

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 9, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 99-1366

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**LAVERNE T. YATSO, INDIVIDUALLY AND
AS PERSONAL REPRESENTATIVE OF THE
ESTATE OF MICHAEL G. YATSO, M.D.,**

PLAINTIFFS-APPELLANTS,

v.

**JAMES E. AUER, M.D., PHYSICIANS INSURANCE
COMPANY OF WISCONSIN AND WISCONSIN
PATIENTS COMPENSATION FUND,**

DEFENDANTS-RESPONDENTS,

**ST. LUKE'S MEDICAL CENTER AND/OR
AURORA HEALTH CARE, KARL W.
SCHMITT, M.D., OHIO HOSPITAL INSURANCE
COMPANY, MEDICAL PROTECTIVE COMPANY,
ABC INSURANCE COMPANIES, BLUE CROSS
BLUE SHIELD OF WISCONSIN, AND THE
DEPARTMENT OF HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION,**

DEFENDANTS.

APPEAL from a judgment of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. LaVerne T. Yatso, individually and as personal representative of the estate of Michael G. Yatso, M.D., appeals from the circuit court judgment granting summary judgment to James E. Auer, M.D., and his insurers regarding her claim that Auer failed to obtain her informed consent to perform an autopsy on her husband. We affirm.

I. BACKGROUND

¶2 The essential facts are undisputed. On April 20, 1994, Dr. Yatso died unexpectedly after having heart surgery at St. Luke's Medical Center. Mrs. Yatso asked her husband's cardiologist, Dr. Auer, whether an autopsy should be performed; he responded affirmatively. A St. Luke's nurse then met with Mrs. Yatso and provided her with the requisite forms. Mrs. Yatso signed two documents, a postmortem examination consent form and an anatomical gift request consent form. Mrs. Yatso executed the two forms, consenting to her husband's autopsy, but declining to donate Dr. Yatso's organs. Mrs. Yatso modified the postmortem examination consent form's language, however, crossing out the words authorizing examination of "any or all parts of the body" and inserting the words "the thorasic [sic] cavity." In the space provided "list[ing] any exception," Mrs. Yatso wrote, "Thorasic [sic] examination only." A St. Luke's pathologist performed the autopsy on Dr. Yatso and, according to a letter from St. Luke's president, the autopsy did not reveal "any clear and logical explanations as to why [Dr. Yatso] would have passed away at this particular point in his recovery process."

¶3 Dissatisfied with the autopsy results, Mrs. Yatso had Dr. Yatso's body exhumed for a second autopsy. Following exhumation and examination, Mrs. Yatso learned that Dr. Yatso's corpse no longer contained its thoracic organs and pacemaker. Mrs. Yatso then brought an action for wrongful death and for the failure to obtain her informed consent to the taking and retention of her husband's organs. She sued Dr. Auer, St. Luke's pathologist, Dr. Karl Schmitt, St. Luke's, and their insurers.

¶4 The circuit court granted summary judgment to Dr. Auer on the autopsy claim, concluding: "Dr. Auer is out on the autopsy stuff. There [are] no evidentiary facts supported in the record to establish that he had any duty under the informed consent statute or anything else." The wrongful death claim against Dr. Auer was dismissed at the close of the plaintiff's case, and the jury found no negligence by either Dr. Schmitt or St. Luke's. On appeal, Mrs. Yatso challenges only the circuit court's grant of summary judgment to Dr. Auer on the autopsy claim.

II. ANALYSIS

¶5 Mrs. Yatso argues that the circuit court erred in granting summary judgment to Dr. Auer because, she contends, Dr. Auer failed "to obtain 'informed consent' for the autopsy performed on[her] husband." We disagree.

¶6 We review the circuit court's grant of summary judgment *de novo*. See *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). WISCONSIN STAT. § 802.08(2) sets forth the standard by which summary judgment motions are to be judged: "The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together

with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”

¶7 Mrs. Yatso’s second claim alleged:

That following the death of ...[Dr. Yatso] ...James Auer M.D., ..., without consent or permission of ... LaVerne T. Yatso or any other next of kin, willfully, maliciously, fraudulently and without authority, and in reckless disregard of the wishes of the plaintiffs and without any authority at law, trespassed upon the rights of the plaintiff, LaVerne T. Yatso, as custodian of the deceased’s body, and cut out, removed and carried away multiple organs of the deceased ... without the knowledge or consent of the plaintiff, LaVerne T. Yatso.

In addition, she alleged that the defendants failed to return the body parts and interfered with her right to bury Dr. Yatso.

¶8 The fundamental principles defining a survivor’s right to bury the body of a relative have been recognized in Wisconsin. *See Koerber v. Patek*, 123 Wis. 453, 459-60, 102 N.W. 40 (1905). In *Koerber*, the supreme court stated:

We can imagine no clearer or dearer right in the gamut of civil liberty and security than to bury our dead in peace and unobstructed; none more sacred to the individual, nor more important of preservation and protection from the point of view of public welfare and decency.

