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IN THE SUPREME COURT OF IOWA

NO. 14-1682

ALAN ANDERSEN, Individually and as Injured Parent of CHELSEA ANDERSEN and BRODY ANDERSEN and DIANE ANDERSEN, Wife of Alan Andersen
Plaintiffs-Appellants,

vs.

SOHIT KHANNA, M.D., and IOWA HEART CENTER, P.C.,
Defendants-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
THE HONORABLE MICHAEL HUPPERT, JUDGE
POLK COUNTY NO. CL100171

APPELLEES DR. KHANNA & IOWA HEART'S RESISTANCE TO APPLICATION FOR FURTHER REVIEW

(Court of Appeals Decision January 25, 2017)

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Resistance to Application for Further Review

Defendants/Appellees Dr. Sohit Khanna and Iowa Heart Center, P.C. resist Plaintiffs' application:

1. "Further review by the supreme court is not a matter of right, but of judicial discretion. An application . . . will not be granted in normal circumstances." Iowa R. App. Proc. 6.1103(1)(b).

2. In their routing statement, Plaintiffs stated this case "presents the application of existing legal principles" and was appropriate for transfer. Plaintiffs were correct. Plaintiffs simply re-urge their initial appeal arguments and further review is not warranted.

3. The decisions on two of the issues raised in Plaintiffs' application (concerning an informed consent claim on a material risk of surgery and related rebuttal evidence) turned on procedural and evidentiary grounds. Given the procedural history and Plaintiffs' own failures to adequately raise or preserve issues, the Court of Appeals could find no basis to overturn the district court's discretion. Plaintiffs have presented nothing new that warrants further review of these rulings.

4. On these two issues, Plaintiffs had many years and ample opportunity to prepare their case and formulate their theories. Yet when the case was finally tried to the jury, Plaintiffs did not proffer the necessary

evidence to support a claim based upon the nondisclosure of a material risk resulting in harm. Plaintiffs had chosen a different theory to pursue. In fact, Plaintiffs' theory in their case-in-chief was *contrary* to this informed consent claim and Plaintiffs only sought to submit the claim in rebuttal. The Court of Appeal's affirmance of the district court's rulings does not warrant review.

5. Plaintiffs also seek further review of the Court of Appeals' affirmance of an informed consent summary judgment ruling that a physician does not have a duty to disclose his or her own personal information, such as training and experience. However, this allegedly undisclosed risk never materialized as the jury found Dr. Khanna was not negligent in performing the surgery. Therefore Plaintiffs are not entitled to a new trial regardless of the substantive legal issue. Nor does the substantive issue warrant further review as the Court of Appeals' decision is consistent with this Court's decision in *Pauscher v. Iowa Methodist Med Ctr*, 408 N.W.2d 355 (Iowa 1987).

WHEREFORE, for the reasons set forth above and below, Defendants respectfully request that Plaintiffs' application be denied in its entirety.

Summary of the Case

This case arises from a January 2004 open heart surgery performed by Dr. Khanna. The case was tried in July 2014. The jury found Dr. Khanna was not negligent. App. 564 (Verdict).

Procedural history.

This case was set for trial multiple times, with full trial preparation completed on at least four occasions, including on some of the appeal issues. The case was tried before Judge Michael Huppert who was tasked with interpreting rulings previously entered by Judge Scott Rosenberg and Judge D. J. Stovall.

August 19, 2008 amended petition. Plaintiffs' allegations included that Dr. Khanna was negligent in:

> a. Failing to properly advise Andersen regarding all the risks and dangers of the procedures recommended by Khanna, and failing to obtain informed consent for the procedures actually performed;
>
> . . .
>
> d. Failing to advise Andersen that he [Khanna] had limited experience in performing a Bentall procedure.

App. 11 (Amended [Petition] ¶9).

June 15, 2010 summary judgment ruling. Defendants filed motions for partial summary judgment in which Dr. Khanna sought dismissal of the informed consent claim. Judge Rosenberg granted the motion, concluding

that "Iowa law does not include a duty to disclose personal characteristics or the experience of a physician or doctor in obtaining consent from a patient." App. 162 (Ruling).

