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SUPREME COURT OF WISCONSIN

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MELISSA A. HUBBARD,  
  
Plaintiff-Respondent,

**Appeal No. 2023AP255**

v.

CAROL J. NEUMAN, M.D.,  
  
Defendant-Appellant-Petitioner.

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**DEFENDANT-APPELLANT-PETITIONER'S BRIEF**

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES . . . . . 3

STATEMENT OF ISSUE . . . . . 5

STATEMENT OF THE CASE

    A. Nature of the Case and Procedural History 6

    B. Statement of Relevant Facts . . . . . 8

ARGUMENT

I. WISCONSIN LAW DOES NOT REQUIRE THAT A REFERRING  
PHYSICIAN INFORM A PATIENT WITH REGARD TO A  
PROCEDURE TO BE PERFORMED BY ANOTHER PHYSICIAN  
AND IMPOSING SUCH A REQUIREMENT WOULD DISCOURAGE  
OPEN COMMUNICATION AND CONSULTATION BETWEEN  
PHYSICIANS . . . . . 12

II. THE MAJORITY OF JURISDICTIONS HOLD THAT A  
TREATING PHYSICIAN WHO REFERS A PATIENT TO  
ANOTHER PHSYICIAN FOR TREATMENT BUT WHO DOES NOT  
ORDER THAT TREATMENT OR RETAIN CONTROL OVER THE  
TREATMENT PROVIDED BY THE OTHER PHYSICIAN  
HAS NO DUTY TO INFORM. . . . . 20

CONCLUSION . . . . . 30

CERTIFICATION . . . . . 32

**TABLE OF AUTHORITIES**

<b><u>Wisconsin Cases</u></b>	<b><u>Page</u></b>
<i>Bubb v. Brusky</i> (“ <i>Bubb I</i> ”) 2008 WI App 104, 313 Wis. 2d 187, 756 N.W.2d 584 . . . . .	14-15
<i>Bubb v. Brusky</i> (“ <i>Bubb II</i> ”) 2009 WI 91, 321 Wis. 2d 1, 768 N.W.2d 903 . . . .	16
<i>Data Key Partners v. Permira Advisers LLC</i> , 2014 WI 86, 356 Wis. 2d 665, 849 N.W.2d 693. . . .	8
<i>Steinberg v. Jensen</i> 186 Wis. 2d 237, 519 N.W.2d 753 (Ct. App. 1994 . . . .	17
<i>Watton v. Hegerty</i> 2008 WI 74, 311 Wis. 2d 52, 751 N.W.2d 369. . . .	19
<i>Wetterling v. Southard</i> 2023 WI App 51, 409 Wis. 2d 434, 997 N.W.2d 115 . . . . .	13,14
<b><u>Other Cases</u></b>	
<i>Johnson v. Whitehurst</i> 652 S.W.2d 441 (Tex App. 1983) . . . . .	25-26
<i>Kashkin v. Mt. Sinai Med. Ctr.</i> 142 Misc. 2d 863, 538 N.Y.S.2d 686 (1989). . . .	26
<i>Koapke v. Herfendal</i> 2003 N.D. 64, 660 N.W.2d 206. . . . .	26-27
<i>Logan v. Greenwich Hosp. Ass’n</i> 191 Conn. 282, 465 A.2d 294 (1983). . . . .	27-28
<i>Nisenholtz v. Mt. Sinai Hosp.</i> 126 Misc. 2d 658, 483 N.Y.S.2d 568 (1984). . . .	24-25
<i>Shaw v. Kirschbaum</i> 439 Pa. Super. 24, 653 A.2d 12 (1994). . . . .	28-29
<i>Spinosa v. Weinstein</i> 168 A.D. 2d 32, 571 N.Y.S.2d 747 (1991). . . . .	22-23

*Quintanilla v. Dunkelman*  
 34 Cal. Rptr. 3d 557 (Ct. App. 2005) . . . . . 21

*Wilson v. Merritt*  
 48 Cal. Rptr. 3d 630 (Ct. App. 2006) . . . . . 21

**Wisconsin Statutes**

Wis. Stat. § 448.30 . . . . . 5, 12-13, 19, 20

Wis. Stat. § 802.06(a)(6) . . . . . 5

**Other Statutes**

NY CLS Pub Health § 2805-d 1 . . . . . 24

**STATEMENT OF ISSUE**

Does a treating physician who refers a patient to another physician for care have a duty under Wis. Stat. § 448.30 to inform the patient about her conversations with the other physician who provides the care at issue, including her thoughts and recommendations to that other physician, where the referring physician does not provide the care out of which the claim arises?

