

SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

MARIA CUMMINGS, INDIVIDUALLY AND
AS PERSONAL REPRESENTATIVE OF THE
ESTATE OF SHAUN MICHAEL CHAVEZ;
JANA VALLEJOS INDIVIDUALLY
AND AS PERSONAL REPRESENTATIVE OF THE
ESTATE OF DONOVAN VALLEJOS; and
LEON SALAZAR, INDIVIDUALLY, on behalf of
themselves and ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

vs.

Cause No. CV 2001-00579
(As consolidated with
Cause No. CV 2001-01409)

BOARD OF REGENTS OF THE UNIVERSITY OF NEW MEXICO,
a body corporate of the State of New Mexico, for itself and its public operations,
including UNIVERSITY OF NEW MEXICO HEALTH SCIENCES CENTER,
and its components the UNIVERSITY OF NEW MEXICO HOSPITAL, and UNIVERSITY
OF NEW MEXICO SCHOOL OF MEDICINE,

Defendants.

THIRD AMENDED CLASS ACTION COMPLAINT
FOR MEDICAL AND OTHER NEGLIGENCE

Maria Cummings, individually, and as Personal Representative of the Estate of Shaun Michael Chavez, Leon Salazar, individually, and Jana Vallejos individually, and as Personal Representative of the Estate of Donovan Vallejos, and all others similarly situated hereby bring a class action pursuant to Rule 1-023 NMRA 2001 and NMSA 1978, §41-4-1 et seq. to recover damages from defendants for the negligent operation and negligent provision of health care services by UNM Hospital (hereinafter "UNMH") and its pediatric oncology/hematology program for themselves and for two classes of patients treated at University of New Mexico Hospital (a/k/a University Hospital and Bernalillo County Medical Center) for pediatric cancers, as more fully described in this Complaint.

General Allegations

1. Plaintiff Maria Cummings, individually, and as Personal Representative of the Estate of Shaun Michael Chavez, is a resident of Bernalillo County, New Mexico.
2. Plaintiff Jana Vallejos individually, and as Personal Representative of the Estate of Donovan Vallejos, is a resident of Bernalillo County, New Mexico.
3. Plaintiff Leon Salazar individually is a resident of Rio Arriba County, New Mexico.
4. Plaintiffs bring this action on behalf of the Estate of Shaun Michael Chavez, the Estate of Donovan Vallejos, and Leon Salazar individually, as well as two classes, pursuant to Rule 1-023 NMRA, of pediatric cancer patients who presented for treatment at UNMH between 1977 and 1997, as more fully defined in this Complaint, on behalf of themselves and all other persons similarly situated.
5. The events giving rise to this complaint occurred in Bernalillo County, New Mexico.
6. At all times material hereto, defendants were not qualified health care providers in the State of New Mexico pursuant to N.M.S.A. 1978, §41-5-1 et seq. (Repl.Pamp. 1989).
7. At all times material hereto, Marilyn Duncan, M.D. and the other pediatric oncologists and their supervisors employed by UNMH were acting within the course and scope of their duties of employment with the Board of Regents of the University of New Mexico and the University of New Mexico Hospital.
8. The Board of Regents of the University of New Mexico is a body corporate of the State of New Mexico, for itself and its public operations including University of New Mexico Health Sciences Center and its components the University of New Mexico Hospital (f/k/a Bernalillo County Medical Center) and University of New Mexico School of Medicine, and are responsible for supervisory and other functions of the Department of Pediatrics and the Pediatric Hematology Oncology Office at the University of New Mexico Hospital within the

County of Bernalillo, State of New Mexico at the time Shaun Chavez, Leon Salazar and Donovan Vallejos and all other similarly situated Plaintiffs were UNMH patients. Throughout this Complaint, Defendant Board of Regents may be referred to as “UNM Hospital” or “UNMH”.

9. Marilyn Duncan, M.D., one of the treating pediatric oncologists, surrendered her license to practice medicine in the state of New Mexico on August 28, 1998. The Surrender Order from the New Mexico Board of Medical Examiners required she never again apply for a license to practice medicine in this state. At all material times hereto, she was a licensed physician practicing and was a public employee of UNMH in her declared specialty, pediatric oncology. Further, she was the pediatric oncologist for Shaun Chavez, Leon Salazar, Donovan Vallejos, and all other patients similarly situated, in the UNMH system at all material times.
10. The class members are so numerous that joinder of all members is impractical. Plaintiff representatives, upon reasonable belief, estimate the number of members of the class to exceed one thousand. There are questions of fact and law common to the class which common questions predominate over any questions that affect only individual members. The named Plaintiffs will fairly and adequately protect the interest of the class. The class action is an appropriate method for the fair and efficient adjudication of the controversy.
11. Defendants held themselves out as specializing in the evaluation and treatment of children with cancer.
12. UNMH promoted its pediatric cancer center throughout New Mexico so that other doctors and hospitals would refer children with cancer to UNMH. UNMH promoted itself for referrals when it was incompetent to treat these children.

