

**FILED**  
**11-11-2024**  
**CLERK OF WISCONSIN**  
**SUPREME COURT**

SUPREME COURT OF WISCONSIN

---

Melissa A. Hubbard,

Plaintiff-Respondent,

Appeal No. 2023AP255

v.

Carol J. Neuman, M.D.

Defendant-Appellant-Petitioner.

---

BRIEF OF THE PLAINTIFF-RESPONDENT

---

FISH LAW OFFICES

Guy K. Fish  
Wis. State Bar No.1005282  
Attorney for Plaintiff-Respondent

2309 E. Pine Tree Ct.  
Milton, WI 53563  
(608) 868-3200  
guyfish@fishlawoffices.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES . . . . . 3

STATEMENT OF THE ISSUE. . . . . 3

STATEMENT OF THE CASE . . . . . .4

ARGUMENT

    I. THE COURT OF APPEALS CORRECTLY HELD THAT NEUMAN,  
    HAVING A PHYSICIAN-PATIENT RELATIONSHIP WITH HUBBARD  
    AS HER TREATING PHYSICIAN, HAD A DUTY UNDER THE  
    INFORMED CONSENT STATUTE TO DISCLOSE TO HUBBARD  
    PRE-SURGERY THAT: 1) SHE HAD PRESCRIBED A MEDICAL MODE  
    OF TREATMENT TO ANOTHER PHYSICIAN, NAMELY, THE  
    SURGICAL REMOVAL OF HUBBARD’S OVARIES, AND 2) THE  
    SURGERY WOULD BE PERFORMED BY THAT PHYSICIAN . . . . .7

CONCLUSION . . . . . .14

CERTIFICATION . . . . . 14

## TABLE OF AUTHORITIES

## CASES

<i>Bubb v. Brusky (Bubb I)</i> 2008 WI App 104, 313 Wis.2d 187, 756 N.W.2d 584. . . . .	7,13
<i>Martin v. Richards,</i> 192 Wis. 2d 156, 513 N.W.2d 70 (1995) . . . . .	8,9,11
<i>Nisenholtz v. Mt. Sinai Hosp.,</i> 126 Misc. 2d 658, 483 N.Y.S.2d 568 (1984) . . . . .	10,12
<i>Scaria v. St. Paul Fire &amp; Marine Ins. Co.,</i> 68 Wis. 2d 1, 227 N.W.2d 647 (1975). . . . .	4
<i>Spinosa v. Weinstein,</i> 168 A.D. 2d 32, 571 N.Y.S.2d 747 (1991) . . . . .	10,12

## STATUTES

WIS. STAT. §448.30 . . . . .	3, 4, 8
------------------------------	---------

## STATEMENT OF THE ISSUE

The only issue before this Court as pled by the Defendant-Appellant-Petitioner (Neuman) in her Petition for Review is:

Does a treating physician who refers a patient to another physician have a duty under Wis. Stat. § 448.30 to inform the patient about her conversations with that other physician, including her thoughts and alleged recommendations to the other physician, where the referring does not provide the treatment out of which the claim arises? <sup>1</sup> *Neuman Petition for Review* at 5.

Answered by the circuit court: Yes.

Answered by the Court of Appeals: Yes. The Court of Appeals

---

<sup>1</sup> Whether by design or error Neuman misstates the issue on appeal in her First Brief-Supreme Court by removing the word “alleged”. *Neuman’s First Brief-Supreme Court* at 5.

held that Neuman, had a duty established by Wis. Stat. § 448.30 to inform the Plaintiff-Respondent (Hubbard) about the availability, benefits, and risks of reasonable alternate modes of treatment for Hubbard's pelvic endometriosis, and that such duty to disclose encompassed the disclosure to Hubbard of Neuman recommending to Dr. McGauley that he surgically remove her ovaries; and by doing so would allow Hubbard to "at the time of disclosure to intelligently exercise [her] right to consent or to refuse the treatment or procedure proposed." *Scaria v. St. Paul Fire & Marine Ins. Co.*, 68 Wis. 2d 1, 13, 227 N.W.2d 647 (1975).

