



# SURGERY LIABILITY ISSUES

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# LIABILITY ISSUES: COMMON TO SURGICAL PROCEDURES

- ◆ FAILURE TO MAINTAIN PATIENT RAPPOR
- ◆ FAILURE TO OBTAIN INFORMED CONSENT
- ◆ FAILURE TO OBTAIN INFORMATION ON SIGNIFICANT PAST MEDICAL HISTORY



# LIABILITY ISSUES (cont.)

- ◆ PERFORMING PROCEDURES NOT REQUESTED
- ◆ BREACH OF STANDARD OF CARE
- ◆ FAILURE TO DIAGNOSE AND TREAT COMPLICATIONS IN A TIMELY FASHION
- ◆ EXPERT WITNESS  
MISREPRESENTATION




# PATIENT RAPPORT

- ◆ PERSONALITY CONFLICTS
- ◆ UNREALISTIC EXPECTATIONS
- ◆ DYSMORPHIC PERSONALITY
- ◆ COMPLICATIONS
- ◆ DIFFICULT PATIENT



# PATIENT COMPLAINTS IN LAWSUITS

- ◆ THE DOCTOR DID NOT LISTEN TO ME
- ◆ THE DOCTOR WAS RUSHED
- ◆ THE DOCTOR DID NOT EXPLAIN THE POSSIBLE COMPLICATIONS
- ◆ THE DOCTOR NEVER ANSWERED MY PHONE CALLS



# INFORMED CONSENT

- ◆ THE PATIENT HAS THE RIGHT TO RECEIVE ENOUGH INFORMATION ABOUT THE DIAGNOSIS, PROPOSED TREATMENT, VIABLE ALTERNATIVES, PROGNOSIS, AND MATERIAL RISKS AND COMPLICATIONS OF PROPOSED THERAPY AND VIABLE ALTERNATIVES TO BE ABLE TO MAKE AN INFORMED DECISION



# INFORMED CONSENT (cont.)

- ◆ PLAINTIFF MUST SHOW THAT:
  - COMPLICATION NOT EXPLAINED DID IN FACT OCCUR
  - IF HE HAD BEEN INFORMED OF THE PARTICULAR RISK OR COMPLICATION, HE WOULD NOT HAVE CONSENTED TO THE PROCEDURE



# INFORMED CONSENT (cont.)

## ◆ COGNITIVE DYSFUNCTION

- POSTOPERATIVE PATIENT RECALL
- NORMAL PERSON RECALL



# PREVENTING LACK OF INFORMED CONSENT (cont.)

- ◆ THE PHYSICIAN'S RECORD SHOULD CONTAIN THE FOLLOWING STATEMENT:
  - **“I DISCUSSED WITH THE PATIENT THE SURGICAL PROCEDURE, ITS MATERIAL RISKS AND COMPLICATIONS, ALL VIABLE ALTERNATIVES AND THEIR MATERIAL RISKS AND COMPLICATIONS, AND ANSWERED ALL QUESTIONS.”**



# ZALAZAR v VERCIMAK: ILLINOIS APPEALS CT 1994

- ◆ HELD THAT THE SUBJECTIVE (PATIENT) STANDARD IS LESS OF AN “INSURMOUNTABLE” BARRIER THAN THE OBJECTIVE STANDARD (REASONBLY PRUDENT PHYSICIAN OR REASONABLY PRUDENT PATIENT) WOULD BE
- ◆ THE DECISION TO ELECT COSMETIC SURGERY IS PERSONAL



# MARTELLI v REARDON, NE

- ◆ FEMALE PATIENT HAD FACELIFT AND BLEPHAROPLASTY
- ◆ DEVELOPED NUMBNESS BEHIND RIGHT EAR & CHRONIC FACIAL PAIN ELECTRIC SHOCK-LIKE
- ◆ ALLEGED PERMANENT PAIN, FAILURE TO INFORM
- ◆ DEFENDANT CLAIMED COMPLICATION NOT DISCUSSED BECAUSE SO RARE
- ◆ \$738,100 VERDICT



# PAST MEDICAL HISTORY

- ◆ HISTORY OF BLEEDING, EASY BRUISING, THROMBOEMBOLISM, DIABETES, HEART OR LUNG DISEASE, MEDICATIONS, ALLERGIES
- ◆ HISTORY OF PRIOR SURGERY IN THE AREA
- ◆ CANCER HISTORY: ESPECIALLY FOR BREAST SURGERIES



# PERFORMING A PROCEDURE NOT REQUESTED

- ◆ BATTERY: AN UNLAWFUL TOUCHING



# PERRY v SHAW: CA 1999

- ◆ 46 YEAR-OLD FEMALE CONSULTED FOR REMOVAL OF EXCESS SKIN OF ARMS, THIGHS, AND BACK
- ◆ DEFENDANT DISCUSSED MASTOPEXY WHICH SHE REFUSED
- ◆ SURGICAL CONSENT HAD MASTOPEXY AND REMOVAL OF EXCESS TISSUE



## PERRY v SHAW (cont.)

- ◆ SURGEON PERFORMED BREAST ENLARGEMENT WITH THE EXCESS TISSUE
- ◆ \$1,089,000 VERDICT



# STANDARD OF CARE

- ◆ THE LEGAL DUTY IMPOSED UPON THE PHYSICIAN TO EXERCISE THE DEGREE OF REASONABLE CARE, DILIGENCE, AND SKILL THAT REASONABLY COMPETENT PHYSICIANS WOULD EXERCISE UNDER THE SAME OR SIMILAR CIRCUMSTANCES
- ◆ LOCALITY RULE