While the ruling purported to dismiss the entire claim, there was specific discussion only of allegation (d), concerning a failure to disclose experience information. *Id*. However, important to Defendants' subsequent position on the informed consent claim and how informed consent played out at trial, as to allegation (a) of the amended petition (concerning a failure to disclose material risks), Plaintiffs never pursued that allegation with expert evidence. Plaintiffs' experts did not opine that Mr. Andersen's complication was the result of a non-disclosed risk. At no time during the long history of this case, did Plaintiffs disclose an expert opinion that would support a failure to disclose material risks.[1]

Judge Rosenberg also stated:

> The Court does observe, however, that this ruling does not prevent Plaintiffs from introducing evidence regarding the abilities, knowledge, experience and expertise of Dr. Khanna in performing the procedure at issue in this case. Clearly, these factors would be relevant to the issue whether or not Dr. Khanna

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[1] *See* App. 626-31 (Defendants' Resistance to Post-Trial Motion, Exh. 1, including Plaintiffs' expert reports); *Doe v. Johnston*, 476 N.W.2d 28, 31 (Iowa 1991) ("the burden rests with the plaintiff to establish by expert testimony the nature of the risk involved and the likelihood of its occurrence.").

was negligent in performing medical procedures involved in this case.

App. 162. As a result, Plaintiffs were allowed to introduce substantial evidence at trial to support their position that Dr. Khanna lacked sufficient experience. *See* App. 644-45 (Post-Trial Ruling, describing record as "replete with references to [Dr. Khanna's] lack of training and experience").

June 2011. On June 1, 2011 Plaintiffs asked for a reconsideration of the summary judgment ruling on informed consent based upon new evidence. App. 165-67 (Motion). However, the *only* evidence Plaintiffs referred to was *defense* expert Dr. Henri Cuenoud's May 3, 2011 deposition testimony about Plaintiff's pre-existing heart condition (i.e. the "super bad heart") as explaining the cause of his complication. *Id.*

Again, important to Defendants' subsequent position on the viability of the informed consent at trial, at no time did Plaintiffs seek to add Dr. Cuenoud as a Plaintiffs' expert in support of an informed consent claim. And at the July 2014 trial, Plaintiffs did not request to read any portion of Dr. Cuenoud's deposition in their case-in-chief or make an offer of proof of the same.

June 20, 2011 trial date. Before the June 20, 2011 trial began, Judge Stovall ruled that certain medical expenses were inadmissible. Plaintiff's employer (Syngenta) represented its intent to remove the case to federal

court. Trial was continued. *See* App. 290-93 (June 20, 2011 Tr. 1, 16-17, 21-23).

September 20, 2011 ruling. In advance of trial to begin October 31, 2011, Judge Stovall ruled on Plaintiffs' request to revive the informed consent claim based upon defense expert Dr. Cuenoud's deposition testimony:

> The Court reconsiders its June 15, 2010, ruling and enters the following ruling modifying the same only as follows: The Plaintiffs shall be allowed to present evidence relating to Dr. Cuenoud's awareness of the Plaintiff's increased mortality risk and apprising the Plaintiff of the same.

App. 294 (Ruling).

Contrary to the implication by Plaintiffs, Judge Stovall's ruling was left unchanged by Judge Huppert for the July 2014 trial.[2] *See* App. 640 (Post-Trial Ruling). However, as explained by Judge Huppert, Plaintiffs failed to offer the evidence in their case-in-chief as allowed by the above ruling. *Id.*

October 31, 2011 trial date. At the trial commencing October 31, 2011, Plaintiffs' former attorney represented during jury selection that Dr.

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[2] Even if Judge Huppert had modified Judge Stovall's ruling, "Iowa adheres to the general rule that a district court judge may review and change a prior interlocutory ruling of another district judge in the same case." *Hoefer v. Wisc. Edu. Assoc,* 470 N.W. 2d 336, 339 (Iowa 1991).

Khanna had lied. Judge Stovall granted a mistrial. *See* App. 332-34 (April 17, 2013 Order, explaining same).

March 2013. In advance of trial to commence April 15, 2013, Judge Huppert did not disturb Judge Stovall's rulings. *See* App. 331 (April 9, 2013 Order ¶4).

April 15, 2013 trial date. During jury selection at the trial commencing April 15, 2013, Judged Huppert granted another mistrial when Plaintiffs' former counsel violated a limine order. App. 332-34 (April 17, 2013 Order).

