



Informed Consent Evidence in Medical Malpractice Cases Based Only Upon Substandard Medical Treatment

By Anthony J. Viorst

In medical malpractice cases involving substandard medical treatment, the medical provider will frequently try to assert, as a component of their defense, that the plaintiff-patient was aware that the injury suffered was a potential complication of the medical treatment. This happens when a plaintiff-patient signs an informed consent form in which the injury that plaintiff suffered was mentioned as a potential surgical complication. For instance, a spine surgeon may seek to introduce evidence that paralysis was a recognized risk of spine surgery, or an orthopedic surgeon may seek to introduce evidence that nerve palsy was a recognized risk of knee or hip replacement surgery, as set forth in the informed consent form that the patient signed. However, if the complaint only contains a claim for negligent medical treatment, and does not include a claim for lack of informed consent, evidence relating to the informed consent advisement should be deemed irrelevant, unduly prejudicial, and inadmissible at trial.

Relevant Law

The Difference Between Claims for Substandard Medical Treatment and Lack of Informed Consent

There is a significant difference between claims for substandard medical treatment and claims for lack of informed consent. A claim for substandard medical treatment is basically a simple negligence claim modified to apply to a medical provider. The elements of a medical negligence claim are: (1) the plaintiff-patient suffered injuries, damages or losses; (2) the medical provider was negligent; and (3) the negligence of the medical provider was a cause of the plaintiff's injuries, damages or losses.¹ A medical provider is negligent if the expert testimony shows that a medical provider in the same field of practice performed an act that reasonably careful medical providers in the same field of practice would not do, or failed to perform an act that reasonably careful medical providers would do.²

In contrast, an informed consent claim requires proof that: (1) the defendant-physician performed a procedure on the plaintiff-patient; (2) the physician negligently failed to obtain the plaintiff's informed consent before performing the procedure; (3) a reasonable person in the same or similar circumstances as the plaintiff would not have consented to the procedure if they had been given the information required for informed consent; and (4) the physician's negligent failure caused the plaintiff to suffer injuries, damages and losses.³ An informed consent claim can only be brought against a physician because informed consent must be obtained by the physician performing a medical procedure,⁴ and this responsibility cannot be delegated to hospital staff.⁵

Medical malpractice claims alleging that a medical provider breached the applicable standard of care in providing medical treatment are different from, and unrelated to, informed consent claims. These two claims are distinguishable because they reflect two independent duties that medical providers owe to their patients: (1) the duty to diagnose and and/or treat a patient in accordance with the standard of care; and (2) the duty to disclose all medically reasonable treatment alternatives and potential risks so that a patient can make an informed decision.⁶

Informed consent claims are not very common in Colorado because it is rare for a surgery to be performed without the patient having first executed an informed consent form listing all of the alternatives and potential complications that can arise from the surgery. In addition to this impediment, informed consent claims are extremely difficult to win because the plaintiff-patient must prove not only that informed consent was lacking for their procedure, but also that "a reasonable person in the same or similar circumstances would not have consented to the procedure." For this reason, most medical malpractice cases involving post-surgical complications contain only a claim for substandard medical

treatment, and not a claim for lack of informed consent.

Evidence of Informed Consent in Medical Negligence Cases is Irrelevant, Prejudicial, and Not Harmless

Colorado Rule of Evidence 401 defines the term “relevant evidence” as evidence with “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable.” Thus, relevant evidence is any evidence that is probative of a material fact.⁷ Under CRE 402, irrelevant evidence is inadmissible, and relevant evidence may be excluded if its admission is inconsistent with another rule of evidence.⁸ Under CRE 403, relevant evidence may be excluded if its probative value is substantially outweighed by the risk of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, waste of time, or unnecessary presentation of evidence.⁹ Under CRE 103, the erroneous admission of irrelevant or unfairly prejudicial evidence, despite a timely objection, is not harmless, and will mandate reversal of the underlying judgment, when the error substantially influences the outcome of the case.¹⁰ On numerous occasions, the Colorado Court of Appeals has reversed defense verdicts due to the admission of evidence that was irrelevant or unduly prejudicial to the plaintiff.¹¹

The admission of informed consent evidence in medical malpractice cases based only upon substandard medical treatment, over an objection lodged by plaintiff’s counsel, is irrelevant, prejudicial, and not harmless. The evidence is irrelevant under CRE 401 and 402 because a patient cannot consent to negligent conduct, so the fact that a patient has signed an informed consent form recognizing the potential risks of the surgery is not probative of any material fact. The admission of such

evidence is prejudicial and confusing under CRE 403 because it erroneously suggests that a plaintiff-patient *can* consent to the negligent conduct of the medical provider and the resulting injury. Finally, the admission of informed consent evidence in medical negligence cases is not harmless, pursuant to CRE 103, because there is a substantial likelihood that its admission could impact the jury’s verdict.

