

SUPREME COURT OF NORTH CAROLINA

BRENDA FENNELL,)
 ADMINISTRATRIX OF THE)
 ESTATE OF CLAUDE MCKINLEY)
 FENNELL,)
 PLAINTIFF,)
 v.)
 EAST CAROLINA HEALTH D/B/A)
 VIDANT ROANOKE-CHOWAN)
 HOSPITAL, DARLA K. LILES, M.D.,)
 AND VIDANT MEDICAL CENTER,)
 DEFENDANTS.)

From Hertford County
 No. 16CVS155
 No. COA18-1096

MOTION OF THE AMERICAN PATIENT RIGHTS ASSOCIATION SEEKING LEAVE TO
 FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF THE PETITION FOR
 DISCRETIONARY REVIEW OF PLAINTIFF

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

NOW COMES THE AMERICAN PATIENT RIGHTS ASSOCIATION, pursuant to Rule 28 of the North Carolina Rules of Appellate Procedure, and respectfully moves the Court for leave to file an Amicus Curiae Brief in support of the Plaintiff's Petition for Discretionary Review. The United States is presently going through a pandemic in which over 56,000 Americans have died and almost 1,000,000 Americans have been infected by COVID-19. One of the most important matters the state and federal governments are engaged in is testing citizens to find out if they are positive or negative for the Coronavirus. And citizens want to obtain their test results for this virulent virus as soon

as possible. There is no question that this country is presently involved in a medical crisis situation the likes of which this country has never experienced.

This case brings before this Court whether a physician has the legal right in North Carolina to knowingly withhold a patient's adverse medical test results from the patient where the test results are dire and are a matter of life and death. No one in our present pandemic could rationally argue that a physician could so knowingly withhold a patient's test results showing the patient had tested positive for COVID-19, with his or her life hanging in the balance.

I. INTRODUCTION AND INTERESTS OF AMERICAN PATIENTS RIGHTS ASSOCIATION AS AMICUS CURIAE

The American Patient Rights Association (APRA) is an independent, nonprofit consumer organization for fair, safe, and affordable healthcare. It is dedicated to empowering consumers by providing information, education and a voice for patients, and is fighting to save lives that are being lost or ruined due to our broken medical system.

The American Patient Rights Association provides a voice for consumers in the United States healthcare system to create a movement for fair, safe, transparent healthcare and to provide a resource for people who wish to protect themselves and their families from preventable physical and financial harm when they seek medical care.

The APRA's mission is to provide the leadership, education and advocacy for the right of healthcare consumers to receive safe, fair and transparent medical services and goods.

II. REASONS WHY AN AMICUS BRIEF IS DESIRABLE

Hundreds of thousands of United States citizens, including thousands in North Carolina are being tested for the COVID-19 virus. Again, many of these test results deal with life and death decisions. Where medical test results are adverse, the patient especially has a right to know his or her test results.

The Patient Bill of Rights from the National Institutes of Health (NIH) (see Exhibit A attached hereto) mandates that patients receive their medical test results from their physician. The applicable statement says:

You have the right to receive complete information about diagnosis, treatment, and prognosis from the physician, in terms that are easily understood.

A patient's adverse test results would be included in complete information about diagnosis, treatment and prognosis from a physician. This case has important and widespread implications for citizens in this state and in this nation.

This case deals with knowingly withholding adverse medical test results from a patient in an **emergency** situation where a physician (a fiduciary) took advantage of her position of trust to the detriment of the patient, which in this case resulted in his death.

III. THE ISSUES OF LAW TO BE ADDRESSED AND THE POSITION OF THE AMERICAN PATIENT RIGHTS ASSOCIATION

This case brings forth to this Court critical issues dealing with a physician, again a fiduciary, knowingly withholding adverse medical test results from her patient in a medical emergency.

As is the case here, Plaintiff has the right to seek legal redress for fraudulent concealment (both actual and constructive fraud). The Court of Appeals took away the Plaintiff's right to have the jury decide actual fraud and constructive fraud in this case by taking the evidence of the Defendants as true and overlooking the evidence of the Plaintiff that went the other way.

The positions of the American Patient Rights Association are as follows:

1. The test results are factual and not an opinion. The Court of Appeals looks at the dire test results of Mr. Fennell as being a medical opinion. Ct. App. Opinion at p. 11. Plaintiff's expert, Dr. Robert K. Stuart testified that Mr. Fennell's test results showed he had Auer rods, which is indicative of Acute Myeloid Leukemia (AML). (Tr pp 590-591). The Court of Appeals was incorrect that Plaintiff's experts did not testify that it was more likely than not that Plaintiff had AML. Plaintiff's evidence should have taken the fraudulent concealment claim to the jury.

Plaintiff's evidence established that the Defendant physician received Mr. Fennell's adverse test results at 9:38 PM on 26 March 2014. By failing to disclose this information to Mr. Fennell, he had no knowledge that he should have gone to a top-tier hospital to have a bone marrow biopsy performed. When Mr. Fennell went to Vidant Medical Center in Greenville, North Carolina on 7 May 2014, a bone marrow biopsy was performed on 8 May 2014, and Mr. Fennell was then diagnosed with AML. By that time, it was too late to save his life. Mr. Fennell died on 25 May 2014 from AML and

complications from chemotherapy treatment for AML. (Tr pp 294-296, p 443, pp 744-746).

2. The Court of Appeals ignored this Court's recent Opinion in *Head v. Gould Killian, CPA*, 371 N.C. 2, 812 S.E.2d 831 (2018). *Head* sets out two elements for Plaintiff to prove constructive fraud, which was proven by Plaintiff in this case, i.e., there was a relation of trust and confidence and the physician took advantage of her position of trust in knowingly withholding the adverse test results, which caused Mr. Fennell's death. The Court of Appeals doesn't even mention *Head* in its Opinion.