July 2, 2014 hearing. The status of Plaintiffs' informed consent claim was again discussed before trial in 2014. App. 341-44 (Tr. 34:9-37:18). Plaintiffs suggested that Judge Stovall's ruling, that allowed Dr. Cuenoud's testimony, reopened "a form of informed consent." App. 342-43 (Tr. 35:24-36:16).

Plaintiffs only partially quote Defendants' arguments that informed consent was "out of the case," omitting the position that Plaintiffs had no expert support for their claim. Application at 10. In responding to Plaintiffs' suggestion that Dr. Cuenoud reinstated the informed consent claim, defense counsel argued:

> Your Honor, that is our expert, not an expert to be called in plaintiffs' case-in-chief. Plaintiffs didn't cross-designate or in

> any way indicate a reliance on our expert opinions, so we believe informed consent is out of the case.

App. 343 (Tr. 36:15-23). In response, Plaintiffs did not ask for leave to use Dr. Cuenoud in their case, by deposition or otherwise.

Judge Huppert focused on the status of the pleadings:

> . . . There was an informed consent claim that was the subject of a summary judgment motion which was granted. Now, ordinarily that would tell me everything I need to know about the viability of the informed consent claim. Has there been any effort to re-plead another informed consent claim since Judge Rosenberg's ruling?
>
> Plaintiffs' counsel: Not to my knowledge.

App. 344 (Tr. 37:7-15). Plaintiffs did not, at this time, inform the court of an intent or desire to re-plead their informed consent claim.

July 7, 2014—first day of trial. On the first day of trial, Judge Huppert clarified his ruling on informed consent:

> Now, I think I am pretty well-versed on where the informed consent claim stands or doesn't stand based on the pleadings, . . .
>
> . . . just so it's perfectly clear, there is no issue regarding the informed consent claim based upon prior rulings.
>
> So is that helpful or clarify where the record is at this point? Mr. Morgan, any questions in that regard?

App. 351, 353 (Tr. 80:20-22; 85:9-13). Plaintiffs offered no further argument and clarified that "We're not going into informed consent." App. 353-54 (Tr. 89:12-13; 85:14-92:24).

July 16, 2014-- eighth day of trial. After Plaintiffs had rested on July 15th, and before the testimony of defense expert Dr. Cuenoud, Plaintiffs revisited Judge Stovall's ruling, its meaning, and the scope of the testimony they could elicit from Dr. Cuenoud. App. 449-51 (Tr. 1043:15-1054:22).

Judge Huppert conveyed the quandary created by Plaintiffs' failure to present the issue of informed consent more fully in their case-in-chief and timely re-assert an attempt to put informed consent back into the case:

> . . . The parties and the Court have taken this case up to this point we're now in the waning days of trial, after a week and a half of trial, operating under the assumption that informed consent was out of the case. I know that there have been some issues back and forth on this topic, *but in general, either in terms of offers of proof or other proffers of evidence, nothing has been presented that would suggest that informed consent was going to be a theory of liability for the jury to resolve or at least to preserve for further review.* I'm not going to reopen that issue mid-trial to allow for a discussion of whether or not Dr. Khanna should be found liable or negligent for not discussing any increased risks from the surgery that the doctor may be testifying about today.

App. 450 (Tr. 1049:9-22) (emphasis added).

July 18, 2014—ninth day of trial. Near the conclusion of trial, Plaintiffs indicated their intent to call witnesses to rebut the defense evidence that Plaintiff suffered from a "worn out" heart. App. 469-70 (Tr. 1203:1-1205:24). Judge Huppert denied rebuttal as there was nothing new to rebut and the defense evidence was properly disclosed in pretrial expert

opinions. App. 471 (Tr. 1210:3-1212:8); *see also* App 470-71 (Tr. 1206:2-1209:3). In fact, because the defense theory was not new, Plaintiffs experts actually discussed the condition of the heart in Plaintiffs' case-in-chief.

July 22, 2014—jury verdict. On July 22nd, the jury returned its verdict, finding that Dr. Khanna was not negligent and never reaching the causation question. App. 564 (Verdict).

Summary of relevant expert testimony.

