

1991

Michel Lounsbury v. Neal C. Capel : Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

MICHEL LOUNSBURY,
Plaintiff/Appellant,

vs.

NEAL C. CAPEL, M.D.,
Defendants/Appellee.

)
) REPLY BRIEF OF APPELLANT
)

) 91-0584-CA
)

) Case No. [REDACTED]
) Argument Priority: 16
)

APPEAL FROM FINAL ORDER OF THE FIFTH
JUDICIAL DISTRICT COURT IN AND FOR WASHINGTON COUNTY,
STATE OF UTAH

THE HONORABLE J. PHILIP EVES, DISTRICT JUDGE

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**UTAH COURT OF APPEALS
BRIEF**

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91-0584-CA

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Clerk, Supreme Court, Utah

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MICHEL LOUNSBURY,)	
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Plaintiff/Appellant,)	
)	
vs.)	
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NEAL C. CAPEL, M.D.,)	Case No. 900160
)	Argument Priority: 16
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§ 78-14-5(3) (1987)5, 6, 7, 8

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STANDARD OF REVIEW

This case comes before the Court from a judgment entered after both parties made a proffer of evidence before the lower court judge. All of the facts stated in the Defendant's Brief were not established by this proffered evidence. Since no jury involvement took place, the judgment should be characterized as a directed verdict. For this reason Plaintiff urges the Court to disregard the facts as stated in the Defendant's Brief and note that because it is reviewing a directed verdict, Plaintiff's version of the facts is the only one that it should consider.

The standard of review is that this court must examine the evidence in a light most favorable to the Plaintiff against whom

the directed verdict was entered. Ferris v. Chugach Electric Assn., 557 P.2d 763 (Alaska 1976); Denney v. St. Marks Hospital, 442 P.2d 944 (Utah 1968); Wells v. Denver and Rio Grande Western Railroad Co., 426 P.2d 229 (Utah 1967). And, if there is a reasonable basis in the evidence, and in the inferences to be drawn therefrom that would support a judgment in favor of the Plaintiff in this case, the final order of the lower court must be reversed. Management Committee of Greystone Pines Home Owners Assn. v. Greystone Pines Inc., 652 P.2d 896, 897-98 (Utah 1982).

SUMMARY OF ARGUMENTS

POINT I: Because the Plaintiff never provided consent for the surgery he received, Defendant's focus on "informed consent" case authority is misplaced. Without any consent, the cause of action arises outside the Utah Health Care Malpractice Act provisions.

POINT II: When substitute consent was obtained from Plaintiff's wife, despite Plaintiff's being competent to provide such consent himself, the substitute consent was invalid and outside statutory sanctions.

POINT III: When Defendant was permitted to rely upon substitute consent that was more cooperative and convenient, instead of Plaintiff's competent and withheld consent, Plaintiff was deprived of basic protective liberty over himself. If such alternative consent is permitted under the circumstances, then Section 78-14-5(3) of the Utah Code is without meaning and Section 78-14-5(4)(b) is unconstitutional.

ARGUMENT

POINT I

DEFENDANT'S FAILURE TO OBTAIN ANY CONSENT
WHATSOEVER FROM PLAINTIFF WAS A BATTERY, NOT
A FAILURE TO OBTAIN INFORMED CONSENT

The Plaintiff voluntarily submitted to diagnosis and testing prior to surgery. He withheld and/or refused his consent to the surgery and anesthesia repeatedly while simultaneously asking for a conference with Defendant.

Plaintiff never consented to the surgery. Surgery without consent is a battery. Riedisser v. Nelson, 11 Ariz 542, 534 P.2d 1052, 1054 (1975); Miller v. Kennedy, 11 Wash. App. 272, 522 P.2d 852, 860, aff'd 85 Wash. 2d 151, 530 P.2d 334 (1974); Cluff, California Supreme Court Expands The Informed Consent Doctrine; Physicians Have A Duty To Obtain An Informed Refusal: Truman v. Thomas, 1980 B.Y.U.L. Rev. 933, 933 n.2. Where the entire course of surgery on Plaintiff was performed without consent, all incisions, medication, etc., are tortious injuries.

