

Fourth Circuit Advances Patients' Constitutional Privacy Suit

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Ferguson On Remand

An October 17 decision of the U.S. Court of Appeals for the Fourth Circuit has given a major boost to the Fourth Amendment action for damages brought by maternity patients against the Medical University of South Carolina (MUSC), hospital personnel, and law enforcement officials with whom MUSC cooperated. *Ferguson v. City of Charleston*, 2002 WL 31319506. This case is of interest not only because it finds an actionable violation of a constitutional right of privacy but also because it involves consequences of systematically cooperating with law enforcement officials that may have broader relevance in the context of post-September 11 efforts to prevent terrorism.

Ferguson Case Background

The Fourth Circuit decision follows up on last year's important Supreme Court decision in this litigation holding that a MUSC policy designed to discourage cocaine use by pregnant women violated MUSC patients' Fourth Amendment rights against warrantless searches (See April 2001 *PIF*). Under that policy, maternity patients were tested for cocaine use if they met one of nine screening criteria. The policy provided that where the results of urine testing were positive, the police were notified, and the patient was arrested and charged to provide leverage to induce the patient to complete drug abuse counseling or treatment programs. The Supreme Court rejected the Fourth Circuit's holding that this policy fell within the "special needs" exception to the constitutional ban on warrantless searches, because, unlike scenarios where that exception applies, "the immediate objective of the searches was to generate evidence for law enforcement purposes."

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Having found that the testing constituted a Fourth Amendment search, the Supreme Court remanded the case to the Fourth Circuit to determine whether the record supported an earlier jury finding that the plaintiff patients had given their "informed consent" to the searches, in which event their suits would be dismissed. A divided Fourth Circuit panel found, as a matter of law, that the patients had not given their informed consent. Thus, the litigation will continue.

"Informed Consent" Standard

Judge William W. Wilkins, writing for the majority, reasoned that the informed consent standard applied, because the searches were conducted not by uniformed police but by medical personnel acting as undisclosed "agents of law enforcement." In order to give informed consent, the patients needed to understand that "the request was not being made by medical personnel for medical purposes, but rather by agents of law enforcement for purposes of crime detection."

Hospital Forms Insufficient

The majority first considered whether sufficient information was conveyed by the standard hospital consent forms that all patients, not just the plaintiff patients, were routinely shown and asked to sign as a prerequisite to receiving treatment. Those forms provided, in part, that the patient consented to "testing for drugs if deemed advisable by or necessary in the professional judgment of the physician or surgeon." The majority found that the forms did not provide the requisite knowledge, because neither the quoted language nor anything else about the forms advised the patients that "their urine might be searched for evidence of criminal activity for law enforcement purposes." Rather, the Court found that the forms led patients to believe that "such tests would be conducted only if an Appellant's treating physician deemed such a test advisable in the particular circumstances of that Appellant's medical care," whereas, in fact, the tests "were performed pursuant to the strictures of the Policy," without any "independent medical judgment."

No Implied Consent

The majority then considered whether the plaintiff patients "gave implied consent." This involved determining whether each patient "had knowledge of the Policy from one or more sources and implicitly consented to the searches by thereafter going to MUSC for treatment." After reviewing the facts of record on each of the plaintiff's knowledge and MUSC treatment history, the majority concluded that "the evidence presented at trial was insufficient for a rational jury to find that Appellants' implicitly consented to the searches." First, Judge Wilkins' review of the record evidence on knowledge led the majority to conclude that no more than two of the plaintiffs could properly have been found to have knowledge of the MUSC policy. Even as to those two, there was no consent, the majority concluded, because "presenting themselves to MUSC for treatment cannot be considered 'voluntary' in a constitutional sense."

This conclusion relied partly on the premise that "medical distress may create a vulnerable subjective state that is inimical to voluntary consent" in that a "patient who is in dire need of medical treatment will feel less free to question or refuse certain portions of that treatment" or the "physical strain of labor, birth, or serious illness will have a deleterious effect on the patient's mental process, limiting her ability to rationally consider whatever choices she has." Additionally, the majority noted that the plaintiff patients were "all insured by Medicaid and that MUSC was the only medical system in the Charleston area that accepted Medicaid as a

form of payment." Thus, they had no other source of treatment. The majority found that the "choice to be searched or forego necessary medical treatment is the antithesis of free choice to consent or refuse." Consequently, they concluded, even as to the two patients who "possessed the requisite knowledge of the policy, a rational jury could not find voluntariness." This ruling could well have broader implications in other settings involving implied consent in the context of medical treatment.

The Dissenter's Analysis

Judge Niemeyer, dissenting, would have affirmed the jury finding of consent. He questioned whether the Supreme Court actually intended that an "informed consent" standard should be applied by the Court of Appeals and thought it more appropriate to apply a "mere voluntariness" standard. He reasoned that such a standard was met, because there was no evidence that "any patient was compelled to provide a urine sample or that any patient objected to providing one when requested to do so by medical authorities." Moreover, applying the majority's standard, Judge Niemeyer construed the factual record to support the jury's finding with respect to all but one plaintiff.

Absent additional Supreme Court intervention, the case will now be returned to the District Court, where Judge C. Weston Houck will conduct proceedings regarding plaintiffs' damages, proceedings which themselves could involve novel and important issues of general interest to privacy litigants.