ORAL ARGUMENT – 04/23/03
02-0405
BINUR V. JACOBO

COOPER: There are really two issues in this case. The first is the ability of a party in Texas to combine a no evidence and traditional motion for summary judgment together. The second concerns the scope and extent and duty with respect to informed consent.

PHILLIPS: If we agreed with you on the first would the proper remedy not be a remand to the CA?

COOPER: First off we believe that we satisfied our burden with respect to the traditional motion. Since it has not been considered by the...

PHILLIPS: Well if you did that that's not really your main argument.

COOPER: Correct. But on that point alone, yes, it would be to send it back to the CA for consideration with respect to the no evidence motion for summary judgment. We believe that Texas rules of civil procedure does allow the combination. Because I think it is pretty much without dispute, the combination is not predicted by the rules. The combination of these two motions is consistent we believe with the purpose and the spirit of the rules. Also with this court's notes and comments which accompany the rules, we believe it's consistent with that. So far 13 of the 14 CA in this state have allowed and have reviewed motions for summary judgments that had both traditional and no evidence points without any problem.

ENOCH: It seems to me that the points you make is valid, that they ought to be able to bring both motions together. But if it is a motion that you take the burden to establish or disestablish one of the elements of the plaintiff's claim, the respondent to that doesn't have to file a response and they can argue that you didn't get there on what you _____. But if you say they can't or they don't have any evidence of any particular element of their claim, they have a duty to respond otherwise they lose. So it may be that the CA is incorrect to be so strict on how this is done. But shouldn't there still be some requirement on the movant to make sure that their motion is clear to the respondent that they are going to have a duty to respond? In other words they can't say, well we've got all this evidence that disproves their elements, and oh by the way they don't have any evidence that proves it. And then you go back to the big print and they therefore lose on a no evidence that they really didn't have any notice that they had a duty to respond to.

COOPER: There's no doubt in my mind that the nonmovant should have noticed. Here though in the motion for summary judgment that was filed by Dr. Binur, there were separate sections. There was a traditional section where the evidence was discussed. And then there was a separate section talking about a motion for summary judgment under 166 (a)(I). So clearly in this case the nonmovant was put on notice and that was §4 of the motion for summary judgment where they talked about the standard for review of a motion for summary judgment under 166(a)(I). And

they talked about that there was no evidence. Again, Dr. Binur is entitled to summary judgment under 166(a)(I) as to all of the plaintiff's claims because there's no evidence to show that informed consent was not given. Also there's no evidence to show proximate causation. So I agree in concept that there should be notice in this case. There clearly was notice because it was contained in a separate section.

We believe it should have been considered. We also believe that again that the plaintiff in this case did fail to respond. There was no response filed with respect to proximate causation which was raised. And for this reason we believe that the CA erred in failing to affirm the judgment of the TC in light of the fact that no response was filed as required by the comments and as required by this court in McConnell(?)and as required by rule 166(a) that you've got to file a response. You've got to set out what are the fact issues that would defeat our motion for summary judgment. And so we believe that it's fatal. There was no response filed and that the CA erred in failing to consider and then on remand should go ahead and affirm the summary judgment that was granted by the TC.

The second point is informed consent. And we believe that the CA in this case misconstrued Texas law regarding informed consent. And what they have done is they have attempted to miscast and recast what is allegations of misdiagnosis or unnecessary surgery as lack of informed consent.

PHILLIPS: Do you agree with everything in dissenting Justices opinion?

COOPER: I believe we do. The dissent said, as presented the evidence in this case really is about the negligent diagnosis and recommended course of treatment not informed consent. In Texas as this court is well aware under 6.02 of art. 4590i, the legislature has very narrowly crafted what is allowable in an informed consent case in Texas. And the legislature has said back in 1977 that the only theory with respect to informed consent is the failure of a physician to disclose the risks and hazards of a proposed procedure for surgery. That is it. And what the majority in the CA has done in this case has said, well the plaintiff has said that the surgery was unnecessary and therefore there should have been disclosure about the fact that the surgery was unnecessary and therefore there was not informed consent.