Defendant urges that the claim the Plaintiff filed is an "informed consent" type malpractice claim. This is not correct. Informed consent is the name for a general principal of law that a physician has a duty to disclose what a reasonably prudent physician in the medical community in the exercise of reasonable care would disclose to his patient as to risk so that the patient can balance risk and benefit before electing surgery. Zebarth v. Swedish Hospital Medical Center, 81 Wash. 2d 12, 499 P.2d 1 (1972). Informed consent issues turn on partial disclosure of a

collateral hazard to the patient before consent is obtained. Nishi v. Hartwell, 52 Hawaii 188, 296, 473 P.2d 116, 118 (1970). Disclosure in each case is variable dependent upon circumstances. Cobbs v. Grant, 8 Cal. 3d 224, 502 P.2d 1 (1972).

In this case consent was never provided. Plaintiff has not alleged partial disclosure. He has alleged that no consent whatsoever was given. The issue arises at the basic consent level itself, not at whether Defendant made appropriate disclosures when obtaining consent. There was never an express or implied consent to the Plaintiff's surgery by the Plaintiff himself.

The Plaintiff did not acquiesce to the surgery. He specifically, intentionally and repeatedly withheld his consent from the anesthesiologist and Defendant physician. He instead requested a conference with the Defendant which he never received while at the hospital prior to surgery. Therefore, he has properly made out a prima facie case for battery and whether he obtained proper disclosures to establish informed consent is irrelevant to this case.

POINT II

THE SUBSTITUTE CONSENT BY PLAINTIFF'S WIFE
WAS INVALID BECAUSE PLAINTIFF WAS NEITHER A
MINOR, NOR INCAPACITATED, NOR WAS AN
EMERGENCY CONDITION PRESENT

Plaintiff attacks the validity of consent for surgery obtained from a third party. In Woods v. Brumlop, 71 N.M. 221, 377 P.2d 520, 524 (New Mexico 1962) the court states that without

the disclosure by the doctor [addressing the issue of "informed consent"] it is said that the patient is not informed and that, therefore, "any consent obtained is ineffectual." Id., 377 P.2d at 524. "An adult person, if he be of sound mind, is considered to have the right to determine for himself whether a recommended treatment or surgery shall be performed upon him" Natanson v. Kline, 186 Kan. 398, 350 P.2d 1093 (1966).

The right of one to give his own competent consent is specifically protected by Section 78-14-5(3).¹ Plaintiff asserts that it is also his right to have a jury determine the circumstances of his competency to consent or not.

A fair reading of Section 78-14-5(3) establishes the uncompromised right of a patient to refuse treatment including surgery. To hold, as did the court below, that despite this protected right the substitute consent obtained after heavily medicating Plaintiff is somehow more valid or superseding in nature than the Plaintiff's express withholding of consent, is clearly erroneous. Since the law presumes sanity or competence, Grannum v. Berard, 422 P.2d 812 (Wash. 1967), the determination of valid consent should rest with the trier of fact. In this case, a jury was not allowed to consider the issue and it should be remanded for determination by the trier of fact.

¹ "Nothing contained in this act shall be construed to prevent any person 18 years of age or over from refusing to consent to health care for his own person upon personal or religious grounds." Utah Code Ann. § 78-14-5(3) (1987).

POINT III

PLAINTIFF'S CONSTITUTIONAL RIGHTS WERE
VIOLATED WHEN DEFENDANT WAS PERMITTED TO RELY
ON SUBSTITUTE CONSENT AFTER AFFIRMATIVE
REFUSAL OF SUCH CONSENT

Absent some compelling reason such as incapacity, minor child, or emergency, consent for medical treatment is reserved to the individual himself. Reiser v. Lohner, 641 P.2d 93 (Utah 1982); Utah Code Ann. § 78-14-5(3) (1987). Permitting anyone to override the competent withholding of consent to medical treatment offends notions of basic personal liberties afforded constitutional protection. Certainly, the drafters of the Utah malpractice statute intended no such offense.

The recent Supreme Court case of Cruzan v. Director, Missouri Department of Health, 111 L. Ed. 2d 224, (1990) is helpful in identifying and reaffirming some important constitutionally protected interests applicable in our case.