13. Plaintiffs were told that they were receiving state-of-the-art treatment at UNMH. Plaintiffs were denied state-of-the-art treatment by UNMH.
14. Defendant UNMH has acknowledged that substandard care was used in the care and treatment of over 100 children with pediatric cancer. The number of mistreated children is reasonably estimated to be 1,404.
15. Upon information and belief, as of September 30, 1998, at the latest, UNMH knew that the care provided by UNMH to its pediatric oncology patients was questionable as to whether it met accepted treatment standards pursuant to applicable current treatment protocols.
16. After UNMH's mistreatment of Plaintiffs and the proposed class members was uncovered, Defendant UNMH contacted a small percentage of the injured patients and their families to inform them that patients were subjected to substandard care at their facility. All of the class members have a right to know they received substandard treatment at UNMH.
17. Defendant UNMH has not undertaken a complete investigation to determine the degree to which the evaluation, care and treatment rendered to the pediatric oncology patient/plaintiffs did not meet accepted treatment standards.
18. UNMH failed to provide safety measures to assure the proper treatment of its pediatric cancer patients. The safety mechanism of the Institutional Review Board; a tumor board; and a review of patient outcomes in the pediatric oncology department were not adequately or properly utilized.
19. UNMH's negligent operation of its hospital and its provision of negligent health care first began to come to the public light in 1997 when Dr. Jami Frost, who had recently joined the UNMH faculty in the pediatric cancer department, reported to senior UNMH administrators

that children were not treated on protocol and their survival rates were well below published national rates.

20. At all times material hereto, the relationship of doctor-patient, medical provider-patient existed between the Plaintiffs, members of the proposed classes and the Defendants.
21. Defendants had a duty to provide informed consent, including appropriate, requested and/or required second opinions for evaluation and treatment of Plaintiffs which was breached, proximately causing injury and damages.
22. UNMH and their doctors had a duty to properly evaluate, inform, care for and treat the Plaintiffs at UNMH which was breached proximately causing injury and damage to Plaintiffs.
23. UNMH Defendants negligently operated the pediatric oncology department and negligently provided health care services to UNMH's patients, including Plaintiffs and members of the proposed classes which was a breach causing injury and damage to Plaintiffs and members of the proposed classes. UNMH had a duty to appropriately staff its medical facility to evaluate and treat pediatric oncology patients; said duty was breached proximately causing injury and damage to Plaintiffs and members of the proposed classes, including the lost chance for survival or opportunity for a better outcome.
24. Defendants had a duty to maintain, retain, secure, and preserve all its patients' medical records. Defendants breached that duty and sanctions are requested by Plaintiffs as more fully addressed in Plaintiffs' Motion for Spoliation Sanctions.
25. UNMH Defendants knew or should have known their pediatric oncology department was improperly evaluating, caring for and treating its pediatric oncology patient-Plaintiffs.

26. Defendant UNMH had a duty not to represent their pediatric oncology department was capable of rendering appropriate evaluation and treatment of pediatric oncology patients. The Plaintiffs and members of the proposed classes were severely injured and suffered damages as a proximate result of Defendants' negligence.
27. Defendants are responsible for all injuries and damages proximately caused to Plaintiffs from Defendants' negligence.
28. Donovan Vallejos was diagnosed with acute lymphoblastic leukemia and was treated at UNMH, but did not receive treatment per the then current national treatment protocol.
29. Shaun Chavez was diagnosed with acute lymphoblastic leukemia and was treated at UNMH, but did not receive current national treatment for his condition per protocol.
30. Leon Salazar was diagnosed with acute lymphoblastic leukemia and was treated at UNMH, but did not receive treatment per current national protocol.
31. Donovan Vallejos, Shaun Chavez, Leon Salazar, and members of the proposed classes suffered a common lost chance for survival or an opportunity for a better outcome as a proximate cause of the negligent acts or omissions of the Board of Regents through their employees at the University of New Mexico School of Medicine and University of New Mexico Hospital, and Health Sciences Center.
32. UNMH and the other related Defendants are vicariously liable for the negligence of their employees while acting within the scope of their duties in the operation of the hospital and in providing health care services.
33. The Defendants acted with such reckless, willful, or wonton disregard for the Plaintiffs, that Defendants would be responsible for punitive damages. The statutory inability to have punitive damages assessed against the Defendants is unconstitutional. Should that statute be

found unconstitutional or otherwise invalidated, Plaintiffs would be entitled to punitive damages from the Defendants because of their conduct.

34. UNMH is under a duty to use ordinary care to avoid or prevent what a reasonably prudent person would foresee as an unreasonable risk of injury to another. A hospital that fails to do so is negligent. UNMH is under a duty to possess and apply the knowledge and to use the skill and care ordinarily used in reasonably well-operated hospitals. A hospital that fails to do so is negligent.

