NO. CAAP-14-0000818

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

ROBERT PERALES, Plaintiff-Appellant,
v.
GARY BLUM, M.D.; ROBERT ATKINSON, M.D.;
ORTHOPEDIC ASSOCIATES OF HAWAII, LLP,
Defendants-Appellees

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 12-1-0613-03)

MEMORANDUM OPINION
(By: Leonard, Presiding Judge, Reifurth and Ginoza, JJ.)

Plaintiff-Appellant Robert Perales (**Perales**) appeals from the Judgment, filed on April 11, 2014, in the Circuit Court of the First Circuit (**circuit court**).[1]

Perales contends that the circuit court erred when it granted Defendants-Appellees Gary Blum, M.D. (**Dr. Blum**), Robert Atkinson, M.D. (**Dr. Atkinson**), and Orthopedic Associates of Hawaii, LLP's (collectively **Defendants**) motion for judgment as a matter of law (**JMOL**) on Perales's claim for lack of informed consent at the conclusion of Perales's case during jury trial.[2]

[1] The Honorable Virginia L. Crandall presided.

[2] In the argument section of Perales's opening brief, he appears to argue that claims for battery and breach of warranty also apply in this case. Perales does not include these claims in his points of error. Further, it does not appear from the record, and Perales provides no citation to the
(continued...)

For the reasons stated below, we affirm in part, vacate in part, and remand.

I. Background

Perales injured his right thumb in a work accident. As a result of his injury, Perales underwent two surgeries on his thumb, the first performed by Dr. Blum and the second performed by Dr. Atkinson.

After the two surgeries, Perales filed a Complaint against the Defendants alleging (a) negligent breach of the standard of care, and (b) negligent failure to obtain informed consent. With respect to his claim for lack of informed consent, Perales asserted, *inter alia*, that: both Dr. Blum and Dr. Atkinson failed to properly inform him of the risks and benefits of the surgery, including the anticipated results of the surgeries and that there was a risk he would not be able to return to work as a welder; and Dr. Atkinson failed to inform him of the risks of the fusion surgery, and in particular that his thumb would be shortened due to the fusion surgery. In his complaint, Perales seeks: "[s]pecial damages including but not limited to Plaintiff's medical expenses (past and future), lost wages (past and future), and loss of earning and/or working capacity," as well as "[g]eneral damages in an amount according to proof at trial[.]"

On January 28, 2014, the circuit court granted summary judgment in favor of the Defendants with regard to Perales' claim for negligent breach of the standard of care. This claim is not in issue on appeal.

The case proceeded to a jury trial on the issue of whether Perales gave informed consent for each of the two surgeries to his thumb. In his case in chief, Perales testified and also called Dr. Blum and Dr. Atkinson as witnesses. Perales

---

[2](...continued)
record showing, that he argued a claim for battery or breach of warranty in the circuit court. Therefore, these arguments are waived. See Hawaiʻi Rules of Appellate Procedure (**HRAP**) Rule 28(b)(4), (7).

testified that in his visits with each doctor prior to the surgeries, they both guaranteed their surgery would enable Perales to return to work as a welder and both doctors did not inform Perales that there was a risk that the surgeries would not be successful. Perales testified that he signed a consent form but when he expressed concerns about the form to Dr. Blum, Dr. Blum "laughed about it and said, I know it sounds horrible. But it's a standard form . . . . But I can assure you, Mr. Perales, that you will be –- you'll do just fine." Likewise, Perales testified that when he questioned Dr. Atkinson, he was told "[d]on't worry about it, Mr. Perales." Perales also testified that Dr. Atkinson did not properly inform him that the second surgery would result in a shortened thumb.

Both Dr. Blum and Dr. Atkinson testified that they did not guaranty a successful surgery or that Perales would be able to return to work. Further, Dr. Blum and Dr. Atkinson testified that they discussed the risks and possible complications of the respective surgeries as provided on the related consent form and answered Perales's many questions regarding the form and their surgery.

