. Nurse Tammy Bleak, who arranged for the sales-demo ventilator to be used on Derek, was IHC's employee and officer. She was head of the CTM committee charged with testing and evaluating the sales-demo ventilator. She was also IHC's Children's Services Equipment Specialist, with the admitted duty of ensuring reliability of the sales-demo ventilator through completion of the CTM testing and evaluation process, prior to allowing its use on Derek.

Nurse Bleak staffed the CTM committee with other IHC medical personnel and together they established rules for use of the sales-demo, including that it would not be used on critically-ill or unstable patients, and that parents would have to give their informed consent, before IHC used it on their children. She and the entire CTM committee recognized their duty to inform parents about use of the sales-demo on their children and arranged for an informed consent document to be drafted. After Nurse Bleak arranged for use of the sales-demo on Derek, IHC employee and committee member Kevin Crezee then hooked

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[2]Contrary to the plain language of Utah Code Ann. §78B-3-406(1) and §78B-3-403(12), the trial court ruled, "Utah Code 78B-3-406 does not create an independent duty on the part of PCMC to obtain informed consent." *See*, Addendum 1, p. 2, ¶ 3. The trial court thus has ignored the plain language of the statute, and substituted its will for that of the Utah Legislature.

Derek up to the sales-demo and he and other IHC employees transported Derek on the sales-demo, while the CTM committee members observed. Kevin Crezee, Ramsey Worman, Kathy Bolte and all the IHC nurses on the committee and involved in using and allowing use of the sales-demo on Derek Nguyen, knew the experimental status and the rules governing use of the sales demo. Their knowledge and conduct also obligated IHC to obtain informed consent.

Ignoring the fact that Derek could not have been attached to the sales demo without Nurse Tammy Bleaks' approval, as well as the participation of other IHC committee members, the trial court was misled by IHC's incorrect argument that the law imposed a legal duty only upon Derek's attending physician, Madeline Witte, M.D. Yet, even arriving at this erroneous conclusion, the trial court also had to ignore the fact that Dr. Witte was IHC's officer, employee, and/or agent. As presented to the trial court (and to the court of appeals on the first appeal), and set forth again above, Dr. Witte was IHC's Medical Director of Pediatric Life-Flight, the department for which she and IHC's other employees were testing and evaluating the sales-demo ventilator. IHC paid Dr. Witte $20,000 per year in this position. Dr. Witte was also a member of the CTM committee charged with testing and evaluating the sales-demo. The committee tasked Dr. Witte with drawing up the informed consent release for parental signature. Thus, even if one were to assume that no one but Dr. Witte was involved in attaching Derek to the sales-demo ventilator, IHC would still owe a duty of informed consent, since the evidence shows that Dr. Witte IHC's officer, employee, and/or agent.

Having been presented with IHC's legal duty arguments and the facts regarding the conduct of IHC's officers, employees, and agents, the court of appeals understood the situation, the first time around, in ruling that IHC was subject to liability for failing to obtain informed consent. Pursuant to the Utah Code, IHC owed Plaintiff a legal duty to obtain informed consent.

POINT III

IHC ALSO ASSUMED A LEGAL DUTY TO OBTAIN INFORMED CONSENT.

In addition to its statutorily imposed legal duty, IHC should be held to have assumed a legal to obtain informed consent. IHC published and posted a Patient Bill of Rights at Primary Children's Medical Center, telling parents that it owed them a duty to obtain informed consent:

> Primary Children's Medical Center is dedicated to meeting your health care needs, and to treating you and your child with the respect and consideration you deserve.
>
> You and your child have the following rights:
>
> . . .
>
> - ***To participate in your child's plan of care and other decisions about your child's health care, including how to manage your child's plan.***
>
> . . .
>
> - ***To be told if any proposed treatment is for the purpose of research, and to be able to consent or refuse to participate*** without your decision affecting your child's care.
>
> . . .
>
> - ***To be informed of hospital rules that apply to you and your child.***

R. 3847-3848. (emphasis added). True to IHC's representation to parents, the CTM committee decided it had an obligation to obtain informed consent prior to attaching children to the sales-demo ventilator, and assigned committee member Dr. Witte the task of drafting the informed consent document.