In Cruzan, the Court was faced with allowing a family to substitute their judgment for that of a patient when the patient was in a persistent vegetative state. Withdrawal of medical treatment would bring certain death to the patient. It is within this context the Court discusses substitute judgment issues.

The Court sustained the finding of the Missouri Supreme Court which had held that because there was no clear and convincing evidence of the patient's desire to have life-sustaining treatment withdrawn under the circumstances, her parents lacked authority to effectuate such a request. The Court

sustained this finding despite personal testimony of a roommate to the contrary.

In this case there was affirmative conduct in withholding consent for treatment during uncontested periods of competence by the patient himself. Clearly, the Court would not validate contrary substitute consent.

Utah's statutes do preserve the right of an individual to withhold his or her consent from any medical treatment. Utah Code Ann. § 78-14-5(3)(1987). It does not permit substitute judgment on this issue if contrary to a competent determination by the patient himself.

In Cruzan, the Supreme Court states that the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property without due process of law." The principal that a competent person has a constitutionally protected liberty interest in unwanted medical treatment may be inferred from our previous decisions." Cruzan, 111 L. Ed.2d 224, 241. The Court was unable to justify permitting the parents to withhold medical treatment from their daughter because there was insufficient evidence of their daughter's wishes.

Cruzan is not wholly unlike this case. Here, Plaintiff expressed repeatedly his refusal to sign consent forms for either the surgery or the anesthesia. Yet once he was made incapacitated by medication, the Defendant secured consent by the substitute judgment of the Plaintiff's spouse, obviously contrary to Plaintiff's express wishes. Plaintiff's constitutional right

to determine his medical treatment was violated. The Defendant's actions also breached the statutory protection outlined in Section 78-14-5(3).

The Court cautioned against the very facts presented in our case when it further warned "there is no automatic insurance that the view of close family members will necessarily be the same as the patient's would have been had she been confronted with the prospect of her situation while competent." Cruzan, 111 L. Ed.2d 224, 247. The substitute judgment may be further clouded when, as here, the spouse was startled by being summoned to the hospital early in the morning, then pressured to sign the consent forms. That consent was directly opposed to the intentional actions of the patient while competent. It was not valid consent.

The Cruzan case supports and gives great affirmation to the principle behind Section 78-14-5(3) which expressly reserves the liberty of consent to treatment to the patient and should be applied by this Court.

CONCLUSION

Because Defendant failed to obtain the necessary consent from the Plaintiff prior to performing surgery, and because the Plaintiff was competent to and did withhold consent prior to surgery, the acts of the Defendant constitute battery, not failure to obtain informed consent, upon the Plaintiff.

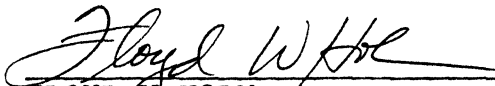
Further, despite consent being provided by Plaintiff's spouse, such consent was ineffective because either the Defendant negligently or intentionally created circumstances of temporary incapacity so as to justify substitute consent. The Defendant should not be permitted to take refuge behind the malpractice statutes when the case is proceeding properly as a battery cause of action.


Finally, if the Utah statute is applied in such a way as to negate the Plaintiff's own refusal to provide the Defendant with consent and the substitute consent of his spouse is validated under the circumstances of this case, it is unconstitutional.

Plaintiff respectfully requests that this Court reverse the decision of the lower court and remand the case for trial on the merits.

RESPECTFULLY SUBMITTED this 1st day of November, 1990.

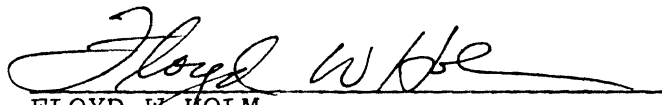
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of November, 1990, four (4) copies of the within and foregoing REPLY BRIEF OF APPELLANT were served upon Elliott J. Williams and Elizabeth King at SNOW, CHRISTENSEN & MARTINEAU, 10 Exchange Place, 11th Floor, P.O. Box 45000, Salt Lake City, Utah 84145.


FLOYD W. HOLM