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## Informed Consent Does Not Include Surgeon's Success Rate

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In this recently published decision, the Michigan Court of Appeals held that, as a matter of law, defendants did not have a duty to disclose a surgeon's statistical history of transplant failures in order to obtain decedent's informed consent.

The decedent was diagnosed with kidney failure in May 1998. He underwent a kidney transplant in July 1999. After the surgery, he suffered post-operative complications, and the transplanted kidney ultimately failed. After removal of the failed kidney, the decedent resumed kidney dialysis and his health continued to decline over the next year. Eventually, the decedent elected to withdraw from dialysis and died in a hospice program in September 2000.

The plaintiff filed a medical malpractice wrongful death action against the doctor who performed the transplant and the hospital, alleging that they committed several errors related to a blood clot that appeared after the operation. In an amended complaint, the plaintiff added a count for the defendants' failure to garner the plaintiff's and the decedent's informed consent based upon an alleged discrepancy between the hospital's reported success rate for kidney transplants and its actual success rate.

The defendants moved for summary disposition on the basis that the plaintiff had failed to substantiate any of her claims. Specifically, her claim of lack of informed consent did not have factual support because the plaintiff testified at her deposition that she had been informed of the risks associated with the transplant procedure. The trial court denied the motion on the basis that the defendants had failed to counter the statements of the plaintiff's expert regarding withheld statistical information related to the standard of care. The case proceeded to trial.

At trial, despite the court's proper ruling that privilege precluded the plaintiff from obtaining and presenting details of the defendant doctor's failed transplant surgeries as evidence, the plaintiff's experts continued to make comments about the doctor's failure rate and plaintiff's counsel called attention to those failed surgeries during his closing arguments. The jury awarded the plaintiff \$1.4 million in damages and after minor adjustments, the court entered a judgment for \$1.5 million.

On appeal, the defendants argued that a physician has no duty to disclose to a patient the physician's success rates for a particular medical procedure and, in the present case, the defendant doctor's failure to advise the decedent of his success rates could not, as a matter of law, taint the patient's consent.

The court agreed with the defendants' argument, relying on the holding in *Lincoln v Gupta*, 142 Mich App 615, 625; 370 NW2d 312 (1985), wherein the Lincoln court held that "the doctrine of informed consent requires a physician to warn a patient of the risks and consequences of a medical procedure." In the present case, the court reasoned that by itself, the defendant doctor's success rate was not a risk associated with the medical procedure and further, none of the affidavits of merit provided by the plaintiff's experts indicated that disclosure of the defendant doctor's particular success rate was necessary to obtain informed consent according to the standard of care.

The court also found that there was no misrepresentation on the part of the defendant doctor regarding his transplant history and that the case lacked any hint of relationship between the defendant doctor's previous failed transplants and the failure of the decedent's new kidney.

Additionally, the court rejected the plaintiff's use of statistical evidence as a link between a doctor's negligence and the treatment's failure. The court reasoned that bare numerical success rates are not, in themselves, evidence that a doctor did anything wrong and determined the trial court erred when it allowed the limited inclusion of these statistics, which encouraged the jury to conclude that the defendant doctor had a proclivity to fail.

In conclusion, the court held that, as a matter of law, a physician's raw success rates do not constitute risk information reasonably related to a patient's medical procedure. Therefore, a physician does not have a duty to disclose statistical history of medical successes or failures in order to obtain a patient's informed consent. The court vacated the trial court's judgment in this matter and remanded the case for a new trial.

*We are honored to acknowledge that one of Plunkett & Cooney's appellate attorneys, Robert G. Kamenec, successfully argued this issue before the Michigan Court of Appeals.*

For a complete copy of the Michigan Court of Appeals published decision on *Wlosinski v Steven Cohn, M.D., et al* (No. 253286, rel'd 12/20/05), [click here](#).

For a copy of the partial concurrence/dissent on the decision, [click here](#).

For a copy of the dissent on the decision, [click here](#).

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