Courts have imposed a legal duty on hospitals where they have represented owing a duty of care or decided to obtain informed consent for experimental care. *See, e.g., Lenahan v. University of Chicago*, 808 N.E.2d 1078, 1082 - 85 (Ill. App. 5th 2004) (reversing summary dismissal where hospital undertook independent duty to obtain informed consent for clinical trial patients); *Friter v. Iolab Corp.*, 607 A.2d 1111 (Pa. Super. Ct. 1992) (finding duty of care where the hospital voluntarily participated in a clinical trial and accepted the duty to obtain informed consent). *See also, Kus v. Sherman Hosp.*, 644 N.E.2d 1214 (Ill.App. 1995); *Stewart v. Cleveland Clinic Foundation*, 736 N.E.2d 491, 501 (Ohio Ct. App. 1999); *Watkins v. Hosp. of the University of Penn.*, 737 A.2d 263, 268 (Pa. Super. Ct. 1999);

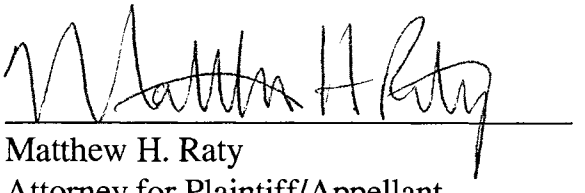
The facts at bar show that IHC was conducting a clinical evaluation of an untested, sales-demo ventilator, and that as part of this evaluation, the hospital imposed on itself a requirement that informed consent be obtained for any child put on the sales-demo ventilator. If the trial court's reversal of the court of appeals ruling were allowed to stand, hospitals could potentially subject their patients to experimental procedures and devices without obtaining patient informed consent. The court should, therefore, additionally recognize that IHC assumed a legal duty of care to obtain informed consent.

CONCLUSION

The trial court failed to follow the law of the case in reversing the Court of Appeals decision in *Nguyen*. The Court of Appeals should now enforce its mandate from *Nguyen*, reversing the trial court's second entry of summary judgment. The Utah Code, quoted in *Nguyen,* imposed a legal duty on IHC to obtain parental consent in using the sales-demo ventilator on Plaintiff's son. Also, IHC assumed a legal duty of care by representing to parents that it owed such a duty, and by deciding to obtain informed consent to use the sales-demo.

WHEREFORE, plaintiff respectfully requests that the Utah Court of Appeals again reverse the summary judgment entered by the trial court and remand the case for trial.

DATED AND SUBMITTED this 1st day of August, 2011.



Matthew H. Raty
Attorney for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing **APPELLANT'S BRIEF** was served upon appellee's counsel at the address listed below, by depositing the same in the United States mail, postage pre-paid on the 1st day of August, 2011.

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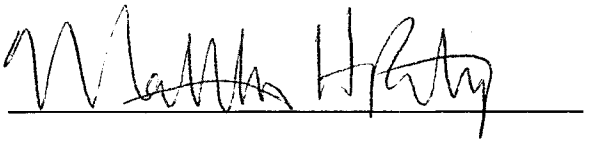

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ADDENDUM

Addendum 1:	R. 5837-5840, Order Granting Summary Judgment
Addendum 2:	R. 3742-3746, Brief of Appellee, Primary Children's Medical Center
Addendum 3:	R. 3748-3753, Appellant's Reply Brief

Tab 1

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THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

BUU NGUYEN, Plaintiff, vs. IHC HEALTH SERVICES, INC., a Utah Corporation, dba PRIMARY CHILDREN'S MEDICAL CENTER, UNIVERSITY OF UTAH HOSPITALS AND CLINICS, UNIVERSITY OF UTAH and STATE OF UTAH, Defendants.	**ORDER GRANTING SUMMARY JUDGMENT** Case No. 030901469 Judge Sandra Peuler

Defendant Primary Children's Medical Center's Motion for Summary Judgment was heard by the Honorable Sandra Peuler on January 10, 2011. Plaintiff was represented by his counsel, Matthew H. Raty and Cory B. Mattson. Defendant Primary Children's Medical Center

("PCMC") was represented by its counsel, Robert G. Wright and Brandon B. Hobbs RICHARDS BRANDT MILLER NELSON. The Court, having heard oral argument from the parties, having reviewed the relevant pleadings, and otherwise being fully advised, hereby

ORDERS, ADJUDGES, AND DECREES the following:

1. This Court denies Plaintiff's Motion to Strike PCMC's Motion for Summary Judgment. The law of the case doctrine does not bar this Court from considering Defendant PCMC's Motion because the Utah Court of Appeals decision in *Nguyen v. IHC Health Services, Inc.*, did not hold that PCMC had an independent duty to obtain informed consent. The Utah Court of Appeals' decision to reverse and remand this matter was based upon the fact that this Court's "sole rationale . . . for granting summary judgment was the absence of expert testimony." *Nguyen v. IHC Health Services, Inc.*, 2010 UT App. 85, ¶ 18. The Utah Court of Appeals remanded this case "for trial or such other disposition as may now be proper." *Id.* Disposition of this matter pursuant to PCMC's Motion for Summary Judgment is proper, in accordance with statutory law, case law, and public policy.