#### STATEMENT OF THE CASE

##### *Nature of the case, Procedural history, and Disposition in the circuit court and court of appeals -*

On May 12, 2021 Plaintiff-Respondent (hereinafter "Hubbard") filed a Complaint in Rock County Circuit Court against Defendant-Appellant Carol J. Neuman, M.D. (hereinafter "Neuman") alleging that Neuman committed medical malpractice, when as Hubbard's treating physician, she failed to disclose to Hubbard pre-surgery that she had recommended or would be recommending to a surgeon that Hubbard's ovaries be removed. (R.2:3-6). As part of Neuman's response she filed three motions - dismissal, summary judgment, and sanctions. (R.13:1-2; R.14:1-2). Neuman's key legal basis being that she had no duty owed to Hubbard under the informed consent statute because she was not the surgeon who removed Hubbard's ovaries. As part of her opposition to these three

motions, Hubbard submitted her affidavit and the affidavit of Dr. James W. Wheeler. (R.26:1-2; R.28:1-7). In summary, Hubbard averred under oath that she did not consent at any time to the removal of her ovaries; that she was not advised pre-surgery by Neuman, as her treating physician, that Neuman had recommended or would be recommending to the surgeon that Hubbard's ovaries be removed; and that had Hubbard been so advised pre-surgery of this recommendation she would have canceled her surgery so that she and her husband could consider all available options. Dr. Wheeler, a board certified obstetrician/gynecologist of some 33 year gave a straightforward opinion about Neuman's duty when he stated under oath:

It is my opinion to a reasonable degree of medical certainty that for a treating physician the appropriate standard of care includes the duty of that doctor to advise, to disclose, to inform the patient prior to the surgery of that doctor's recommendation made to the surgeon scheduled to perform the surgery on the patient. (R.28:1, ¶3).<sup>2</sup>

A motion hearing on Neuman's three motions was held on January 9, 2023 with the court denying all three motions. (R.52:1-29). The trial court entered the appropriate order on January 27, 2023. (R.51:1). Subsequent to the motion hearing Hubbard filed an amended complaint re-alleging the cause of action against Neuman as medical

---

<sup>2</sup> To date, Hubbard is not aware that Neuman has submitted any expert medical opinion which rebuts Dr. Wheeler's medical opinion. Further, Hubbard submits that Dr. Wheeler's medical opinion properly meets the reasonable physician standard of Wis. Stat. Sec. 448.30, which "requires disclosure only of information that a reasonable physician in the same or similar medical specialty would know and disclose under the circumstances."

malpractice, in that as Hubbard's treating physician, Neuman failed in her duty to disclose to Hubbard pre-surgery that she had recommended or would be recommending to a surgeon that Hubbard's ovaries be removed. (R.55:3-7). Neuman files her petition for leave to appeal the non-final order entered January 27, 2023. (R. 60:1-19). The Court of Appeals grants her petition and enters the appropriate order. (R.65:1). On March 21, 2024 that Court issued a decision affirming the circuit court, in part by:

Recognizing that Hubbard has alleged sufficient facts to support a claim that Dr. Neuman had a duty to inform Hubbard in this situation . . . .

*Court of Appeals Opinion/Decision* at ¶ 38. (P-App. 024).

Neuman files a petition for review with this Court and her petition is granted by this Court on October 7, 2024.

*Statement of relevant facts -*

For purposes of Neuman's motion to dismiss in the circuit court, and her petitions in the Court of Appeals and this Court, Neuman has admitted certain facts, but crucial facts, as pled by Hubbard as true, namely:

1. Neuman was Hubbard's treating physician.
2. Neuman recommended to the surgeon pre-surgery to remove Hubbard's ovaries.
3. Neuman did not disclose this recommendation to Hubbard pre-surgery.
4. Hubbard did not consent to the removal of her ovaries.