As the Court of Appeals found, none of Plaintiffs' experts had opinions to support an informed consent claim concerning undisclosed material risks of the Bentall procedure. *See* Decision at 9;[3] App. 626-29 (Defendants' Resistance to Post-Trial motion, Exh. 1, expert opinions). Instead, Plaintiffs' experts supported that there was no reason—other than Dr. Khanna's alleged negligence—for Plaintiff to suffer a complication. In other words, they did not opine that Plaintiff suffered a complication from an undisclosed risk.[4] They testified that the alleged breaches of the standard of care caused Plaintiff's complication—not his preexisting heart condition.[5]

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[3] The Court of Appeals' decision is referred as "Decision."

[4] *See* App. 386-89 (Tr. 350:9-356:9, 369:7-375:25, Dr. Johnson); App. 413-14 (Tr. 572:21-577:22, Dr. Peetz).

[5] *See* App. 379-80 (Tr. 304:4-307:23, Dr. Johnson); App. 407-08, 412 (Tr. 518:25-519:18, 568:8-570:23, Dr. Peetz).

Defense experts disagreed, including Dr. Henri Cuenoud who explained that Plaintiff's difficulty during the surgery was because "his heart was not a normal heart, was a heart that was tired."[6]

I. Further review is not warranted on Plaintiffs' informed consent claim relating to material risks of surgery.

A. Standard of Review.

Plaintiffs articulate this issue as relating to a summary judgment ruling. But that is not the ruling that was affirmed by the Court of Appeals. The Court of Appeals found that this claim was *not* dismissed in the summary judgment ruling. Decision at 18.

As explained above, Judge Rosenberg's summary judgment ruling only expressly addressed the lack of experience informed consent allegation. As to the material risk informed consent allegation, the Court of Appeals did not view the summary judgment ruling as addressing, much less dismissing, it. Instead, the Court of Appeals affirmed the district court's refusal to allow the claim on procedural grounds:

> . . . [T]hough the claim survived summary judgment, the plaintiffs failed to pursue it at trial. They did not cross-designate defense expert Dr. Cuenoud or question their own experts about material risk and a doctor's duty to inform, they never re-pled their claim or asked the court for clarification of when or how this informed-consent claim ceased to exist, and they never made an offer of proof regarding what Andersen

[6] App. 454-55 (Tr. 1072:16-1075:17).

> knew or had been told about the condition of his heart pre-surgery during their case-in-chief. . . . We find no abuse of discretion in the court's refusal to expand the issues at trial after the close of the plaintiff's case.

Decision at 18.

On further review, Plaintiffs suggest the standard of review is that applicable to a grant of summary judgment. Application at 8. Plaintiffs fail to explain why and Plaintiffs' application is devoted almost exclusively to procedural issues within the trial court's discretion.

Further, Plaintiffs raised this issue in their post-trial motion as an evidentiary issue subject to the court's discretion. *See* App. 638 (Post-Trial Ruling); *Hansen v. Central Iowa Hosp. Corp*., 686 N.W.2d 476, 480 (Iowa 2004) ("If the motion [for new trial] and the ruling are based on a discretionary ground, we review the ruling for abuse of discretion.") (citation omitted); *Graber v. City of Anke*ny, 616 N.W.2d 633, 638 (Iowa 2000) (admissibility of evidence is reviewed for an abuse of discretion).

The Court of Appeals correctly reviewed this issue for abuse of discretion. Decision at 18.

B. The Court of Appeals correctly affirmed the district court.

The Court of Appeals was correct in finding Plaintiffs failed to pursue this informed consent claim at trial and were not entitled to relief. *Id.*

Plaintiffs suggest that they were not allowed to pursue this claim. This is incorrect.

First, Judge Huppert made it clear that he viewed the status of the pleadings as a procedural bar for this claim. App. 344 (Tr. 37:7-15). He nearly invited Plaintiffs to do something to correct this deficiency: "Has there been any effort to re-plead . . .? *Id.* In response, Plaintiffs made no attempt to reassert or replead the claim at that time. The trial transcript reflects that Judge Huppert was exceedingly patient with Plaintiffs' repeated re-urging of theories and attempts to introduce evidence. Yet, when the basis for Judge Huppert's ruling to exclude informed consent from the case was made clear, Plaintiffs did not attempt to cure the pleading deficiency that he identified. *See Wolbers v. The Finley Hospital*, 673 N.W.2d 728, 732 (Iowa 2004) ("Proposed instructions must be supported by the pleadings" and evidence).

