

## The Continued Vitality of a Patient's Informed Consent

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Practice Area: Health Law

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The Wisconsin Supreme court recently decided a case that may have practice implications for Wisconsin physicians. The case, *Schreiber v. Physician's Insurance Company*, raised the issue of a physician's duties when, during the course of treatment, a patient revokes his or her consent and requests instead another viable form of treatment. After deciding a number of informed consent cases in recent years, this is the Court's first opinion that addresses an issue other than the sufficiency and content of the informed consent discussion. For this reason, the case warrants discussion.

The abbreviated facts of the case are as follows. Prior to labor and after discussions with her physician, the patient, who had undergone two cesarean sections (csections) in the past, chose to attempt a vaginal delivery (VBAC). During the course of her labor, the patient experienced significant abdominal pain. On three separate occasions, she told her physician that she had changed her mind and requested that the physician perform a c-section instead. The physician urged the patient to continue with the VBAC as he did not feel a c-section was medically indicated. However, the physician testified that he would have performed the c-section if the patient continued to insist. After several hours of labor, the fetal heart rate dropped. The physician performed an emergency c-section. However, the patient's uterus had ruptured and the baby was born a spastic quadriplegic as a result of oxygen deprivation.

The patient did not pursue a medical malpractice claim. Instead, the patient sued for breach of the duty of informed consent. The trial court dismissed the case. It reasoned that there had not been a substantial change in medical circumstances, so the risks the patient faced were the same as when she had originally given her consent. Thus, the original consent was valid and there was no need to re-obtain consent.

The Supreme Court reinstated the claim. The court held that where there is a substantial change in circumstances, a physician has the duty to readvise the patient of the available treatment options and their risks. However, unlike the trial court, the Supreme Court held that change in circumstances can be both medical and legal. In this case, the change in circumstances, i.e., the patient's withdrawal of consent where another viable treatment option existed, was a legal change in circumstances. This triggered the physician's obligation to undertake a new informed consent discussion. The court found that because the patient withdrew her consent and other treatment options were available the physician had no authority to continue with the VBAC.

In previous informed consent cases, all of which addressed issues relating to the substance or content of the informed consent discussion, the court applied a “reasonable patient” test. In other words, did the physician fail to give information that a reasonable patient would want to know? This case, however, dealt with an entirely different issue: whether the patient was given an opportunity to choose her treatment options. The court held that this analysis must be made on an individual basis, that is, what treatment did this patient want.

There are some important considerations physicians should take away from this case. First, this case does not stand for the proposition that physicians must perform procedures on demand. The Supreme Court anticipated such a concern and specifically stated that the case did not require such action by physicians. However, if there are a number of treatment options, the patient does have a legal right to choose among those that are medically viable.

Next, the facts of this case are extreme. The negative outcome in the case was significant in that the child was born with multiple disabilities. The patient’s attorney did not pursue a malpractice claim because expert witnesses could not definitively say that the physician did not meet the standard of care. Thus, the plaintiff changed from a theory of professional negligence (malpractice) to the informed consent theory. Plaintiffs’ attorneys have been quite successful using this tactic and no doubt this trend will continue.

Perhaps most importantly, the patient’s revocation occurred in the throws of labor, where, according to the physician’s testimony women often request c-sections because of the intense labor pain. At trial, the patient testified that she believed she would attempt the VBAC but that she could change her mind during labor and instead have another c-section. She also testified that she felt intimidated by her physician when she requested the c-section. The physician testified he believed the patient’s pre-labor choice of a VBAC was to be pursued unless and until her symptoms medically warranted a c-section. Apparently, the physician and patient had miscommunicated. It is very important that physicians are clear when discussing treatment options with a patient. Also, the need to be open to the patient’s input throughout the course of treatment cannot be overly stressed.

Although it may be clear to physicians when a substantial change in medical circumstances occurs, a legal change in circumstances may be less obvious. This case focuses on a legal change in circumstances, a revocation of consent.

A number of other changes in legal circumstances may present themselves to physicians in the consent area. For example, a child reaching age of majority, or a patient who becomes incapacitated may trigger a duty to re-obtain consent. When there is a substantial change in medical or legal circumstances, it is prudent to re-obtain informed consent.

Suggestions for informed consent discussions in light of this case include:

- Document all informed consent discussions thoroughly in the patient’s medical record. Include any risks associated with the alternative methods of treatment, any specific patient questions, and any materials given to the patient.
- If the patient requests treatment that in a physician’s medical judgment is not a viable alternative or is outside the scope of the physician’s training, or morally objectionable, explain the problem to the patient and offer the patient the option of obtaining a second opinion. Document objections or concerns in the medical record.
- If, during the course of treatment, the patient requests a different viable medical treatment, ask the patient if the request is a revocation of consent to the current procedure. If the answer is yes, and there are other viable treatment options, the procedure should be terminated. Another informed consent discussion of the risks and benefits should be undertaken before another procedure is commenced.

Consistent with the adage that hard facts make bad law, the *Schreiber* case may be described as unusual facts make peculiar law. The Court cautioned that this was an unusual case, and should not be read too broadly to imply conclusions beyond the facts of the case. However, the decision is at least a very strong reminder that patient consent and decision making is paramount in medical treatment decisions.

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