**Answered by the circuit court:** Yes. The circuit court denied defendant-appellant-petitioner Dr. Carol Newman's motion to dismiss on the pleadings for failure to state a claim upon which relief may be granted under Wis. Stat. § 802.06(a)(6). The circuit court found that plaintiff-respondent Melissa Hubbard's Complaint stated a claim upon which relief may be granted.

**Answered by the Court of Appeals:** Yes. The court of appeals affirmed. It concluded that the facts alleged in Ms. Hubbard's Complaint were sufficient to state a claim for failure to inform about the availability of reasonable alternate medical modes of treatment and the benefits and risks of such treatment under Wis. Stat. § 448.30.

**STATEMENT OF THE CASE**

**A. Nature of the Case and Procedural History.**

Dr. Carol Neuman, an OB/GYN, treated Mrs. Hubbard in early 2018. Dr. Neuman referred Mrs. Hubbard to her colleague, surgeon Dr. Michael McGauley, for a robotically-assisted laparoscopic colon resection to treat Mrs. Hubbard's suspected endometriosis. Dr. McGauley operated on February 13, 2018, and during that procedure he removed Mrs. Hubbard's ovaries. Mrs. Hubbard claims she did not consent to removal of her ovaries.

Mrs. Hubbard first filed a lawsuit in Rock County circuit court against Dr. McGauley only, alleging that he failed to obtain her informed consent to the removal of her ovaries and claiming she would have refused the procedure had she known he might remove her ovaries ("the McGauley Lawsuit"). The circuit court ultimately dismissed the McGauley Lawsuit because Mrs. Hubbard produced insufficient proof that any alleged failure to inform was a cause of injury. Mrs. Hubbard appealed, and the court of appeals affirmed the dismissal in a summary disposition.

Mrs. Hubbard filed the instant lawsuit against

Dr. Neuman on May 12, 2021. (R. 2; Appendix 061-065). She alleged that, prior to Dr. McGauley's surgery, Dr. Neuman had recommended to Dr. McGauley that he remove her ovaries. Mrs. Hubbard claimed Dr. Neuman violated a duty to disclose this alleged recommendation to her. *Id.*

Dr. Neuman moved to dismiss for failure to state a claim under Wis. Stat. § 802.06(a)(6). (R. 12).

The circuit court denied Dr. Neuman's motion to dismiss at a hearing on January 9, 2023. The court held that where a treating physician refers a patient to another physician, and is alleged to have offered thoughts and recommendations to that other physician, the patient may state a claim against the referring physician for failing to inform of her communications with the physician who ultimately performs the procedure out of which the patient's lawsuit arises. (R. 52; Apx at 032-060).

The circuit court's Order memorializing its ruling was entered on January 27 (R. 51; Apx 031). Dr. Neuman filed a petition for leave to appeal from that nonfinal order and the court of appeals granted her petition.

Following briefing, the court of appeals issued a Decision on March 21, 2024, affirming the circuit court's Order. The court of appeals held that the circuit court did not err in denying Dr. Neuman's motion to dismiss for failure to state a claim, characterizing her allegations as implicating Dr. Neuman's duty to inform Mrs. Hubbard about the available benefits and risks of reasonable alternative modes of treatment for endometriosis. (Apx 001-030).<sup>1</sup>

Dr. Neuman timely petitioned this Court for review and the Court granted the petition by Order of October 7, 2024.

