Daily Journal

# VERDICTS & SETTLEMENTS

FRIDAY, MAY 7, 2010

## PERSONAL INJURY

### Medical Malpractice

Lack of Informed Consent, Battery

VERDICT: Defense

CASE/NUMBER: *Nathan Rivas, a Minor, by his Guardian ad Litem, Eduardo Rivas v. Childrens Hospital Los Angeles, Dean Anselmo, M.D., Childrens Hospital Los Angeles Medical Group* / BC409335.
COURT/DATE: Los Angeles Superior Central / April 13, 2010.

JUDGE: Hon. Luis A. Lavin.

ATTORNEY:
Plaintiff — Nathaniel J. Friedman (Law Offices of Nathaniel J. Friedman, Beverly Hills).
Defendant — N. Denise Taylor (**Taylor Blessey LLP**, Los Angeles) for Dean Anselmo; Robert C. Reback (Reback, McAndrews & Kjar, LLP, Manhattan Beach) for Childrens Hospital Los Angeles; David J. Weiss (Law Offices of David J. Weiss, Los Angeles) for Childrens Hospital Los Angeles Medical Group.

MEDICAL EXPERTS:
Plaintiff — Ronald M. Baum, M.D., pediatric neurology, West Hills; Sharon Muenchow, M.D., pediatric surgery, Pasadena.

Defendant — Craig Albanese, M.D., pediatric surgery, Palo Alto; Kimberly BeDell, M.D., pediatric rehabilitation, Long Beach; David Hicks, M.D., pediatric pulmonology/neonatology, Orange; Perry R. Lubens, M.D., neurology, Long Beach.

TECHNICAL EXPERTS:
Plaintiff — Heidi Paul, Ph.D., vocational rehabilitation, life care planning, San Marino; Ted Vavoulis, M.S., economics, Los Angeles.

FACTS: Nathan Rivas was born on June 9, 2007 at Glendale Memorial Hospital, at 25 weeks gestation. He had multiple complications related to his prematurity, including pulmonary complications requiring him to be on a ventilator for the first 55 days of life, as well as for an additional five days subsequently for infections. He also was at high risk for developmental delay, had Grade II-III intraventricular hemorrhages, retinopathy of prematurity, and sepsis. He developed large, bilateral inguinal hernias.

On Nov. 15, 2007, he was transferred to Children's Hospital of Los Angeles for the repair of the bilateral inguinal hernias, scheduled for Nov. 16, 2007. The plan was for him to be discharged home thereafter. On the evening of Nov. 15, 2007, the testimony of the NICU nurse and the surgical fellow was that there was a 30-45 minute face-to-face meeting with Eduardo Rivas in the NICU, during which time the consent form was read to him and all of the risks, benefits and alternatives to surgery were explained. The discussion was in English and the testimony was that Rivas was offered a translator. After the discussion, Rivas refused to sign the consent form; he asked to take the consent form home to discuss it with family members and also asked to speak with the attending surgeon. The form was signed by the surgical fellow and was placed in the chart. Rivas was asked to return to the NICU the next morning to have a discussion with the attending surgeon.

Rivas denied ever being in the NICU that night, but instead contended that he was at home and the discussion was held over the phone, was only 10 minutes in length, that he wasn't told of any risks except for a small risk of infection, and that a social worker was a party to the discussion in order to act as an interpreter. The social worker testified that she was not there and was not a party to a discussion on November 15.

On the morning of November 16, the surgery was postponed because consent had not been obtained. It was the testimony of the surgeon and the NICU nurse that, because Rivas was not present in the NICU, the nurse called him on his cell phone, and that the surgeon thereafter had a discussion with Rivas, explaining why the surgery was necessary, with the nurse on the phone as a "witness" to the discussion. The surgeon allegedly told Rivas that he could not take the baby home without the surgery because of the high risk of incarceration/strangulation of the hernias that could lead to significant morbidity/mortality. Rivas allegedly consented verbally to the surgery, which was verified by the nurse, and the nurse signed the consent form on the space evidencing that a telephonic consent was obtained. The nurse, however, did not check the box for telephonic consent.

The anesthesiologist further testified that his resident had a face to face discussion with Rivas the evening before the surgery regarding the anesthetic risks and that he came to the NICU at around 12 noon, at which time Rivas was there. The verbal "consent" was documented in the anesthetic record by the anesthesiologist and in the operative report by the surgeon.

Rivas denied that he ever had a telephone discussion with the surgeon, and denied ever giving his consent to the surgery. He denied ever meeting the anesthesiologist until after the surgery. He contended that he did come to the NICU that morning but the surgeon was not there and that the nurse instructed him to go to the first floor and wait. He claimed that the telephone calls documented on his cell phone were calls from the nurse telling him that she could not find the surgeon.

After the surgery, the baby returned to the NICU intubated, and subsequently there was a decompensation of his pulmonary condition and he remained on the ventilator. He eventually had a tracheostomy, and was transferred to a care facility.

By the time of the trial, he was still on the ventilator but was "sprinting" off of it for one hour at a time, up to four times a day, and was living at home with his father. He was diagnosed with developmental delays, and at the time of trial, he was two and a half years old, with a developmental age of approximately 10 months.