2. Whether PCMC has an independent duty to obtain informed consent is a purely legal question subject to this Court's determination.

3. Utah Code 78B-3-406 does not create an independent duty on the part of PCMC to obtain informed consent.

4. Defendant PCMC's hospital policies do not establish an independent duty of care to obtain informed consent.

5. Plaintiff has failed to apply the facts of this matter to the law to establish that an agency or employment relationship existed between Dr. Witte and PCMC. Therefore, there is no genuine issue of material fact as to whether Dr. Witte is an agent or employee of PCMC.

6. This Court concludes that the Utah Supreme Court's holding in *Schaerrer v. Stewart's Plaza Pharmacy, Inc.*, 79 P.3d 922 (Utah 2003), is applicable and recognizes a public policy to protect the privacy and integrity of the physician-patient relationship. Further, *Schaerrer* established that imposing a duty to obtain informed consent on a third party would "have the effect of undermining the physician-patient relationship by engendering fear, doubt, and second-guessing." *Id.* at 929 (citations omitted).

7. The majority of jurisdictions recognize that a hospital does not have an independent duty to obtain informed consent and the duty to obtain informed consent rests upon physicians, who actively manage the patient's care. These jurisdictions recognize that imposing an independent duty upon a hospital to obtain informed consent from a patient unduly interferes with the physician-patient relationship, has the potential to undermine the physician-patient relationship, and leads to patient confusion. *See Giese v. Stice*, 567 N.W.2d 156 (Neb. 1997); *see also Schaerrer*, 79 P.3d at 928–929. These jurisdictions also recognize that the treating physician, rather than hospital staff members, has the education, expertise, skill, and training necessary to determine what information the patient requires in order to give informed consent. *Id.*

8. This Court concludes that the Nebraska Supreme Court's decision in *Giese v. Stice*, 567 N.W.2d 156 (Neb. 1997) is particularly persuasive. In *Geise*, the court rejected the

plaintiff's argument that because the hospital supplied the implants used in the patient's surgeries the hospital had an independent duty to inform the plaintiff regarding the possible side effects associated with the implants. The court concluded that the hospital did not have a duty to inform and to hold otherwise would "constitute an unwarranted interference in the physician-patient relationship." *Id.* at 164.

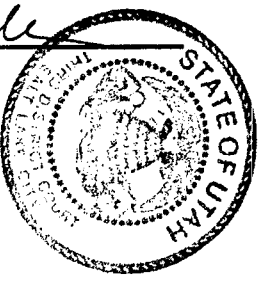
9. This Court concludes that, in this matter, Defendant PCMC did not have an independent duty to obtain informed consent.

10. Based upon the foregoing conclusions of law, PCMC's Motion for Summary Judgment is GRANTED.

11. Plaintiff's claims and causes of action against Defendant IHC Health Services, Inc., dba Primary Children's Medical Center are dismissed in their entirety with prejudice and on the merits. Judgment is hereby entered in favor of Defendant IHC Health Services, Inc., dba Primary Children's Medical Center.

DATED this 27 day of January, 2011.

Honorable Sandra Peuler
Third District Court



Tab 2

IN THE UTAH COURT OF APPEALS

BUU NGUYEN, Appellant/Plaintiff, vs. IHC HEALTH SERVICES, INC., a Utah Corp., dba PRIMARY CHILDREN'S MEDICAL CENTER, UNIVERSITY OF UTAH HOSPITALS AND CLINICS, UNIVERSITY OF UTAH, AND STATE OF UTAH, Appellees/Defendants.	Case No. 20080738

BRIEF OF APPELLEE, PRIMARY CHILDREN'S MEDICAL CENTER

Appeal from Final Order from the Third District Court, Salt Lake County, State of Utah, Judge Sandra N. Peuler

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The CTM process was completely irrelevant to the decision to transport Derek for a CT scan. Derek was critically ill, and his condition was deteriorating. Absent some improvement, Derek was going to die. Dr. Goldenring admitted that he was ignorant of each of these critical factors, so he used an irrelevant product evaluation protocol to opine that Dr. Witte, PCMC, and PCMC's staff breached the applicable standard of care. Dr. Goldenring's testimony is the definition of unreliable, speculative testimony that Rule 702 is designed to preclude.