The Defendants moved for JMOL at the close of Perales's case at trial, arguing that Perales did not present evidence to support the causation element for his lack of informed consent claim. In their written motion, Defendants argued in relevant part that "the evidence presented is that Plaintiff would not have consented to the surgical treatments had he been informed that there was no 100% guaranty. Consequently, the radial collateral ligament of his right thumb would have remained ruptured and the injury he claims he now suffers (inability to work as a welder) would still exist." The circuit court orally granted JMOL in favor of the Defendants stating:

> Viewing all of the evidence in the light most favorable to the plaintiff, and giving the plaintiff's evidence all the value to which it is legally entitled, and indulging every legitimate inference which may be drawn from the evidence in favor of the plaintiff, the Court grants the Motion for Judgment as a Matter of Law and finds that

> there's no evidence to support plaintiff's claim for lack of informed consent, as there is not evidence as to the legal causation as required under element three of the claim for failure to obtain informed consent.
>
> There's no evidence that there was any treatment or surgical procedure that had a 100 percent guarantee for return to work as a welder, and so the plaintiff has failed to present evidence as to a prima facie case as to all elements of the claim.

(Emphasis added.)

On March 18, 2014, the circuit court filed an "Order Granting [Defendants'] Motion for Judgment as a Matter of Law." On April 11, 2014, the circuit court filed the Judgment.

On May 12, 2014, Perales timely filed a Notice of Appeal from the Judgment.

II. Standard of Review

We review *de novo* the circuit court's ruling on the motion for JMOL. Ray v. Kapiolani Med. Specialists, 125 Hawaiʻi 253, 261, 259 P.3d 569, 577 (2011).

> A [motion for judgment as a matter of law] may be granted only when after disregarding conflicting evidence, giving to the non-moving party's evidence all the value to which it is legally entitled, and indulging every legitimate inference which may be drawn from the evidence in the non-moving party's favor, it can be said that there is no evidence to support a jury verdict in his or her favor.

Id. (citation omitted). Further,

> [a] motion for [judgment as a matter of law] asks the trial court to rule that the movant's opponent has introduced so little evidence to support a verdict in his favor that the case does not raise a jury question. . . . *If there is any substantial evidence which might support a verdict for each side, the case should be submitted to the jury*.

Miyamoto v. Lum, 104 Hawaiʻi 1, 14, 84 P.3d 509, 522 (2004).

III. Discussion

Perales contends that the circuit court erred when, at the close of his evidence in the jury trial, it granted the Defendants' motion for JMOL. The sole issue at trial was Perales's claim for negligent failure to obtain informed consent for the two surgeries on his thumb.

As stated above, the circuit court ruled that Perales did not present evidence as to legal causation. The following

elements must be proven for a negligent failure to obtain informed consent claim:

> (1) the physician owed a duty of disclosure under HRS § 671-3(b);
> (2) the physician breached that duty;
> (3) the patient suffered injury;
> (4) the physician's breach of duty was a **cause of the patient's injury** in that (a) the physician's treatment was a substantial factor in bringing about the patient's injury and (b) a reasonable person in the plaintiff patient's position would not have consented to the treatment that led to the injuries had the plaintiff patient been properly informed; and
> (5) no other cause is a superseding cause of the patient's injury.

Garcia v. Robinson, 137 Hawaiʻi 388, 394, 375 P.3d 167, 173 (2016) (emphasis added) (citation omitted). Hawaii Revised Statutes (**HRS**) § 671-3(b) (2016) provides the standard for a physician's duty to disclose information to the patient, stating:

> (b) The following information shall be supplied to the patient or the patient's guardian or legal surrogate prior to obtaining consent to a proposed medical or surgical treatment or a diagnostic or therapeutic procedure:
> (1) The condition to be treated;
> (2) A description of the proposed treatment or procedure;
> (3) The intended and anticipated results of the proposed treatment or procedure;
> (4) The recognized alternative treatments or procedures, including the option of not providing these treatments or procedures;
> (5) The recognized material risks of serious complications or mortality associated with:
> (A) The proposed treatment or procedure;
> (B) The recognized alternative treatments or procedures; and
> (C) Not undergoing any treatment or procedure; and
> (6) The recognized benefits of the recognized alternative treatments or procedures.

(Emphasis added.)

On appeal, Perales contends there was lack of informed consent arising under HRS § 671-3(b)(3) because Dr. Blum and Dr. Atkinson did not properly inform him of the risk of failure for the surgeries or the possibility he would be unable to return to work as a welder and, thus, Perales claims that he suffered the following injuries: (1) he was unable to return to work as a

welder; (2) his right thumb was shortened; and (3) he experienced the pain, inconvenience, and expense of the two surgeries.