PLAINTIFF'S CONTENTIONS: Rivas contended that he did not provide his informed consent for the hernia surgery and that the surgery caused or contributed to his son's current condition, including his ventilator dependence and neurological deficits. Rivas claimed that he was not sufficiently fluent in English and that an interpreter should have been provided for informed consent discussions. Rivas further contended that the hospital's own "informed consent" protocol demands a signed release for elective surgery, a fact that in this case was not disputed.

The Los Angeles County Dept. of Health conducted an investigation of this situation per Health & Safety Code Section 1279.1 ("adverse incidents"). The hospital had not reported this case at all (much less within five days of the occurrence, as required by Section 1279.1). This report was received by plaintiffs counsel after the jury had been sworn. The findings of the Health Dept. were that "there was no informed consent to the surgery." Notwithstanding, the trial judge refused to allow plaintiff to cross-examine, defense expert Albanese (who opined that there was "informed consent") with the Health Dept. report.

DEFENDANT'S CONTENTIONS: Defendants contended that Rivas did provide informed consent for the hernia surgery, that even if he hadn't that no reasonable person in his position would have refused the surgery as it was necessary and the risks of not doing the surgery were greater than the risk of surgery, and that plaintiff's damages are the result of his extreme prematurity, not due to a complication of surgery or anesthesia during surgery.

Defendants also contended that Rivas spoke fluent English and was not in need of an interpreter for his multiple discussions with the health care providers at CHLA.

INJURIES: Sharon Muenchow, M.D., pediatric surgeon, testified that Anselmo and Giuliani fell below the standard of care in not adequately providing informed consent to Rivas (accepting Rivas' testimony that he did not have informed consent discussions); that the written informed consent was incomplete as it was signed by the fellow the night before and not by the surgeon who obtained the alleged telephonic consent; that the surgery should have been delayed for a more thorough evaluation that would have caused the physician's to recognize that the patients lung condition was too fragile for surgery; that his pulmonary condition following surgery was due to the anesthetic gases given during surgery, causing the pulmonary damages.

Ronald M. Baum, M.D., pediatric neurologist, testified that plaintiff has cerebral palsy and microcephaly, and is significantly developmentally delayed. Baum opined that he has a normal survival to the eighth decade of life, provided the care that plaintiff's life care planner is provided.

Heidi Paul, Ph.D., life care planner, testified concerning her life care plan, including the future care needs of 24/7 LVN care for life.

Craig Albanese, M.D., pediatric surgery, testified that the hernia surgery was indicated and it would have been below the standard of care to discharge the patient home without the surgery; the patient was stable for surgery from a surgical standpoint; there were no surgical complications; the risks, benefits, and alternatives the father was advised of, per the telephonic consent form, and the testimony of Giuliani and Anselmo, met the standard of care.

David Hicks, M.D., pediatric pulmonology/neonatology, testified that the standard of care did not require a pediatric pulmonary consult before surgery; the patient was stable for surgery; the decompensation of the patient's pulmonary status after surgery, including the need to remain on the ventilator, was due to his pre-existing chronic lung disease, not due to the surgery itself; the plaintiff is likely to get off of the ventilator in one to two years, but has a limited life expectancy to approximately 20 years due to his pulmonary fibrosis and chronic lung disease.

Kimberly BeDell, M.D., pediatric rehabilitation, testified that all of the plaintiff's future care needs are the result of his extreme prematurity. He does not need 24/7 LVN care because he is being cared for now by his father and a caretaker (the father having voluntarily withdrawn the LVN care he was receiving before trial), and because he will likely get off of the ventilator, per Hicks' testimony.

Perry Lubens, M.D., pediatric neurologist, testified that Nathan's neurologic deficits are due to his extreme prematurity and/or congenital, and unrelated to the hernia surgery; his life expectancy, due to his chronic lung disease and neurologic deficits, is between 10-20 years.

DAMAGES: Plaintiff asked for $19 million in damages. Ted Vavoulis, economist, testified regarding the economic damages for future care costs based on plaintiff's life care plan, assuming a normal life expectancy, future value of $204,654,095 and present value of $16,059,437; assuming a 20 year life expectance (on cross-examination), future value $12,543,640, present value $6,944,000. Economic damages for loss of earnings projected at $1,126,000 to $1,480,318, assuming a bachelor's degree to professional degree. Past economic damages limited to MediCal lien of $912,895.55.

JURY TRIAL: Length, 13 days; Poll, 11 defense (1 undecided); Deliberation, 1.5 hours.
SETTLEMENT DISCUSSIONS: The plaintiff made a C.C.P. Section 998 demand of $750,000. The defendant made a C.C.P. Section 998 offer of $95,001.

SETTLEMENT DISCUSSIONS: Plaintiff demanded $2 million (policy limits) to Dr. Anselmo and Children's Hospital Los Angeles Medical Group; and $8 million to Children's Hospital Los Angeles before trial. Plaintiff's last demand during trial was an offer to dismiss Dr. Anselmo and the group for a high-low settlement of $6 million/$8 million as to Children's Hospital Los Angeles.
Defendants made no offer.

RESULT: Defense verdict.

OTHER INFORMATION: Plaintiff intends to move for a new trial.