

**[J-121-2001]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**EASTERN DISTRICT**

ESMELINDA VALLES, ADMINISTRATRIX:	Nos. 10 & 11 EAP 2001
OF THE ESTATE OF LOPE VALLES,	:
DECEASED; RUBEN VALLES,	:
	: Appeal from the Order of the Superior
Appellant	: Court entered at 2325 PHL 1998 affirming
	: the Order of the Court of Common Pleas
	: of Philadelphia County, Civil Division
v.	: entered at 1211 Nov T 1994.
	:
ALBERT EINSTEIN MEDICAL CENTER;	:
LEONARD H. COHEN, M.D.;	: 758 A.2d 1238 (Pa. Super. 2001)
ARCHIMEDE J. SILVESTRI, M.D.; PAUL	:
H. STEERMAN, M.D.; A. SILVESTRI	:
ASSOCIATES; JAY MORROS, M.D.;	: ARGUED: October 16, 2001
MARK KRAMER, M.D.; AND ALAN	:
WLADIS, M.D.,	:
	:
	:
Cross-Appellant: Jay Morros, M.D.	:

**OPINION**

**MR. JUSTICE CAPPY**

**DECIDED: August 28, 2002**

We granted allocatur in order to address several issues regarding the scope of the informed consent doctrine. The Superior Court affirmed the entry of summary judgment in favor of Appellee Albert Einstein Medical Center (“AEMC”) and Cross-Appellant Jay Morros, M.D. (“Morros”). For the reasons set forth herein, we affirm the order of the Superior Court.

We view the facts in the light most favorable to Appellant Esmelinda Valles, as the non-moving party. Murphy v. Duquesne Univ. of the Holy Ghost, 777 A.2d 418, 429 (Pa. 2001). Appellant’s claims arise from two separate medical procedures performed upon her

brother, Lope Valles ("Valles").<sup>1</sup> On November 14, 1992, Valles, a diabetic, was admitted to AEMC for a suspected abdominal aortic aneurysm<sup>2</sup>. An aortogram<sup>3</sup> was scheduled to study the location of the aneurysm. Muriel Gordon, M.D., a radiology resident at AEMC, obtained Valles' written consent to undergo the procedure scheduled to be performed by Steven Allen, M.D. ("Allen"), a radiologist at AEMC. While the written consent does not disclose the risk of renal damage or alternatives to the procedure, Allen indicated that it was his custom to inform a patient undergoing this procedure that the dye from the aortogram might damage the kidneys. After the procedure was performed on November 19, 1992, Valles' kidney functions worsened. Surgery to repair the aneurysm was postponed and Valles was discharged on November 24, 1992. On December 8, 1992, Valles was again admitted to AEMC suffering from renal failure. On December 17, 1992, the aneurysm was successfully repaired.

Given Valles' need for extended dialysis and prior complications with a short-term catheter, doctors recommended placement of a different catheter (the "Permacath"), which was suitable for longer periods of dialysis. Morros was scheduled to perform the surgical placement of the Permacath. On January 6, 1993, Alan Wladis, M.D., a surgical resident at AEMC, obtained Valles' written consent for the procedure. Wladis advised Valles of certain risks involved in the insertion of the Permacath, including bleeding, infection, collapsing of a lung and death. While the Permacath can be placed at several sites, including the jugular

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<sup>1</sup> Ruben and Esmelinda Valles, Valles' brother and sister, respectively, commenced the action as administrators of his estate; Ruben was subsequently removed as a plaintiff.

<sup>2</sup> An aneurysm is a dilation of a portion of an artery. See STEDMAN'S MEDICAL DICTIONARY at 79 (27<sup>th</sup> ed. 2000).

<sup>3</sup> An aortogram is the image resulting from radiographic imaging of the aorta and its branches, or a portion of the aorta, by injection of contrast medium, ultrasound or magnetic resonance. See STEDMAN'S MEDICAL DICTIONARY at 108 (27<sup>th</sup> ed. 2000).

(neck) veins, the subclavian (chest) veins, or the femoral (groin) veins, Wladis did not know at which site the catheter would be inserted and did not advise Valles as to where the catheter would be placed.

On January 7, 1993, Morros attempted to insert the Permacath into Valles' right subclavian vein. During the procedure, Valles suffered a hemopneumothorax<sup>4</sup> and cardiac arrest. Thereafter, Valles remained comatose and subsequently died on January 16, 1993.