Out-of-State Cases Relating to the Admission of Informed Consent Evidence

The first reported case to address this issue was *Waller v. Aggarwal*,¹² a medical malpractice case in which the plaintiff-patient suffered a bladder injury following a laparoscopic abdominal surgery. The Ohio Court of appeals reversed the judgment in favor of the defendant-doctor based upon the prejudicial admission of informed consent evidence:

[A]ppellant was substantially prejudiced by the references to informed consent. As appellant correctly contends, the action brought against appellee sounded in negligence. It did not sound in battery for a nonconsensual procedure. Nor did appellant allege that she was not fully apprised of the risks of the procedure. Instead, appellant alleged that appellee negligently performed the procedure. The fact that appellee informed appellant that injury to the bladder was a possible risk of the procedure could not be a defense to the claim of negligence brought by appellant. Thus, the admission of evidence pertaining to that issue and references to that issue carried great potential for the confusion of the jury.

As a result, we hold that the references to informed consent

made during the trial constituted plain error, as they were both apparent on their face and prejudicial.¹³

Perhaps the most succinct explanation of why informed consent evidence is not admissible in a medical malpractice case alleging only substandard medical treatment is set forth in *Baird v. Owczarek*,¹⁴ a case involving corneal impairment following LASIK eye surgery, in which the Delaware Supreme Court explained:

Once Baird’s claim for lack of informed consent was removed from the suit, the consent forms Baird signed pre-surgery became irrelevant, because assumption of the risk is not a valid defense to a claim of medical negligence, and because evidence of informed consent is neither material or probative of whether Dr. Owczarek met the standard care in concluding that Baird was an eligible candidate for the surgery. Therefore, the evidence should have been excluded pursuant to [Rule of Evidence] 401.

Even if relevant, ‘evidence may be excluded where its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading he jury...’ Informing the jury of a plaintiff’s consent does not help a defendant show that he was not negligent. Evidence of informed consent in a medical malpractice action could confuse the jury by creating the impression that consent to the surgery was consent to the injury. Therefore, because evidence of informed consent in this case carried a clear danger of confusing the jury, even if the evidence would have been otherwise relevant, it should have been excluded pursuant to [Rule of Evidence]

403. The trial judge's failure to do so was an abuse of its discretion.¹⁵

All of the other out-of-state appellate courts that have directly addressed this issue have uniformly held that, in medical malpractice cases based upon substandard medical treatment, where no informed consent claim has been raised, and where a timely objection has been made, evidence of informed consent should be excluded from the evidence presented at trial.¹⁶ Conversely, there are no appellate cases, from any state, approving the admission of informed consent evidence when only substandard medical treatment has been asserted.

Colorado Law Relating to the Admission of Informed Consent Evidence in Cases Alleging Substandard Medical Treatment: *Liscio v. Pinson*

The only Colorado appellate case addressing this issue is *Liscio v. Pinson*.¹⁷ *Liscio* was a medical malpractice case in which the plaintiff-patient alleged that the defendant-surgeons negligently injured her saphenous nerve during a knee surgery. The complaint did not include a claim for lack of informed consent. At trial, plaintiff's counsel initially raised the issue of informed consent, by asking one of the defendant-physicians "whether a patient's signing a consent form relieved a doctor of the obligation to properly perform surgery or precluded the patient from bringing suit." This question "extracted an acknowledgement" that a patient's execution of an informed consent form does not waive that patient's right to receive competent medical care.¹⁸ On re-direct examination, over an objection from plaintiff's counsel, defense counsel questioned the physician about the contents of the informed consent form that plaintiff had signed, which referenced a nerve injury as one of the potential risks of surgery.¹⁹