And you think about it. If that is the law, then the effect the court is adopting a strict liability for physicians and for surgeons with respect to perhaps misdiagnosis or unnecessary surgery because clearly if the surgery wasn't necessary nobody in their right mind would say, well if you told me it was unnecessary I would have gone ahead and consent to it. They would have said, of course not, I would never have consented. And yet, the standard with respect to either misdiagnosis or unnecessary surgery is whether or not the physician followed the standard of care. On many occasions a doctor will not know what is the situation until for example he's gone in and done exploratory surgery. And the question is, did the doctor follow the standard of care in making the decision to go forward with the procedure? And if it turns out that the procedure was unnecessary because the condition that he thought existed did not exist, then all the plaintiff would have to do is say, well it was unnecessary surgery. You never told me it was unnecessary. If you had told me it was unnecessary I never would have consented. Therefore, we don't have informed

consent. Therefore, doctor, you're liable. And we're entitled to recover.

SCHNEIDER: Can you imagine any circumstance under which a person, a doctor could puff to the extent that you would not come under the informed consent statute, such as what your real need for this type of surgery, what can it do for you? Not so much need, but what it can do for you. Almost misrepresentation.

COOPER: A doctor can do that. And there are cases which say that the doctor does that. As far as misrepresenting the need for surgery, that that is actionable. That is actionable as misrepresentation or unnecessary surgery but it's not actionable under the theory of informed consent. And again the question would be whether or not the doctor followed the standard of care in recommending the surgery for this particular condition or ailment. And again there's been at least four CA's decisions that we have cited in our brief. I think the best is Patton v. St. Joseph's Hospital, Ft. Worth, where the Ft. Worth court said, and it involved unnecessary laparoscopic surgery or allegations of unnecessary laparoscopic surgery. And they said under Patton's argument she would want this court to hold a doctor liable under an informed consent theory whenever a patient is misdiagnosed and an unnecessary surgery is performed. The medical act 4590i simply doesn't provide that. There have been other courts, the Houston 1st CA in Neeble(?) V. Sepulveda ; the Houston 14th CA in Marling v. Maillard, held the same thing; the Houston 14th CA earlier in Brown v. Armstrong also held that when you're talking about unnecessary surgery or misdiagnosis it is not informed consent.

JEFFERSON: In Patterson V. Shield how does that impact this case? Is it possible to say that under that decision there is room for a claim just like this?

COOPER: Patterson v. Shield again is governed by §6.02. And what Patterson v. Shield does it talks about first off if you're in List A, which are those procedures where the panel has prescribed informed consent. And there's Panel b where no informed consent is necessary. Then you have those procedures where there's no listing under Panel A or Panel B. And what Patterson v. Shield says is under 4590i, under 6.02, if you're not under List A, if you're not under List B, then the standard is for informed consent is what are the risks that would be reasonably disclosed by a physician that would reasonably influence a person in withholding or granting consent? But it's those two the risk inherent to the procedure itself. Again because it tracks what is contained in art. 6.02 of art. 4590i.

ENOCH: On the issue of consent. Let's assume that it's exploratory surgery. And let's assume that we don't know, the doctor doesn't know, the patient doesn't know if they will find anything, but the doctor thinks that they ought to go look for it. Suppose the doctor fails to tell the patient that we may not find anything. Suppose the doctor fails to inform the patient that I think based on what I see, and it's my recommendation to go forward with surgery, because this is really important to do. But in the medical community it is known that the exploratory surgery doesn't necessarily find it. It's just one of the avenues you could use. And you go in and you don't find it. Does the patient have a claim against the doctor for having failed to fully inform because all the doctor said is, this is necessary in order to do an appropriate looking at this, but failed to inform them that in 50% of the cases we don't find anything, but that's just the way it is. Can he rely on the fact

that proper medical standards would say yes, you should have performed the procedure even though the patient was not fully informed about it may not be necessary?