Appellant filed a complaint against AEMC, Morros and others. The claim against AEMC was premised, inter alia, upon a theory of vicarious liability for the battery committed by Allen due to his failure to obtain informed consent prior to performing the aortogram. Appellant contends that Valles was not properly advised of the risks of the use of contrast dye and alternatives to the aortogram. In support of this claim, Appellant's expert opined that there were alternatives to the aortogram; that the risks to Valles of contrast-induced renal failure were significant (10-20%) and that Valles' renal failure was caused by the aortogram.

The claim against Morros was also based on a lack of informed consent to the catheter procedure Morros performed. Appellant claims that Valles was not advised of the alternative placement sites for the Permacath and risks relative to those sites. Appellant's expert opined that use of the alternative sites would have lessened or eliminated the risks of the complication that developed during the attempted insertion of the Permacath. The expert further indicated that the attempted placement of the catheter in the right subclavian vein resulted in the complications that led to Valles' death.

AEMC moved for summary judgment. Morros filed a motion in limine in which he sought to preclude Appellant from pursuing any claims relating to informed consent. The

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<sup>4</sup> A hemopneumothorax is "[a]ccummulation of air and blood in the pleural [chest] cavity." STEDMAN'S MEDICAL DICTIONARY at 805 (27<sup>th</sup> ed. 2000).

trial court granted AEMC's motion but denied Morros' motion, leaving Morros as the only remaining defendant.<sup>5</sup> Prior to jury selection, Morros renewed his motion, which a different trial judge granted and thereafter dismissed the claim.<sup>6</sup>

On appeal, a panel of the Superior Court unanimously affirmed the trial courts' orders. Following reargument, a divided en banc panel affirmed. Valles v. Albert Einstein Medical Center et al., 758 A.2d 1238 (Pa. Super. 2000). With regard to the aortogram performed by Allen, a majority of the en banc panel concluded that AEMC could not be held vicariously liable for Allen's failure to obtain informed consent. The court determined that nothing in the record indicated that AEMC exercised control over the manner in which Allen was to perform radiology work. The court relied on Kelly v. Methodist Hospital, 664 A.2d 148 (Pa. Super. 1995), wherein the Superior Court determined that a hospital could not be held liable under a theory of corporate negligence based on its failure to promulgate policies and procedures relating to informed consent. The court in Kelly reasoned that the surgeon was in the best position to advise each patient of such risks, and it would be unworkable to have the hospital draft the forms imparting the substantive information relative to each procedure. Id. at 151. Similarly, in this case, the Superior Court reasoned that oversight of a highly specialized procedure such as an aortogram would improperly inject the hospital into the physician-patient relationship and would be unworkable.

As to the claim against Morros based on the placement of the Permacath, the court determined that "informed consent applied to the method or manner of surgery and the

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<sup>5</sup> All other defendants had been dismissed by this point.

<sup>6</sup> The trial court entered a nonsuit in Morros' favor. Procedurally, this order was improper, as the jury had not yet heard any evidence. Lewis v. United Hospitals, Inc., 692 A.2d 1055, 1056-57 (Pa. 1997); Pa.R.C.P. 230.1. Instead, the trial court should have treated the motion as a request for summary judgment or a motion for judgment on the pleadings. 692 A.2d at 1058. Both Morros and Appellant treat the motion as one for summary judgment, and we do the same.

risks associated therewith.” Id. at 1246. The court further concluded that “a physician is only required to inform the patient of those medically recognized or medically viable alternate methods of implanting a device.” Id. at 1246-47. The court recognized that there are typically six alternative sites for placement of the catheter but after reviewing the relevant testimony, concluded that none of these alternative sites were viable given Valles’ condition. The court therefore affirmed the dismissal of the claim against Morros.

Judge Del Sole filed a dissenting opinion, joined by Judges McEwen and Todd. Judge Del Sole asserted that AEMC could be held vicariously liable as Allen was its employee. As to the claim against Morros, Judge Del Sole agreed with the majority that the informed consent doctrine encompasses the method and manner of surgery, but he determined that there was a disputed issue of fact regarding the alternate viable sites. Judge Musmanno filed a concurring and dissenting opinion. He agreed with the majority that the hospital could not be held vicariously liable, but joined the dissenting opinion of Judge Del Sole with respect to the informed consent claim against Morros.

This court granted allocatur to address issues raised by Appellant Valles and Cross-Appellant Morros. Appellant raises the following issues: (1) whether a hospital can be held vicariously liable as a matter of law for its employee-physician’s failure to obtain informed consent; (2) whether, in an informed consent case, there exists a disputed issue of material fact precluding a grant of summary judgment in the defendant physician’s favor when plaintiff’s expert disagrees with the defendant physician regarding the medical viability of a surgical approach. In his cross-appeal, Morros asks us to resolve whether the Superior Court erred in determining that the doctrine of informed consent requires surgeons to discuss treatment techniques in addition to treatment alternatives.<sup>7</sup>

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<sup>7</sup> Our review on an appeal from the grant of a motion for summary judgment is well-settled. Summary judgment may be granted only in those cases in which the record clearly shows that there are no genuine issues of material fact and the moving party is entitled to (continued...)