35. Providing medical care and treatment to pediatric cancer patients is intrinsically and inherently dangerous and involves a peculiar risk. If appropriate skill and training are not applied, the patient can certainly die. UNMH knew that children could die and/or be severely injured if they did not assure that necessary safety measures were utilized. A reasonable person would recognize the necessity of taking necessary precautions under these circumstances, as UNMH and its related Defendants should have known to protect against the risks to the pediatric oncology patients. This knowledge required that necessary precautions be taken, including the proper utilization of safety monitoring mechanisms through the IRB, tumor board, and patient outcome reviews. Also required was the provision of health care services through the delivery of treatment pursuant to current national protocols and instead UNMH gave substandard treatments to the members of the class. UNMH and its related Defendants did not have necessary precautions in place to assure that Plaintiffs and members of the proposed classes were given appropriate care and treatment and those children were proximately caused injury and damage, including the lost chance for survival or an opportunity for a better outcome.

Class Action Allegations

36. Plaintiffs incorporate by reference each and every allegation contained in all preceding paragraphs, as though fully set forth herein.

37. This action is properly maintainable as a class action pursuant to Rule 1-023 NMRA.

38. The Rule 1-023(B)(3) class is defined as:

All pediatric cancer patients, excluding those patients treated for hydatid moles and cervical neoplasias, and excluding the individuals with whom UNMH previously reached settlements, who presented for treatment at University of New Mexico Hospital between the years 1977 and 1997, and their guardians, natural parents and siblings who may be personal representatives or legal successors to their claims.

39. The Rule 1-023(B)(2) class is defined as:

All pediatric cancer patients, excluding those patients treated for hydatid moles and cervical neoplasias, and excluding the individuals with whom UNMH previously reached settlements, who presented for treatment at University of New Mexico Hospital between the years 1977 and 1997, and their guardians, natural parents and siblings who may be personal representatives to their claims, who are currently alive.

40. The proposed class definitions are precise, objective and presently ascertainable and it is administratively feasible for the Court to easily ascertain whether a particular individual is a member of each class.

41. The members of the class are so numerous that joinder of all members of the class is impracticable.

42. Certification of the classes is desirable and proper because there are questions of law and fact in this case which are common to all members of the two classes. Such common questions of law and fact include, but are not limited to:

- Whether UNMH authorized the wrong treatments for the pediatric cancer patients in the proposed class.
- Whether UNMH's failure to utilize a pediatric tumor board fell below the standard of care.
- Whether UNMH's failure to conduct adequate review of patient treatment and outcomes fell below the standard of care.
- Whether UNMH's failure to review the treatment of the proposed class members by the Institutional Review board fell below the standard of care.
- Whether UNMH's institutional negligence caused the proposed class members some loss of chance.
- The aggregate damages suffered by the proposed class resulting from UNMH's institutional negligence.
- Whether medical monitoring is called for.

43. Certification of the Classes is desirable and proper because Plaintiffs' claims are typical of the claims of the members of the classes that Plaintiffs seek to represent.

44. Certification of the Classes is desirable and proper because Plaintiffs will fairly and adequately protect the interests of the Class they seek to represent. There are no conflicts of interest between Plaintiffs' claims and those of other members of the Class, and Plaintiffs are cognizant of their duties and responsibilities to the Class. Plaintiffs' attorneys are qualified, experienced, and able to conduct the proposed class action litigation.

45. This action should proceed as a class action under Rule 1-023(B)(3) NMRA, because the questions of law or fact common to members of the Class predominate over any questions affecting only individual members, and a class action is superior to all other available

methods for the fair and efficient adjudication of the controversy. In this action:

- a. Common or generalized proof will predominate with respect to the essential elements of the loss of chance claims at issue.
- b. The common questions of law or fact that pertain to the Class predominate over any individual questions and any individual issues do not overwhelm the common ones.
- c. No member of the Class has a substantial interest in individually controlling the prosecution of a separate action, but, if any member or members wish to do so, they may exclude themselves from the Class upon receipt of notice under Rule 1-023(C)(2) NMRA.
- d. Upon information and belief, there are no pending lawsuits by members of the Plaintiff Class who may be similarly situated and which may potentially affect the matters raised in this action. It is desirable to concentrate the litigation of these cases in this forum.
- e. The determination of the claims of all members of the Class in a single forum and in a single proceeding would be a fair, efficient and far superior means of resolving the issues raised in this litigation.
- f. Any difficulty encountered in the management of the proposed class is reasonably manageable, especially when weighed against the impossibility of affording adequate relief to the members of the Class through numerous independent actions.

46. This action should also proceed as a class action under Rule 1-023(B)(2) NMRA because Defendant has acted or refused to act on grounds generally applicable to the Class, thereby making appropriate injunctive relief in the form of medical monitoring.

WHEREFORE, Plaintiffs pray for judgment against Defendant Board of Regents of the

University of New Mexico as follows:

- A. Certify this case to proceed as a class action with classes under Rule 1-023(B)(2) and 1-023(B)(3);
- B. Award Plaintiffs just compensation for damages reasonable to compensate them for their injuries and losses;
- C. Award Plaintiffs the costs of this action;
- D. Award pre- and post-judgment interest; and
- E. Grant such other and further relief as the Court deems just and proper.

Respectfully submitted,

/s/ Jacob G. Vigil

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