

	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
	*	BALTIMORE CITY
Defendant	*	Case No.:

DEFENDANT'S OPPOSITION TO PLAINTIFF'S SECOND MOTION IN LIMINE TO BAR EVIDENCE THAT PLAINTIFF'S INJURY WAS A KNOWN RISK AND TO BAR EVIDENCE OF INFORMED CONSENT

Defendant _____ by and through his attorneys,
 _____ and _____, hereby submits this
 Opposition to Plaintiff's Second Motion in Limine to Bar Evidence that Plaintiff's Injury
 was a Known Risk and to Bar Evidence of Informed Consent, and states as follows:

Introduction

Defendant, through _____ testimony and _____ medical records,
 intends to introduce evidence that _____ warned _____ of the risk of an injury to
 the common hepatic duct before her gallbladder removal surgery. Defendant, through
 expert testimony, also intends to introduce evidence that an injury to the common hepatic
 duct is an inherent risk to the surgery. This evidence is relevant and there is no danger
 that this evidence will confuse the jury. The preclusion of this evidence is fundamentally
 prejudicial and unfair to _____. Accordingly, Plaintiff's Second Motion in Limine to
 Bar Evidence that Plaintiff's Injury was a Known Risk and to Bar Evidence of Informed
 Consent should be denied.

Argument

Plaintiff incorrectly argues that _____ signed informed consent form, the testimony and medical records reflecting _____ discussions with _____ about her surgery, and expert testimony regarding the known risks of a gallbladder removal surgery are irrelevant and would only confuse the jury. In her motion, Plaintiff has failed to cite a single published Maryland opinion that has found this type of evidence to be inadmissible under Maryland Rules 5-402 or 5-403.

A. Evidence regarding _____ informed consent is relevant, as is the expert testimony regarding the inherent risks of a gallbladder removal surgery.

Evidence regarding _____ informed consent is relevant in two respects. First, it is relevant in demonstrating the completeness and appropriateness of _____ care. Second, it is relevant in establishing _____ affirmative defense of assumption of the risk.

1. Evidence regarding _____ informed consent is relevant in demonstrating the completeness and appropriateness of _____ care.

Under Maryland Rule 5-401, relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." See Maryland Rule 5-401.

In the case at bar, _____ discussions with his patient pertaining to the known risks of her surgery, _____ medical records that reflect those discussions and the informed consent form containing _____ written acceptance of the risks of the surgery are relevant in determining whether _____ overall care of _____ was appropriate or negligent. While it may not directly address _____ surgical

technique, it is probative as to his total care of _____. To say it is not relevant in this case is sophistry at its worst.

At trial, Plaintiff will undoubtedly attempt to show what she believes _____ did wrong in her care. _____, however, should not be limited to only those specific aspects of his care of _____ in attempting to prove that what he did was correct. In order to demonstrate that he is a competent physician and that the totality of his care was appropriate, _____ should be allowed to explain all of his care and treatment.

Even the authority cited by Plaintiff supports the concept that a patient's medical records, which reflect the patient's and physician's discussions regarding the known risks of any particular surgery, are relevant in determining whether the physician complied with the standard of care. See Hayes v. Camel, 283 Conn. 475, 484, 927 A.2d. 880, 888 (2007) (holding that the physician's notes regarding the inherent risks of surgery were relevant evidence in determining whether the physician complied with the standard of care). Here, _____, similar to the physician in Hayes, summarized his discussion with _____ about her upcoming surgery, as well as his discussion regarding the known risks of the surgery in a progress note. See _____'s Progress Note, attached hereto as Exhibit 1. Accordingly, _____ should be permitted to testify as to his progress note, introduce his note into evidence, and address his full care of _____ – not just select parts chosen by Plaintiff's counsel.

2. _____ informed consent is relevant in establishing _____
affirmative defense of assumption of the risk.