**B. Statement of Relevant Facts.<sup>2</sup>**

Dr. Neuman, an OB/GYN at MercyHealth North in Janesville, treated Mrs. Hubbard in the January 1, 2018, to February 13, 2018, timeframe. (R. 2; Apx 064, ¶ 6). Dr. Neuman's records memorialize a consultation

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<sup>1</sup> Dr. Neuman had moved in the circuit court in the alternative for summary judgment under Wis. Stat. § 802.08, on the grounds that Mrs. Hubbard could not prove causation since Dr. McGauley testified in his deposition in the McGauley Lawsuit that he made the decision to remove Mrs. Neuman's ovaries independent of any input from Dr. Neuman. (R. 12). The circuit court denied that motion because it found there was a disputed issue of material fact as to causation and the court of appeals also affirmed.

<sup>2</sup> Since Dr. Newman moved to dismiss Mrs. Hubbard's lawsuit on the pleadings for failure to state a claim, she accepted all of the factual allegations in the Complaint as true for purposes of the motion only. *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 19, 356 Wis. 2d 665, 849 N.W.2d 693.

she had with Mrs. Hubbard on January 16, in which they discussed Dr. Neuman's suspicion that Mrs. Hubbard had severe endometriosis:

She needs to consider the removal of the left tube and ovary and if she wants definite surgery for the endometriosis - removing uterus tubes and ovaries. There is nothing she has to do as an emergency. She needs to consider these options. If she removes her uterus she will not conceive but I believe her endometriosis is so severe she may need reproductive specialists to help her. She does not want to see them because her insurance does not cover this option. . . . She will contact us when she decides. I have talked to Dr. McGauley about this patient and he is willing to see her.

(Apx 064-065, ¶ 8).<sup>3</sup>

Dr. Neuman referred Mrs. Hubbard to her colleague Dr. McGauley, a surgeon, who promptly consulted with Mrs. Hubbard and scheduled her for a robotically-assisted laparoscopic colon resection on February 13, 2018. (Apx 064, ¶ 7).

Prior to the February surgery, Dr. Neuman spoke with Dr. McGauley and "recommended to [Dr.] McGauley that he should surgically remove Hubbard's ovaries for

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<sup>3</sup> Endometriosis is commonly defined as a disorder in which tissue similar to the lining of the uterus grows outside of the uterine cavity and on the ovaries, bowel, and tissues lining the pelvis. As the tissue grows, thickens, and breaks down over time, it becomes trapped in the pelvis. The trapped tissue can cause irritation, scar formation, adhesions, severe pain and fertility problems. [Endometriosis: Causes, Complications, and Treatment](#)

the surgery scheduled for February 13, 2018". (Apx 065, ¶ 10). Dr. Neuman did not advise Mrs. Hubbard of her recommendation to Dr. McGauley. *Id.*, ¶ 11.

Dr. McGauley performed the surgery on Mrs. Hubbard on February 13, 2018, and he removed her ovaries during the procedure. *Id.* ¶ 13. Mrs. Hubbard did not give Dr. McGauley consent to remove her ovaries. *Id.*, ¶ 12. Mrs. Hubbard would have cancelled the February 13 surgery with Dr. McGauley, in which Dr. McGauley removed Mrs. Hubbard's ovaries, if she had known that Dr. Neuman had recommended to Dr. McGauley that he remove her ovaries. (Apx 066, ¶ 15). Mrs. Hubbard suffered unspecified damages as a result. *Id.*, ¶ 17.<sup>4</sup>

#### **ARGUMENT**

The circuit court denied Dr. Neuman's motion to dismiss on the pleadings because it found that, as a matter of law, a patient may state a claim against a treating physician for failing to obtain informed

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<sup>4</sup> While not material to Dr. Neuman's motion to dismiss on the pleadings in the circuit court or to the proceedings in the court of appeals or in this Court, Dr. Neuman stresses that she disputes Mrs. Hubbard's substantive factual allegations. A significant dispute exists over whether Dr. McGauley informed Mrs. Hubbard that he may need to remove her ovaries during the February 13 procedure and over whether Mrs. Hubbard consented.

consent relating to treatment performed by a different physician. The court of appeals affirmed. This case raises an issue of first impression in Wisconsin. While no Wisconsin court has squarely addressed the question, the majority of jurisdictions that have addressed it have held that a physician who refers a patient to another physician for care and treatment does not have a duty to inform the patient with respect to the treatment to be rendered by the other physician, unless the referring physician orders the treatment in question or exercises control over the treatment.

