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IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

JACKSON CUENCA, a minor, by and through his Parents and Next Friends, John Cuenca and Emily Cuenca; EMILY CUENCA, Individually; and JOHN CUENCA, Individually,

Plaintiffs,

v.

PHYSICIANS CLINIC, INC. and THE NEBRASKA METHODIST HOSPITAL,

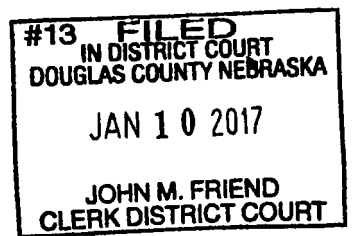
Defendants.

STATE OF NEBRASKA,

Intervenor.

CASE NO. CI 12 - 5413

ORDER



THIS MATTER came before the Court on December 21, 2016, following trial and the rendition of a verdict in the above-captioned case. Following the jury's verdict, Defendants Physicians Clinic, Inc. and The Nebraska Methodist Hospital (collectively, "Defendants") filed (1) a Motion for Entry of Judgment, seeking to have this Court enter a judgment on the Jury's verdicts consistent with the Nebraska Hospital-Medical Liability Act, and (2) a Motion for Judgment Notwithstanding the Verdict (the "Motion for JNOV"), pursuant to Neb. Rev. Stat. § 25-1315.02. Due to the Defendants' pending motions, the Court has not yet entered judgment on the Jury's verdict. Plaintiffs opposed the Defendants' motions, stating the motions are not ripe for hearing, the Court should enter judgment consistent with the jury verdict, and after said entry, Defendants can seek application of the Nebraska Hospital-Medical Liability Act and file under Neb. Rev. Stat. § 25-1315.02 for Judgment Notwithstanding the Verdict.

On November 29, 2016, post-verdict hearing was held, and the matters were continued to December 21, 2016 on oral motion of the Plaintiffs. Plaintiffs appeared at the December 21, 2016 hearing and at the prior hearing held on November 29, 2016 by counsel, Joseph P. Cullan and Joseph S. Fox. Defendants were represented at each hearing by counsel Robert A. Mooney and Thomas J. Shomaker. The State of Nebraska ("Intervenor") entered its appearance through counsel, William Settles, who appeared at each hearing.

At the hearing on November 29, 2016, Defendants and Intervenor proffered all of their evidence to support their claims that: (i) Defendants were qualified "health care providers" (as such term is defined in the Nebraska Hospital-Medical Liability Act); (ii) Defendants were in compliance with the provisions of the Nebraska Hospital-Medical Liability Act at the times relevant to this case; and (iii) the Nebraska Hospital-Medical Liability Act does not violate or offend the State of Nebraska Constitution or the United States Constitution and is constitutional in all respects.

On November 29, 2016, Defendants offered four affidavits (Exhibits 424, 425, 426, and 427), which were received by the Court over Plaintiffs' objection. Intervenor offered two affidavits (Exhibits 428 and 429 \_\_\_\_\_) which were received by the Court over Plaintiffs' objection. Plaintiffs argued that the six affidavits were not properly noticed as required by Neb. Rev. Stat. § 25-910 and that, as a result, Plaintiffs had not had an opportunity to review them prior to the hearing. After the November 29, 2016 hearing, Plaintiffs filed motions to strike three of the four affidavits filed by Defendants, and both of the affidavits filed by Intervenor.

In advance of the hearing on December 21, 2016, Plaintiffs caused to be served witness subpoenas, which subpoenas were served on December 20, 2016 on Mary Thomas (an employee of Physicians Clinic), and on several third-party entities. Defendants and attorneys acting on

behalf of those persons and entities filed motions to quash those subpoenas, which were set for hearing on December 21, 2016, as well.

Defendants argued that the subpoenas issued to their employees and the third-party witnesses were improperly issued and served, and failed to provide six-day notice of appearance as required by Neb. Rev. Stat. § 25-1226. In support of their six (6) motions to strike the Defendants' and Intervenor's evidentiary affidavits, and in support of their argument regarding the applicability and constitutionality of the Nebraska Hospital-Medical Liability Act to this action, Plaintiffs argued that they wish to question some of the affiants whose affidavits were received by the Court on November 29, 2016. Plaintiffs also wish to submit new testimony from other individuals regarding these issues. During the December 21, 2016 hearing, Plaintiffs submitted certain exhibits to the Court in support of their arguments regarding the applicability of the Nebraska Hospital-Medical Liability Act and the validity of some of the previously submitted affidavits. Defendants objected to the Court's continuance of this hearing. Defendants also objected to the exhibits offered by Plaintiffs. The matters were submitted for decision, and the Court's Order in this regard appears below.

