STATE OF MICHIGAN

COURT OF APPEALS

KATHERINE HIGGS, Individually and as Personal Representative of the ESTATE OF DARYL HIGGS,

Plaintiff-Appellant,

v

ST. JOHN PROVIDENCE, DR. ELIZABETH ANNE BANKSTAHL, M.D., and DR. MOHAMMAD KHALED TASHKANDI, M.D.,

Defendants-Appellees,

and

DR. MICHAEL NATHAN HELMREICH, M.D., DR. GRANT EDWARD NELSON, M.D., DR. JOHN/JANE DOE ANESTHESIOLOGIST(S), and DR. JOHN/JANE DOE GI-ATTENDING,

Defendants.

UNPUBLISHED
April 29, 2021

No. 352499
Wayne Circuit Court
LC No. 18-008005-NH

Before: O'BRIEN, P.J., and STEPHENS and BOONSTRA, JJ.

BOONSTRA, J. (*concurring*).

I concur in the majority opinion, but write separately for two reasons. First, I would characterize plaintiff's argument a little differently. As I read it, plaintiff never quite argues that a blood transfusion was not an objectively reasonable treatment under the circumstances (although that indeed is the "proper inquiry" under *Braverman v Granger*, 303 Mich App 587, 606; 844 NW2d 485 (2014)). Rather, what plaintiff argues is that the refusal of a blood transfusion was objectively reasonable given that (in plaintiff's view) an alternative treatment (i.e., earlier surgery) was available. At bottom, however, what plaintiff seeks is not to distinguish *Braverman* but rather to create an exception that would swallow the *Braverman* rule. But the expert testimony in this case does not reflect (as plaintiff suggests) that an alternative treatment was available. Instead, it merely reflects that that when faced with a patient (such as plaintiff) who refuses the best treatment

option, health care providers should then pursue the next best option. But a next best option does not equate to an alternative treatment within the meaning of *Braverman*. And a refusal of treatment does not become objectively reasonable under *Braverman* whenever a next best option could then be followed.[1] A next best option will always exist, and equating it to an alternative treatment would in effect render *Braverman* a nullity.[2]

Second, having served on the *Braverman* panel, I find my concurring opinion in that case to be equally applicable here, and I therefore adapt and repeat it here in full:

> I fully concur in the majority opinion and in its excellent analysis. I write separately to emphasize that our opinion should not be interpreted as reflective of any viewpoint regarding religion generally or any particular religious belief or expression. To the contrary, it is reflective of the spirit of the First Amendment of the United States Constitution and its guarantee of every person's right to freely exercise and express the religious beliefs of his or her choice, without governmental interference.
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> That said, however, it bears noting that every person bears responsibility for the decisions and choices that he or she makes in life. People make decisions and choices in all aspects of their lives, and for untold hosts of reasons. But regardless of the reasons, decisions and choices have consequences. It is the essence of personal responsibility that the makers of decisions and choices, relative to their own lives, bear the consequences that flow from those decisions and choices. Our recognition of that fact is in no respect a criticism or indictment (or endorsement, for that matter) of any person's decision or choice (or of the reasons for which it was made). It is merely an acknowledgement of the principle of personal responsibility.
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> In this sad case, [Katherine Higgs] and her family made a choice, and decided to forgo a blood transfusion that likely would have saved her life. In her particular case, and while the reasons could have been many, the reason for doing so was based on her religious beliefs. But the reason simply does not matter. The choice was hers to make, whether for reasons of religion, or for altogether different reasons entirely, or in fact for no reason at all. But as in any aspect of life, in which choices result in consequences, Ms. [Higgs's] choice resulted in a consequence for her. Sadly, that consequence was her death.

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[1] Nor, of course, would it mean, under *Braverman*, that the preferred treatment option is not an objectively reasonable means of avoiding or minimizing damages.

[2] In any event, the feasibility of alternative treatments is merely one factor among many to be considered in evaluating whether, under the given circumstances, the proposed treatment (here, a blood transfusion) was an objectively reasonable means to avoid or minimize damages.

> However unfortunate the nature of that consequence, it does not provide a basis for shifting responsibility for the consequence of Ms. [Higgs's] choice to others.[3] That choice, no matter how principled, admirable, and honorable it might have been, was hers and hers alone to make, and with that choice came the consequences that naturally flowed from it, irrespective of the righteousness of the reasons for which she made her choice.
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> For these additional reasons, I concur in the majority opinion.

Braverman, 303 Mich App at 610-611 (BOONSTRA, J., concurring).

/s/ Mark T. Boonstra

[3] In this case, that shifting of responsibility would place Ms. [Higgs's] medical professionals in the untenable position of having to choose between bearing legal responsibility for the consequences of Ms. [Higgs's] religion-based choices or, alternatively, opting not to treat her. In either event, they likely would face legal action, of different sorts. The First Amendment does not require that medical professionals be placed between such a rock and hard place.