Id. at 463. Accordingly, the court recognized that a relative of the deceased has a right to bury the corpse and “that this is a legal right, which . . . is a wrong to violate, and which, therefore, courts can and should protect and vindicate.” *Id.* at 459-60. The court also has recognized that the intentional interference with familial burial rights by mutilation or disturbance of the corpse is compensable. *See Scarpaci v. Milwaukee County*, 96 Wis. 2d 663, 672-73, 292 N.W.2d 816 (1980). “The basis for recovery of damages is found not in a property right in a dead body but in the personal right of the family of the deceased to bury the

body.” *Id.* at 672. Thus, in instances where a corpse is “intentionally mutilated or intentionally mishandled prior to or at the time of burial, the legal right not to be harmed from such wrongful conduct constitutes a property interest.” *Holsen v. Heritage Mut. Ins. Co.*, 165 Wis. 2d 641, 646, 478 N.W.2d 59 (Ct. App. 1991).

¶9 Mrs. Yatso alleged that Dr. Auer was liable because he failed to inform her of the hospital’s policy of retaining organs examined during autopsies, and because he failed to direct her how to modify the autopsy form to comport with her wishes to have her husband’s organs returned to his body upon completion of the examination. Mrs. Yatso grounded her theory for liability in WIS. STAT. § 448.30, the statute mandating that a physician obtain a patient’s informed consent on alternative modes of treatment, and WIS. STAT. § 157.05, requiring the next of kin’s consent to an autopsy. Mrs. Yatso argued that §§ 448.30 and 157.05 established Dr. Auer’s duty of care to her and, therefore, that his breach of this duty made him liable for the trespass and mutilation of her husband’s corpse.

¶10 Mrs. Yatso contends that the circuit court erred in concluding that Dr. Auer had no duty to obtain her informed consent for Dr. Yatso’s autopsy. She maintains that under WIS. STAT. § 448.30, Dr. Auer, as the attending physician, was required to obtain her informed consent for the autopsy and to inform her of her options in limiting its scope and requiring the return of body parts and the pacemaker. While she concedes that she signed the consent form authorizing the autopsy, she points out that she authorized only an autopsy of the thoracic cavity, and that her authorization form specified that her husband’s organs be returned to the body for burial. Consequently, she contends that Dr. Auer should be liable for the severe emotional distress she says she suffered upon realizing that her husband’s internal organs had been destroyed.

¶11 Dr. Auer responds that he had no duty to gain Mrs. Yatso’s informed consent to an autopsy of her husband and, accordingly, that he was entitled to summary judgment. Specifically, Dr. Auer contends that Mrs. Yatso fails to recognize the distinction between WIS. STAT. § 448.30,¹ addressing informed consent, and WIS. STAT. § 157.05,² governing consent for an autopsy. The former, he argues, requires the physician to inform a patient “about the availability of alternative, viable medical modes of treatment and about the benefits and risks of these treatments.” The latter, he maintains, relates specifically to consent for a

¹ WISCONSIN STAT. § 448.30, provides:

Information on alternate modes of treatment.

Any physician who treats a patient shall inform the patient about the availability of all alternate, viable medical modes of treatment and about the benefits and risks of these treatments. The physician's duty to inform the patient under this section does not require disclosure of:

- (1) Information beyond what a reasonably well-qualified physician in a similar medical classification would know.
- (2) Detailed technical information that in all probability a patient would not understand.
- (3) Risks apparent or known to the patient.
- (4) Extremely remote possibilities that might falsely or detrimentally alarm the patient.
- (5) Information in emergencies where failure to provide treatment would be more harmful to the patient than treatment.
- (6) Information in cases where the patient is incapable of consenting.

² WISCONSIN STAT. § 157.05, provides:

Autopsy.

Consent for a licensed physician to conduct an autopsy on the body of a deceased person shall be deemed sufficient when given by whichever one of the following assumes custody of the body for purposes of burial: Father, mother, husband, wife, child, guardian, next of kin, or in the absence of any of the foregoing, a friend, or a person charged by law with the responsibility for burial. If 2 or more such persons assume custody of the body, the consent of one of them shall be deemed sufficient.

physician to conduct an autopsy by the next of kin. Auer argues that the two are separate and distinct and, under the former, he had no obligation to Mrs. Yatso, and, under the latter, Mrs. Yatso consented. We agree.

¶12 WISCONSIN STAT. § 448.30 governs a physician's duty to obtain a patient's informed consent concerning diagnostic procedures and treatment. *See Martin v. Richards*, 192 Wis. 2d 156, 175-76, 531 N.W.2d 70 (1995). The common-law doctrine of informed consent, now codified as § 448.30, arose from and reflected the fundamental notion of the right to bodily integrity. *See Johnson v. Kokemor*, 199 Wis. 2d 615, 628, 545 N.W.2d 495 (1996). "Originally, an action alleging that a physician had failed to obtain a patient's informed consent was pled as the intentional tort of assault and battery." *Id.* Under the common law, the typical scenario giving rise to an informed consent action involved a patient-plaintiff who had consented to a specific operation but in the course of the procedure was subjected to other unauthorized procedures. *See id.* at 628-29. "The court further developed the doctrine of informed consent in *Trogun v. Fruchtmann*, 58 Wis. 2d 569, 207 N.W.2d 197 (1972), stating for the first time that a plaintiff-patient could bring an informed consent action based on negligence rather than as an intentional tort." *Id.* at 629.