(R.60:5-6).

## ARGUMENT

- I. THE COURT OF APPEALS CORRECTLY HELD THAT NEUMAN, HAVING A PHYSICIAN-PATIENT RELATIONSHIP WITH HUBBARD AS HER TREATING PHYSICIAN, HAD A DUTY UNDER THE INFORMED CONSENT STATUTE TO DISCLOSE TO HUBBARD PRE-SURGERY THAT: 1) SHE HAD PRESCRIBED A MEDICAL MODE OF TREATMENT TO ANOTHER PHYSICIAN, NAMELY, THE SURGICAL REMOVAL OF HUBBARD'S OVARIES, AND 2) THE SURGERY WOULD BE PERFORMED BY THAT PHYSICIAN.

Neuman avers that she had no duty to disclose to Hubbard of her recommendation to Dr. McGauley that he surgically remove Hubbard's ovaries; her position best stated in her appellate brief to the Court of Appeals when she pens the law in this State to be:

For a physician to have a duty to obtain a patient's consent, that physician must provide the treatment about which the consent has to be obtained. A physician's act of simply consulting with or providing recommendations to the health care provider who provides the treatment in question does not expose that physician to potential liability under the informed consent statute. See, *Bubb v. Brusky*, 2008 WI App 104, ¶ 21, 313 Wis. 2d 187, 756 N.W. 2d 584 rev'd on other grounds, 2009 WI 91.<sup>3</sup> *Neuman Brief of Appellant* at 14.

So for Neuman, the discussion of the option of ovarian removal was enough; and although Neuman prescribed ovarian surgery to another doctor, which a lay person would consider a major surgery, and did so without disclosing that recommendation to Hubbard pre-

---

<sup>3</sup> There are significant errors with Neuman's position. First, this case is about a "treating physician", and not about any "physician". Second, Neuman's citation to the *Bubb I* case in support of her position is fatally flawed. Her stating that *Bubb I* specifically and generally held that a physician is not exposed to liability by providing recommendations to another health care provider - that alleged holding is nowhere to be found in the cited paragraph or in any other portion of *Bubb I*. Indeed, had this been the actual and true holding, then Hubbard submits the circuit court would have dismissed her lawsuit and the court of appeals would have affirmed that dismissal.

surgery, nonetheless, she maintains she is off the liability hook.

For Hubbard, that cannot be the law in this State! She submits that Neuman's duty she has pled in her Amended Complaint falls under the provisions of §448.30. A duty imposed by the informed consent statute "is dependent upon the facts of the situation." *Martin v. Richards*, 192 Wis. 2d 156, 175, 513 N.W.2d 70 (1995). The facts as pled by Hubbard, and which she would present to a jury, are: that as Hubbard's treating physician, Neuman prescribed<sup>4</sup> a medical mode of treatment, namely, ovarian surgery, to be performed by another physician without disclosing that to Hubbard pre-surgery; and had Neuman actually disclosed that recommendation pre-surgery, Hubbard would have canceled the surgery.

And in this case, what was the "mode"? *Black's Law Dictionary* 1003 (6th ed. 1990) defines "mode" as: "the manner in which a thing is done." So for Neuman, a "mode" in the treating of Hubbard was the surgical removal of Hubbard's ovaries; and she prescribed that "mode" to be performed by another doctor. "Prescribe" in the medical field carries a significant meaning.

In a medical sense 'prescribe' means to direct, designate, or order use of a particular remedy, therapy, . . . . *Black's Law Dictionary* 1183 (6th ed. 1990).