IV. PCMC owed no duty to obtain informed consent from Mr. Nguyen.

The trial court properly dismissed Mr. Nguyen's claim for failure to obtain informed consent. A claim for lack of informed consent is grounded in negligence principles. *See Lounsbury v. Capel*, 836 P.2d. 188, 193 (Utah Ct. App. 1992). To state a claim for negligence, a plaintiff must establish "(1) that the defendant owed the plaintiff a duty, (2) that the defendant breached that duty, (3) that the breach of duty was the proximate cause of the plaintiff's injury, and (4) that the plaintiff in fact suffered injuries or damages." *Webb v. University of Utah*, 2005 UT 80, ¶9, 125 P.3d 906 (citation omitted). Therefore, in order to maintain a cause of action for lack of informed consent, a plaintiff is required to establish that the defendant owed the plaintiff a duty of care to obtain informed consent.

The determination of whether a legal duty exists is a purely legal question that falls to the court. *See Yazd v. Woodside Homes Corp.*, 2006 UT 47, 143 P.3d 283. The vast majority of courts refuse to impose a duty to obtain informed consent upon a

hospital. *See Krane v. Saint Anthony Hosp. Sys.*, 738 P.2d 75, 77 (Colo. Ct. App. 1987) (holding that the hospital does not have a duty to obtain informed consent similar to that which the surgeon is obligated to obtain). Instead, the duty to obtain informed consent is generally placed upon "those physicians who have actively managed the patient's care." *Johnson v. Sears, Roebuck & Co.*, 832 P.2d 797, 799 (N.M. App. 1992) (holding that the treating physician is in the best position to obtain informed consent from a patient).

In *Johnson v. Sears, Roebuck & Co.*, a non-employee physician ordered that the hospital nurses give the patient a blood transfusion. *See id.*, 832 P.2d at 798. The patient later developed hepatitis, which was traced to the blood transfusion. The patient's estate sued the hospital for failure to obtain informed consent prior to giving the blood transfusion. *See id.* The trial court dismissed plaintiff's complaint for failure to state a claim for which relief could be granted against the hospital. The New Mexico Court of Appeals affirmed the trial court's ruling, holding that the hospital did not have duty to obtain a patient's informed consent for a procedure ordered by a non-employee physician and performed by hospital employees. *See id.* at 798–799. In refusing to place a duty to obtain informed consent on the hospital, the court determined that attending physicians are more qualified than hospital staff to obtain informed consent. The court's ruling, thereby, protected the physician-patient relationship from unnecessary third-party interference.

The Utah Supreme Court has also sought to protect the physician-patient relationship from third-party interference. In *Schaerrer v. Stewart's Plaza Pharmacy,*

Inc., the plaintiff experienced nausea, chest pains, and dizziness after taking an off-label prescription of fenfloramine and phentermine (or "fen-phen") for weight loss, as prescribed by her treating physician. Plaintiff filed a complaint against several defendants including her pharmacist claiming strict products liability. The trial court dismissed plaintiff's claims on motions for summary judgment and the plaintiff appealed. The Utah Supreme Court affirmed the trial court's ruling and specifically held that pharmacists are exempt from strict products liability for failure to warn of the risks of prescription drugs. *Id.* at ¶¶20-21. Under the learned intermediary doctrine, the court held that

> The physician is the best situated to weigh the potential risks associated with a prescription drug against the possible benefits of the drug and the unique needs of the patient. The physician thus has the ability to combine medical knowledge and training with an individualized understanding of the patient's needs, and is the best conduit for any warnings that are deemed necessary.

Id. at ¶21 (citations omitted). The court also recognized that if the court placed a duty upon pharmacists to warn patients of the potential risks of prescription drugs it would "have the effect of undermining the physician-patient relationship by engendering fear, doubt, and second-guessing. . . . Physicians are health care specialists trained to act as 'exclusive intermediaries' in the drug distribution system." *Id.* at ¶21 (citations omitted).

Similarly, this Court should follow the precedent set by the Utah Supreme Court and the majority of courts to protect the physician-patient relationship by recognizing that PCMC had no duty to obtain informed consent for treatment prescribed by non-employee

physicians. Utah public policy acknowledges that the treating physician is "best situated to weigh the potential risks . . . the possible benefits . . . and the unique needs of the patient." *Id.* at ¶20. By placing a duty to obtain informed consent on third parties, such as PCMC, this Court would undermine "the physician-patient relationship by engendering fear, doubt, and second guessing." *Id.* at ¶21.