We first address Appellant's contention that AEMC should be held vicariously liable for Allen's failure to obtain Valles' informed consent prior to performing the aortogram. Appellant asserts under principles of respondeat superior, a hospital may be vicariously liable for its employee-physician's intentional torts, including the failure to obtain informed consent. Because a hospital has an obligation to oversee all persons who practice medicine within its walls, Appellant maintains that the hospital as an employer and health care provider in its own right maintains a right of control in the relationship sufficient to justify the imposition of liability.<sup>8</sup>

Appellee responds that historically in Pennsylvania, the duty to obtain informed consent rests only with the physician performing the surgical procedure, except in limited circumstances not present here. Thus, a medical facility such as AEMC cannot be held vicariously liable for the physician's failure to perform this non-delegable duty.

Although this is an issue of first impression for this court, the Superior Court has addressed vicarious liability for a physician's failure to obtain informed consent in two cases, with different results. See Grabowski v. Quigley, 684 A.2d 610 (Pa. Super. 1996) (defendant-physician who directed second physician to perform surgery could be held vicariously liable for unauthorized surgery), appeal dismissed as improvidently granted, 717 A.2d 1024 (Pa. 1998); Watkins v. Hospital of the Univ. of Penn., Penn Health Systems,

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(...continued)

judgment as a matter of law. P.J.S. v. Penn. State Ethics Comm'n, 723 A.2d 174, 176 (Pa. 1999). A reviewing court may disturb the order of the trial court only where it determines that the court committed an error of law or abused its discretion. Capek v. DeVito, 767 A.2d 1047, 1048 n.1 (Pa. 2001). As this appeal presents questions of law, our review is plenary. Phillips v. A-Best Products Co., 665 A.2d 1167, 1170 (Pa. 1995).

<sup>8</sup> Appellant clarifies that she is not contending that AEMC had an independent duty to obtain consent, nor that AEMC was negligent under a theory of corporate liability for failing to ensure that informed consent was obtained. Therefore, this opinion in no way opines on any other theories other than the hospital's vicarious liability.

737 A.2d 263 (Pa. Super. 1999) (hospital could not be held vicariously liable because as a general rule, there is no independent duty for a non-physician to obtain a patient's informed consent).<sup>9</sup>

Appellant further contends that the Superior Court erred in relying on Kelly, as the decision in that case to reject a theory of corporate negligence conflicts with this court's decision in Tonsic v. Wagner, 329 A.2d 497 (Pa. 1974). In Tonsic, this Court determined that agency principles apply to hospitals, and that a hospital can be held liable for negligent acts of its employee-physicians. Id. at 501. See also Thompson v. Nason Hosp., 591 A.2d 703, 707 (Pa. 1991) (Tonsic recognized respondeat superior as a basis for hospital liability). Appellant urges us to follow the holding of Grabowski, and reject the reasoning of Watkins and Kelly.

Resolution of Appellant's first issue necessarily entails a discussion of the principles of informed consent and vicarious liability. In a claim alleging lack of informed consent, it is the conduct of the unauthorized procedure that constitutes the tort. Moure v. Raeuchle, 604 A.2d 1003, 1008 (Pa. 1992). A claim of a lack of informed consent sounds in the intentional tort of battery because an operation performed without the patient's consent is deemed to be the equivalent to a technical assault. Smith v. Yohe, 194 A.2d 167, 174 (Pa. 1963). To obtain a patient's informed consent, doctors must provide patients with "material information necessary to determine whether to proceed with the surgical or operative procedure or to remain in the present condition." Duttry v. Patterson, 771 A.2d 1255, 1258

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<sup>9</sup> The court noted one exception, enunciated in Friter v. Iolab Corp., 607 A.2d 1111 (Pa. Super. 1992), in which a hospital was held liable for the lack of informed consent because the hospital was involved in a clinical investigation for the Food and Drug Administration. Federal regulations required the hospital to obtain the informed consent of any patient participating in the study. Thus, the hospital assumed an independent duty to obtain the patient's informed consent. Appellant does not allege that AEMC has similarly assumed an independent duty in this case.