3. This Court's Opinion in *Head* makes it clear that the elements of actual fraud and reasonable reliance are ordinarily questions for the jury. The jury would also have to decide the intent of the physician in knowingly withholding the adverse test results of Mr. Fennell. The trial court should not have taken away the jury's right to decide this issue by granting a directed verdict against Plaintiff at the end of Plaintiff's evidence.

4. The issues raised by Plaintiff in the Petition for Discretionary Review could not be more timely.

IV. CONCLUSION

WHEREFORE, the American Patient Rights Association (APRA) respectfully asks this Court to grant Discretionary Review in this case and to grant leave for the filing of an Amicus Brief.

Respectfully submitted this the 28th day of April, 2020.

- 6 -

GRAY NEWELL THOMAS, LLP

s/Angela N. Gray

7 Corporate Center Court, Suite B
Greensboro, NC 27408

336-285-8151


State Bar No. 21006

angela@graynewell.com

Attorney for Amicus


American Patient Rights Association

Patient Bill of Rights


English ([././._pdf/bor.pdf](#))  | Spanish ([././._pdf/bors.pdf](#)) 

You have the right:

- To safe, considerate and respectful care, provided in a manner consistent with your beliefs;
- To expect that all communications and records pertaining to your care will be treated as confidential to the extent permitted by law;
- To know the physician responsible for coordinating your care at the Clinical Center;
- To receive complete information about diagnosis, treatment, and prognosis from the physician, in terms that are easily understood. If it is medically inadvisable to give such information to you, it will be given to a legally authorized representative;
- To receive information necessary for you to give informed consent prior to any procedure or treatment, including a description of the procedure or treatment, any potential risks or benefits, the probable duration of any incapacitation, and any alternatives. Exceptions will be made in the case of an emergency;
- To receive routine services when hospitalized at the Clinical Center in connection with your protocol. Complicating chronic conditions will be noted, reported to you, and treated as necessary without the assumption of long-term responsibility for their management;
- To know in advance what appointment times and physicians are available and where to go for continuity of care provided by the Clinical Center;
- To receive appropriate assessment of, and treatment for, pain;
- To refuse to participate in research, to refuse treatment to the extent permitted by law, and to be informed of the medical consequences of these actions, including possible dismissal from the study and discharge from the Clinical Center. If discharge would jeopardize your health, you have the right to remain under Clinical Center care until discharge or transfer is medically advisable;
- To be transferred to another facility when your participation in the Clinical Center study is terminated;
- To expect that a medical summary from the Clinical Center will be sent to your referring physician;
- To designate additional physicians or organizations at any time to receive medical updates.

NOTE: PDF documents require the free Adobe Reader
(<http://www.adobe.com/products/acrobat/readstep2.html>) 

This page last updated on 11/15/2019

NIH Clinical Center (<https://www.facebook.com/NIHClinicalCenter>) 
Clinical Center Flickr (<https://www.flickr.com/photos/clinicalcenternih/>) 
@NIHClinicalCtr (<https://twitter.com/NIHClinicalCtr>) 
Clinical Center YouTube (<https://www.youtube.com/c/NIHClinicalCenter>) 
Other Clinical Center Social Media (<http://www.cc.nih.gov/ocmr/socialmedia.html>)

10 Center Drive, Bethesda, MD 20892 | [Directions \(/about/visitor1.html\)](#)
[Privacy Statement \(/disclaimers.html#Privacy\)](#) | [Accessibility \(/accessibility.html\)](#) | [Plain Language \(/plain.html\)](#) | [FOIA \(/foia.html\)](#) | [Disclaimer \(/disclaimers.html\)](#)
[Clinical Center \(/index.html\)](#) | [National Institutes of Health \(http://www.nih.gov/\)](#) | [U.S. Department of Health and Human Services \(http://www.hhs.gov/\)](#) | [USA.gov \(http://www.usa.gov/\)](#)
NIH... *Turning Discovery Into Health*[®]

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she served a copy of the foregoing MOTION OF THE AMERICAN PATIENT RIGHTS ASSOCIATION SEEKING LEAVE TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF THE PETITION FOR DISCRETIONARY REVIEW OF PLAINTIFF by depositing a copy, contained in a first-class postage-paid wrapper, into a depository under the exclusive care and custody of the United States Postal Service, addressed as follows:

Gloria Becker
Kari R. Johnson
Randolph L. Lee
BATTEN LEE, PLLC
4141 Parklake Avenue, # 350
Raleigh NC 27612
919-439-2221
rlee@battenlee.com
gbecker@battenlee.com

C. David Creech
Jay C. Salsman
HARRIS, CREECH, WARD & BLACKERBY, P.A.
325 Pollock Street
P.O. Drawer 1168
New Bern, NC 28563
252-638-6666
cdc@hcwb.net
jcs@hcwb.net

Harvey L. Kennedy
Harold L. Kennedy, III
KENNEDY, KENNEDY, KENNEDY AND KENNEDY, LLP
301 North Main Street, Suite 2000
Winston-Salem, NC 27101
Telephone: 336-724-9207
Facsimile: 336-724-5127
harveykennedy@bellsouth.net
haroldkennedyiii@bellsouth.net

This is the 28th day of April, 2020.

GRAY NEWELL THOMAS, LLP

s/Angela N. Gray

7 Corporate Center Court, Suite B

Greensboro, NC 27408

336-285-8151

State Bar No. 21006

angela@graynewell.com

Attorney for Amicus

American Patient Rights Association