_____ pled assumption of the risk as an affirmative defense. See _____ Answer to Complaint, attached hereto as Exhibit 2. Maryland law provides that the defense of assumption of risk arises when the Plaintiff knows of and appreciates a risk

and voluntarily chooses to encounter it. Leakas v. Columbia Country Club, 831 F. Supp. 1231, 1236 (D. Md. 1993). Maryland law accepts the doctrine of assumption of the risk in medical negligence actions. See Newell v. Richards, 323 Md. 717, 730, 594 A.2d 1152, 1159 (1991) (stating that during trial the burden of proof only switches from plaintiff to defendant “in medical malpractice cases where contributory negligence or assumption of the risk is an issue....”) (internal citations omitted).

The elements of assumption of the risk, under Maryland law, require that the Plaintiff have knowledge of the risk, appreciate the risk and voluntarily confront the risk. ADM Partnership v. Martin, 348 Md. 84, 91, 702 A.2d 730, 734 (1997). The evidence in this matter establishes that the elements for the defense of the assumption of risk have been met. Specifically, that evidence includes: [redacted]’s discussions with [redacted] about the possibility of a bile duct injury, the medical records that reflect those discussions, and [redacted] signed informed consent form. See Progress Note, attached hereto as Exhibit 1; and Informed Consent Form, attached hereto as Exhibit 3.

In Maryland, informed consent is a communication between a treating physician and a patient regarding “the nature of the ailment, the nature of the proposed treatment, the probability of success of the contemplated therapy and its alternatives, and the risk of unfortunate consequences associated with such treatment.” Sard v. Hardy, 281 Md. 432, 439-40 (1977) (internal citations omitted). [redacted] decision to not assert a lack of informed consent claim, given of the overwhelming evidence that the risk of a bile duct injury had in fact been disclosed, should not prevent the Defendant from establishing a recognized affirmative defense under Maryland law.

Courts from other jurisdictions have addressed the issue of whether informed consent may be introduced to show that a medical malpractice claimant assumed the risk of injury, thereby barring recovery. In King v. Clark, 709 N.E.2d 1043, (Ind. App. 1999), plaintiffs sued a defendant physician, alleging failure to timely diagnose and treat breast cancer. At trial the defendant introduced evidence suggesting the patient delayed seeking recommended medical treatment, despite being informed about the aggressive nature of her cancer and the need for timely treatment. The trial court granted defendant's request for jury instruction on whether the patient voluntarily incurred the risk of injury as follows:

"The question of whether or not _____ voluntarily incurred the risk of injury is an issue in this case. When a person knows of a danger, understands the risk involved and voluntarily exposes herself to such a danger, that person is said to have incurred the risk of injury. The doctrine of incurred risk is based on the proposition that one incurs all the ordinary and usual risks of an act upon which she voluntarily enters, so long as those risks are known and understood by her. The doctrine is applicable when two elements are present. First the plaintiff must act voluntarily. Second, she must know and understand the risk to which she voluntarily exposes herself. If _____ voluntarily incurred an increased risk in her cancer recurring, your verdict should be for _____"

Id. at 1046.

In upholding the lower court's decision, the Court of Appeals of Indiana determined that the evidence presented at trial supported a reasonable inference from which the jury could conclude that plaintiff's conduct demonstrated that she voluntarily incurred the risk of injury when she chose alternative and untimely therapy for her cancer. Not only was the introduction of evidence of informed consent appropriate, but the defendant was entitled to a jury instruction on assumption of risk based upon informed consent discussions.

In Boyle v. Revici, 961 F.2d 1060 at 1063 (C.A.2 N.Y 1992), the United States District Court for the Southern District of New York held it was reversible error for the trial court to refuse to instruct the jury on the issue of assumption of risk in a medical malpractice action. In that case, the parties stipulated as to the defendant's negligence. Defendant introduced evidence indicating that he warned the decedent that his proposed cancer treatment was not approved by the FDA, and that he could not offer any guarantee as to a cure. Although the lower court allowed the informed consent discussion to come into evidence, it refused to grant the defendant a jury instruction on whether the decedent assumed the risk of injury. In reversing the lower court, the United States District Court noted:

The defendants presented evidence at trial that [redacted] consciously decided not to accept conventional cancer treatment and instead sought [redacted] care, despite known risks of which she was aware. Accordingly, the defendants argue that the jury should have been asked not only whether [redacted] negligence caused [redacted] injuries but whether she expressly assumed the risks that caused those injuries. We agree.

