STATE OF MICHIGAN

COURT OF APPEALS

BARBARA WLOSINSKI, Personal Representative of the Estate of MICHAEL WROBEL, Deceased,

Plaintiff-Appellee,

and

BLUE CROSS BLUE SHIELD OF MICHIGAN and BLUE CARE NETWORK OF MICHIGAN,

Intervening Plaintiffs,

v

STEVEN COHN, M.D., and WILLIAM BEAUMONT HOSPITAL,

Defendants-Appellants.

FOR PUBLICATION
December 20, 2005
9:15 a.m.

No. 253286
Oakland Circuit Court
LC No. 01-033241-NH

Official Reported Version

Before: O'Connell, P.J., and Schuette and Borrello, JJ.

BORRELLO, J. (*dissenting*).

I respectfully dissent because I believe that the jury should have been permitted to determine whether Dr. Cohn failed to obtain the decedent's informed consent to a kidney transplant by failing to disclose to the decedent his statistical failure rate for kidney transplants. I disagree with the majority's creation of a bright-line rule that a physician never has a duty to disclose to a patient the physician's statistical success or failure rate for a particular medical procedure. I would affirm the trial court's denial of defendants' motion for summary disposition on plaintiff 's claim of lack of informed consent, as well as the judgment in favor of plaintiff.

Dr. Cohn had a duty to warn the decedent about the risks and consequences of kidney transplant surgery. *Lincoln v Gupta*, 142 Mich App 615, 625; 370 NW2d 312 (1985). In a negligence action, whether a person has breached a duty of reasonable care is generally an issue for the finder of fact. *Case v Consumers Power Co*, 463 Mich 1, 7; 615 NW2d 17 (2000).[1] Only

[1] Furthermore, in medical malpractice cases, whether there is a breach of the standard of care
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when there is an "'overriding legislatively or judicially declared public policy'" should the court decide the standard of care as a matter of law. *Id.*, quoting *Moning v Alfono*, 400 Mich 425, 438; 254 NW2d 759 (1977).

I see no reason to depart from the general rule that it is for the finder of fact, and not the trial court, to decide whether a defendant in a negligence action has breached a duty of reasonable care. Furthermore, there are not sufficiently compelling public policy reasons that would justify removing this issue from the jury's consideration and allowing the trial court to decide the standard of care as a matter of law. The jury was in the best position to consider the particular facts of this case and determine whether Dr. Cohn breached the standard of care by failing to inform the decedent of his statistical failure rate for kidney transplants.

In their opinions, my brother jurists assert that Dr. Cohn's success rate was not a risk related to the medical procedure and that Dr. Cohn therefore had no duty to disclose such information under the doctrine of informed consent. This is true under the more traditional view of a physician's duty to inform, in which the duty to inform is "confined to the actual procedure" and does not include "provider specific information." See *DeGennaro v Tandon*, 89 Conn App 183, 189; 873 A2d 191 (2005). However, I reject such a narrow and outdated construction of the doctrine of informed consent and embrace a more expansive, patient-centered view of a physician's duty to inform a patient, as the Connecticut Court of Appeals did in *DeGennaro*. In holding that the defendant dentist's duty to obtain the plaintiff patient's informed consent to a dental procedure required the defendant to disclose to the plaintiff "provider specific information," including the fact that the defendant was understaffed, that the defendant's office was not ready for business, and that the defendant was using equipment with which she was unfamiliar, the *DeGennaro* court asserted:

> The duty to inform, however, requires a physician "to provide the patient with the information which a reasonable patient would have found material for making a decision whether to embark upon a contemplated course of therapy." (Internal quotation marks omitted.) *Godwin v. Danbury Eye Physicians & Surgeons, P.C.*, 254 Conn. 131, 143; 757 A.2d 516 (2000). We conclude that in addition to material information about the procedure to be performed, the duty to inform encompasses provider specific information where the facts and circumstances of the particular situation suggest that such information would be found material by a reasonable patient in making the decision to embark on a particular course of treatment, regardless of whether the patient has sought to elicit the information from the provider. In reaching this conclusion, we join a number of other jurisdictions that have concluded that a patient centered duty to inform necessarily counsels against excluding from that duty to inform information that "a reasonable person in the patient's position would need to know in order to make an intelligent and informed decision"; *Johnson v. Kokemoor*, 199 Wis.2d 615, 639; 545 N.W.2d 495 (1996); simply because that information was

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generally requires expert testimony, and the credibility of the experts is primarily a "question for consideration by the jury." *Wilson v Stilwill*, 411 Mich 587, 599; 309 NW2d 898 (1981).