By contrast, the Defendants contend, *inter alia*, that JMOL was appropriate because Perales did not present expert testimony as to, among other things, causation.[3]

In Carr v. Strode, 79 Hawaiʻi 475, 904 P.2d 489 (1995), although the plaintiff underwent a vasectomy operation, his wife later became pregnant. Id. at 478, 904 P.2d at 492. Carr and his wife filed a complaint against their doctor alleging, *inter alia*, lack of informed consent. Id. With regard to the need for expert testimony in a lack of informed consent case, the Hawaiʻi Supreme Court affirmatively quoted the following:

> Experts are ordinarily indispensable to identify and elucidate for the factfinder the risks of therapy and the consequences of leaving existing maladies untreated. They are normally needed on issues as to the cause of any injury or disability suffered by the patient and, where privileges are asserted, as to the existence of any emergency claimed and the nature and seriousness of any impact upon the patient from risk-disclosure. Save for relative[ly] infrequent instances where questions of this type are resolvable wholly within the realm of ordinary human knowledge and experience, the need for the expert is clear.

Id. at 486, 904 P.2d at 500 (quoting Canterbury v. Spence, 464 F.2d 772, 791-92 (D.C. Cir. 1972)) (emphasis added). See also Barbee v. Queen's Med. Ctr., 119 Hawaiʻi 136, 158-59, 194 P.3d 1098, 1120-21 (App. 2008) (stating "in a medical malpractice case, a plaintiff must establish proximate or contributory causation through the introduction of expert medical testimony" but recognizing a "common knowledge exception").

One of Perales's claimed injuries is that the surgeries rendered him unable to return to work as a welder. However, Perales testified that he was unable to work as a welder after the workplace accident and before he underwent either of the two surgeries. Further, although Dr. Blum and Dr. Atkinson testified

[3] At oral argument, Defendants asserted several points unrelated to the issue of causation. Because Defendants' JMOL motion and the circuit court's JMOL ruling were based on causation, we confine our review to whether Perales presented sufficient evidence at trial as to causation for his lack of informed consent claim.

that Perales expressed concerns about being able to return to work as a welder, they did not testify that the surgeries were the cause of his inability to return to work. In short, Perales did not present expert medical evidence that the surgeries caused his inability to return to work. Therefore, with regard to Perales's claimed injuries of being unable to return to work and any lost wages associated with his inability to return to work, Perales did not present evidence that the surgeries were a "substantial factor" in bringing about these injuries. Thus, the circuit court correctly granted JMOL as to these claimed injuries.

Perales also claims injury in that his right thumb is shorter as a result of the surgery performed by Dr. Atkinson. Perales testified that Dr. Atkinson assured him that his right thumb would look exactly like his left thumb. Perales further testified that after his surgery with Dr. Atkinson and while he was in physical therapy, the therapist informed Perales that his injured thumb was a half inch shorter than his uninjured thumb.

Dr. Atkinson testified that a shortened thumb was a risk of the fusion surgery that he performed. Dr. Atkinson testified that he explained to Perales that part of the surgical procedure was to remove the cartilage in part of his thumb and fuse the bones together and that Perales understood the procedure and "he understood that when we shave a little bit of the joint surface . . . it's going to be shorter than it would have been if he hadn't had that portion of the joint removed." Dr. Atkinson testified that a "couple millimeters" of Perales's thumb bone was removed, but in all nine of Perales's post-operative visits with Dr. Atkinson, Perales never mentioned his thumb was shorter.

Based on Dr. Atkinson's testimony, and in indulging every legitimate inference which may be drawn from the evidence in Perales's favor given the JMOL standard, Perales presented evidence as to causation on this claimed injury, *i.e.*, that Dr. Atkinson's surgery was a "substantial factor" in bringing about Perales's claimed injury of a shortened thumb. Further, in

regard to the second part of the causation element -- whether a "reasonable person in the plaintiff patient's position would not have consented to the treatment that led to the injuries had the plaintiff patient been properly informed" –- this is a question for the jury given the evidence in this case.

The final injury that Perales claims is that, because he was not properly informed about the two surgeries, he decided to undergo the procedures and thus experienced the pain, inconvenience, and expense of the two surgeries. Perales testified that although he signed a consent form[4] prior to his surgery with Dr. Blum, which stated "[n]o promise or guarantee has been made to me as to result or cure[,]" he did not discuss that particular statement with Dr. Blum because he was satisfied based on their conversations that he "would be able to return to work full duty" and his "right thumb would look exactly like [his] left thumb." Perales testified that Dr. Blum reassured Perales that Dr. Blum had done "many of these surgeries" and "it was a fairly simple procedure." Perales also testified that Dr. Blum told Perales that many athletes have similar injuries and are "typically back to doing whatever they were doing . . . within six to eight weeks." Perales further testified that he was very clear with Dr. Blum that he wanted full use of his thumb and would not undergo surgery if there was even a 99.9 percent chance that it would succeed, because with his luck he would "be that point 1 percent." According to Perales, Dr. Blum said that he could not put it in writing "[b]ut I can guarantee you that you're going to have a hundred percent use of your thumb."