# SEPTOPLASTY AND OTOPLASTY

- ◆ 41 YEAR OLD FEMALE HAVING SEPTOPLASTY & RHINOPLASTY.
- ◆ ONSET HYPERTENSION (SYSTOLIC 230), PULSE 130. SURGEON DECIDED TO CONTINUE PROCEDURE.
- ◆ GIVEN MEDICATION FOR THE HYPERTENSION. CARDIAC ARREST.
- ◆ SURGEON LEFT TO FIND ACLS TRAINED DR. CPR STARTED AFTER 10 MINUTES.
- ◆ SEVERE BRAIN DAMAGE.
- ◆ \$200,000 SETTLEMENT



# NEVADA MEDICAL BOARD v SCHMERLER - PATIENT B

- ◆ 61 YEAR-OLD FEMALE HAD LIPOSUCTION
- ◆ DEVELOPED POSTOP RENAL FAILURE AND BLOOD IN URINE
- ◆ FOUR PERFORATIONS OF BLADDER NOTED ON CYSTOSCOPY



## PATIENT B (continued)

- ◆ SIGNED SURGERY DISCOUNT AGREEMENT PREOP THAT STATED FOR \$10,000 DISCOUNT (SURGERY CHARGE OF \$15,500) PATIENT WAIVES RIGHT TO BRING COMPLAINT OR SUE
- ◆ ALLEGED SIGNED AGREEMENT WAS AN ACT OF ENGAGING IN CONDUCT INTENDED TO DECEIVE



# MISREPRESENTATION BY EXPERT WITNESS

- ◆ AN EXPERT WITNESS SHOULD BE PREPARED TO RENDER AN UNBIASED OPINION ON THE FACTS PRESENTED
- ◆ THE EXPERT IS FULLY PROTECTED UNDER MOST STATE STATUTES AND FEDERAL LAW FROM INCORRECT OPINIONS EXPRESSED UNDER OATH
- ◆ REPORT TO AMA, SOCIETY, MEDICAL BOARD



WILKINSON, T.S.: Our own  
worst enemies. Technical Forum  
1998;24:5

- ◆ “THE PATIENT’S DISPROPORTIONATE WEIGHT-TO-HEIGHT MADE LIPOSUCTION A POOR PROCEDURE AND THE BEST PROCEDURE WOULD HAVE BEEN PANNICULECTOMY.”  
(WHICH THE PATIENT HAD REFUSED)



## WILKINSON (cont.)

- LIPOSUCTION IS PERFORMED FOR LIPODYSTROPHY IN PATIENTS WHO ARE USUALLY OVERWEIGHT, OBESE, AND HAVE POOR CONTOURS. MANY TIMES LIPO IS PERFORMED BEFORE ABDOMINOPLASTY WHICH WILL LIMIT THE AMOUNT OF RESECTION NECESSARY



# WILKINSON (cont.)

- ◆ “THE INJECTION OF LARGE AMOUNTS OF TUMESCENT SOLUTION WITH EPINEPHRINE AND EXCESSIVE FAT REMOVAL RESULTED IN THE COMPLICATION OF SKIN LOSS”
  - SKIN NECROSIS OCCURS FROM LIPOSUCTION TOO CLOSE TO THE SKIN RESULTING IN DAMAGE TO SKIN VASCULATURE AND NOT FROM TUMESCENT SOLUTION OR EXCESSIVE FAT REMOVAL.



## WILKINSON (cont.)

- ◆ A 5'2", 150 POUND PATIENT WOULD BE CONSIDERED A POOR CANDIDATE FOR LIPOSUCTION BECAUSE OF POOR SKIN ELASTICITY”
  - THE EXPERT NEVER EXAMINED THE PATIENT. THERE WERE NO STRIAE ON THE EXAMINATION BY THE SURGEON. THE PATIENT WAS NOT ELDERLY.



# PEPE v MID-TOWN SURGICAL CENTER: TX 1994

- ◆ “DR. TOWHIDI IS A COSMETIC SURGEON WITHOUT RESIDENCY TRAINING IN PLASTIC SURGERY AND HAS LACK OF SURGICAL TRAINING AND EXPERIENCE AND THIS LED TO PAIN, DISCOMFORT, AND DISTORTION”



## PEPE v TAWHIDI (cont.)

- 4 YEARS GENERAL SURGERY, 2 YEARS THORACIC CARDIOVASCULAR SURGERY, 23 MONTHS PLASTIC SURGERY
- IN PRACTICE FOR 20 YEARS



## SARIDEN v FOWLER: TX 1997

- ◆ “IT IS THE STANDARD THAT 3 LITERS OF FAT IS MAX SAFE AMOUNT WITHOUT TRANSFUSION AND HOSPITALIZATION SHOULD HAVE BEEN CONSIDERED.”



# SARIDEN v FOWLER (cont.)

- TUMESCENT TECHNIQUE (SINCE 1987) RESULTS IN 1% BLOOD LOSS AND LESS COMPLICATIONS. COSMETIC SOCIETIES AND SOME STATE MEDICAL BOARDS USE 5,000 cc AS MAXIMUM BEFORE CONSIDERING HOSPITALIZATION. TRANSFUSIONS ARE RARELY NECESSARY UNLESS THERE IS SIGNIFICANT POSTOPERATIVE BLEEDING.



THANK YOU