The majority rule is consistent with existing informed consent law in Wisconsin as codified in Wis. Stat. § 448.30 and interpretive case law, and it comports with sound public policy considerations. Dr. Neuman respectfully asks the Court to recognize the majority rule in Wisconsin.

Mrs. Hubbard's Complaint does not allege that Dr. Neuman ordered the procedure performed by Dr. McGauley or that she ordered the removal of Mrs. Hubbard's ovaries, or that Dr. Hubbard exercised the degree of control recognized by other courts as justifying

imposing a duty to inform on the referring physician. Imposing a duty on a physician to inform a patient of her communications or recommendations to another physician who will provide the treatment in question, and who himself has a duty to obtain informed consent for the treatment, will run counter to the goal of encouraging physicians to openly communicate with each other to more effectively treat their patients.

**I. WISCONSIN LAW DOES NOT REQUIRE THAT A REFERRING PHYSICIAN INFORM A PATIENT WITH REGARD TO A PROCEDURE TO BE PERFORMED BY ANOTHER PHYSICIAN AND IMPOSING SUCH A REQUIREMENT WOULD DISCOURAGE OPEN COMMUNICATION AND CONSULTATION BETWEEN PHYSICIANS.**

The duty of a physician to inform a patient is governed by Wis. Stat. § 448.30:

Any physician who treats a patient shall inform the patient about the availability of reasonable alternate medical modes of treatment and about the benefits and risks of these treatments. The reasonable physician standard is the standard for informing a patient under this section. The reasonable physician standard requires disclosure only of information that a reasonable physician in the same or a similar medical specialty would know and disclose under the circumstances. The physician's duty to inform the patient under this section does not require disclosure of:

- (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.

(7) Information about alternate medical modes of treatment for any condition the physician has not included in his or her diagnosis at the time the physician informs the patient.

As evidenced by this language, the duty to inform is limited to treating physicians. Neither the legislature nor the courts have extended the scope of the informed consent duty, or the scope of liability for a failure to inform, beyond the treating physician. *Wetterling v. Southard*, 2023 WI App 51, ¶¶ 21 and 30, 409 Wis. 2d 434, 997 N.W.2d 115 (Ct. App. 2023) (rejecting a patient's attempt to recognize a common law duty by a hospital, via its nurses, to ensure a patient has been fully informed by a physician and consented to a procedure before administering medication that may dull the patient's awareness).

"The doctrine of informed consent is grounded in the doctor's duty to inform the patient of 'significant potential risks ... so that [the patient

can] make a rational and informed decision of whether [to] ... undergo the proposed procedures.'" *Wetterling* at ¶ 17.

While the statute extends the duty to inform to "any physician who treats a patient", the statute does not explicitly indicate whether this means a) that any physician who has provided any treatment to a patient has a duty to inform a patient regarding treatment to be provided by another physician to whom the patient has been referred, or b) simply that the duty extends to all physicians to inform a patient with respect to the treatment they themselves provide, *i.e.*, that no physician is exempt from the duty.

No Wisconsin appellate court has considered this discrete question. However, existing case law is consistent with not extending the duty to inform about treatment that is or will be provided by a different physician.

*See, Bubb v. Brusky*, 2008 WI App 104, ¶ 21, 313 Wis. 2d 187, 756 N.W.2d 584 ("*Bubb I*"). The plaintiff in *Bubb I* alleged that he suffered a stroke because the defendants failed to timely inform him of a diagnostic test that could have prevented the stroke

(*i.e.*, that they failed to inform him of “reasonable alternative medical modes of treatment”). One of the physicians, Dr. Brusky, had treated the plaintiff in the emergency room two days before the plaintiff’s stroke. Dr. Brusky contacted Dr. Gu, a neurologist, for a consult. Dr. Brusky discussed the plaintiff’s condition with Dr. Gu, and the plaintiff made an appointment with Dr. Gu. However, the plaintiff suffered the stroke before his appointment. *Id.* 2008 WI App 104, ¶¶ 3-4.