COOPER: First, I don't think that would fall within informed consent. Because informed consent is the risk inherent to the procedure. The doctor has a duty under 6.02 to inform the patient of the risk that are inherent to the procedure. That is something that bad could happen from doing this procedure. Not whether or not the procedure should or should not be performed to begin with. I think those types of cases under Malliard, under Brown, under Patton would be under a misrepresentation. It would be under unnecessary surgery, but would not be under informed consent. No Texas court has recognized that type of case as being under informed consent because of the narrow construct that has been given to us by our legislature.

WAINWRIGHT: Let's go back to your statement that to take the position of the CA as to convert every case of this sort and to a strict liability case against doctors. It may be that this type of case where the allegation of the plaintiff is that there was an overstatement of the need for the double simple mastectomy is an informed consent case as the plaintiff has alleged may be that that's actionable under 6.02 and it may not be. I'm not sure yet. But the purpose of informed consent is to make sure that the patient has accurate information within reason to make a decision to have the procedure or not. Correct? Given that purpose which you've stated already this morning why is it not possible at least conceptually that overstating the need for a procedure would mean that the consent given was not informed consent.

COOPER: Informed consent is to state accurately the risk inherent for the procedure. Not necessarily the need for the procedure. Because again I think misstating the need for the procedure again goes back to the standard of care. And it may be about the doctor overstating the need for the procedure may not have followed the standard of care. If there was only a 3% risk of whatever condition happened and the doctor says, J. Wainwrights you really need to have this because of your condition you could die. The question is, did the doctor follow the standard of care in stating the need for the procedure? And if he has overstated the fact that you only had a 3% risk of this condition, and he said, you know, you may die from it, then that may go to the standard of care as far as recommending and going forward with the surgery. But again it doesn't have to do with the risk inherent from the procedure because in order to connect the dots...

WAINWRIGHT: So your point is, a misrepresentation about the need for a procedure may be actionable, maybe not, but it's not actionable under 6.02?

COOPER: Correct. It may be actionable under the standard of care. You've got to connect the dots between the surgical procedure and a risk that results from the surgical procedure. We don't have that in your situation. We don't have that in this case.

* * * * * * * * * *

RESPONDENT

PHILLIPS: Why is this case presented to us only as an informed consent?

WALDNER: Because if you take all of the facts and all this paper and all the law that both sides have presented to the courts, everything that happened in the trial, every affidavit, all the testimony, all the depositions, and to still it down there is one thing that's accountable for what happened to Donna Jacobo. And that was her doctor told her "if you don't have this surgery it's a certainty that you will have cancer." The information that he gave her, which formulated the basis for obtaining her consent, is the heart of this case.

HECHT: How is that different than a misdiagnosis?

WALDNER: In this case there was no diagnosis.

HECHT: Isn't that a misdiagnosis?

WALDNER: I don't think they are the same thing. If you take the cases that have been presented by Dr. Binur to the court of having to do with performing surgery to remove a limp gland when it was actually an infection, performing surgery to remove an appendix when there was nothing wrong with the appendix, those are misdiagnosis cases. Where there's been a definitive diagnosis and based on that diagnosis a course of treatment has been followed. In this case there was no diagnosis. Donna Jacobo wasn't injured. She wasn't ill. She had no disease of any kind. So there's no diagnosis to then become a misdiagnosis in her case.

ENOCH: You've described everything that she knew before she had the surgery. Aren't you describing that she knew that she didn't have cancer before she had the surgery?

WALDNER: Yes, that she knew she didn't have cancer and had been told that she would get it.

ENOCH: And she had the surgery because she understood that in that doctor's medical judgment she had a chance of getting cancer or was going to get cancer. There are studies out there that say that there's a genetic link in certain types of breast cancer that if your mother had breast cancer the daughter will get breast cancer. Is that what this issue is about? She didn't have that genetic link or somehow the doctor made a misdiagnosis. Isn't the issue here that the doctor was saying she would get cancer but she was not one of those patients who would?

