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

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. 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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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutory Provisions

REPLY TO DEFENDANT'S STATEMENT OF FACTS

Defendant IHC has not disputed any of the facts set forth in Plaintiff's principal brief. The court should, therefore, deem all of Plaintiff's facts admitted for purposes of its *de novo* review of IHC's motion for summary judgment. Also, on review of summary judgment, the appellate court views 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.

Furthermore, the court should disregard the facts narrated by IHC in its brief. These "facts" are only supported by sporadic citation to the record, in violation of Rule 24(a)(7), Utah R. App. P., are often exaggerated or inaccurate, and, most importantly, are irrelevant to the issues on appeal. In a "nutshell", IHC provides a narration about Dr. Witte's care and treatment of Plaintiff's son. IHC's conduct in using an experimental ventilator on Plaintiff's son, not Dr. Witte's medical care, is at issue on appeal.

ARGUMENT

POINT I

IHC'S BRIEF FAILS TO ADDRESS THE ISSUES ON APPEAL.

Defendant IHC fails to address the issues before the court on appeal. At issue are not Dr. Witte's desire to obtain a CT scan for Derek Nguyen, nor whether Dr. Witte's duty of informed consent for her treatment should be shared by IHC.[1] Rather, the issues are whether IHC had a duty to obtain informed consent for its own conduct in testing a sales-demo ventilator on Plaintiff's son, and whether the Utah Court of Appeals contemplated this issue in ruling that IHC was subject to liability for failing to obtain informed consent. *Nguyen v. IHC Health Services, Inc.*, 2010 UT App 85,¶¶ 16-18, 232 P.3d 529, 532 (Utah App. 2010) (hereinafter "*Nguyen I*"). Plaintiff's claim, as explicitly articulated by this Court in its previous opinion, is that IHC failed in its duty to inform Mr. Nguyen that its sales-demo ventilator "***was unproven and was being tested by the hospital to determine if it should be purchased [,] . . . 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.***" *Id.*, ¶¶ 17, 18. (emphasis added).

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[1]For example, IHC begins its argument, "PCMC does not have a duty to obtain informed consent for ***medical procedures and treatment ordered by Dr. Witte***." p. 11. (emphasis added).

IHC ignores the language and ruling of this Court in *Nguyen I*, in favor of mis-characterizing the case as one over a duty to obtain informed consent for Dr. Witte's care. To this end, IHC resurrects arguments explicitly rejected in *Nguyen I*. For example, IHC repeatedly states that Dr. Witte discussed with Mr. Nguyen the need and risk of transporting Derek to get a CT scan. *See e.g.*, Defendant's brief, pp. 7, 12. In *Nguyen I*, the court noted this assertion by IHC, and responded:

> We note that the record shows that some general information was given to Nguyen about the need for Derek to be transported to receive a CT scan and "that there was a risk involved with this process." ***However, 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.***

Nguyen I, at 537, n. 9. IHC's attempt to conceal its conduct in using the experimental ventilator and, instead, make the case about Dr. Wite's decision to get a CT scan, was already rejected by this Court. As explained by this Court, the issue is not what Dr. Witte told Plaintiff about transport, the issue is what IHC failed to tell Plaintiff before attaching its sales-demo ventilator to his son.

POINT II

THE TRIAL COURT AND IHC HAVE FAILED TO ABIDE THE MANDATE OF *NGUYEN*.

IHC's arguments only emphasize the reason for and the importance of the mandate rule of the law of the case doctrine. The law of the case doctrine exists to "avoid the delays and difficulties involved in repetitious contentions and reconsideration of rulings

on matters previously decided in the same case." *See*, *Thurston v. Box Elder County* ("*Thurston II*"), 892 P.2d 1034, 1037 (Utah 1995). Yet, here we are again, addressing the same attempt by IHC to misconstrue the nature of Plaintiff's informed consent claim, which attempt was previously heard and rejected by this Court. IHC refuses to acknowledge that it made all the same arguments, including its argument that it had no duty to obtain informed consent, when the parties were previously before the court of appeals between 2008 and 2010. *See*, Addendum 2, R. 3742-3746, pp. 28-31; Addendum 3, R. 3748-3753, pp. 10-14, attached to Plaintiff's Principal Brief. This is a large waste of time and judicial and litigant resources.