V. The trial court properly granted summary judgment on plaintiff's claims for intentional infliction of emotional distress and punitive damages.

a. Intentional Infliction of Emotional Distress.

A plaintiff alleging intentional infliction of emotional distress must establish facts on the record showing the defendant's alleged conduct was "outrageous and intolerable." *Schuurman v. Shingleton*, 2001 UT 52, ¶24, 26 P.3d 227,. Essentially, liability exists only where the conduct is "atrocious, and utterly intolerable in a civilized community." *Retherford v. AT&T Commc'ns*, 844 P.2d 949, 977–78 n. 19 (Utah 1992) (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965)). The determination of whether conduct is "outrageous" is a question of law for the Court to decide. *See Schuurman*, 2001 UT 52 at ¶24.

Utah courts have historically been wary of opening the door to recovery for emotional distress claims because of their "highly subjective and volatile nature." *Franco v. The Church of Jesus Christ of Latter-Day Saints*, 2001 UT 25, ¶25, 21 P.3d 198. Accordingly, to establish a claim for intentional infliction of emotional distress, it is not enough for a plaintiff to show that the defendant intentionally acted in a way that

Tab 3

IN THE UTAH COURT OF APPEALS

BUU NGUYEN, Appellant and Plaintiff, v. IHC HEALTH SERVICES, INC., a Utah Corporation, dba PRIMARY CHILDREN'S MEDICAL CENTER, UNIVERSITY OF UTAH HOSPITALS AND CLINICS, UNIVERSITY OF UTAH and STATE OF UTAH, Appellees and Defendants.	**APPELLANT'S REPLY BRIEF** Appellate Case No. 20080738 District Case No. 030901469

Appeal from the Judgment of the Honorable Sandra N. Peuler,
Judge of the Third Judicial District Court, Salt Lake County, State of Utah

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disregard for the safety of Derek Nguyen and the rights of his father, the plaintiff. Therefore, the court should reverse the summary judgment of the trial court and remand the claim for trial.

POINT IV

DEFENDANTS ARE SUBJECT TO LIABILITY FOR FAILING TO OBTAIN INFORMED CONSENT.

Defendants argue that they should have no duty to disclose to a parent, their intention to use his critically-ill, unstable child to test a sales-model ventilator, nor to inform him of the risks associated with that. They also argue that they should have no duty to obtain parental permission.

Defendant University basis its argument on case law that has no relevance and does not excuse the University's duty, case law which addresses whether the FDA status of a medical device need be disclosed. Defendant University also basis its argument on the assumption that "Dr. Witte's use of the ventilator was outside the scope of the CTM process." Defendant University's brief, p. 46. That, however, is an issue for jury resolution.

PCMC argues that hospitals generally do not owe a duty of informed consent and that the duty of informed consent is upon "those physicians who have actively managed the patient's care." Here, however, PCMC's agent, Dr. Madolin Witte was one of the physicians actively managing Derek's care and the physician who, along with PCMC's employee Tammy Bleak, decided to use Derek Nguyen to test the sales-model ventilator. As an active member of PCMC's CTM committee which established the rules for testing,

evaluating, and assessing the reliability of the sales model ventilator, as a paid Medical Director of Pediatric Life Flights Services for PCMC, and as a clinician practicing exclusively at PCMC, Dr. Witte was the employee, agent, and/or apparent agent of PCMC. R. 2372-74, 25:6-11, 21:18-22:6, 23:7-12, 23:21-24:9, 24:10-22, 24:23-25:5, 25:12-18, and 26:20-27:3. Dr. Witte's conduct is legally the conduct of PCMC. PCMC, like Defendant University, is thus vicariously liable for Dr. Witte's failure to obtain informed consent.

PCMC incorrectly asserts that the "vast majority of courts refuse to impose a duty to obtain informed consent upon a hospital." *See* PCMC's brief p. 29. The cases cited by Defendant involve facts where an independent physician has alone ordered or provided the treatment that gives rise to the cause of action for failure to obtain informed consent. Utah statutory law, like the law of all jurisdictions, holds hospitals subject to liability for failure to obtain informed consent for their own treatment decisions. *See,* Utah Code §78B-3-406. The Utah Code recognizes that any "health care provider" owes a legal duty to obtain informed consent. *Id.*

PCMC, like Defendant University, was a "health care provider" that made health care decisions for one-year-old Derek Nguyen, both through its own employees and through its agent or employee, Madeline Witte, M.D. It thus owed a duty of informed consent to Derek's father, the plaintiff. In the matter at bar, Defendants PCMC and University actually recognized their duty to obtain informed consent from the parents of potential test-subject children, to whom it wanted to attach the sales-model ventilator.