On appeal, the Colorado Court of Appeals, citing *Waller v. Aggarwall*, *supra*, acknowledged that evidence "pertaining to a patient's informed consent may be irrelevant and potentially unfairly prejudicial to the patient in cases where the patient sues a physician solely on the theory of negligent medical treatment."²⁰ However, in *Liscio*, the Court of Appeals did not find that the admission of the informed consent evidence was improper, because plaintiff's counsel was the first party to raise the issue of informed consent, thereby "opening the door" to the informed consent evidence.²¹ In addition, the appellate court held that the admission of this evidence was harmless, because the trial lasted 11 days, defendants' informed consent evidence only played a small part in the course of trial, and the cross-examination by plaintiff's counsel had "plac[ed] the informed consent topic in proper perspective."²²

Practice Pointer: Motion to Exclude Informed Consent Evidence

In cases alleging substandard medical treatment, without an accompanying claim for lack of informed consent, plaintiff's counsel should file a pretrial motion to exclude any evidence relating to the signed informed consent form listing certain injuries as potential surgical complications. The motion can be filed as a request to exclude expert testimony under CRE 702, because the interpretive case law relating to CRE 702 authorizes the exclusion of evidence which is unduly prejudicial or confusing under CRE 403.²³ The motion to exclude informed consent evidence can also be filed as a motion *in limine*, under CRE 403, to exclude unduly prejudicial or confusing evidence.

In drafting a motion to exclude informed consent evidence, plaintiff's counsel should clarify that: (A) only

medical negligence has been asserted in the complaint; (B) plaintiff has not raised a claim for lack of informed consent; (C) the admission of evidence showing that plaintiff signed a form consenting to the risk of certain iatrogenic injuries would be unduly prejudicial and confusing to the jury under CRE 403 because it would suggest that plaintiff consented to the defendant's acts of medical negligence or to the injuries caused by that negligence; (D) the admission of informed consent evidence would also be inconsistent with the dicta in *Liscio v. Pinson*, as well as the holdings of the myriad out-of-state cases cited in above;²⁴ and (E) the trial court should therefore exclude any evidence that plaintiff, after an advisement by a physician, signed an informed consent form in which the injury that plaintiff suffered was mentioned as a potential surgical complication.

Conclusion

As shown above, the admission of informed consent evidence in cases alleging only substandard medical treatment is irrelevant, unduly prejudicial, and confusing to a jury. Therefore, under Colorado Rules of Evidence 702, 401, 402, 403, and 103, such evidence should be excluded at trial and, when erroneously admitted over plaintiff's objection, should constitute grounds for the reversal of an adverse judgment. Although the *Liscio* Court did not reverse the adverse judgment imposed against the plaintiff in that case, it recognized the general principle that informed consent evidence is generally inadmissible in medical negligence cases based only upon allegations of substandard medical treatment. Thus, the law in Colorado, like the well-reasoned rulings by appellate courts in other states, appears to be that evidence of informed consent is inadmissible in medical malpractice cases alleging

substandard medical treatment alone. Based upon the Colorado Rules of Evidence, the dicta in *Liscio*, the out-of-state cases cited above, and general principles of logic and fairness, medical-malpractice practitioners are encouraged to move for the exclusion of informed consent evidence in cases alleging only substandard medical treatment. ▲▲▲

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Endnotes:

- ¹ COLJI-Civ. 9:22.
- ² COLJI-Civ. 15:2, 15:3.
- ³ COLJI-Civ. 15:10. Informed consent claims are also distinguishable from battery claims. If a patient consents to a surgical procedure but is not adequately informed about the risks of the surgery, the physician may be liable for failure to obtain the patient's informed consent. In contrast, a physician who operates on a patient without any consent whatsoever, or who performs an operation different from that to which the patient consented, may be liable for battery. *Espander v. Cramer*, 903 P.2d 1171, 1173 (Colo. App. 1995).
- ⁴ *Martin v. Bralliar*, 36 Colo. App. 254, 257, 540 P.2d 1118, 1120 (1975).
- ⁵ *Krane v. Saint Anthony Hosp. Sys.*, 738 P.2d 75, 77 (Colo. App. 1987).
- ⁶ See *Ehrlich v. Sorokin*, 451 N.J. Super. 119, 129, 165 A.3d 812, 818 (App. Div. 2017).
- ⁷ See *Fletcher v. People*, 179 P.3d 969, 974 (Colo. 2007).
- ⁸ See *People v. Carlson*, 712 P.2d 1018, 1021-22 (Colo. 1986).
- ⁹ See *Banning v. Prester*, 2012 COA 215, ¶ 31, 317 P.3d 1284, 1290; *Quigley v. Jobe*, 851 P.2d 236, 238 (Colo. App. 1992).
- ¹⁰ *Devenyns v. Hartig*, 983 P.2d 63 (Colo. App. 1998); accord, *Rojhani v. Meagher*, 22 P.3d 554, 557 (Colo. App. 2000). See

also C.R.C.P. 61 (error not harmless where it is "inconsistent with substantial justice" and "affect[s] the substantial rights of the parties").