So is the duty of a treating physician to inform or advise a

---

<sup>4</sup> Prescribe, order, recommend, direct, designate - are different words but without legal distinction in that if utilized by a treating physician to convey a mode of treatment (e.g. surgery) to another physician then the meaning is essentially the same - a communication to perform a mode of treatment.

patient about a "mode" narrowly limited to only informing the patient of its availability, and nothing else, including in the case of the non-disclosure by the treating physician's prescribing the performing of that "mode" to another physician? This is Neuman's position. And then is a patient better informed and able "to make an intelligent decision with respect to" that "mode" if the treating physician remains silent on his/her prescribing that "mode" to another physician? *Id.* at 174. The obvious and common sense response is: "of course not"! The more information given to a patient the better. And to include such a disclosure as a duty for a treating physician cannot be "construed so as to unduly limit the physician's duty to provide information which is reasonably necessary under the circumstances". *Id.* at 175. In the circumstances of this case Neuman made a professional decision; and instead of simply referring Hubbard to another physician and let that physician prescribe medical modes of treatment for Hubbard, Neuman decided to stay involved beyond a referral, and prescribe a medical mode of treatment. Hubbard submits, once Neuman crossed the medical rubicon of referring to prescribing, she then had the irrevocable duty of disclosing that recommendation to Hubbard.

A simple colloquy of such a mandatory disclosure might be - treating physician: "This medical mode of treatment is available to you, and by the way, I have recommended (or will recommend) that Dr. X perform that medical mode of treatment. Are you ok with all

this? Do you consent to that recommendation to Dr. X?"

Case law cited by Neuman in her appeal recognizes this duty of disclosure to the patient of prescribing a medical mode of treatment:

[E]xisting case law obligates the physician **who has prescribed** or is to perform the procedure to obtain the patient's informed consent. *Spinosa v. Weinstein*, 168 A.D. 2d 32, 40, 571 N.Y.S.2d 747 (1991). (Emphasis supplied.) *Neuman Brief of Appellant Brief* at 19.

Rather, it is the responsibility of a physician to obtain informed consent to those procedures and treatment which the physician **actually prescribes** or performs. *Nisenholtz v. Mt. Sinai Hosp.*, 126 Misc. 2d 658, 663, 483 N.Y.S.2d 568 (1964). (Emphasis supplied.) *Neuman Brief of Appellant* at 20.

And yet, despite these clear holdings that Neuman herself has presented in her appeal, she continues to contrarily argue that Neuman, as Hubbard's treating physician, and actually having prescribed the medical mode treatment of ovarian surgery, owed no duty to disclose her recommendation of ovarian surgery to Hubbard because:

[A] physician who refers a patient to another physician **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. (Emphasis supplied.) *Neuman First Brief - Supreme Court* at 11.

So, will the final analysis in determining a duty to disclose based on the facts of this case boil down to a battle over the semantics of the words "prescribe", "order", "recommend", "direct",

and "designate"? Or, as it should be, due consideration of the "information about alternate modes of treatment . . . not limited in title or text . . . ." *Id.* at 181. Hubbard, facing modes of treatments, namely surgical procedures, including ovarian surgery, was entitled, in order to make intelligent decisions of whether or not to undergo those surgeries, to have Neuman provide her information about those modes of treatment, including the information of her recommendation to Dr. McGauley that he surgically remove Hubbard's ovaries. *Id.* at 174.

And the context in which Neuman recommended to Dr. McGauley that he surgically remove Hubbard's ovaries also needs to be considered. Her recommendation was not a one-time phone call, or fax, or email. It was not conveyed during a brief encounter in an elevator. It was not brought out during a coffee break in the hospital cafeteria. The Court of Appeals correctly noted that Neuman, as a treating physician for Hubbard, was significantly involved with Hubbard's care.

