

NEW MEXICO INJURY ATTORNEY BLOG

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Scope of Informed Consent: Duty to Disclose Physician's Background?

The 10th Circuit case of *Willis v. Bender* addressed a doctor's duties to disclose the doctor's background information to a patient as part of informed consent. Lack of informed consent is often an element in medical malpractice claims in New Mexico particularly in surgical procedures.

Under New Mexico law, informed consent does not typically require that a physician provide the patient with the doctor's background information even matters related to competence. The courts reason that such a duty would require the disclosure of large amounts of information not necessarily relevant to the patient's medical decision-making.

However, the 10th Circuit Court of Appeals (Wyoming) in *Willis v. Bender* addressed a situation where the patient explicitly inquired into the doctor's background, and the doctor provided false and misleading information in response to the patient's inquiry. The Court found that in this case, a failure to provide honest and truthful answers to the patient's questions violated the patient's right and the doctor's duty of informed consent.

Willis v. Bender involved a laparoscopic cholecystectomy, laparoscopic surgery to remove Ms. Willis' gallbladder. Ms. Willis had several prior surgeries in her abdominal area causing significant abdominal scarring and adhesions. Due to the scarring and adhesions, the doctor who performed two of the prior surgeries advised Ms. Willis that future surgeries should be performed with an "open" rather than "closed" procedure.

During the consults leading up the surgery with Dr. Bender, Ms. Willis discussed the need for a closed procedure due to the scarring. Ms. Willis asked a number of questions of Dr. Bender regarding his qualifications for the procedure, his past history of such procedures, his success rate, past medical malpractice complaints and prior issues with his license. She also requested that Dr. Bender consult with her prior doctor prior to moving forward with the closed procedure.

Dr. Bender assured Ms. Willis that he had never had a medical malpractice complaint, had no prior issues with his license, that he had a 99.9% success rate with this type of procedure and that he had discussed the procedure with her prior doctor suggesting the two had agreed on the proposed approach to the surgery. In fact, Dr. Bender had had

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a several prior medical malpractice claims, one involving a wrongful death action resulting from a the death of a patient following a laparoscopic cholecystectomy. In addition, Dr. Bender had past actions against his license by the Wyoming Board of Medicine. Perhaps worst of all in light of the facts, Dr. Bender had never contacted Ms. Willis' prior doctor to consult regarding the risks of the proposed closed procedure.

Unfortunately, the closed procedure did not go well due to the existing scar tissue. There were several surgical and post-surgical complications including a bowel perforation and a resulting bowel obstruction, ileus, and severe infection.

The 10th Circuit recognized that a doctor generally has no duty to disclose background information. However, the court stated, "Under these circumstances, if proved, her consent can hardly be considered "informed."" As a result, the Court reversed the District Court's summary judgment in favor of Dr. Bender.

Willis v. Bender raises some important issues. As seen in previous posts, hospitals and surgery carry an alarming level of risks. Patient's are advised "Protect Thyself" by taking measures to protect themselves from harm. In light of the lack of an affirmative duty on the part of the physician to disclose relevant background information, a patient should ask the questions. In the great majority of cases, the doctor will respond honestly. However, in those rare situations where the doctor is not honest, the patient will have some recourse for the misrepresentations assuming New Mexico follows the lead of the 10th Circuit Court of Appeals.

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