IN THE CIRCUIT COURT OF MC HENRY COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Smith	)	
	)	
Plaintiff,	)	
	)	
v.	)	No.:
	)	
Jones	)	
	)	
Defendant.	)	

PLAINTIFF'S MOTION IN LIMINE

Exclusion of Evidence of Informed Consent

NOW COMES the Plaintiff and moves this Court for entry of an Order *in limine* excluding any evidence relating to the subject of informed consent for the subject surgery which was performed on August 14, 2008 surgery, including but not limited to discussions of the risk of injury, recognized risk of injury, alternatives to surgery or lack of guarantee of outcome and, in support thereof, states:

1. The Plaintiff has filed a single count medical negligence case against the Defendant D.P.M. alleging that he violated the standard of care applicable to a podiatric surgeon during ankle surgery, including that he performed surgery in such a manner as to cause injury to the tibial nerve of the Plaintiff.

2. This is not a lack of informed consent cause of action. The Plaintiff has not pleaded an action for lack of informed consent, which is fundamentally different action from a direct medical negligence action. *Taylor v. County of Cook*, 957 N.E.2d 413, 433 (1st D. 2011) Specifically, in an informed consent action the issue is whether the Defendant had properly informed Plaintiff preoperatively of the material risks and benefits of a surgical procedure, such that the plaintiff made an informed decision to proceed with surgery. *Schiff v. Frieberg*, 331

Ill.App.3d 763 (1st D. 2002). Instead, this is a direct negligence action alleging that, when the Defendant performed the surgery, his methods, manner or technique was negligent and caused injury

Where lack of informed consent action has not been pleaded but rather only a direct medical negligence action, several Appellate courts have held that the admission of evidence relating to informed consent prejudiced the Plaintiff, finding that it was an abuse of discretion which required granting a new trial. *Spar v. Cha, M.D.*, 907 N.E.2d 974 (Indiana Sup. Ct. 2009)(reversible error for the trial court to allow defense evidence of signing informed consent, discussing risks of procedure, or the decision to do the procedure, because patently irrelevant to the alleged medical negligence issues presented to the jury); *Hayes v. Camel, M.D.*, 927 A.2d 880, 889(Connecticut Sup. Ct. 2007); *Wright v. Kaye, M.D.*, 593 N.E.2d 307 (Sup. Ct. of Virginia 2004); *Waller v. Aggarwal, M.D.*, 116 (Ohio App.3d 355(1999) *See also, Storm v. NSL Rockland Place,* 898 A.2d 874, 884-85 (Delaware Sup. Ct 2005) which held that plaintiff's consent to risks of care and treatment does not relieve a healthcare provider from practicing within the standard of care, particularly when it is not elective surgery, and that such evidence is contrary to public policy, prejudicial and should be excluded because a medical patient does not expressly or impliedly assume any risks for negligence.

In *Waller*, which is the leading, seminal case, the court found that it was *plain error* to allow evidence of informed consent in a laparoscopic surgery case involving a perforation of the bowel and granted a new trial, because such evidence substantially prejudiced the plaintiff's issues in a direct medical negligence. *Id*, at 356(emphasis added) The plaintiff did not consent to negligence. *Id.* Informed consent is not relevant to a direct medical negligence action. Any evidence that the defendant apprised the plaintiff of risks of the surgery is not a defense.

Evidence of consent should not be used to suggest that the injury can occur in the absence of negligence. Id, at 357 (emphasis added). Such evidence can only create great confusion in the mind of the jury. *Id*, at 356

Indeed, the Plaintiff has not found a single reported appellate case from outside Illinois where the court affirmed the trial court's admission of informed consent type evidence in a direct medical negligence action.

3. In the instant case, the Plaintiff has only brought a direct medical negligence case based on violations of the standard of care applicable to a physician during surgery. See Plaintiff's Second Amended Complaint at Law. In the instant surgical negligence case, any issues which would be raised through evidence of Plaintiff's informed consent are irrelevant and collateral to the negligence issues pleaded, anticipated standard of care testimony and jury instructions to be given.

4. The Plaintiff has attached a copy of the subject informed consent document which is entitled "*Consent For Surgery, Anesthesia And Other Medical Services*" (Hereinafter "Informed Consent") This Informed Consent document does not address a specific risk of injury to a nerve. Therefore, the subject informed consent document is not relevant or probative of whether the Defendant complied with the standard of care, at surgery, including manner, method or technique to to protect against or avoid injury to the tibial nerve.

4. Obviously, the Plaintiff did not consent to negligence by the Defendant. The Plaintiff's Informed Consent is not an affirmative defense to medical negligence. *Corletta v. Caserta*, 204 Ill.App.3d 403 (1st D. 1990) The Plaintiff did not assume the risk that the Defendant would be negligent in his care and treatment. Importantly, Illinois Appellate Courts have excluded "release" documents, and medical pamphlets discussing risks because such