Defendants PCMC and University assigned their employee or agent, Dr. Witte, with the duty to prepare the informed consent paper that it would present to parents of children. PCMC also recognized its legal duty to obtain informed consent, through its policy document titled "Patient and Family Rights". R. 3146. Under its own declared policies, PCMC had a duty to allow Plaintiff to participate in his son's health care, to make decisions to accept or refuse medical care, and to "be told if any proposed treatment is for the purpose of research, and to be able to consent or refuse to participate . . ." *Id.* Also, plaintiff's expert witness, Dr. Goldenring, who has extensive experience and is very familiar with informed consent issues in hospitals has testified that PCMC had a duty and breached its duty to obtain informed consent from plaintiff.

Nevertheless, PCMC seeks relief from its duty of informed consent on the basis of *Schaerrer v. Stewart's Plaza Pharmacy, Inc.*, 2003 UT 43, 79 P.3d 922. In *Schaerrer*, the court held that a pharmacist who did not manufacture a drug could not be held strictly liable under product-liability law for the drug's design defects, nor could he, under the "learned intermediary rule" be held strictly liable for failing to warn the drug's end-user. *Id.* at ¶ 15. Under that rule "manufacturers of prescription drugs have a duty to warn only the physician prescribing the drug, not the end user or patient." *Id.* at ¶ 20. The court held that it would be "'incongruous' to impose upon pharmacists a duty to warn patients directly when the manufacturer did not have a similar duty" and so recognized that a "unique set of relationships necessitates adoption of the rule exempting pharmacists from strict products

liability for failure to warn of the risks of prescription drugs." *Id.* at ¶¶ 21-22. The unique circumstances included that physicians are "exclusive intermediaries" in the drug distribution system, pharmacists are limited in their ability to distribute drugs, and like manufacturers, do not have direct access to patients. *Id.* The court noted that holding pharmacists strictly liable to warn patients would undermine the physician-patient relationship by engendering fear, doubt and second-guessing, and would lead pharmacists to "present patients with confusing or contradictory information, cast doubt on the propriety of a physician's legitimate exercise of sound medical judgment, or even refuse to fill valid prescriptions in an effort to avoid liability." *Id.* ¶ 21.

Schaerrer has no application to the case at bar. Plaintiff has asserted no claim of strict liability against PCMC, nor is PCMC a manufacturer or a pharmacist. The court made clear that its holding, including extension of the learned intermediary rule to pharmacists, only applied to strict product liability claims, not to claims of professional malpractice or negligence, and only to the unique circumstances of manufacturers and pharmacists. Further, *Schaerrer* noted specifically that pharmacists and manufacturers would still be subject to liability for negligence, so long as there were facts to support such a claim. *Id.* ¶¶ 34, 37.

Also, PCMC fails to recognize that even if the "learned intermediary doctrine" could be applied to exempt the conduct of PCMC's employees, PCMC would still be subject

to liability because, as set forth above, Dr. Witte was PCMC's agent, if not its employee. Under the law, her conduct is the conduct of PCMC.

POINT V

DR. GOLDENRING'S CAUSATION TESTIMONY IS NOT SPECULATIVE.

Causation in the case is established through Dr. Goldenring's opinion that Derek died as a result of Defendants' breaches of the standard of care in attaching Derek to the sales model. Unfortunately, Defendants ignore Dr. Goldenring's plain and material testimony of causation, and, instead, embark on an irrelevant and speculative discussion about what might have happened had Defendants adhered to the standard of care. Thus, Defendants state, "When questioned about his causation opinion, Dr. Goldenring agreed that it would be speculative to say what Derek's outcome would have been absent the ventilator failure." Defendant University's brief p. 38. Obviously, Derek's future, had Defendants complied with the standard of care, is unknown. He could have lived eight days, eight weeks, or eighty years. Dr. Witte, just like Dr. Goldenring, acknowledged as much,

> Q: Okay. So he could have lived weeks?
>
> A: I think if he was going to die it probably would have been – well, I just can't say. He could have gotten better or got worse. I just can't say when he would have died.

R. 1265, 124:20-24.