Had IHC believed that this Court ignored its argument, as explained by the Supreme Court in *Thurston II*, its opportunity and obligation was to ask the court for rehearing, not to wait for a more favorable venue with the trial court, where the claim had before been dismissed. *See*, *Thurston II*, at 1037-38. IHC's duty to obtain informed consent was argued and briefed for this Court, and this Court ruled that IHC was subject to liability. *See*, *Nguyen I*, ¶¶ 16-18; Addendum 2, R. 3742-3746, pp. 28-31; Addendum 3, R. 3748-3753, pp. 10-14. Even though the decision in *Thurston I* was arguably wrong[2], in *Thurston II*, the court stated, "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

[2]The supreme court recognized that "*Thurston I* overstated the applicability of the Act to the County's personnel policies and procedures," but declined to reconsider its ruling, for reasons of efficiency and consistency. *Thurston II*, at 1038-39.

below." *Id.* at 1037-38. Likewise, because it failed to petition the court of appeals for rehearing, IHC is bound by the decision in *Nguyen I* in all subsequent proceedings.

Nevertheless, IHC continues misappropriating language from *Nguyen I* that the trial court's " 'sole rationale . . . for granting summary judgment was the absence of expert testimony.' " *See*, Addendum 1, p. 2, ¶ 2, attached to Plaintiff's Principal Brief. IHC will not acknowledge the obvious, that the trial court's sole rationale for dismissal does not equate to a sole consideration by the Utah Court of Appeals. IHC argued that it owed no duty to obtain informed consent and the court rejected that argument in holding IHC subject to liability. In fact, as noted above, this Court's opinion specifically addressed the argument that Dr. Witte alone owed a duty and fulfilled that duty by telling Plaintiff about a general risk of transport. The court held that there was more to the case, that IHC's failure to disclose the experimental status of the sales-demo ventilator, as well as the trial court's rationale that expert testimony was required, were the grounds for holding IHC subject to liability for failing to obtain informed consent:

> ***Because there was a total absence of any disclosure about the ventilator's experimental status*** and because the court's sole rationale given for granting summary judgment was the absence of expert testimony, ***we reverse the grant of summary judgment in favor of Defendants on the claim of failure to obtain informed consent***. On that claim, we remand for trial or such other disposition as may now be proper.

Nguyen I, ¶18 (emphasis added).

IHC misplaces reliance on *Madsen v. Washington Mut. Bank FSB*, 2008 UT 69, 199 P.3d 898. There, the defendant did not argue on the first appeal that federal banking

regulations were grounds for summary judgment. *Id.* at ¶ 7. This was raised only on the second appeal; therefore, the supreme court rightly held that the law of the case did not preclude raising the issue in the second appeal. *Id.* at ¶ 26. Contrast *Madsen* with the case at bar, where IHC did argue and brief the issue of its duty to obtain informed consent on the first appeal. *See*, Addendum 2, R. 3742-3746, pp. 28-31; Addendum 3, R. 3748-3753, pp. 10-14. Thus, *Madsen* supports application of the law of the case doctrine to the matter at bar; that is, where the law of the case does not apply to a position not previously asserted, as in *Madsen*, it does apply to a matter previously argued on appeal, as it was in the case at bar. Therefore, as stated peviously, IHC's only remedy was to petition for rehearing, not seek reversal of this Court's ruling at the trial court level. The trial court, too, should have honored the mandate of *Nguyen I,* and stricken the motion for summary judgment.