(Pa. 2001) (quoting Sinclair by Sinclair v. Block, 633 A.2d 1137, 1140 (Pa. 1993)). This information must give the patient “a true understanding of the nature of the operation to be performed, the seriousness of it, the organs of the body involved, the disease or incapacity sought to be cured, and the possible results.” Id. (quoting Gray v. Grunnagle, 223 A.2d 663, 674 (Pa. 1966)). While doctors are not required to disclose “all known information,” they are required to “advise the patient of those material facts, risks, complications and alternatives to surgery that a reasonable person in the patient’s situation would consider significant in deciding whether to have the operation.” Gouse v. Cassel, 615 A.2d 331, 334 (Pa. 1992) (emphasis omitted).<sup>10</sup>

Vicarious liability is at issue because of the alleged master-servant relationship between Allen and AEMC. As a general rule, a master may be held liable for the acts of the servant when those acts are committed during the course of his employment and within the scope of his authority. Lunn v. Boyd, 169 A.2d 103 (Pa. 1961). A master may be vicariously liable even in the case of assaults committed by the servant. See Orr v. William J. Burns Int'l Detective Agency, 12 A.2d 25 (Pa. 1940).

This court has previously examined the contours of the employer/employee relationship. Shafer v. State Employees' Retirement Bd., 696 A.2d 1186 (Pa. 1997). We consider numerous factors to determine whether a person is an employee:

Control of manner work is to be done; responsibility for result only; terms of agreement between the parties; the nature of the work or occupation; skill required for performance; whether one employed is engaged in a distinct occupation or business; which party supplies the tools; whether payment is by the time or by the job; whether work is part of the regular business of the employer, and also the right to terminate the employment at any time.

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<sup>10</sup> The General Assembly has recently codified the law of informed consent. See 40 P.S. § 1301.811-A (repealed and recodified as amended, 40 P.S. §1303.504). Those provisions are inapplicable to the instant matter as they became effective after the procedures at issue here.



Id. at 1192 (quoting Zimmerman v. Public School Employees' Retirement Bd., 522 A.2d 43, 45 (Pa. 1987)). We further indicated that "[n]one of these factors is absolutely dispositive of a person's status as an employee and each case must be determined on its own facts." Id. (citing Budzichowski v. Bell Telephone Co. of Penn., 469 A.2d 111, 113 (Pa. 1983)).

Appellant contends that the Superior Court's determination that AEMC lacked the requisite control over Allen conflicts with our prior decision in Budzichowski, supra. In that case, a plant worker sought damages for injuries allegedly caused by negligent medical diagnosis and treatment received from the plant's medical dispensary physicians. We held that the physicians were "employees" for purposes of the Workers' Compensation Act, and therefore were immune from liability as "fellow employees" of the plaintiff. As to the issue of control, we stated that "[a]n employer-employee relationship may be found even though 'a particular occupation may involve such technical skill that the employer is wholly incapable of supervising the details of performance.'" (citing Babich v. Pavich, 411 A.2d 218 (Pa. Super. 1979)). The evidence demonstrated that both physicians worked a 40-hour week in the dispensary, and did not engage in any other medical practice. Moreover, they were under the direct supervision of the employer's medical director who had the authority to direct the type, manner and extent of treatment of any patient and could transfer patients from the care of any doctor in the dispensary.<sup>11</sup>

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<sup>11</sup> In addition to Budzichowski, Amicus Curiae, the Pennsylvania Trial Lawyers Association, directs our attention to other cases in which courts have addressed whether physicians are employees. Cf. Kinloch v. Tonsey, 473 A.2d 167 (Pa. Super. 1984) (physician who was medical director, worked eight hours per day and was compensated in the same manner as other full time employees was an employee, even though he worked as a private physician on nights and weekends) and Zimmerman, supra (physician deemed to be independent contractor rather than an employee where, inter alia, he worked part-time, carried his own malpractice insurance, and had different fringe benefits and working conditions than other employees).

Unlike the plaintiff in Budzichowski and similar cases cited by amicus, Appellant points to little record evidence to support her claim that Dr. Allen was an employee of AEMC. As the Superior Court noted, Appellant has not presented any employment agreement between Dr. Allen and AEMC. Instead, Appellant generally cites the control that a hospital maintains when it employs a physician, including: its provision of the instrumentalities, place to work, support staff, patient base and wages; its right to require the employee's presence at a particular time and to terminate employment; its retention of revenues for the employee's professional services; and its use of departmental organization, peer review, rules and regulations, credentialing and privileging practices. Appellant asserts, without citation to the record, that Allen's exercise of independent medical judgment was subject to AEMC's right of control because: his work may not be delegated to others, except as the hospital's rules permit; his medical findings must be reported in a manner and within a time frame set by hospital policy; and he must perform the requested study according to departmental protocols and schedule. Appellant also relies on Dr. Allen's testimony that he surmised that there was a hospital and departmental regulation requiring him to obtain Valles' consent to the procedure. Transcript of Allen testimony at 24. In light of these factors, Appellant contends that she is entitled to the inference that Allen was an employee of the hospital, so that a question of fact exists which must be presented to a jury.