Hubbard met with Dr. Neuman in January 2018 regarding Hubbard's reproductive issues. Dr. Neuman discussed treatment options for her pelvic endometriosis, including surgery to remove her left fallopian tube and ovary. As alleged by Hubbard, however, Dr. Neuman told her "[t]here is nothing she has to do as an emergency. She needs to consider these options . . . . She will contact us when she decides." According to the complaint, Dr. Neuman failed to inform Hubbard about the possibility of addressing Hubbard's endometriosis by performing ovarian removal surgery during the planned colon surgery, despite the fact that Dr. Neuman recommended precisely this option. More specifically, as summarized above, the complaint alleges that Dr. Neuman "engaged in pre-

surgery discussions and planning" for the February 2018 surgery with Dr. McGauley, planned for the removal of Hubbard's fallopian tubes, ovaries, and uterus, and ultimately recommended to Dr. McGauley that he remove Hubbard's ovaries during that surgery. It is reasonable to infer from these allegations that Dr. Neuman not only had a physician-patient relationship with Hubbard, but also had expertise as an OB/GYN regarding treatment options for pelvic endometriosis and was actively involved in Hubbard's care and in planning the February 2018 surgery, including plans for the removal of Hubbard's ovaries. Consequently, the facts alleged by Hubbard, with all reasonable inferences therefrom, support a claim that Dr. Neuman was far more involved in Hubbard's treatment and planning for the February 2018 surgery than the nonexistent physician-patient relationship between the neurologist and Bubb.

*Court of Appeals Opinion/Decision* at ¶ 31. (P-App. 018-019).

Neuman has resorted to citing cases from various jurisdictions outside the State of Wisconsin. Surprisingly, the *Nisenholtz* and *Spinosa* cases support Hubbard's position that a duty to disclose is imposed on a treating physician that prescribes (recommends) to another physician that he/she perform a mode of treatment. Also, Hubbard does not disagree with her other cases that hold that a mere referral, or a consulting or assisting physician, don't come under the duty to disclose to a patient.

And finally addressing Neuman's argument that imposing upon a physician the duty to disclose to the patient the type of recommendation made in this case is against public policy because such a duty to disclose "will run counter to the goal of encouraging physicians to openly communicate with each other to more effectively treat their patients." *Neuman First Brief-Supreme Court* at 12.

First, not every physician is subject to the informed consent statute - only "treating" physicians; doctors who provide the management and care to and for a patient; doctors that actually have a physician-patient relationship. *Bubb I* at ¶21.

Second, Hubbard is not seeking to muzzle any physician in engaging in intra-disciplinary communications between doctors. Hubbard condones the fullest but allowable discourse between physicians, and in this case, in no way is she trying to muzzle Neuman with any physician. But how on earth is a patient, like Hubbard, better off with limiting the sharing of pertinent medical information? Is not a patient better off in making informed decisions by receiving more information concerning care and management from the treating physician than less! How is a treating physician's duty of disclosure unduly burdened by sharing more with a patient than less? Doesn't a treating physician more fully fulfill his/her duty by disclosing more pertinent medical information to the patient? Isn't a primary goal of the informed consent statute to provide medical information that a patient "would want to know in order to make his or her own decision"? *Bubb I* at ¶35 (Brown, C.J., dissenting). All she expected, as any patient would expect, and what she submits the informed consent statute mandates as a duty, and what she submits the Court of Appeals correctly held, was that Neuman, as her treating physician, should have disclosed to her the pertinent discussions Neuman had with the other physician,

especially her prescribing ovarian surgery. Had Neuman just done that, this case would not now be on appeal because Hubbard would have not had the surgery; her understanding at the time was that it was colon only surgery; which was reiterated verbally by the surgeon just prior to the surgery.

#### CONCLUSION

For the reasons stated herein, Hubbard respectfully prays that this Court affirm the Decision of the Court of Appeals and remand this case back to the circuit court for further proceedings.

Respectfully submitted,

Dated this 11<sup>th</sup> day of November, 2024.

Electronically signed by: Guy K. Fish

Guy K. Fish  
Wis. State Bar No. 1005282  
Attorney for Plaintiff-Respondent  
Melissa A. Hubbard

#### CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is fourteen(14)pages.

Dated this 11<sup>th</sup> day of November, 2024.

Electronically signed by: Guy K. Fish

Guy K. Fish  
Wis. State Bar No. 1005282  
Attorney for Plaintiff-Respondent  
Melissa A. Hubbard