Second, as Judge Huppert himself observed in his post-trial ruling, Plaintiffs failed to take advantage of a ruling that was in their favor on related subject matter. In the post-trial ruling, Judge Huppert restated his incorporation of Judge Stovall's ruling on the evidence that:

> The Plaintiffs shall be allowed to present evidence relating to Dr. Cuenod [sic] [or Dr. Khanna's][7] awareness of the Plaintiffs' increased mortality risk and apprising the Plaintiff of the same.

App. 640 (Post-Trial Ruling). Judge Huppert continued:

> During plaintiffs' case-in-chief, neither the plaintiffs nor Dr. Khanna were asked regarding any conversation covered by Judge Stovall's ruling on the motion to reconsider. It was not until Dr. Cuenod [sic], as well as Dr. Robert Love and Dr. Frazier Eales testified in defendants' case-in-chief that the plaintiffs first sought the opportunity to present such evidence in rebuttal, through the testimony of the plaintiffs and another of plaintiffs' experts (Dr. Aroesty).
>
> . . . .
>
> . . . Counsel offers no explanation as to why efforts were not made in plaintiffs' case-in-chief to develop the issues afforded them as a result of Judge Stovall's ruling on their motion to reconsider. . . .

App. 640, 642 (*Id.* at 3, 5).

It does not matter whether Judge Stovall meant Dr. Cuenoud or Dr. Khanna. Plaintiffs failed to attempt to introduce the evidence at issue or make an offer of proof as to *either* physician in their case-in-chief.

Third, *regardless* of who interpreted which order correctly or incorrectly, at no time did Judge Huppert ever restrict or limit Plaintiffs' ability to make offers of proof. The only offers of proof on the material risk allegation (assuming they were otherwise sufficient) were in the defense

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[7] Judge Huppert viewed Judge Stovall's ruling as mistakenly referring to Dr. Cuenoud, instead of Dr. Khanna. App. 640 (Post-Trial Ruling at 3, n. 1).

case—not Plaintiffs' case-in-chief. *See* App. 457, 507-09 (Tr. 1121:16-1122:17, Supp. Tr. 87:9-89:22).[8]

Plaintiffs made no attempt to introduce defense expert evidence (i.e. Dr. Cuenoud's deposition), or make an offer of proof of that deposition, in their case-in-chief. (Nor did Plaintiffs ever attempt to designate or cross-designate the defense experts in their Iowa Code §668.11 expert designations.[9])

Plaintiffs should have made offers of proof fully sufficient for an affirmative claim of informed consent in their case-in-chief to provide Judge Huppert with an adequate opportunity to re-evaluate that claim. In fact, during the defense case, Judge Huppert expressed that Plaintiffs' failure to present their offers and arguments in their case-in-chief created an insurmountable problem in his ability to reconsider the claim during the defense case. *See* App. 450 (Tr. 1049:9-1050:11). It is clear that Judge Huppert –as the trial judge making the determination as to the admissibility of evidence and submission of claims—did not believe Plaintiffs had

[8] The offer of proof Plaintiffs did make in their case-in-chief on informed consent only pertained to the lack of experience allegation, not to the material risk allegation. *See* App. 434 (Tr. 895:12-897:9).

[9] *See* App. 320-23 (Defendants Third Motion in Limine Exh. 11, expert designation).

provided sufficient record in their case-in-chief for him to consider the informed consent claim. *See DeVoss v. State*, 648 N.W.2d 56, 60 (Iowa 2002) ("'[t]rial courts must be afforded the opportunity to avoid . . . error in judicial proceedings.'"). Plaintiffs essentially had *no* evidence in their case-in-chief, by offer of proof or otherwise, to support the material risk allegation.

The Court of Appeals --like the district court--was at a loss to understand how Plaintiffs expected relief in light of Plaintiffs' failure to pursue the claim. There is no reason to further review this issue. Plaintiffs have had enough review.

Plaintiffs suggest they should not bear all the responsibility for "mutual" mistakes about various rulings. Defendants do not agree there were mutual mistakes. Instead, ambiguous orders were subject to different interpretations, as guided by the procedural facts of the case at the time. For example, when Defendants argued strenuously that informed consent was out-of-the case, it was not just because of prior orders but also because Plaintiffs had no timely designated expert to support the claim. *See* App. 343 (Tr. 36:12-23).