WALDNER: There are studies and there was medical evidence having to do with certain _____ traits that may increase your chance of developing cancer. That was in the evidence at the TC. What Donna was told, it's 100% for you. What the trial testimony showed it was less than 8% given the risk factor.

O'NEILL: But isn't there a diagnostic element to that predicting future possibilities or probabilities? It sounds to me like your definition of diagnosis has to be of existing condition and it can't be predicting the future of somebody's genetic previous position. It seems to me that what happens in the future has an element of diagnostic evaluation to it.

WALDNER: There may be an element involved in that the physician is talking to her about

a disease. But it's not a diagnosis because a diagnosis, and I set out in our brief that the definition of that term, you know the diagnosis has to do with the definitive medical opinion with regard to a condition that exist which will then formulate the basis for treatment. That's not what we're dealing with. All we're dealing with is a woman who had a lump in her breast and went to her doctor. She had two previous lumps in her breast which had been removed and were benign. And then when she was referred to Dr. Binur, and Dr. Binur sat down and talked to her about her cancer risks, he admitted that he did not take a full history from her that would be necessary to determine the extent to which she was at risk for developing cancer. He admitted that.

ENOCH: Wouldn't your proof against Dr. Binur be another medical expert who comes in and says, his evaluation of the patient and his determination to recommend surgery was beneath the standard of care in the medical community. Wouldn't that be the element of evidence in this case?

WALDNER: Yes. And we have it from Dr. Sharron Webb, who is a Prof. of Plastic and Reconstructive Surgery. That Dr. Binur even stated himself that would be beneath the standard of care to make that representation. He denies those are the words he spoke. But that's the summary judgment evidence that he spoke.

ENOCH: So isn't that a medical malpractice case? Isn't that the case that she had unnecessary surgery because the doctor did not do his proper medical evaluation?

WALDNER: If I could restate that a little bit. She had unnecessary surgery because the doctor gave her information that was wrong that formulated the basis for her to consent to the procedure.

ENOCH: But the information was based on improper medical evaluation.

WALDNER: Improper medical evaluation. It was based on whatever was going on in Dr. Binur's practice that day. To tell a patient that it's not a question of if you will acquire to cancer. It's a question of when you will develop the disease.

WAINWRIGHT: Let's assume that Dr. Schmidt provided the proper information ____ form of consent. Not Dr. Binur but Dr. Schmidt provided that. Let's also assume that you would agree that Dr. Schmidt was the surgeon for the mastectomy. Does your case go away?

WALDNER: If Dr. Schmidt gave her the proper information with regard to her cancer risk, yes it does.

WAINWRIGHT: If Dr. Binur was the surgeon for the mastectomy not just the assistant surgeon and he had the obligation to provide information even if the proper information came from Dr. Schmidt because it didn't come from Dr. Binur, Dr. Binur is liable here. Is that your position?

WALDNER: I think that if Donna Jacobo had been given the proper information, and the information extends and considering the Carr v. Cooley cases and the Wilson v. Scott cases that are

cited not just by the Waco court, but by Dr. Binur in his brief, that the requirement that that information be given is not just about the procedure that's going to be done, but it goes to options and it says that in the consent form and they pointed that out. What are your alternatives? One of your alternatives is not to have the surgery. And so the risk and hazard of not having the surgery is part of the informed consent process. Now if I understand your question correctly, that if your asking if Dr. Schmidt had given the proper information to Donna Jacobo, you have a slight increase in cancer risk because of your family history, that the increase in risk is about 8%, now under those circumstances I would recommend this surgery to you. If she had been given that information, then the whole case goes. She consented to the surgery with that information. But Donna Jacobo and every patient is entitled not just to information about the risk and hazards of the procedure but the risk and hazards of not having the procedure done. What risk am I at if I don't consent to this.

WAINWRIGHT: So your contention is that Dr. Schmidt did not give the plaintiff appropriate information about the need for the surgery, and Dr. Binur overstated the need for the procedure?

WALDNER: Yes. As a matter of fact, Dr. Schmidt in his trial testimony that I cited in our brief said, I'm not the one that pushed her into this surgery. I sent her to the plastic surgeon and that's where she discussed the consent with him.

