IN THE SUPREME COURT

STATE OF ARIZONA

BRIDGET SHARPE, Plaintiff/Appellant/Respondent, v. ARIZONA HEALTH CARE COST CONTAINMENT SYSTEM ADMINISTRATION, a state agency, ANTHONY D. RODGERS, Director of the Arizona Health Care Cost Containment System, in his official capacity, and MERCY CARE PLAN. Defendants/Appellees/Petitioners.	No. CV09-0044-PR Court of Appeals, Division One NO. 1 CA-CV 07-0817 Maricopa County Superior Court No. LC2007-000076-001 DT

Brief of *Amici Curiae* Support for People with Oral and Head and Neck Cancer (SPOHNC), the American Cancer Society (ACS) Great West Division, and the American Cancer Society Cancer Action Network (ACS CAN) In Support Of Plaintiff/Appellant/Respondent

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1. Support for People With Oral And Head and Neck Cancer (SPOHNC)

Support for People with Oral and Head and Neck Cancer (SPOHNC) was founded by a survivor of oral cancer in 1991 to meet the unmet educational, emotional, physical, and humanistic needs of oral and head and neck cancer patients. This organization is dedicated to raising awareness and meeting the needs of oral and head and neck cancer patients.

Oral and head and neck cancer patients have a wide range of challenges that they must address during their cancer journey. Not only is a patient dealing with a diagnosis that can be life threatening, but she must also deal with possible alterations in facial appearance, speech, smell, taste, chewing, swallowing, dentition, and sight. In addition to these physical changes resulting from surgery and/or radiation therapy, alterations may in turn lead to considerable threats to one's self image, confidence, identity and emotional balance. No body part is so exposed to the world as a person's head and neck. Whereas other scars and deformities of the body may be covered, it is difficult to hide disfigurements and dysfunctions of the head and neck. [1]

SPOHNC presently serves a database of more than 12,500 people. One of the most recurring questions that is presented relates to dental care. Oral and head

[1] J. Zeller, *High Suicide Risk Found for Patients with Head and Neck Cancer*, 296 J. Am. Med. Assoc. 14:1716-1717 (2006).

and neck cancer patients call or email SPOHNC looking for answers to questions concerning dental problems that have occurred as results of medical procedures used to treat their cancer.

2. ACS and ACS CAN

ACS is the nationwide community-based voluntary health organization dedicated to eliminating cancer as a major health problem by preventing cancer, saving lives and diminishing suffering from cancer, through research, advocacy and service. ACS has three million volunteers nationwide who dedicate themselves to this life-saving mission, and ACS Great West Division serves Arizona, the state in which this case arises. ACS CAN is the advocacy affiliate of ACS, working to achieve public policies that further the organizations' shared goal of providing access to quality medical care. ACS CAN has 4,700 volunteer advocates in state of Arizona.

ACS and ACS CAN advocate nationwide for meaningful health insurance that is adequate, available, affordable, and administratively simple. In this case, the Court's ruling will address the critical issue of whether cancer and other patients will receive coverage for complications from their treatment. ACS Great West Division and ACS CAN believe patients should have timely access and coverage of the complete continuum of quality, evidence-based healthcare services essential to re-establishing full health. We believe that in addition to disease-

directed treatment, the symptoms and side effects associated with either the disease or its treatment must be fully addressed. For many patients, these services include restoring teeth damaged by cancer treatments.

Argument

I. Oral and Head and Neck Cancer Treatment Includes Responding To the Predictable and Severe Damage to Patients' Mouth, Gums and Teeth.

Surgery, radiation therapy and chemotherapy more often than not cause multiple types of dental problems in patients with oral, head and neck cancer. Some of the major side effects and/or complications of radiation therapy to the head and neck are xerostomia (dry mouth), post-radiation caries (rampant tooth decay), trismus (inability to open the mouth widely), difficulties with removable dentures and necrosis of hard (bone) and soft (oral mucosa) tissues. It is estimated that radiation caries occur 100 times more often in patients who have received head and neck radiation as compared with normal individuals. These caries can progress within months, advancing towards pulpal tissues and resulting in dental abscesses that can extend to the surrounding irradiated bone. Extensive infection and osteoradionecrosis (bone death) can result. The potential for oral side effects

from radiation therapy always exists and the results of these side effects can often be devastating and life threatening, if not treated.[2]

Thus, it is imperative that health insurers recognize the fact that patients who have undergone treatment for oral and head and neck cancer suffer from short term and long term dental problems. All must realize that the dental problems of these patients were caused by the medical treatment which was necessary to save the individual's life. Consequently, the cost of treatment for medically necessary dental problems resulting from other medical conditions should be covered by Medicaid, Medicare and/or private insurance.

Oral and head and neck cancer management remains predominantly surgical/ ablative in nature, with a majority of patients also requiring radiation treatment to the oral cavity, oropharynx and neck. The addition of chemotherapy to a patient's radiation treatment plan has become increasingly common as a means of obtaining better results, longer survival times, and an ultimate cure.

Each of these treatment modalities carries significant local and regional side effects that are permanent and life-altering.[3] Aside from the tremendous impact on

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[2] *Oral Complications of Chemotherapy and Head/Neck Radiation (PDQ)*, National Cancer Institute, www.cancer.gov/cancertopics/pdq (last visited 7/09/09).