In addition, it is not at all clear that Plaintiffs made a "mistake" as opposed to a deliberate choice to pursue in their case-in-chief the theory

supported by their own experts (which was *not* an informed consent theory).[10]

Even assuming there was a "mistake" as to Judge Stovall's ruling and Dr. Huppert's rulings were as Plaintiffs argue, Plaintiffs still had the obligation to adequately preserve the material risk claim as a theory of recovery. The district court and Court of Appeals were correct in finding that Plaintiffs failed to do so.

Plaintiffs have also failed to identify another case in conflict with the Court of Appeals' Decision. Plaintiffs only cite general law describing informed consent claims and suggest that the refusal to allow the claim in this case conflicts with that general law. Application at 10-11. There is no conflict and the authority cited does not address the procedural basis for the Court of Appeals' Decision.

II. Further review is not warranted on Plaintiffs' informed consent claim relating to lack of experience.

As an initial matter, there was ample evidence contrary to Plaintiffs' theory about Dr. Khanna's qualifications.[11] And, while Plaintiffs suggest

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[10] Plaintiffs' closing argument sets forth their theory that the material risk of a super bad or worn out heart was not true:

> [The defense position is that] It's his heart's fault. And there's no truth in it…

App. 519-20 (Supp. Tr. 135:21-136:17).

there was a misrepresentation about Dr. Khanna's experience, Plaintiffs refer to a broad and general statement from Dr. Chawla—*not* Dr. Khanna. Application at 4, 13.

A. Regardless of whether a physician has a duty to disclose his qualifications, Plaintiffs cannot show prejudice and are not entitled to a new trial.

Consistent with Judge Rosenberg's ruling that evidence of Dr. Khanna's experience was admissible on the negligence claim, Plaintiffs were allowed to introduce evidence of their theory that Dr. Khanna was *not* sufficiently qualified or experienced in the Bentall surgery. In fact, the record was "replete with references to [Dr. Khanna's] lack of training and experience." App. 644-45 (Post-Trial Ruling).

Plaintiffs' experts testified that Dr. Khanna's lack of experience led to his negligence in performing the procedure. *See* App. 394 (Tr. 405:1-406:7, Dr. Johnson explaining criticism as related to inexperience); App. 396-97 (Tr. 414:1-415:22, Dr. Johnson explaining role of judgment, experience, and training in surgery); App. 409 (Tr. 543:3-546:7, Dr. Peetz explaining concern with "experience of the surgeon and the way this procedure was done"); App. 411 (Tr. 560:11-561:7, Dr. Peetz, linking artery reattachment

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[11] App. 466 (Tr. 1169:25-1171:25, Dr. Love); App. 504-05 (Supp. Tr. 67:24-68:17, Dr. Eales).

to "a reflection of being unqualified to do this operation"); App. 419 (Tr. 602:18-603:2, Dr. Peetz, linking reattachment issue to "experience factor").

Plaintiffs' arguments also linked Dr. Khanna's experience with the alleged surgical negligence. *See* App. 370 (Tr. 211:18-23, Plaintiff's opening, "I'm going to go through how a novice that's never done it before can botch the surgery," objection to argument sustained); App. 514-18, 521 (Plaintiffs' closing, Supp. Tr. 127:16-131:24, 139:7-10).

Thus, the "risk" under Plaintiffs' theory was that Dr. Khanna's lack of experience would lead to surgical negligence. Yet, whether or not Dr. Khanna committed any negligent act or omission in connection to the surgery was considered by the jury—and rejected.

The very risk allegedly not disclosed did not materialize and any risk created by Dr. Khanna's alleged lack of experience did not occur. Plaintiffs cannot establish they were prejudiced by the failure to submit the claim. *See Canterbury v. Spence*, 464 F.2d 772, 790 (D.D.C. 1972) ("An unrevealed risk that should have been made known must materialize, for otherwise the omission, however unpardonable, is legally without consequence. Occurrence of the risk must be harmful to the patient, for negligence unrelated to injury is nonactionable."); *K.A.C. v. Benson*, 527 N.W.2d 553, 561-62 (Minn. 1995) (claim failed because nondisclosed risk did not

materialize); *Howard v. University of Medicine and Dentistry*, 800 A.2d 537, 549 (NJ 2002) (plaintiff must prove "'undisclosed risk occurred and harmed the plaintiff'") (emphasis removed); *see also Pauscher v. Iowa Methodist Med Ctr*, 408 N.W.2d 355, 362 (Iowa 1987) (citing *Canterbury* on other issues).

