SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 North King Street, Suite 10400
Wilmington, Delaware 19801-3733
(302) 255-0664

Kenneth M. Roseman, Esquire
Kenneth M. Roseman, P.A.
1300 King Street
Wilmington, Delaware 19899
Attorney for Plaintiff

Bradley J. Goewert, Esquire
Lorenza A. Wolhar, Esquire
Marshall Dennehey Warner Coleman & Goggin
1220 North Market Street, 5th Floor
P.O. Box 8888
Wilmington, Delaware 19899-8888
Attorneys for Defendant

Re: Spencer v. Goodill
C.A. No. 08C-06-183 RRC

Submitted: December 7, 2009
Decided: December 11, 2009

On Plaintiff's Inquiry as to Whether the "Reasonably Prudent Patient Standard" in an Informed Consent Action Requires Expert Testimony.
INQUIRY ANSWERED. **EXPERT TESTIMONY IS NOT REQUIRED.**

Dear Counsel:

This letter memorializes the Court's bench ruling on December 7, 2009, in which the Court held that, in an Informed Consent action, expert medical testimony is not required pursuant to 18 *Del. C.* § 6853 to establish

whether a reasonably prudent patient in the position of the injured patient or (in this case) the decedent would have declined the medical procedure if properly informed of the risks and alternatives involved in the medical procedure.

This case stems from the alleged failure of Defendant, John Goodill, M.D., to have provided the decedent, Muriel Stewart (Plaintiff's mother), adequate information necessary to make an informed decision prior to her bronchoscopy with transbrachial biopsy. The decedent had significant health issues: "Decedent was a forty-six year old woman with chronic medical conditions including 'chronic obstructive pulmonary disease ("COPD"), [] diabetes, end-stage renal disease ("ESRD") . . . and respiratory failure requiring mechanical ventilation.' She also was a chronic smoker."[1] She died as a result of the medical procedure.

This Court had issued an opinion on December 4, 2009 holding, *inter alia*, that proximate causation in a claim based on lack of informed consent required a plaintiff to prove by a preponderance of the evidence that a reasonably prudent patient in the position of the decedent would have decided against the medical procedure if she had been properly informed of the risks and alternatives. In so holding, the Court recognized that

[1] *Spencer v. Goodill*, 2009 WL 5177154, at * 1 (Del. Super.) (citations omitted).

Delaware, like many other states, follows a negligence standard in an informed consent action. This Court found that proximate causation in an informed consent action based on negligence required "a plaintiff to 'demonstrate that a reasonable person knowing of the risk would not have consented to the treatment, and that the undisclosed risk actually occurred, causing harm to the patient.'"[2]

Immediately prior to jury selection on December 7, Plaintiff sought clarification from the Court, in light of the Court's December 4 opinion, on whether an expert opinion was required for Plaintiff to prove that a reasonably prudent patient in the position of the decedent would have declined the procedure if properly informed of the risks and alternatives, in light of 18 *Del. C.* § 6853(e). That statute provides in pertinent part:

> No liability shall be based upon asserted [medical] negligence unless expert medical testimony is presented as to the alleged deviation from the applicable standard of care in the specific circumstances of the case and as to the causation of the alleged personal injury or death . . .

Neither party had raised this issue in the pretrial briefing, and the Court did not reach that issue in its December 4 opinion.

---

[2] *Spencer v. Goodill*, 2009 WL 4652960, at * 7 (Del. Super.) (citing 61 Am. Jur. 2d *Physicians, Surgeons, etc*. § 183 (2004); *see also Canesi ex rel. Canesi v. Wilson*, 730 A.2d 805, 813 (N.J. 1999) (holding that a "plaintiff must prove not only that a reasonably prudent patient in her position, if apprised of all material risks, would have elected a different course of treatment or care . . . and that the undisclosed risk actually materialized and that it was medically caused by the treatment."); *K.A.C. v. Benson*, 527 N.W.2d 553, 561 (Minn. 1995) ("To prevail on a claim for negligent nondisclosure plaintiff must demonstrate that a reasonable person knowing of the risk would not have consented to treatment, and that the undisclosed risk actually materialized in harm.")).