documents were irrelevant to the negligence issue present to the jury, and because there was substantial concern that such evidence could confuse or mislead the jury. See *Sullivan-Coughlin v. Palos Country Club, Inc.*, 349 Ill.App.3d 553, 559-60(1st D 2004)); *Pagel v. Yates*, 128 Ill. App. 3d 897, 903, 471 N.E.2d 946 (4th Dist. 1984) (Held: Court correctly excluded irrelevant and confusing document which relates to an uncontested issue); *Hulman v. Evanston Hosp. Corp*., 259 Ill. App. 3d 133, 147-48, 631 N.E.2d 322 (1st Dist. 1994)(the court held that the trial judge properly excluded from evidence a hospital pamphlet discussing risks because its admission might confuse the jury.); *Lebrecht v. Tulli*, MD, 130 Ill.App.3d 457 (4th Dist. 1985) (held: trial judge properly excluded from the jury a "Release Form" because "possibly confusing" and prejudicial, and the document did not legally release Defendants from liability). *Macek v. Schooner*, 224 Ill.App.3d 103 (1st D 1991) To be relevant to a defense, the Informed Consent document would have to constitute affirmative matter which bars recovery. On its face, the language of the subject Informed Consent document is not an exculpatory agreement releasing the Defendants from liability for negligence. *Nikolic v. Seidenberg*, 242 Ill.App.3d 96 (2nd D 1993); *Macek v. Schooner*, 224 Ill.App.3d 103 (1st D 1991) A document is not a Release unless it contains unequivocal, clear language releasing the party from liability. *Macek*, at 105-6

5. However, there is a danger that Plaintiff's Informed Consent document could be confused by the jury as to its legal effect or misconstrued by the jury to be some sort of release from liability.

THE COURT SHOULD EXCLUDE INFORMED CONSENT DOCUMENTS THAT ARE NOT RELEVANT TO ANY ISSUE OF NEGLIGENCE ALLEGED IN THIS CASE

6. Rule 401 of the newly adopted Illinois Rules of Evidence, effective January 1, 2011 defines relevancy as follows:

> **"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.**

This newly adopted Illinois Rule 401 is identical to the Federal Rule of Evidence 401. Before January 1, 2011, the Illinois courts had adopted and applied this definition of relevancy through case law. *People v. Monroe,* 66 Ill. 2d 317, 321-22, 362 N.E.2d 295 (1977); *Spencer v. Wandolowski*, 264 Ill. App. 3d 611, 617, 636 N.E.2d 854 (1st Dist. 1994); *Cochran v. Great Atlantic & Pacific Tea Co., Inc*., 203 Ill. App. 3d 935, 937-38, 148, 561 N.E.2d 229 (5th Dist. 1990) (trial judge has inherent power to exclude irrelevant evidence); and *Benson v. Bradford Mut. Fire Ins. Corp.*, 121 Ill. App. 3d 500, 510, 459 N.E.2d 689, 47 A.L.R.4th 759 (2d Dist. 1984) (trial judge had discretion to exclude irrelevant witness testimony).

Illinois case law provides that evidence may be properly excluded where it is not relevant to the contested issues. See *Sullivan-Coughlin v. Palos Country Club, Inc.,* 349 Ill.App.3d 553, 559-60(1st D 2004) (Held: trial judge properly excluded from evidence a golf cart rental agreement as irrelevant because, although the agreement informed plaintiff of the risk of riding in a golf cart, including being struck by errant golf ball, the rental agreement did not bear on the issues in the instant action, mainly defendants failure to take precautionary measures to protect players against errant golf balls).

THIS COURT SHOULD PRECLUDE
EVIDENCE THAT COULD BE CONFUSING OR MISLEADING TO THE JURY

7. Rule 403 of the newly adopted Illinois Rules of Evidence, effective January 1, 2011 relating to arguably relevant evidence which can be confusing to the issues or misleading to the jury, states as follows:

> ***"Although relevant,* evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, *confusion of the issues, or misleading the jury*, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."** (Emphasis added.)

Before January 1, 2011, the Illinois courts had adopted and applied this rule of evidence at common law relevancy through case law. See *People v. Walker*, 335 Ill. App. 3d 102, 112, 779 N.E.2d 268 (2nd D. 2002), *as modified on denial of rehearing*, (Oct. 24, 2002) and *judgment aff'd*, 211 Ill. 2d 317, 812 N.E.2d 339 (2004). Further, Illinois case at common law had held that evidence may be excluded where it may confuse the issues or mislead the jury. *Congregation of the Passion, Holy Cross Province v. Touche Ross & Co.*, 224 Ill. App. 3d 559, 578-79, 586 N.E.2d 600 (1st D 1991), *judgment aff'd*, 159 Ill. 2d 137, 636 N.E.2d 503 (1994); *Pagel v. Yates*, 128 Ill. App. 3d 897, 903, 471 N.E.2d 946 (4th Dist. 1984) (Held: Court correctly excluded irrelevant and confusing document which relates to an uncontested issue); *Hulman v. Evanston Hosp. Corp*., 259 Ill. App. 3d 133, 147-48, 631 N.E.2d 322 (1st Dist. 1994); *Lebrecht v. Tulli*, MD, 130 Ill.App.3d 457 (4th Dist. 1985) (held: trial judge properly excluded from the jury a "Release Form" because "possibly confusing" and prejudicial, and the document did not legally release Defendants from liability). For example, in *Hulman* the court held that the trial judge properly excluded from evidence a hospital pamphlet discussing risks because its admission might confuse the jury.

WHEREFORE, the Plaintiff prays for entry of an order *in limine* excluding from voir dire, opening statement, closing argument, and direct or cross-examination of any witness any evidence or reference to the Informed Consent document which was executed by the Plaintiff, a copy of which is attached to this Motion in Limine, and any evidence or reference informed consent discussions related to the surgery, including risk of injury, recognized complications, alternatives to surgery or lack of guarantee of outcome.

Respectfully submitted,

By: _____

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