The Court took up the matter of the Motion for JNOV. Such a motion can only be made following an entry of judgment, and no judgment had been entered at the time of the filing of the motion. Therefore, pursuant to Neb. Rev. Stat. § 25-1315.02, the Motion for JNOV will be deemed filed as of the date of entry of judgment.

Considering all the facts, having heard the arguments of counsel, and being fully advised in the premises, it is hereby ORDERED:

1. The Motion for JNOV is denied, without prejudice to reassertion pursuant to Neb. Rev. Stat. § 25-1315.02.

2. Defendants' and the various third-parties' objections and motions to quash are overruled as moot. Plaintiffs' subpoenas are deemed moot based upon the Court's continuance of this matter, and the parties are instructed to work together to issue new subpoenas to all parties from whom they seek testimony or evidence on the remaining motions.

3. Defendants' Motion for Entry of Judgment and Plaintiffs' Motions to Strike are continued. Evidentiary hearing on those remaining motions will take place on February 16, 2017 at 10:00 a.m.

4. The Court's rulings on Defendants' objections to the exhibits offered by Plaintiffs are reserved for the hearing scheduled at 10:00 a.m. on February 16, 2017.

5. By agreement of the parties, it is the Order of the Court that as to any witness whom a party seeks to compel to testify at the hearing on February 16, 2017, such witness shall be served with a subpoena no later than February 6, 2017, and the parties shall work together and cooperate in securing such testimony and evidence properly requested in the subpoena. As to any such witness, the party seeking to compel such witnesses' testimony shall provide notice to all other parties of such witnesses' identity and shall serve a copy of any such subpoena on all parties no later than February 6, 2017.

6. With respect to any written submissions Plaintiff seeks to offer at the February 16, 2017 hearing, Plaintiff shall submit to the Court and provide to all counsel of record copies of any such written submissions no later than Friday, February 3, 2017. With respect to written submissions Defendant or Intervenor seeks to offer at the February 16, 2017 hearing, Defendants and Intervenor shall submit to the Court and provide to all counsel of record copies of any such written submissions no later than Friday, February 10, 2017. Any written submissions or

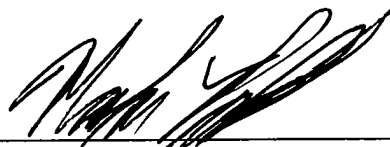
arguments by Intervenor shall be strictly limited to the issue of the constitutionality of all or any part of the Nebraska Hospital-Medical Liability Act, Neb. Rev. Stat. § 44-2801, *et seq.*

7. Should any party seek to compel the testimony of a corporate designee witness whose testimony is sought on behalf of a corporation as set forth in Neb. Ct. R. Disc. § 6-330(b)(6), such party shall serve a subpoena consistent with Rule 6-330(b)(6) and provide notice to counsel of record no later than January 17, 2017.

8. Any statutory deadline notwithstanding, and provided that any subpoena duces tecum is served on or before January 17, 2017, any documents or materials sought by any requesting party for the benefit of preparing written submissions to the Court shall be produced to counsel of said party, with copies to all other counsel, no later than January 24, 2017. Any subpoenas to be served upon a party shall be deemed served upon receipt by such party's counsel of an electronic or facsimiled copy of the subpoena.

DATED this 9<sup>th</sup> day of January, 2017

BY THE COURT:

  
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MARLON A. POLK  
DISTRICT COURT JUDGE

31G8308

**CERTIFICATE OF SERVICE**

I, the undersigned, certify that on January 10, 2017 , I served a copy of the foregoing document upon the following persons at the addresses given, by mailing by United States Mail, postage prepaid, or via E-mail:

Catherine L Stegman  
cstegman@sodorolaw.com

William M Lamson Jr  
wlamson@ldmlaw.com

Joseph P Cullan  
jhendrix@cullanlaw.com

Date: January 10, 2017

BY THE COURT:

*John M. Friend*  
CLERK