Plaintiffs were not prejudiced and are not entitled to relief on this issue. Further review is not warranted.

B. The Court of Appeals correctly affirmed the district court's summary judgment ruling.

To establish an informed consent claim, a plaintiff must prove "the existence of material information concerning the (name of procedure or treatment)." Iowa Uniform Jury Instruction 1600.10; *see also Kennis v. Mercy Hosp. Med. Center*, 491 N.W.2d 161, 166 (Iowa 1992). Plaintiffs' position would impose a duty upon physicians to disclose personal information. However, this Court has spoken on the scope of a physician's duty to disclose and the Court of Appeals' Decision is consistent with existing Iowa law.

In *Pauscher v. Iowa Methodist Med Ctr*, 408 N.W.2d 355, 360 (Iowa 1987), the Court looked to Iowa Code §147.137 as "the most definitive statement of public policy on [the] issue" of what information should be disclosed during the informed consent process. Iowa Code §147.137 sets

forth what written information would create a presumption that informed consent was obtained. It does *not* require that a physician disclose his or her personal information, such as experience in a particular procedure. *See also Bray v. Hill*, 517 N.W.2d 223, 226 (Iowa Ct. App. 1994) ("A physician has a duty to disclose only those material risks involved in the medical procedure.").

Section 147.137(1) provides:

> A consent in writing . . . which meets the requirements of this section shall create a presumption that informed consent was given . . . :
>
> 1. Sets forth in general terms the nature and purpose of the procedure or procedures, together with the known risks, if any, of death, brain damage, quadriplegia, paraplegia, the loss or loss of function of any organ or limb, or disfiguring scars associated with such procedure or procedures, with the probability of each such risk if reasonably determinable.
>
> . . .

Even though *Pauscher* did not involve a written consent, the Court still found that "in our view, [§147.137] is a plain statement of the requirements of the patient rule." 408 N.W.2d at 361. The statute does *not* require disclosure of physician-specific information as Plaintiffs' claim in this case would require. Instead, risks of the "procedure" are listed in the statute.

For their part, Plaintiffs emphasize "objective, peer-reviewed studies" that post-date the surgery in this case and two non-Iowa cases. However, other courts have disagreed with the expansion of informed consent to include physician personal information. "The traditional view is that material facts are those that relate to the proposed treatment." *Whiteside v. Lukson*, 947 P.2d. 1263, 1265 (Wash. Ct. App. 1997) (applying the objective reasonable patient standard). "[W]e conclude that a surgeon's lack of experience in performing a particular surgical procedure is not a material fact for purposes of finding liability predicated on failure to secure an informed consent." *Id.*

See also Duttry v. Patterson, 771 A.2d 1255, 1257-59, 1259 n. 2 (Penn. 2001) (declining to adopt expansive view of informed consent under patient rule, holding that information personal to the physician, including surgery experience, was irrelevant); *Ditto v. McCurdy*, 947 P.2d 952, 959 (Ha. 1997) (holding surgeon did "not have an affirmative duty to inform [patient] of his qualifications or the lack thereof"); *Foard v. Jarman*, 387 S.E. 2d 162, 167 (N.C. 1990) ("statute imposes no affirmative duty on the health care provider to discuss his or her experience"); *Abram v. Children's Hospital of Buffalo*, 151 A.D.2d 972 (Sup. Ct. N.Y. 1989) (qualification of personnel need not be disclosed under New York statute and common law);

see also Wlosinski v. Cohn, 713 N.W.2d 16, 21 (Mich. Ct. App. 2006) (holding surgeon did not have duty to disclose statistical history of procedure); *Howard,* 800 A.2d at 82 (N.J. 2002) ("Our case law never has held that a doctor has a duty to detail his background and experience as part of the required informed consent disclosure; nor are we called on to decide that question here.").