WAINWRIGHT: That's a bit odd isn't it for the plastic surgeon talking about the need for a mastectomy, or not when the patient had a surgeon who talked to her about that?

WALDNER: Well Donna Jacobo's affidavit and her summary judgment proof and her trial testimony under deposition all said that when this was first presented to her by Dr. Schmidt, that she thought it was extreme. She didn't want to have anything to do with it. But when she was referred to Dr. Binur....

WAINWRIGHT: She thought it was extreme?

WALDNER: She thought it was extreme and didn't consent to it until she was referred to Dr. Binur. Now plastic and reconstructive surgeons do a lot of reconstructive surgery for women who have mastectomies. And as such in the medical literature you will find a lot of articles about the issue having to do with prophylactic mastectomies that are written by plastic surgeons in plastic surgery journals.

JEFFERSON: Are you saying that you could not have brought your claim as a negligence cause of action or a misdiagnosis under these facts?

WALDNER: Yes.

JEFFERSON: And it's because there was no diagnosis?

WALDNER: Yes. With regard to the negligence, the mastectomies as I've pointed out in the brief, mastectomies were done properly. There is no issue about the way in which the surgery was performed. The only issue that we present has to do with the information that was given to her, the

misinformation that she was given that formulated the basis for her consent.

ENOCH: The doctor denies having given her that information. Let's assume the doctor did give that information. Your point is that the doctor gave the information without a proper diagnosis. You say he didn't give a diagnosis, but I assume if he told her that she was going to get cancer, and therefore needed surgery, that was an improper diagnosis. He informed a medical judgment about the need for surgery based on a lack of information. And that would be an improper diagnosis wouldn't it?

WALDNER: No. I don't agree with that. Because the diagnosis had to do, for example on the consent form, it said dense fibrocystic breast. That's correct. Most women, Donna Jacobo's age have dense fibrocystic breast. And that's a correct diagnosis.

ENOCH: How is that different than a doctor who looks at the x-rays and says, you need surgery to repair that broken bone. And low and behold the bone is not broken. He has the information and how is that not a misdiagnosis? Is that a misdiagnosis or a lack of informed consent?

WALDNER: That's a misdiagnosis.

ENOCH: But isn't that based on an improper medical work-up? I talked to the patient. I determined that it was a broken bone. You've got to have surgery. What makes that a misdiagnosis case and your case a life informed consent?

WALDNER: Because under those circumstances, when a physician is looking at the x-ray, the physician is performing a clinical test, the physician is doing those things that are necessary to arrive at a diagnosis and then arrives at a diagnosis that's not accurate and based on a inaccurate diagnosis performs the procedure that that would be a misdiagnosis, therefore, mistreatment and a negligence case. In this case, there were no test done. There were no preoperative test done. The only thing that happened is a partial history was taken and partial information was obtained and then information was given to her. And the recommendation of Dr. Binur said, I recommend the entire procedure. That was his testimony.

ENOCH: So the difference is that the doctor in the broken bone case actually looked at the x-ray, but if the doctor had not looked at the x-ray but simply had questioned taken the personal history of the patient and determined that there was a broken bone that needed to be repaired, then that would be a life informed consent?

WALDNER: Yes.

O'NEILL: So in this case if he had looked at her x-rays and said, you do have cancer and it's advanced and we have to do this surgery, that would be a misdiagnosis?

WALDNER: Yes it would. The distinction is in this case is that Donna's mom had cancer. Her risk is determined by when did she have cancer? Pre or post-menopausal? If it was pre-

menopausal Donna's cancer' risk goes up. If it was unilateral it goes down. If it was bilateral it goes up. Her grandmother had breast cancer. If it was pre-menopausal, Donna's risk goes up. If it's post-menopausal it goes down. All of those questions were never asked. Had they been asked the result would have been that her cancer risk was low. Because her mom and her grandmother had post-menopausal breast cancer unilaterally. Only on one side. Had that information been obtained, then the information given by Dr. Binur hopefully would not have been - it's not a question of if you get cancer. It's a question of when. He did not give her the proper information because he did not take the proper information from her. He didn't ask her the proper questions. And based on his recommendation to her, based on his statement to her that she will develop breast cancer if she didn't have this surgery, that's what the summary judgment evidence shows as to why she consented to the procedure. And that's why it comes under informed consent as opposed to a negligent misdiagnosis or negligent treatment.