See Boyle v. Revici, 961 F.2d 1060 at 1063 C.A.2 (N.Y. 1992).

In the instant case, there is no question that there is admissible evidence which establishes that [redacted] knowingly and voluntarily accepted the risk of a bile duct injury. This evidence is established by [redacted] signed consent form, as well as [redacted] testimony, and [redacted] medical records. This evidence is probative and relevant to both the standard of care and the properly pleaded affirmative defense of assumption of the risk.

B. informed consent and testimony regarding the inherent risks of surgery will not confuse the jury. If fact, precluding informed consent runs a greater risk of doing that.

Plaintiff argues that the jury is likely to confuse informed consent with a waiver of her right to sue. However, nothing in the informed consent form states that has waived her right to file a malpractice claim. The consent form clearly states that it is a "CERTIFICATION." This document was signed by both and , and it certifies that has informed of the risks for the procedure and that understands those risks and is willing to proceed. See Informed Consent Form, attached hereto as Exhibit 3. Contrary to Plaintiff's argument, there is nothing about this form that remotely equates to a written contract between and whereby attempted to contract away his liability for medical malpractice.

In addition to the consent form, memorialized his discussions with regarding her surgery, as well as the possibility of a bile duct injury, in his progress notes. See Exhibit 1. Certainly, the jury will not confuse entry in the medical record as a written contract or waiver. entry is nothing more than a written account of what transpired between him and his patient – similar to the diary that kept during her hospitalizations.

Not only will the jury not be confused by the evidence regarding informed consent, but there is a real risk that the exclusion of this evidence will cause the jury to speculate that should have warned of the risk, that he failed to warn her of the risk, and that he is negligent for failing to do so.

The law of informed consent in Maryland applicable to this case requires to discuss the risks and benefits of a surgery before performing it. Sard v. Hardy, 281 Md. at 439-40. Every conscious patient in this country who has had a medical procedure has signed a consent form at one time or another. The jury in this case will know this, either from personal experience in their own medical care, or from the experiences of their friends and family. Precluding all evidence regarding informed consent will almost certainly cause the jury to speculate why did not warn . The jury may then very well question general competence, which will color their assessment of this surgical technique. That jury confusion and error will preclude a fair trial – especially given that warned of the known risks.

Similarly, should the court bar any evidence regarding informed consent, the jury will be precluded from hearing essential and relevant evidence.

discussions with about her surgery and the known risks of that surgery are a large part of his interaction with . They are also his primary defense in this lawsuit. Excluding this evidence will essentially render discussion with his patient to nothing more than a hello and a goodbye.

Finally, contrary to Plaintiff's argument, expert testimony regarding the known and inherent risks of a surgery will not confuse the jury. Even the cases cited by Plaintiff support the position that expert testimony can be used to relay this information to a jury without confusion. See Waller v. Aggarwal, 116 Ohio App. 3d 355, 688 N.E. 2d 274 (1996); see also Hayes v. Camel, 283 Conn. 475, 487-88, 927 A.2d 880, 890 (2007). Any risk of confusion can be easily addressed by appropriate instructions during trial, and

if appropriate at the close of the evidence.

Accordingly, this court should permit _____ to introduce evidence regarding informed consent, the jury should be permitted to hear evidence showing that the risks of the procedure were clearly known, understood and agreed to by _____, and, if deemed appropriate, an instruction from the Court on the role of informed consent in this case as either evidence of assumption of the risk or as evidence of compliance with the standard of care, and that evidence of _____ informed consent is not evidence of a waiver of rights. Such an instruction will still permit _____ to present his primary defense, namely, that _____ injuries were not attributable to negligence, but were due to recognized, common risk inherent in the procedure, without confusing the jury or prejudicing the Plaintiff.