The court of appeals affirmed a trial court order dismissing the informed consent claim against Dr. Gu. The court, noting that § 448.30 imposes an informed consent duty only upon a physician who is providing treatment, held that Dr. Gu had no duty to inform the plaintiff because Dr. Gu did not provide treatment to the plaintiff. *Id.* ¶ 21. Dr. Neuman, like Dr. Gu, was not alleged to have provided the treatment in question (*i.e.*, the surgery) during which *Dr. McGauley* removed Mrs. Hubbard’s ovaries.

The court of appeals did not consider *Bubb I* to be analogous because unlike Dr. Gu, Dr. Neuman had treated Mrs. Hubbard prior to Dr. McGauley’s surgery

and she had (allegedly) recommended to Dr. McGauley that he remove Mrs. Hubbard's ovaries. The court instead found support for its decision in *Bubb v. Brusky*, 2009 WI 91, 321 Wis. 2d 1, 768 N.W.2d 903 ("*Bubb II*").

*Bubb II* held that the circuit court had erred in dismissing the plaintiff's informed consent claim against Dr. Brusky, the emergency room physician who had consulted with Dr. Gu. However, the court did not find that an informed consent claim could stand against Dr. Brusky based on communications, recommendations or thoughts he shared with Dr. Gu.

Rather, the factual basis for the informed consent claim against Dr. Brusky was that he failed to inform the plaintiff of reasonable alternatives to treat the transient ischemic attack ("TIA") that ultimately led to his stroke; specifically, the alternative of immediately admitting the plaintiff to the hospital for a carotid Doppler ultrasound, as an alternative to referring the plaintiff to Dr. Gu for a consult. *Id.*, 2009 WI 91, ¶ 70. Mrs. Hubbard does not allege comparable facts and circumstances in this case.

Mrs. Hubbard alleges that, prior to her surgery with Dr. McGauley, Dr. Neuman recommended to him that he remove Mrs. Hubbard's ovaries. It is Dr. Neuman's alleged failure to disclose that communication to her that Mrs. Hubbard identifies as Dr. Neuman's breach of duty. However, reading Wis. Stat. § 448.30 to require a treating physician to disclose her discussions with the physician who will provide the treatment out of which the claim arises will serve to discourage treating physicians from communicating openly and honestly with each other for the benefit of their patients.

Wisconsin recognizes a strong policy goal of encouraging communication amongst physicians for the benefit of patients. *Steinberg v. Jensen*, 186 Wis. 2d 237, 265, 519 N.W.2d 753 (Ct. App. 1994) (rev'd on other grounds) ("We are very much aware of the importance of intra-disciplinary communication during the period of treatment. This type of communication serves as a way of brainstorming ideas in an effort to provide the best care for a patient. These communications may take the form of specific consults with other physicians or with more informal group

discussions during grand rounds and the like").

This is true regardless of whether the physician who is alleged to be liable is consulted by the patient's treating physician like Dr. Gu in *Bubb I*, or whether she herself is a treating physician who refers the patient to another provider for treatment, like Dr. Neuman here.

Each time a physician was consulted about a patient's care by the treating physicians, each time a physician made a recommendation or suggestion about how another physician might treat a patient, the physician would be exposed to potential liability under the informed consent statute. At best, this would mean every treating physician who had any discussions or offered any thoughts or recommendations about a treatment to be rendered by another physician would have to have an informed consent discussion with the patient about the treatment to be rendered by *the other physician*. At worst, it would mean treating physicians would be discouraged from engaging in intra-disciplinary "brainstorming" out of fear of liability.