HECHT: The medical disclosure pamphlet has provided for the disclosure of some risks of some diseases. And if you do what they say you've discharged your duty under the statute. Are you aware of any of them that require the kind of disclosure that you're talking about in this case?

WALDNER: No. This surgery, the bilateral simple mastectomy which was done on Donna Jacobo is not a List A or List B procedure.

HECHT: I know. It looks to me like if you're saying this is just a common law duty and it looks to me like if you were making up List A you would sure put this on there if you were right about it. On other diseases: pancreatitis, that would have to be on the list; reconstruction of the _____, ear. You know there's lots of them in there. But it seems to me that if you were correct surely under some of them but maybe under all of them you would say you've got to tell the patient all of the information available and if you leave any out that's a nondisclosure. Why wouldn't that be one of the things you had to disclose?

WALDNER: As you pointed out in the Earl v. _____ decision when it was argued by the plaintiff in that case, even though it was a List A procedure in that case, the plaintiff argued there were additional risks that in fact happened that should have been disclosed. And as you wrote in that decision that would thwart the whole purpose of the Texas Medical Disclosure Act. That is to create a list of procedures, relatively _____ to the common procedures, and those risks that the panel feels should be disclosed, and when the patient signs that and the patient consents to surgery based on that disclosure then the physician at that point is immuned to informed consent liability.

HECHT: Why wouldn't the panel put the thing that you think needs to be disclosed on the list under some disease?

WALDNER: Well the panel reviews it once a year. And as the court knows that's a dynamic list. It's not stacked. I could certainly show the court that the whole concept of removing a woman's breast because she may develop cancer in the future is extremely controversial.

HECHT: There are some risks listed from that _____, and maybe that doesn't mean that's been added since or maybe it doesn't apply here. But in all of these diseases none of them say

one of the things you have to tell the patient is all of the relevant information regarding whether the patient may or may not happens is, may or may not need treatment, and the risk that there won't be any treatment. That's just not listed on the list anywhere and I wonder if you have an explanation why the panel wouldn't put that on List A somewhere?

WALDNER: I don't know why they chose not to put that on there. The effect is is that this case is relegated as a non-List case. It's relegated to a negligence standard that has to do with the disclosure of that information that would influence the reasonable person as to whether or not to consent to a procedure. And in this case had the disclosure to Donna Jacobo been look your cancer risk is high because of the presence of cancer in your family, but it's a little bit less than 8%. Now would the reasonable patient want to hear that before she consents to a procedure to remove a breast from her body as opposed to it's a life or death situation if you don't have this surgery you're going to get cancer.

HECHT: It's hard to imagine you wouldn't want to hear that. The only question is is that like an informed consent or is that a failure to provide by the standard of care. That's our concern. Not that you wouldn't want to hear it. Of course you would want to hear it.

WALDNER: I think as I've stated earlier that under the Carp and Wilson cases, those cases discuss - you know the duty of informed consent goes both ways. It has to do with informing the patient about the risk and hazards of the procedure itself. But also the risks and hazards as this consent form in this case mentions, the risks and hazards of not having the procedure. Because there are risks. Even if her cancer risk is less than 8% there is a risk she should know about in not having her breast preventively removed from her body.

O'NEILL: Is it too late for you to amend to allege a misdiagnosis case? Would that relate back to your original petition?

WALDNER: I'm not sure.

PHILLIPS: Would you address why Waco is right and everybody in the class is wrong?