Even if we were to assume arguendo that Allen was an employee, Appellant is still not entitled to relief. We reach this conclusion since we find that a battery which results from a lack of informed consent is not the type of action that occurs within the scope of employment. In our view, a medical facility cannot maintain control over this aspect of the physician-patient relationship. Our lower courts have recognized that the duty to obtain informed consent belongs solely to the physician. See, e.g., Kelly; Friter. Informed consent flows from the discussions each patient has with his physician, based on the facts

and circumstances each case presents. We decline to interject an element of a hospital's control into this highly individualized and dynamic relationship. We agree with the lower court that to do so would be both improvident and unworkable. Thus, we hold that as a matter of law, a medical facility lacks the control over the manner in which the physician performs his duty to obtain informed consent so as to render the facility vicariously liable.

Because of the unique nature of the informed consent doctrine, we find a battery in this context to be distinguishable from those cases in which an employer has been held vicariously liable for its employee's assault. Orr, supra. Tonsic, Budzichowski, Kinloch and Zimmerman are inapt as they did not involve an employment relationship in an informed consent context. Grabowski, also cited by Appellant, is distinguishable, for there, the defendant-physician directed the second physician to perform the surgery. See Restatement (Second) of Agency, §212 ("A person is subject to liability for the consequences of another's conduct which results from his directions as he would be for his own personal conduct if, with knowledge of the conditions, he intends the conduct...."). That is not the case in the instant matter. Thus, we hold that a medical facility cannot be held vicariously liable for a physician's failure to obtain informed consent. The Superior Court correctly determined that AEMC was entitled to summary judgment as a matter of law.

We now turn to Appellant's second issue and Morros' cross-appeal, issues which arise from Morros' attempted insertion of the Permacath. Appellant argues that her expert opined that the femoral vein was a viable alternative site of placement which did not carry the risks which attended the subclavian vein site. This alternative was not disclosed to Valles. As she adduced sufficient evidence to create an issue of fact, Appellant maintains that the question should have been submitted to a jury. In affirming the dismissal of the case, the Superior Court improperly relied on Morros' oral testimony only, and ignored her expert's testimony, in violation of the rule that the defendant's oral testimony cannot be the

basis for summary judgment in his favor. See Borough of Nanty-Glo v. American Surety Co. of New York, 163 A. 523 (Pa. 1932). Morros responds that Valles consented to the procedure that was performed, and that information relative to the alternative sites was not material information which must be disclosed. He further contends that the placement of the catheter is in fact an issue of negligence, rather than informed consent.

In his cross-appeal, Morros argues that the Superior Court impermissibly extended the scope of the informed consent doctrine when it determined that “informed consent applies to the method or manner of surgery and the risks associated therewith.” 758 A.2d at 1246. He argues that the informed consent doctrine requires the physician to advise the patient only as to the risks of the surgery proposed, and not the alternative methods or means of performing a surgical procedure. Appellant responds that the central premise of informed consent is patient self-determination, a goal which is satisfied only if patients are advised of all considerations which a prudent patient would consider material to a decision to undergo surgery, including the alternative methods or manner of performing the surgery proposed.

We agree with Morros' position. We recently reiterated in Duttry that “the doctrine of informed consent is a limited one.” 771 A.2d at 1258. In light of this limited scope, we find that the manner or method in which the surgeon performs the proposed procedure is not encompassed within the purview of the informed consent doctrine. Although there were several methods of performing the particular surgery, there was only one surgery proposed: the insertion of a Permacath. Appellant does not dispute that Valles was adequately informed of the risks attending the surgery: bleeding, lung collapse, and death. That the subclavian vein may not have been the optimum site is not an issue of informed consent, but of negligence in the physician’s decision to place the Permacath at that site. Thus, the trial court properly entered judgment in favor of Morros on the informed consent claim, and

the decision of the Superior Court is affirmed, albeit on other grounds. Moorhead v. Crozer Chester Medical Center, 765 A.2d 786, 787 n.2 (Pa. 2001).

The order of the Superior Court is affirmed.

Former Chief Justice Flaherty did not participate in the decision of this case.

Mr. Justice Saylor files a Concurring and Dissenting Opinion.

Mr. Justice Nigro files a Dissenting Opinion.