POINT III

IHC OWED A DUTY TO OBTAIN INFORMED CONSENT FOR ITS OWN CONDUCT.

As noted above, rather than address its duty to obtain informed consent for its own conduct, IHC's brief sets up the same "straw man" argument previously rejected in *Nguyen I*, to wit, that Plaintiff's claim is for Dr. Witte's failure to obtain informed consent to transport Derek for a CT scan. Thus, IHC incorrectly asserts that at issue is whether a hospital owes a "concurrent" duty with an attending physician to obtain informed consent for care provided by that physician in its hospital. IHC then sets forth lengthy, irrelevant arguments, and cites numerous inapposite cases, to the effect that IHC should not owe a

"concurrent" duty with Dr. Witte for her care and treatment, since that would interfere with the doctor-patient relationship. Sure, in those situations where a hospital's conduct is not at issue, the majority rule is, and rightly is, that the hospital owes no duty of care to a patient. However, that is not this case.

Again, as recognized by *Nguyen I*, at issue is IHC's duty in regard to its own conduct.[3] As set forth in the undisputed Statement of Facts of Plaintiff's Principal Brief, IHC, not Dr. Witte, was in the process of obtaining, testing, and evaluating ventilators for its life flight services. IHC, not Dr. Witte, set up the parameters for experimenting with those ventilators, including that they not be used on critically-ill nor unstable patients. IHC, not Dr. Witte, had the responsibility of determining reliability of the sales-demo ventilators by experimenting within the parameters established by IHC. IHC, not Dr. Witte, received the subject sales-demo ventilator into the hospital. IHC's employees then made the decision to use that sales-demo ventilator contrary to IHC's established parameters, after it appeared that its testing could not proceed as planned with moderately ill, stable patients.

While it is true that Dr. Witte was a member of IHC's committee charged with testing, evaluating, and acquiring a life-flight ventilator, she was not chair of the committee, nor did she, nor could she act in her individual capacity to use the sales-demo on Derek. The chair of IHC's committee authorized use of the sales-demo on Derek Nguyen. An IHC

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[3]Utah Courts have always held that entities have a duty for their own conduct. *See, e.g., Magana v. Dave Roth Construction*, 2009 UT 45, ¶¶ 37-38; *Ottens v. McNeil,* 2010 UT App 237, ¶ 27.

employee on the committee then attached Derek to the sales demo. IHC employees who were IHC committee members, along with the sales-man, watched the use of the sales demo on Derek. IHC's duty arises from its own conduct.

IHC mis-characterizes *Lounsbury v. Capel*, 836 P.2d 188 (Utah Ct. App. 1992) as construing Utah Code Section 78B-3-406 to place a duty of informed consent only upon a physician. *Lounsbury* did not address the issue of whether Utah Code §78B-3-406 places a legal duty of informed consent upon a hospital. The answer to that question is contained in the plain language of Utah Code §§78B-3-403(12) and 78B-3-406. Utah Code §78B-3-406 imposes a duty of informed consent upon a "Health care provider". Utah Code §78B-3-403(12) 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). IHC and PCMC are health care providers for purposes of Utah Code §§78B-3-403(12) and 78B-3-406. 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.

As set forth above, and recognized by the court in *Nguyen I*, IHC, through its officers, employees, and agents rendered health care and professional services, albeit

improper care and services, to Plaintiff's son. It, therefore, owed a duty to obtain informed consent. To hold that IHC does not owe a duty of informed consent for its own conduct, would mean that hospitals could (as IHC did here), subject their patients to experimental procedures and devices without informing parents and obtaining their permission.