There are problems inherent in an expansion of the informed consent theory. Numerical information such as procedure experience and complication rates present complex issues. Indeed a case upon which Plaintiffs rely for this expanded duty to disclose has been criticized for its failure to consider the implications of its holdings. In *Johnson v. Kokemoor*, 545 N.W.2d 495, 498 (Wisc. 1996), the court held that certain evidence about a surgeon's experience and morbidity and mortality rates was admissible for an informed consent claim.

Johnson "did not address how such statistics are to be gathered or offer guidance on how they would be used, . . . Countless questions have been left in the wake of *Johnson v. Kokemoor.* Should the physicians provide statistics concerning all similar surgeries he or she has performed, or should the physician restrict the analysis to his or her experience with patients of similar age, health or attendant medical complications? . . .".

Jennifer Wolfberg, Comment, *Two Kinds of Statistics, The Kind You Look Up and the Kind You Make Up: A Critical Analysis of Comparative Provider Statistics and the Doctrine of Informed Consent,* 29 Pepp. L. Rev. 585, 596 (2002).[12]

Even if physician experience and complication statistics were maintained and disclosed, it is not at all certain the information would be in a form suitable for patient decision-making. There would be no standardization between physicians which would undermine the value of the information provided to patients.

Another issue created by an expanded duty to disclose physician specific information is that such information is often maintained in privileged peer review records. In this case, Dr. Khanna's case log that documented his surgical experience was inadmissible under Iowa Code §147.135(2). *See, e.g.,* App. 326 (Order, April 8, 2013, denying Plaintiffs' motion to reconsider admissibility of log); *see also* Iowa Code §135.40-.42 (providing that hospital information used to reduce morbidity and mortality

[12] *See also Arato v. Avedon*, 858 P.2d 598, 607 (Calif. 1993) ("statistical morbidity values . . . are inherently unreliable and offer little assurance regarding the fate of the individual patient"; declining to endorse mandatory disclosure of life expectancy probabilities).

"shall not be used or offered or received in evidence in any legal proceedings").

The Court of Appeals Decision on this claim does not warrant further review. It is consistent with this Court's decision in *Pauscher*. Further, given Plaintiffs are not entitled to a new trial on the claim regardless of the Court of Appeals' Decision, further review should be denied.

III. Further review is not warranted on the exclusion of rebuttal evidence.

Plaintiffs' argument about rebuttal evidence is addressed to the material risk informed consent claim and causation.[13] For all the reasons set forth in Part I above, Plaintiffs' rebuttal argument also fails. Given Plaintiffs failed to pursue the informed consent claim, including in offers of proof, Plaintiffs were not entitled to rebuttal evidence on that claim. Further, the jury never reached causation and Plaintiffs were not prejudiced by the exclusion of rebuttal evidence on causation. Decision at 22-23.

The evidence was also not proper rebuttal.

Plaintiffs' sought to introduce evidence to rebut the "super bad heart" testimony. Yet Plaintiffs had ample testimony rebutting that defense position

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[13] *See* Plaintiffs' appeal brief at 34 (rebuttal testimony would help "disprove Defendants' theory that Mr. Andersen's super bad heart, and not Dr. Khanna's negligence, was to blame.")

in their case in chief.[14] The super bad heart theory was not "new." *See* App. 641-42 (Post-Trial Ruling, "The condition of Mr. Andersen's heart . . . as described by [defense experts] was by no means a "new matter" or a surprise;" noting Plaintiffs relied on the testimony in June 2011); *Carolan v. Hill*, 553 N.W.2d 882, 889 (Iowa 1996) (rebuttal evidence is to address new matters). Further such rebuttal evidence would be cumulative and not proper rebuttal. *Id.*

Plaintiffs also complain that defense expert Dr. Eales couched his testimony about the condition of Plaintiffs' heart in terms of informed consent. This, however, was one isolated and unsolicited comment from an expert in the context of causation testimony. There was no abuse of discretion in ruling that it could not serve as a springboard to re-introduce informed consent into the case at this point in the trial given the procedural history described above.

Conclusion

For the reasons set forth above, Defendants request that Plaintiffs' application for further review be denied in its entirety.

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[14] *See, e.g.,* Plaintiffs' Appeal Brief at 10-11 (summarizing evidence).

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