Suppose a patient's regular physician, a family practitioner or an internist, refers the patient to a surgeon for a biopsy or removal of an abnormal growth found on an x-ray. The patient's regular physician may have suspicions or concerns about a specific health condition or thoughts about what the best course of action may be for the surgeon depending on what he or she finds. That physician should be free to discuss those concerns and thoughts with the surgeon without facing a claim that the physician is liable for failing to disclose those discussions to the patient.

Interpreting § 448.30 as extending a treating physician's duty to inform to include disclosing that physician's communications with another physician who will provide the subject treatment would lead to unreasonable results because it would discourage the intra-disciplinary communication and cooperation that is critically important to effective patient care. Statutes should be interpreted to avoid unreasonable results. *Watton v. Hegerty*, 2008 WI 74, n. 23, 311 Wis. 2d 52, 751 N.W.2d 369.

It is not unreasonable to interpret the duty to inform as Dr. Neuman urges because no patient will be

deprived of a remedy under Wis. Stat. § 448.30. The physician who provides the care in question clearly has a duty to inform the patient of the risks, benefits and alternative modes of treatment attendant to the procedure the physician is going to perform. Here, that means Dr. McGauley had a duty to inform Mrs. Hubbard of the possibility that he may likely discover she had such severe endometriosis that removal of her ovaries was advisable.

Regardless of whether a physician is a treating physician or a consultant, that physician should not have a duty to inform the patient with respect to the specific risks or possible outcomes of a surgery or other procedure that a *different physician* will perform, or of the thoughts and recommendations she shares with the other physician as part of intra-disciplinary communication during the period of treatment.

**II. THE MAJORITY OF JURISDICTIONS HOLD THAT A TREATING PHYSICIAN WHO REFERS A PATIENT TO ANOTHER PHYSICIAN FOR TREATMENT BUT WHO DOES NOT ORDER THAT TREATMENT OR RETAIN CONTROL OVER THE TREATMENT PROVIDED BY THE OTHER PHYSICIAN HAS NO DUTY TO INFORM.**

Most jurisdictions that have considered the question of whether a referring physician has a duty to inform a patient regarding treatment to be rendered

by the other physician to whom the patient has been referred have answered that question in the negative. The only exception appears to be where the referring physician either orders the subject treatment retains actual control over the treatment provided by the other physician. That exception was evident in the two California cases cited by the court of appeals in its Decision. *See, Wilson v. Merritt*, 48 Cal. Rptr. 3d 630, 640 (Ct. App. 2006), where a referring physician was held to have had a duty to inform a patient with respect to a procedure performed by a different provider where the referring physician performed part of the procedure by administering an injection and holding the patient steady.

*See also, Quintanilla v. Dunkelman*, 34 Cal. Rptr. 3d 557, 574-75 (Ct. App. 2005), where the referring physician in the other California case owned the clinic to which he referred the patient, and ordered the other physician to perform the surgery in question.

Here, Mrs. Hubbard alleges that Dr. Neuman discussed with her that she should consider having her ovaries removed to treat her suspected severe

endometriosis; that Dr. Neuman referred Mrs. Hubbard to Dr. McGauley for an endoscopic procedure to assess her condition; and that Dr. Neuman recommended to Dr. McGauley in a pre-surgery discussion that he should remove her ovaries. Those allegations are not analogous to a treating physician either ordering a specific treatment by another physician or retaining control over how the other physician treats the patient.

Other courts have held that a referring physician who is similarly situated to Dr. Neuman has no duty to inform with respect to the possible, likely or recommended outcomes of treatment to be performed by a different physician. *See, Spinosa v. Weinstein*, 168 A.D. 2d 32, 571 N.Y.S.2d 747 (1991). The key issue in *Spinosa* was whether a physician (Dr. Hochran) who functioned as a surgical assistant to another physician (Dr. Weinstein) and who provided follow up care to the patient had a duty to inform the patient of the potential risks of the procedures which Dr. Weinstein performed on the patient's feet. *Id.* 168 A.D. 2d at 37.