- ¹¹ See, e.g., *Baca v. Conway*, No. 16CA0565, 2017 WL 11932086, at *2 (Colo. App. June 15, 2017) (erroneous admission of irrelevant evidence that Defendant-driver had sustained a DUI conviction relating to the subject accident, and been "punished enough," was reversible and not harmless error with regard to issue of punitive damages); *Westfall v. Town of Hugo*, 851 P.2d 299, 302 (Colo. App. 1993) (admission of irrelevant evidence that plaintiff had instituted four prior lawsuits was reversible and not harmless error); *Hamilton v. Hardy*, 37 Colo. App. 375, 381, 549 P.2d 1099, 1105 (1976) (admission of irrelevant exhibits in cross-examination of plaintiff's expert witness was reversible and not harmless error).
- ¹² 116 Ohio App. 3d 355, 357-58, 688 N.E.2d 274, 275 (1996).
- ¹³ *Waller v. Aggarwal*, *supra*, 688 N.E.2d at 275.
- ¹⁴ 93 A.3d 1222 (Del. 2014)
- ¹⁵ *Baird v. Owczarek*, *supra*, 93 A.3d at 1233.
- ¹⁶ See *Ehrlich v. Sorokin*, 451 N.J. Super. 119, 130, 165 A.3d 812, 819 (App. Div. 2017) ("[W]e are convinced the admission of the informed consent evidence in this matter, where plaintiff asserted only a claim of negligent treatment, constituted reversible error"); *Wilson v. Patel*, 517 S.W.3d 520 (Mo. 2017) (evidence of patient's alleged informed consent was irrelevant and could only mislead jury, and thus, jury instruction withdrawing evidence of patient's alleged informed consent was warranted); *Baird v. Owczarek*, 93 A.3d 1222, 1232 (Del. 2014) (reversing defense verdict based upon admission of informed consent evidence because "evidence of informed consent, such as consent forms, is both irrelevant and unduly prejudicial in medical malpractice cases without claims of lack of informed consent"); *Warren v. Imperia*, 252 Or. App. 272, 287 P.3d 1128 (2012) (trial court did not abuse its discretion in excluding evidence of informed consent in a medical malpractice case that did not

include informed consent claim because the evidence was irrelevant and, to the extent relevant, unfairly prejudicial and confusing to the jury); *Schwartz v. Johnson*, 206 Md. App. 458, 49 A.3d 359, 371-75 (Md. Ct. Spec. App. 2012) (trial court did not abuse its discretion in excluding evidence of informed consent because evidence was irrelevant to claim for medical malpractice and overly prejudicial or confusing to jury even if relevant); *Hayes v. Camel*, 283 Conn. 475, 927 A.2d 880, 889 (2007) (trial court abused its discretion by allowing into evidence informed consent forms in a claim for negligence). *Wright v. Kaye*, 267 Va. 510, 593 S.E.2d 307, 317 (2004) (finding reversible error in medical negligence case where trial court failed to grant plaintiff's motion in limine to exclude evidence of informed consent).

- ¹⁷ 83 P.3d 1149 (Colo. App. 2003)
- ¹⁸ *Liscio*, *supra*, 83 P.3d at 1156.
- ¹⁹ *Id.*
- ²⁰ *Liscio*, *supra*, 83 P.3d at 1156.
- ²¹ *Id.*
- ²² *Id.*
- ²³ See *People v. Shreck*, 22 P.3d 68, 78 (Colo. 2001) (under CRE 702, in addition to applying the three-part test for admission of expert testimony, "a trial court should also apply its discretionary authority under CRE 403 to ensure that the probative value of the evidence is not substantially outweighed by unfair prejudice"); accord, *Bocian v. Owners Ins. Co.*, 2020 COA 98, ¶ 65, 482 P.3d 502, 516.
- ²⁴ See Footnote 14, *infra*.

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