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Recent Developments: *Wisconsin v. Mitchell*: Penalty Enhancing Statute for Hate Motivated Crimes Not Violative of the First Amendment

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*Faya v. Almaraz**HIV-POSITIVE PHYSICIAN
MAY HAVE DUTY TO WARN
PATIENTS OF HIS/HER
CONDITION.*

In *Faya v. Almaraz*, 329 Md. 435, 620 A.2d 327 (1993), the Court of Appeals of Maryland held that a physician who has tested positive for the human immunodeficiency virus ("HIV") may have a duty to warn his or her patients of his or her condition or refrain from performing surgery. The court further ruled that a breach of this duty may constitute a legitimate legal claim against the physician and the hospital despite the lack of infection resulting from exposure.

Dr. Rudolph Almaraz, an oncological surgeon with operating privileges at The Johns Hopkins University Hospital ("Hopkins"), tested positive for HIV in 1986. Nevertheless, he performed breast surgery on Sonja Faya in October 1988 and March 1989. In October 1989, Almaraz was diagnosed as having full-blown acquired immunodeficiency syndrome ("AIDS"). The following month, he operated on Perry Rossi. In 1990, Almaraz gave up his practice and terminated his association with Hopkins. He died of AIDS in November of that year. The next month, Faya and Rossi learned of Almaraz's illness. Each were immediately tested for the AIDS virus and both Faya and Rossi were HIV-negative.

Though the test results were negative, Faya and Rossi filed separate suits in the Circuit Court for Baltimore City against Almaraz's estate, his business entity, and Hopkins. Alleging various negligence and tort counts and claiming compensatory and punitive damages, the complainants specified that Almaraz acted wrongfully by operating on the patients without telling them that he was HIV-positive, or later, that he had full-blown AIDS. Because he declined to inform them of the risk, the plaintiffs claimed they were exposed to a hazard to which they might not have otherwise been subject. In addition, both plaintiffs imputed vicarious liability to Hopkins for its employee's conduct because it had permitted Almaraz to

operate on the patients without their knowledge of his HIV status. The injuries alleged included exposure to HIV and the risk of AIDS, physical injury and financial loss from the blood tests they underwent, and the pain, fear, and emotional distress of the incident.

In the Circuit Court for Baltimore City, the defendants moved to dismiss the plaintiffs' complaint for failure to state a claim upon which relief could be granted. The defendants claimed that Almaraz had no duty to reveal his condition to his patients. They further claimed that the hospital had no duty to investigate their employee's HIV status, and that the plaintiffs had not been infected.

The Circuit Court for Baltimore City agreed with the defendants and dismissed both complaints, stating that plaintiffs did not allege a legally compensable injury because they failed to sufficiently establish actual exposure to the AIDS virus. The trial court concluded that because both patients had tested HIV-negative more than six months after the surgery, it was unlikely that they would develop AIDS and therefore, that plaintiffs' fear "that something that did not happen could have happened" did not represent an actionable injury for damages. Both plaintiffs appealed to the Court of Special Appeals of Maryland, but the Court of Appeals of Maryland granted certiorari prior to intermediate appellate review.

The Court of Appeals of Maryland began its analysis with a discussion of AIDS and HIV and took judicial notice of several scientifically understood AIDS characteristics. *Id.* at 445, 620 A.2d 331-32. The plaintiffs contended that the court below erroneously took judicial notice of medical statistics that should have been offered as expert testimony and therefore, subject to debate at trial. However, since the lower court had adopted similar information via judicial notice, the court of

appeals rejected the appellants' assertion.

Chief Judge Murphy's opinion then addressed the appellants' argument that the trial court should have allowed the jury to evaluate Almaraz's conduct. *Id.* at 447, 620 A.2d at 333. Upholding the appellants' claim, the court reviewed the requirements of negligence and duty in the context of infectious diseases and found foreseeability to be an important factor in determining the existence of a duty in such cases. The court applied these principles and found it foreseeable that Almaraz may have transmitted HIV to his patients during surgery despite the low risk of such a transmission. *Id.*

The court supported this proposition by citing two publications of the American Medical Association ("AMA"), which recommended that HIV-infected doctors disclose their status to a local review committee for a determination of which activities the doctors could perform. *Id.* at 449, 620 A.2d at 334. The court also noted that the AMA Code of Medical Ethics states that physicians who know they are HIV-positive should not engage in any activity which creates a risk of transmission of the disease to others. For these reasons, the court concluded

that Almaraz had a duty to warn his patients. *Id.*

The court next addressed whether consequences endured by appellants as a result of their fear of contracting AIDS can be legally compensable absent allegations of being infected with HIV. *Id.* at 451, 620 A.2d at 335. One line of cases following *Burk v. Sage Products, Inc.*, 747 F. Supp. 285 (E.D.Pa. 1990), denied recovery where the plaintiff could demonstrate neither exposure to HIV nor an injury in the form of an HIV positive test. Other cases, such as *Johnson v. W. Va. University Hospitals*, 413 S.E.2d 889 (1991), held that a physical injury such as a needle stick or bite contributed to the fear of contracting AIDS. *Id.* at 453, 620 A.2d at 335-36.

After a discussion of various court approaches to this issue, the court of appeals held that the appellants could only recover for "the reasonable window of anxiety," or the period of time between learning of their doctor's AIDS infection and receiving their own HIV-negative test results. *Id.* The court based this conclusion on the theory that there must be a material physical injury resulting from fright caused by a wrongful act. Recognizing the possible physical injuries fear

can induce, the court held that the appellants can recover for those injuries that were suffered during a legitimate stage of mental anxiety.

The court concluded that the trial court erred in granting the motion to dismiss. It found that the appellants had alleged enough facts to indicate that Almaraz may have breached a legal duty and that injuries for a reasonable period of fear supported a legal claim. *Id.* at 459, 620 A.2d at 339. Likewise, the court held that the trial court erred in dismissing the appellants' complaint against Hopkins based on agency principles. The court of appeals reversed and remanded the case to the Circuit Court for Baltimore City. *Id.*

In *Faya v. Almaraz*, the Court of Appeals of Maryland held that a physician may have a duty to warn patients of his or her HIV-positive status. In so holding, the court recognized the increasing incidence of HIV related problems in society. Moreover, this case forces health care professionals to think about the foreseeability of transmitting their disease to their patients and take necessary precautions.

-Kristen L. Orff

*John Grisham * Janet Reno * Kurt Schmoke * Ruth Bader Ginsburg*

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