C. The Ohio Court of Appeals' decision in Waller v. Aggarwal is not applicable.¹

In support of its Motion in Limine, the Plaintiff relies on the Ohio case of Waller v. Aggarwal, 116 Ohio App. 3d 355, 688 N.E.2d 274 (1996). In Waller, the appellate court's holding regarding the defendant's affirmative defense of informed consent (an unrecognized affirmative defense in Ohio) arose because the trial court allowed the defendant to introduce the plaintiff's informed consent form and referred to informed consent as "a valid waiver of rights" during its voir dire of prospective jurors. The trial court permitted evidence regarding informed consent even though the plaintiff had not asserted a claim for lack of informed consent.

¹ Unlike Maryland, the highest court in Ohio is not the Court of Appeals. Ohio's highest court is the Supreme Court of Ohio. Ohio's Court of Appeals is equivalent to Maryland's

Waller differs dramatically from the instant case because _____ seeks to utilize evidence of _____ consent to support his legally recognized defense of assumption of the risk, as well as in defense of Plaintiff's negligence claim. See id. 688 N.E. 2d at 275 (addressing the relevance of informed consent with respect to Plaintiff's negligence claim only); see also Wright v. Kaye, 267 Va. 510, 529, 593 S.E.2d 307,317 (2004) (same). In this case, _____ has every right to assert a defense of assumption of the risk, and evidence regarding _____ informed consent is relevant in establishing that defense.

Furthermore, this case differs from Waller because the concern over jury confusion in Waller was focused on a jury interrogatory, which asked the jury to decide whether the consent form "was a valid waiver of the [plaintiff's] rights." There will be no such interrogatory in this case. In addition, as discussed supra, there is no concern that the jury will confuse _____ informed consent form as a waiver of rights or a contract. Hence, the concern for jury confusion is not present here.

Likewise, the fear of jury confusion present in Hayes v. Camel is not present here. In Hayes, the Supreme Court of Connecticut held that evidence regarding the inherent risk of a particular surgical procedure is relevant to the determination of whether a breach of the standard of care occurred, and also whether such a breach caused injury to the plaintiff. Hayes v. Camel, 283 Conn. 475, 484, 927 A.2d 880, 888 (2007). Nevertheless, the court determined that the evidence raised the potential for jury confusion because the "jury might inappropriately consider a side issue that is not part of the case, namely the adequacy of the consent. Indeed, this potential was further increased ... because of the

Court of Special Appeals.

rebuttal testimony of ... [the plaintiff] disputed what ... [the doctor] had told [her husband]” Id. 283 Conn. at 487-88, 927 A.2d at 889-90.

Here, this is no dispute regarding what _____ told _____, or that she was well informed. Therefore, there is no concern that the jury will inappropriately consider the adequacy of _____ consent.

CONCLUSION

For the reasons set forth above, all evidence regarding _____ informed consent and any evidence by way of expert testimony regarding the inherent risks of a gallbladder removal surgery is relevant. In addition, there is no danger that this relevant evidence will confuse the jury. Furthermore, precluding this relevant evidence would be unfairly prejudicial to _____. Therefore, Defendant respectfully requests that this Court deny Plaintiff’s Second Motion in Limine to Bar Evidence that Plaintiff’s Injury was a Known Risk and to Bar Evidence of Informed Consent.

Attorneys for Defendant,

Plaintiff

v.

Defendant

* **IN THE**
* **CIRCUIT COURT**
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ORDER

UPON CONSIDERATION of Plaintiff's Second Motion in Limine to Bar Evidence that Plaintiff's Injury was a Known Risk and to Bar Evidence of Informed Consent, and Defendant's opposition hereto, it is this ____ day of _____, 2010, hereby ORDERED that Plaintiff's Second Motion in Limine to Bar Evidence that Plaintiff's Injury was a Known Risk and to Bar Evidence of Informed Consent is **DENIED**.

Judge, Circuit Court for Baltimore City

cc: Rodney M. Gaston, Esquire