With regard to Dr. Atkinson, Perales also signed a consent form stating that "[n]o promise or guarantee has been made to me as to result or cure." However, Perales testified

[4] Given the evidence in this case, we conclude that although Perales signed a consent form prior to both of his surgeries, the consent form is not conclusive as to whether he gave informed consent. See Keomaka v. Zakaib, 8 Haw. App. 518, 532-33, 811 P.2d 478, 486-87 (1991)(stating that "a physician may not fulfill his affirmative duty of timely and adequate disclosure by merely having the patient sign a printed informed consent form").

that he expressed concerns to Dr. Atkinson about having full use of his thumb and getting back to work as a welder. Perales testified that Dr. Atkinson stated:

> Don't worry, Mr. Perales, you'll be fine. You'll be able to get right back to work. I've done a lot of these surgeries. I've done carpenters and tradesmen, which rely heavily upon their hands to work for a living, and they're swinging hammers all day and climbing the roofs and stuff like that[.]

On cross-examination, Perales testified that if Dr. Atkinson had told him there was only a 99.9 percent chance of a good outcome, he would not have agreed to the surgery.

Dr. Blum testified that he did not give Perales a guarantee as to the outcome of the surgery and he told Perales that the surgery may not work. Dr. Atkinson testified that he talked with Perales about the relative risk of the surgery and there was a good likelihood that the joint would fuse together, but informed Perales that it was not a guarantee that the surgery would be a success.

Based on Perales's testimony, there is evidence in the record that he would not have undergone the surgeries if he had known there was a possibility he would not have full use of his thumb. Our review of the record further shows that Perales argued in the circuit court that if he was properly informed of the risks, he would not have had the surgeries and that an option was to have *no treatment*. In this regard, there is evidence as to causation related to Perales's claimed injury that he experienced pain and inconvenience from undergoing the two surgeries. With regard to these claimed injuries, it does not appear that expert testimony is required. That is, assuming *arguendo* that Perales convinces a jury that the other elements for his lack of informed consent claim are established, the question of whether the two surgeries were a "substantial factor" in causing him pain and inconvenience is within the realm of ordinary human knowledge and experience. See Carr, 79 Hawaiʻi at 486, 904 P.2d at 500. Moreover, the second part of the causation element -- whether a "reasonable person in the plaintiff

patient's position would not have consented to the treatment that led to the injuries had the plaintiff patient been properly informed" –- is a question for the jury given the evidence in this case.

We must emphasize, however, that our ruling is limited only to Perales's pain and inconvenience from the two subject surgeries. Any claimed injury that Perales needed further medical or other treatment as a result of the two surgeries and that he sustained damages due to the further medical or other treatment, would require expert testimony, which he did not present. Therefore, to the extent specified above, JMOL should not have been granted with respect to Perales's claimed injuries of pain and inconvenience from the two surgeries.

With regard to Perales's claimed injury that he incurred expenses for the two surgeries, there was no evidence in his case at trial regarding expenses for the surgeries. Thus, in this regard, there is no evidence that the surgeries were a "substantial factor" in causing Perales to incur expenses. JMOL was properly granted on Perales's claimed injury as to expenses for the surgeries.

IV. Conclusion

Based on the foregoing, the Judgment filed on April 11, 2014, in the Circuit Court of the First Circuit, is:

(1) Affirmed to the extent that JMOL was proper in regard to: (a) Perales's claimed injury that the two surgeries caused his inability to return to work and caused any wage loss; and (b) Perales's claimed injury that he sustained expenses due to the surgeries.

(2) Vacated to the extent that JMOL should not have been granted in regard to: (a) Perales's claimed injury that the second surgery caused his right thumb to be shortened; and (b) Perales's claimed injury that he experienced pain and inconvenience for undergoing the two subject surgeries.

This case is remanded to the circuit court for further proceedings consistent with this opinion.

DATED: Honolulu, Hawaiʻi, August 31, 2017.

On the briefs:
Charles H. Brower,
for Plaintiff-Appellant.

Presiding Judge

Arthur F. Roeca,
April Luria,
Jodie D. Roeca,
for Defendants-Appellees.

Associate Judge

Associate Judge