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## THE BASSETT BULLETIN™

### MEDICAL MALPRACTICE: INFORMED CONSENT OR BATTERY?

The Supreme Court of Texas recently issued an opinion in a healthcare liability case involving a doctor's failure to obtain a patient's "informed consent." The Court's opinion in *Schaub et al v. Sanchez et vir.* shows how doctors can escape liability for failing to obtain the patient's "informed consent," despite the patient previously denying consent.

#### **Background Facts:**

In 1999, Dr. Kevin Crawford operated on Janie Sanchez's broken wrist. Afterwards, she experienced pain, numbness, and tingling in that hand. Dr. Crawford recommended a stellate ganglion block. In fact, two of these blocks were performed but they were ineffective. ***Dr. Crawford obtained Ms. Sanchez's informed consent before he performed these two procedures.***

Since the procedures proved ineffective, Ms. Sanchez informed Dr. Crawford that she did not want any more of the blocks performed on her wrist. In essence, she informed Dr. Crawford that she would not give her consent to any further block procedures.

Dr. Crawford then recommended a wrist manipulation procedure as an alternative to an additional block. Before the wrist manipulation procedure, which constituted surgery, Sanchez signed two consent forms. One was completed at Dr. Crawford's office a few days before surgery, and the second one was completed on the day of surgery.

Dr. Schaub, an anesthesiologist, assisted in the wrist manipulation procedure which was performed under general anesthesia. The two consent forms signed by Ms. Sanchez were general consent forms for that particular surgery.

Both doctors testified that during surgery they saw signs of an acute flare-up of Sanchez's reflex sympathetic dystrophy. This condition can cause stiffness and swelling of the hand which can result in severe post-operative pain, inhibit movement, and reduce benefits from surgery. Both doctors determined that another block would lessen those symptoms, so they proceeded with a third block while Ms. Sanchez was under anesthesia. As a result of the third block, she developed an infection which resulted in spinal surgery.

**Claims by Ms. Sanchez:**

Ms. Sanchez brought claims against Dr. Schaub and Dr. Crawford. Before the Motions for Summary Judgments were heard at the trial court level, by Agreed Order, the Court dismissed all of Ms. Sanchez's claims except her claim for "failure to obtain informed consent with regard to the third stellate ganglion block." The trial court granted the Summary Judgments for both doctors based on the general consent forms Ms. Sanchez signed prior to the surgery. On appeal, the Court of Appeals reversed the trial court's Summary Judgment rulings and remanded the case to the trial court.

The Supreme Court's opinion reversed the Court of Appeals' ruling because according to the Supreme Court, the Summary Judgment record conclusively negated Sanchez's informed consent claim.

**The Supreme Court's Reasoning:**

The Supreme Court determined that Sanchez could only prevail on her informed consent claim if she showed that the doctors negligently failed to disclose the procedure's risks or hazards. Sanchez argued that because she opted for wrist manipulation rather than another block, and had earlier informed Dr. Crawford that she did not want anymore block injections, she *had* refused consent to the block that took place during the third procedure. She contended that this lack of consent supported the claim for lack of informed consent.

However, the Supreme Court felt that a lack of informed consent complaint is a "particular subspecies of negligence based on a failure to disclose the risk or hazards of a procedure." It pointed out that Sanchez did not complain that she was unaware of the risks or hazards of the block. Rather, she was fully aware of the risks having twice undergone the same block procedure. In fact, in her Summary Judgment Affidavit she stated "I was informed of the danger of the treatment."

**Battery Claim v. Informed Consent Claim:**

Since Sanchez verbally objected to a third block, her claim should have been pursued under a theory of battery since she claimed there was a total lack of consent on her part. The Supreme Court referenced *Murphy v. Russell*, 167 S.W. 3d 35, 838 (Tex. 2005) (failure to obtain a patient's consent to treatment can give rise to a cause of action for battery). It also referenced *Binur v. Jacobo*, 135 S.W. 3d 646, 655-56 (Tex. 2004) (indicating that misdiagnosis and mistreatment might constitute negligence, but did not give rise as to a claim for lack of informed consent).

The Court also made reference to the fact that Sanchez, subsequent to her earlier verbal objections to a third block, consented in writing to "different procedures than those planned" and "any anesthesia deemed advisable" by Dr. Schaub. The Court indicated that even if it agreed with Sanchez that her earlier objection was not superseded by these two later-signed consent forms, performing a third block procedure without her consent (a claim she agreed to drop at the trial court level) is not the same as performing without her informed consent.

The legislature narrowly defined informed consent as "failing to disclose the risks or hazards that could have influenced a reasonable person in making a decision to give or withhold consent." The Supreme Court thought that given the statute's plain language, the Summary Judgment could not support a claim that the doctors failed to obtain Ms. Sanchez's informed consent. It rendered a take-nothing judgment because the only theory under which the patient could have recovered was dismissed by an Agreed Order in the trial court.

## HOW THIS MIGHT AFFECT MEDICAL MALPRACTICE CLAIMS IN THE FUTURE

The Texas Supreme Court's ruling likely will affect the pursuit of medical malpractice claims in the future. Litigants will take one of two courses of action in pursuing their medical malpractice claims. They will either narrow the scope of their claim down to the most basic claim, or they will forge forward with the "shotgun approach" whereby they claim just about everything for fear of being poured out by the Texas Supreme Court down the road.

If a patient has previously advised they do *not* want to proceed with a particular procedure, the health care provider needs to protect itself from claims arising out of a judgment call made during an approved surgical procedure. Without a thorough consent form, and a *complete* medical history from the patient, health care providers risk a Plaintiff broadsiding them *not* with a traditional medical malpractice claim, but rather with a "battery" claim.

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