> provider specific as opposed to procedure specific. These jurisdictions have recognized that provider specific information may add to the risks inherent in a particular procedure and may suggest to the patient that a viable and possibly, preferable alternative to the procedure may be having the procedure performed by another provider. [*DeGennaro, supra* at 190-191.]

I would adopt this patient-centered approach to a medical provider's duty to obtain informed consent. Under this approach, in addition to material information about the kidney transplant procedure itself, Dr. Cohn also had a duty to give the decedent "provider specific information" if such information would be found material by a reasonable person in making the decision to embark on a kidney transplant. See *id.* It is axiomatic that a reasonable patient would find information regarding a kidney transplant surgeon's statistical success and failure rates for kidney transplants to be material in making the decision whether to proceed with a surgical procedure as serious as a kidney transplant. Moreover, Dr. Cohn had a duty to supply such information regardless of whether the decedent sought to elicit such information. See *id*. at 190. In *Johnson v Kokemoor*, 199 Wis 2d 615, 620, 641; 545 NW2d 495 (1996), the Supreme Court of Wisconsin held that evidence of a physician's statistical success rate is material to a patient's decision to consent to a medical procedure. In *Johnson*, the court held:

> When different physicians have substantially different success rates, *whether surgery is performed by one rather than another represents a choice between "alternate, viable medical modes of treatment" . . . .*
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> The doctrine of informed consent requires disclosure of "all of the viable alternatives and risks of the treatment proposed" which would be material to a patient's decision. We therefore conclude that when different physicians have substantially different success rates with the same procedure and a reasonable person in the patient's position would consider such information material, the circuit court may admit this statistical evidence. [*Id.* at 645 (emphasis added; citation omitted).]

Similarly, I believe that information about Dr. Cohn's success and failure rates would have aided the decedent's exercise of informed consent because it would have identified "a particular provider as an independent risk factor." *Id.* at 644-645. At the very least, whether "provider specific information" regarding Dr. Cohn's statistical failure rate for kidney transplants was warranted under the facts and circumstances of the case should have been determined by the jury, and not by the trial court. I reject the majority's bright-line rule that, as a matter of law, Dr. Cohn had no duty to provide information regarding his statistical failure rate for kidney transplants to the decedent under the informed consent doctrine. Rather, the jury should have had the opportunity to determine the scope and amount of information required and whether Dr. Cohn was required to disclose "provider specific information" regarding his failure rate for kidney transplant surgeries.

Like the court in *Johnson*, I do not believe that the doctrine of informed consent always requires physicians to give patients statistical information regarding their success or failure rates

for a particular procedure. *Id.* at 646 ("We caution . . . that our decision will not always require physicians to give patients comparative risk evidence in statistical terms to obtain informed consent."). Rather, such questions are fact-driven and context-specific and must be decided on a case-by-case basis. See *id.* In my view, the majority's holding disregards the individual facts of this case and invades the province of the jury:

> "There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under any and all circumstances. The terms 'ordinary care,' 'reasonable prudence,' and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs." [*Case, supra* at 10, quoting *Grand Trunk R Co v Ives*, 144 US 408, 417; 12 S Ct 679; 36 L Ed 2d 485 (1892).]

I believe that the jury, and not the trial court, should have been permitted to determine whether the standard of care required Dr. Cohn to disclose statistics regarding his success rate for kidney transplant surgeries, and I disagree with the majority's bright-line conclusion that Dr. Cohn, as a matter of law, had no duty to disclose his statistical history of transplant failures to obtain the decedent's informed consent. Such a determination was properly a matter for the jury to decide because in this case defendant hospital held itself out as a statistical leader in such operations.[2] Thus, I would conclude that the trial court did not err in denying defendants' motion for summary disposition on plaintiff's claim that Dr. Cohn failed to obtain the decedent's informed consent.