The court answered that question in the negative, relying on a line of cases that refuse to impose informed consent liability upon a physician who merely assists another physician, or who refer a patient to another physician for treatment. *Id.* at 38. The court reached this conclusion despite acknowledging that Dr. Hochran's participation in the patient's care and treatment exceeded that of a referring doctor or of a surgical assistant in a single operation performed in a hospital setting.

[T]he overly broad interpretation of the statute which the plaintiffs favor would extend a physician's duty to obtain his patient's informed consent to encompass a requirement that he inform a patient about the risks inherent in not only his phase of treatment, but of the risks inherent in the treatment rendered by others. Under such an interpretation, a patient facing surgical treatment would have to be repeatedly advised of the same surgical risks, which could serve to discourage the patient from having necessary treatment performed. Moreover, such an extension of a physician's duty to obtain his patient's informed consent is unnecessary for the protection of the patient, since existing case law obligates the physician who has prescribed or is to perform the procedure to obtain the patient's informed consent. [citation deleted]

*Id.* at 39-40.<sup>5</sup>

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<sup>5</sup> The statute to which the court referred read in part as follows:

*See also, Nisenholtz v. Mt. Sinai Hosp.*, 126 Misc. 2d 658, 483 N.Y.S.2d 568 (1984). The plaintiff in *Nisenholtz* sued several physicians, including his surgeon and the treating physician who referred him to the surgeon, after he became impotent as the result of the surgical procedure. He alleged that none of the defendant physicians had adequately warned him of the risk of impotency.

The referring physician, a gastroenterologist, had treated the plaintiff for ulcerative colitis for ten years prior to the surgery in question. He advised the plaintiff that the non-surgical medical treatment he had been providing was no longer effective, told the plaintiff to "seriously" consider surgery, and referred the plaintiff to the surgeon who ultimately performed the procedure in question. The referring physician did not discuss any of the risks involved in the surgery with the plaintiff. *Id.* at 662 and 664.

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Lack of informed consent means the failure of the person providing the professional treatment or diagnosis to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable medical, dental or podiatric practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation.

NY CLS Pub Health § 2805-d 1.

The court held that the referring physician had no duty to inform the patient of the risks of the surgery.

It is the view of the court that a physician who merely refers a patient to another doctor does not become liable should that second doctor perform surgery without informed consent.

The mere referral of a patient by one physician to another is generally insufficient to create liability on the part of the referring physician. . . .

Similarly, it is not necessary that every physician or health care provider who becomes involved with a patient obtain informed consent to every medical procedure to which the patient submits. Rather, it is the responsibility of a physician to obtain informed consent to those procedures and treatments which the physician actually prescribes or performs.

*Id.* at 663.

See also, *Johnson v. Whitehurst*, 652 S.W.2d 441 (Tex App. 1983). The plaintiff in *Johnson* was hospitalized for gastro-intestinal bleeding. Dr. Bautista, an internist, diagnosed a chronic, bleeding duodenal ulcer and referred the plaintiff to Dr. Whitehurst, a surgeon. Dr. Whitehurst performed a procedure in which he removed the lower portion of plaintiff's stomach and reconnected the small intestine to a different area of the stomach. The

plaintiff decided to proceed with the surgery after consulting with both physicians, then sued them both after complications arose during the surgery.

The plaintiff appealed from the trial court's ruling that he could not proceed with an informed consent case against Dr. Bautista, arguing that the physicians had a "shared duty" to apprise him of the alternatives to, and the complications of, the surgery. The court of appeals disagreed and affirmed: "Dr. Bautista . . . recommended that Dr. Whitehurst be called into the case. Dr. Whitehurst is a surgeon, and being more familiar with the proposed surgical procedure, could inform the appellant of the possible risks and consequences. Under these facts, the law requires only that Dr. Bautista exercise ordinary care in choosing Dr. Whitehurst." *Id.* at 445.