¶13 The supreme court has explained:

The concept of informed consent is based on the tenet that in order to make a rational and informed decision about undertaking a particular treatment or undergoing a particular surgical procedure, a patient has the right to know about significant potential risks involved in the proposed treatment or surgery. In order to insure that a patient can give an informed consent, a "physician or surgeon is under the duty to provide the patient with such information as may be necessary under the circumstances then existing" to assess the significant potential risks which the patient confronts.

Scaria v. St. Paul Fire & Marine Ins. Co., 68 Wis. 2d 1, 11, 227 N.W.2d 647 (1975) More recently, the supreme court has emphasized the important and critical nature of this physician-patient dialogue by acknowledging that a patient may withdraw informed consent, see *Schreiber v. Physicians Ins. Co.*, 223 Wis. 2d 417, 577 N.W.2d 26 (1999), or may be held contributorily negligent in a medical malpractice action based on a claim of lack of informed consent, see *Brown v. Dibble*, 227 Wis. 2d 28, 595 N.W.2d 358 (1999).

¶14 Mrs. Yatso hinges Dr. Auer's liability for her trespass and mutilation claim on his failure to obtain her informed consent. As noted, WIS. STAT. § 448.30 requires a physician to advise *patients* of available *treatment* and *diagnostic* options and the incumbent risks. See *Martin*, 192 Wis. 2d at 175-76. In the instant case, however, no treatment or diagnostic options were at issue. Dr. Yatso's autopsy was performed to determine his cause of death. Determining the cause of death is outside the ambit of the statute; it involves neither diagnosis nor treatment. Cf. *Borosich v. Metropolitan Life Ins. Co.*, 191 Wis. 239, 210 N.W. 829, 830 (1926) (autopsy results were not protected by the physician-patient privilege because they were not gained for treatment purposes.). As a result, Auer had no duty under § 448.30 to obtain Mrs. Yatso's informed consent to the autopsy procedure.

¶15 Mrs. Yatso's claim also fails because, under WIS. STAT. § 448.30, Dr. Auer owed a duty to Dr. Yatso, his patient, not to Mrs. Yatso, the next of kin, and his duty to Dr. Yatso expired upon Dr. Yatso's death. See WIS. STAT. § 448.30(6) ("The physician's duty to inform the patient under this section does not require disclosure of ... [i]nformation in cases where the patient is incapable of consenting."). Accordingly, Mrs. Yatso has no basis for her claim that Dr. Auer

had a duty to obtain her informed consent to her husband's autopsy. As Dr. Auer argues:

In the present action, the appellant attempts to merge a cause of action for the mutilation of a corpse with a cause of action based on informed consent for treatment. However, it is clear that the duty in an informed consent action is to the patient and the integrity of the body of a living patient in relation to proposed medical treatment. Conversely, a cause of action based on the mutilation of a corpse, focuses upon the duty of the individuals involved in performing an autopsy to allow the family to properly bury a loved one without prior mutilation. These cause of actions are not interchangeable.

Dr. Auer is correct.

¶16 Mrs. Yatso also claims that Dr. Auer had a duty under WIS. STAT. § 157.05 to obtain her consent for her husband's autopsy. Dr. Auer disagrees, noting that “[u]nder the facts of the case and circumstances at St. Luke's Medical Center, where [he] was practicing at the time of Dr. Yatso's death, [Mrs. Yatso] has failed to demonstrate . . . that he had any responsibility under the circumstances where he practices to do anything more with regard to the autopsy than he did.” Additionally, he notes that he had no duty to discuss the parameters of the autopsy under either hospital policy or § 157.05. Finally, he notes that Mrs. Yatso authorized her husband's autopsy by signing the consent form. Mrs. Yatso offers nothing to counter these arguments. *See Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments deemed admitted).

¶17 In the instant case, the hospital nurse presented Mrs. Yatso with the postmortem examination consent form and Mrs. Yatso consented to the examination, making an effort to place limitations on its scope. Dr. Schmitt performed the autopsy. The jury could have concluded that the autopsy procedure

violated the limitations that Mrs. Yatso specified, but the jury did not do so, finding instead that neither the hospital nor Dr. Schmitt was negligent.

¶18 Thus, while Mrs. Yatso's action against Dr. Schmitt and St. Luke's for failure to perform the autopsy as authorized was potentially viable, her claim against Dr. Auer was not. Any alleged failure of Dr. Auer to inform her of her options was of no consequence precisely because Mrs. Yatso, when she consented to the autopsy, exercised her options by qualifying her authorization with certain specific conditions. Therefore, the circuit court properly granted summary judgment to Dr. Auer.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.