I would further hold that evidence regarding Dr. Cohn's failure rate for kidney transplantation was admissible under MRE 403 for all of plaintiff's claims. Under MRE 403, the trial court has discretion to exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative

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[2] A patient's physician, not the hospital where a procedure is performed, has the duty to impart information to a patient regarding the risks and consequences of a medical procedure. *Lincoln, supra* at 625. While I refrain from examining the issue in this case, I believe that the area of law involving a hospital's duty to inform patients when the hospital makes advertising claims to induce patients to use its facilities requires closer scrutiny with a special focus on whether the hospital, by way of advertising, should have imposed on it a heightened duty to patients in the area of informed consent than has previously been recognized by the courts in this state. I note that nothing in the law forbids this Court from holding hospitals to the same standard as other businesses who engage in deceptive or misleading trade practices.

evidence. MRE 403; *Lewis v LeGrow*, 258 Mich App 175, 199; 670 NW2d 675 (2003). Unfair prejudice does not mean "damaging." *Id.* MRE 403 only prohibits evidence that is unfairly prejudicial. Evidence is unfairly prejudicial if there is a danger that evidence that is only marginally probative will be given undue or preemptive weight by the jury. *Lewis, supra* at 199. I agree with the majority that evidence of Dr. Cohn's statistical failure rate for kidney transplants is, at most, only marginally relevant to whether Dr. Cohn's care of the decedent was negligent in this particular case. However, given the fact that there was a substantial amount of testimony regarding Dr. Cohn's negligence specifically relating to the decedent in this case, there was little chance that the jury would give evidence regarding Dr. Cohn's overall success or failure rate undue or preemptive weight. Therefore, I believe that the evidence, while somewhat damaging, was not unfairly prejudicial. Furthermore, like my brother jurist Judge Schuette, I would also conclude that evidence of Dr. Cohn's failure rate for kidney transplants was not precluded by MRE 404(b)(1) because such evidence was not character evidence. MRE 404(b)(1) prohibits the use of evidence to prove a person's character to show that the person acted in conformity with that character on a particular occasion, but does not preclude using such evidence for other relevant purposes. *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000). The rule limiting the admissibility of bad acts evidence applies in civil cases as well as criminal cases. *Lewis, supra* at 207. MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

MRE 404(b)(1) "is a rule of inclusion" that "permits the admission of evidence on any ground that does not risk impermissible inferences of character to conduct." *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998). To be admissible under MRE 404(b)(1), the evidence must be offered for something other than a character or propensity purpose, it must be relevant, and the probative value of the evidence must not be substantially outweighed by unfair prejudice under MRE 403. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). "Character evidence" is "[e]vidence regarding someone's general personality traits or propensities" or "evidence of a person's moral standing in a community." Black's Law Dictionary (8th ed), p 595. Evidence that Dr. Cohn had a high statistical failure rate for kidney transplants is not suggestive of any type of general personality trait and reveals nothing about the moral or ethical composition of Dr. Cohn. Furthermore, in this case, the testimony was not offered to prove that Dr. Cohn acted in conformity with a character trait on a particular occasion. The testimony therefore "does not risk impermissible inferences of character to conduct." *Starr, supra* at 496. I therefore would hold that evidence regarding Dr. Cohn's success or failure rate for kidney transplant surgeries by definition did not constitute character evidence and falls outside the ambit of MRE 404(b)(1).

Unlike my esteemed colleagues Judges O'Connell and Schuette, I do not believe that the trial court's admission of the evidence regarding Dr. Cohn's failure rate for kidney transplant surgeries or failure to issue a limiting instruction on the use of such evidence requires a new trial

in this case. Admittedly, evidence regarding Dr. Cohn's statistical failure rate for kidney transplant surgeries is only marginally, if at all, relevant to whether Dr. Cohn's care of the decedent was negligent in this particular case. However, the evidence was not improper character evidence under MRE 404(b)(1). Furthermore, in light of the substantial amount of testimony regarding Dr. Cohn's negligence in this specific case, there was little chance that the jury would give evidence regarding Dr. Cohn's overall success or failure rate undue weight. Therefore, the failure to give a limiting instruction was harmless.

For all these reasons, I respectfully dissent.

/s/ Stephen L. Borrello