Although having requested clarification on this issue, Plaintiff agreed, given the Court's ruling (to which Plaintiff not unexpectedly took exception), that expert testimony would not be necessary to establish that a reasonably prudent patient in the position of the decedent would not have undergone the bronchosopy with transbrachial biopsy if properly informed.

Defendant's counsel also concurred that no expert testimony was needed for this non-medical causation issue. Defendant's position was that the requirements of 18 *Del. C.* § 6853 were satisfied because the Court's decision regarding proximate causation on the "reasonably prudent patient issue" did not eliminate the need for expert testimony as to whether the undisclosed risk materialized and caused the decedent's death.[3] Defendant's position was that only this "second prong" of proximate causation required expert testimony. Plaintiff did not take issue with Defendant's position.

In its bench ruling on December 7, the Court agreed with both parties and ruled that Plaintiff need not adduce expert testimony as to whether a reasonable patient would have decided against the procedure if properly informed of the risks. This Court relied in part on *Posta v. Chung-Loy*, a

[3] At the conclusion of all the evidence at trial, the parties and the Court agreed that the bronchoscopy with the transbrachial biopsy caused the death of the decedent and the jury was so instructed. The case was tried only on the Informed Consent claim; Plaintiff made no allegation at trial that the medical procedure itself was negligently performed. The trial resulted in a hung jury.

New Jersey case[4] that implicitly held that expert testimony was unnecessary as to whether a reasonable patient would have decided against the operation if properly informed.[5] The *Posta* Court made no mention of any requirement of expert testimony on what a reasonable patient would have done, but explicitly held in connection with a related issue that expert testimony is required for "medical causation" because "[w]ithout expert testimony, plaintiff could not prove that his [injury] was caused by the medical procedure for which the informed consent was inadequate."[6]

Similarly, in *Gorney v. Meaney*, the Court of Appeals of Arizona held that

> [t]raditionally, plaintiffs alleging lack of informed consent must show two types of causation: 1) adequate disclosure would have caused the plaintiff to decline the treatment, and 2) the treatment proximately caused injury to the plaintiff . . . Expert testimony is not required for the first type . . . Expert testimony is required . . . to demonstrate that the treatment proximately caused injury to the plaintiff . . . Such testimony helps to ensure that the plaintiff's alleged injury was not caused by the progression of a pre-existing condition or was the result of some other cause . . .[7]

This Court followed *Posta* and *Gorney* and held that expert testimony is not required pursuant to 18 *Del. C.* § 6853 in connection with whether a reasonably prudent patient in the position of the decedent in this case would

---

[4] This Court has previously relied on New Jersey law in connection with a claim based on lack of informed consent. *See Spencer*, 2009 WL 4652960; *Patten v. Freedman*, 1989 WL 64116 (Del. Super.).

[5] 703 A.2d 368, 380 (N.J. Super 1997).

[6] *Id.*

[7] 150 P.3d 799, 804 (Ariz. Ct. App. 2007).

have declined the medical procedure if properly informed of the risks.[8] Following *Posta* and *Gorney*, this Court held that 18 *Del. C.* § 6853 only requires expert testimony on "medical causation" and, therefore, an expert must testify in a claim based on lack of informed consent that the undisclosed risk materialized and caused injury. This holding satisfies the requirements of 18 *Del. C.* § 6853 because expert testimony is still required to establish causation in medical negligence cases, including cases based on the lack of informed consent.

Richard R. Cooch

oc: Prothonotary

[8] There is authority to the contrary on this issue, and at least one court has held that expert medical testimony is required to establish what a reasonably prudent patient would have done if properly informed. *See Standefer v. Brewer*, 256 S.W.3d 889, 893 (Tex. App. 2008) (holding that an expert report should opine whether a reasonably prudent patient would have declined the medical procedure if properly informed).