WALDNER: To be quite honest with you with regard to the summary judgment issue, I'm impressed with Dr. Binur's briefing. When you look at all the holdings in all the CA's where some courts said well it should be delineated carefully. Some say it should be filed in two different motions. It seems it's all over the map. I'm convinced the practitioners in this state need some guidance with regard to what this court expects as to delineating between a traditional summary judgment motion and a no evidence one.

JEFFERSON: In that respect then what would you say about their argument that you failed to produce evidence of proximate cause?

WALDNER: That argument is inaccurate. In our response to motion for summary judgment on pages 1, 2, 4, 8, 9, 13 it's all argued that Donna Jacobo only have this surgery because of the information given to her by Dr. Binur. Additionally there were references made to her affidavit and

no one's questioned her affidavit. And in her affidavit she said unequivocally, I would never have had this surgery had I not been told that information about Dr. Binur because when Dr. Schmidt first suggested it without telling me I was going to die from cancer, I thought it was too extreme. And I chose not to consent at that point.

HECHT: Do you know whether the federal court's practice is to separate out different kinds of motions? File them separately? Flag them? They've had the same practice since 1986.

WALDNER: No. I don't.

* * * * * * * * * *

REBUTTAL

COOPER: A couple of points I would like to address. First is, the response to the summary judgment to either the no evidence or the traditional motion for summary judgment. First off, proximate causation is not addressed in the response. You read it and you won't see it mentioned. Two, we don't believe even if you look at her affidavit it doesn't go to the issue of informed consent for the reasons we've been talking about because it doesn't got to the risk inherent to the procedure. Three, this court in Peterson v. Shields said on page 931 that if it's not List A or List B the plaintiff must prove by expert testimony that the medical condition complained of is a risk inherent in the medical procedure performed. The expert should also testify to all of the facts concerning the risk which show that the knowledge of the risk could influence a reasonable person in making a decision to consent to the procedure. There is no expert testimony as required by Peterson v. Shield. They failed in their burden of coming forward with the evidence.

The second point concerns the informed consent. And that is, this was a prophylactic mastectomy. Everybody knew she didn't have breast cancer. Everybody knew that the cyst or the mast was fibroid. Therefore, when you're talking about a prophylactic procedure it necessarily involves the judgment of the physician as far as the future care, the future history of this person. It involves diagnostic skills as far as whether or not this person is a likely candidate in the future to get breast cancer. You're calling for the judgment and skill of the physician in making that decision and in making that recommendation concerning any prophylactic procedure.

It goes to diagnosis. It is a misdiagnosis if it's what they are trying to claim because it involves the judgment of the physician with respect to whether or not this person is a likely candidate in the future.

Now on the issue of informed consent. She did sign an informed consent form that was obtained by Dr. Schmidt. Page 504-05 of the record. The signature was witnessed as required by 4590i. If you look at the consent form she acknowledged that her doctor described the risk complications and consequences of the proposed surgery, which is what's required by an informed consent form. She also states in her informed consent form that Dr. Schmidt discussed alternatives available and the risks, complications and consequences including the option of no surgery. She signed this. Admitted to this two days before she had the mastectomy on March 17, 1993.

O'NEILL: Do you know of anything that would prevent her from amending her petition from an alleged misdiagnosis?

COOPER: The only thing that was pending at the time that the summary judgment was informed consent. We moved for summary judgment. They had waived the remaining claims before the summary judgment at the trial. There were other claims that were post-surgical claims. All the other claims had been waived. If you look at the CA's opinion it says everyone agrees that the only asserted cause of action was informed consent. That's in the dissent. It's also...

O'NEILL: But that doesn't answer the question of whether if there could be an amendment now.

COOPER: Except though we had moved for summary judgment. And if we're correct that would dispose of the case. Because it would have disposed of all claims that were pending at the time we moved for summary judgment. And the question is, can a party after summary judgment has been granted and gone to the CA and go up the SC come back later on and amend their petition once more to assert something. Perhaps they could have. I don't think Texas law allows that. I think Texas law requires that before your summary judgment is heard and granted you have to put out all your possible causes of action, and if you don't, then you can't come back after you've gone up on appeal and try to reassert them _____.