To the extent that Dr. Witte was also involved in the decision to use the sales-demo ventilator on Derek Nguyen, she too was acting as IHC's officer, employee, and/or agent. IHC states that Dr. Witte was not its employee and that it is not vicariously subject to liability for her conduct. Yet, as presented to the trial court (and to the court of appeals on the first appeal), and set forth again in Plaintiff's principal brief, 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. Plaintiff's Principal Brief, Statement of Facts, ¶ 14. Dr. Witte was a member of IHC's 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 assumed 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 was IHC's officer, employee, and/or agent in regard to use of the sales-demo ventilator. However, given the extensive evidence of the conduct of IHC's other officers and employees, as recognized in *Nguyen I*, one need not consider Dr. Witte.

POINT IV

IHC ALSO ASSUMED A LEGAL DUTY TO OBTAIN INFORMED CONSENT.

IHC knew that it had no right to subject Derek Nguyen or other children, even medically-stable children, to experimental devices, and concluded that it must obtain parental informed-consent before attaching children to the sales-demo ventilators. IHC's CTM committee assigned committee-member Dr. Witte the job of drafting the informed consent document. IHC's assumption of legal duty, in this regard, complied with the representations it made to parents in the "Patient Bill of Rights" that it posted at Primary Children's Medical Center:

> 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).

Like other issues on appeal, IHC's brief ignores whether IHC assumed a legal duty to obtain Plaintiff's informed consent. IHC fails to contest the holdings of other jurisdictions finding hospital assumption of legal duty in similar circumstances, including, *Lenahan v. University of Chicago*, 808 N.E.2d 1078, 1082 - 85 (Ill. App. 5th 2004); *Friter v. Iolab Corp.*, 607 A.2d 1111 (Pa. Super. Ct. 1992); *Campbell v. Pitt County Mem. Hosp., Inc.*, 352 S.E.2d 903 (N.C. App. 1987); *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); and *Watkins v. Hosp. of the University of Penn.*, 737 A.2d 263, 268 (Pa. Super. Ct. 1999).

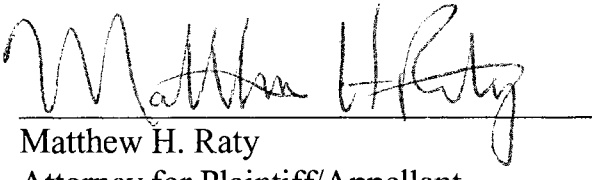
The undisputed facts in this case are that IHC was conducting a clinical evaluation of an experimental, sales-demo ventilator, and that the hospital rightly imposed upon itself a requirement that informed consent be obtained for any child put on the sales-demo ventilator. Plaintiff' Principal Brief, Statement of Facts, ¶ 7. It is also undisputed that IHC failed to obtain informed consent to comply with its own policies. *Nguyen I* at ¶ 18 (stating that "there was a total absence of any disclosure about the ventilator's experimental status . . . ." *Id.*) Considering these essential facts in light of the rules regarding a self-imposed obligation, IHC must take responsibility for failing to obtain informed consent for the use of the experimental ventilator.

CONCLUSION

The trial court failed to follow the law of the case in reversing the Utah Court of Appeals decision in *Nguyen I*. This Court should now enforce its mandate from *Nguyen I*, reversing the trial court's second entry of summary judgment. The Utah Code, quoted in *Nguyen I*, imposed a legal duty on IHC to obtain parental consent in using the experimental sales-demo ventilator on Plaintiff's son. Also, IHC assumed a legal duty of care by rightly imposing upon itself the obligation to obtain informed consent.

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 8TH day of December, 2011.



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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing **APPELLANT'S REPLY BRIEF** was served upon appellees' counsel at the addresses listed below, by depositing the same in the United States mail, postage pre-paid on the 8TH day of December, 2011.

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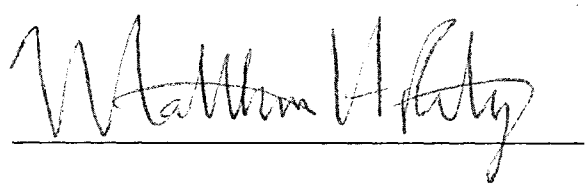

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