*See also, Kashkin v. Mt. Sinai Med. Ctr.*, 142 Misc. 2d 863, 865, 538 N.Y.S.2d 686 (1989) (a referring physician who orders a specific procedure be performed by another physician retains a duty to inform his patient regarding the procedure);

*Koapke v. Herfendal*, 2003 N.D. 64, ¶ 23, 660 N.W.2d 206, which recognized that a referring

physician can only be held liable for failing to obtain informed consent when that physician has formally ordered a procedure or actually participated in performing the procedure, and which found that a dentist who referred patient to an oral surgeon for teeth extractions had no duty to obtain the patient's informed consent to the surgery where the dentist neither formally ordered nor performed the oral surgery.

In discussing the majority rule, *Koapke* noted that "[t]hese jurisdictions hold that it clearly is not necessary for every physician or health care provider who becomes involved with a patient to obtain informed consent for every medical procedure to which the patient submits. Rather, it is the responsibility of a physician to obtain informed consent for those procedures and treatments that the physician formally prescribes or performs." *Id.*, ¶ 18.

Examples of other cases applying what is recognized as the majority rule on this issue include *Logan v. Greenwich Hosp. Ass'n*, 191 Conn. 282, 465 A.2d 294 (1983). One of the defendant physicians in *Logan*, a specialist in internal medicine, had treated

the plaintiff for ongoing pain and swelling following childbirth. The internist diagnosed the plaintiff with lupus and recommended she undergo a kidney biopsy. He explained the biopsy to the plaintiff and warned her that she may experience bleeding and discomfort as side effects, and he admitted the plaintiff to the hospital to have the procedure done. However, the procedure was performed by a urologist to whom the internist had referred the plaintiff. The urologist punctured the plaintiff's gall bladder during the biopsy, necessitating its removal. *Id.* at 284-285.

On those facts, the court held that the internist was entitled to a directed verdict on the plaintiff's claim of failure to obtain informed consent. The internist had neither ordered nor performed the biopsy, and "[w]e hold that . . . Newberg, as the referring physician, had no obligation to inform the plaintiff of viable alternative procedures but might reasonably have relied upon" the urologist who performed the biopsy. *Id.* at 306.

*See also, Shaw v. Kirschbaum*, 439 Pa. Super. 24, 653 A.2d 12 (Penn. Super. Ct. 1994), where the plaintiff patient sued her cardiologist for failing to

obtain her informed consent to surgery after she experienced paralysis following surgical repair of an aortic aneurysm. The defendant cardiologist had not performed the surgery himself, but had referred the plaintiff to two out-of-town surgeons. Recognizing that the duty to obtain informed consent to surgery in Pennsylvania historically extended only to the surgeons who perform the surgery, the plaintiff argued the cardiologist had voluntarily assumed a duty to inform when he not only recommended the surgery but advocated for the plaintiff to travel for the surgery and made her travel arrangements. *Id.*, 439 Pa. Super. 24 at 29.

The trial court agreed with the plaintiff but the superior court disagreed and held that the cardiologist had not assumed a duty to obtain informed consent by advocating for or arranging for the surgery. “[T]here is no duty in Pennsylvania, and we decline the invitation to create one in this case, to impose upon an attending or referring physician the obligation to provide all or the information necessary for the patient to provide an informed consent to the surgeon.” *Id.* at 34. (Emphasis supplied)

Dr. Neuman respectfully submits that the finding of the court of appeals that Mrs. Hubbard can state a claim against her for failing to inform of alternative medical modes of treatment by not disclosing an alleged recommendation to Dr. McGauley runs counter to the majority rule, is not compelled by or supported by the language of Wis. Stat. § 448.30 or interpretative case law, and risks discouraging all physicians from free and open communication for the betterment of patient care.

**CONCLUSION**

For the foregoing reasons, Dr. Neuman respectfully asks the Court to reverse the Decision of the court of appeals and remand this case to the circuit court for entry of an order dismissing Mrs. Hubbard's lawsuit for failure to state a claim upon which relief may be granted.

Dated this 6<sup>th</sup> day of November 2024.

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**CERTIFICATION**

I hereby certify that this brief conforms to the rules contained in Wis. Stat. Rule 809.19(8)(b), (bm), and (c) for a brief. The length of the brief is 32 pages.

Dated this 6th day of November 2024.

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