[3] Pamela J. Hancock, Joel B. Epstein & Georgia Robins Sadler, *Oral and Dental Management Related to Radiation Therapy for Head and Neck Cancer*, 69 J. Can. Dental Assn. 585 (2003); *Side Effects of Cancer Treatment, What You Need To Know About Oral Cancer,* National Cancer Institute, http:www.cancer.gov/cancertopics/oral; *Side Effects of Treatment for Oral Cancer;*

quality of life issues from various sources, the day to day functional problems encountered by the oral and head and neck cancer patient are ones requiring resolution from several members of the healthcare team including the dentist, oral surgeon and the maxillofacial prosthodontist,[4] as the standard of care in the functional rehabilitation of these patients demands this level of interaction. The primary surgeon and the radiation oncologist should also be included, as they are responsible for designing the primary treatment of the cancer while the other providers must reconstruct, rehabilitate, and follow these patients in an ongoing manner.

Local and regional extirpative surgery for malignancies involving the mouth, oropharynx, and nasopharynx generally involve replacement of soft tissue and bone, often from sites away from the head and neck region at the time if surgery and prior to patient discharge. As a part of the treatment planning procedure, the replacement not only of previously removed tissues around the cancer, but also the dentition which will allow the patient to regain as much oral function as possible, consistent with being able to eat, speak, swallow and re-enter society and reassume their role in their families and workplaces. In the absence of appropriate standard of care levels of reconstruction and rehabilitation, oral cancer patients continue to

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What Is Rehabilitation for Oral Cancer, WebMD, www.medicinenet.com/oral_cancer (last visited July 13, 2009).

[4] DJ Okay, *et al*., *Prosthodontic Guidelines for Surgical Reconstruction of the Maxilla*, 86 J. Prosthetic Dentistry 352-363 (2001).

suffer long after their wounds have healed; any semblance of a normal level of function becomes impossible to recapture in the absence of restitution of form and function, thus leaving these individuals at risk for great economic, social and physical compromise, and often unable to re-enter their family and provider roles as prior to the diagnosis and treatment of their cancer.[5]

Coupled with reconstruction of the jaws with prosthetic appliances when necessary, the often additional (adjuvant) radiation therapy compounds the problems of recovery in the short term and in the long term, often lifelong, by way of salivary gland dysfunction. Radiation delivery to the site of the primary cancer and often the regional lymph nodes permanently damages delicate salivary tissue, produces deep muscle scarring which often results in limited jaw opening and dysfunction that must be managed. Primary radiation-induced salivary gland damage results in profound oral dryness that in turn produces rampant and florid dental breakdown, often requiring loss of teeth.

Under normal circumstances such extractions would be routine and generally free of complications. In the individual with an irradiated jawbone, there is very considerable risk of extraction sites not healing due to permanent damage

[5] *What Happens After Treatment for Oral Cancer*, WebMD, www.medicinenet.com/oral_cancer (last visited July 13, 2009).

produced by previously administered radiation.[6] The resultant condition, osteoradionecrosis, is a devastating and common complication requiring surgical removal of the jaw and reconstruction, despite the original cancer having been resolved. In the circumstance of the patient radiated in a primary or adjunctive manner, the role of the dental caregiver must be understood and have treatment initiated prior to the onset of the planned radiation therapy. Unless there is lifelong dental care where prevention is aggressively implemented, the risk of the enormous and expensive dental treatment becomes evermore necessary.

Replacing a body part as a result of or as a complication of cancer treatment can be inescapable. In the case of a limb removal or eye enuncleation, restoration and rehabilitation are normally covered costs. The same standard, perhaps even more so given the functional, emotional and professional impact within this context, must also apply. The means of providing these services exist and are a component of the related standard of care for oral function, speaking, swallowing and all that results when those functions are returned to these patients. There is ample literature to support the medical necessity for such care.[7]

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[6] *Oral Complications of Chemotherapy and Head/Neck Radiation (PDQ)*, National Cancer Institute, *supra*.

[7] See, e.g., W.S. Oh, E. Roumanas, and J. Beumer 3rd, *Maxillofacial Restoration After Head and Neck Tumor Therapy,* 70-6 Compend. Contin. Educ. Dent. 77, 101 (2007); and K. Nelson, S. Herberer, and C. Glatzer, *Survival Analysis and Clinical Evaluation of Implant-Retained Prostheses in Oral Cancer Resection Patients Over a Mean Follow-Up Period of 10 Years,* 98 J. Prosthet. Dent. 405-10 (2007).

II. AHCCCS Policy Denies Cancer Patients Needed Dental Restoration and Dentures, As Illustrated By Application of the Policy in Two Recent Cases.

A. Connie Dodson

Connie Dodson is a 53-year-old woman who is eligible for health care coverage through the Arizona AHCCCS program. Ms. Dodson has a history of cancer of the soft palate, hard palate, and sinuses. She had surgery for her oral cancer in 2004, but due to a resulting infection a subsequent surgery was required in 2007. As a result of the surgeries, Ms. Dodson's hard palate and soft palate were reconstructed. Her new hard palate, constructed out of a graft from her fibula, is flat and does not arch upward. As a result of the surgeries Ms. Dodson has no teeth whatsoever. *Connie L. Dodson, In Re: Connie L. Dodson Complainant, vs. Mercy Care Plan, Respondent*, No. 08F-77045-AHC-rhg, Findings of Fact ¶ 2 (Administrative Law Judge Decision, April 14, 2009).

Ms. Dodson's dentist prescribed a treatment plan including four surgical endosteal implants to be permanently installed into Ms. Dodson's newly-constructed hard palate; four prefabricated abutments to be attached to the implants; an overdenture to be attached to the abutments; and a complete lower denture. *Dodson*, *id*. at ¶ 6.

Mercy Care Plan, Ms. Dodson's AHCCCS health plan, denied her request for the reconstruction of her teeth both initially and at the grievance stage. On

further appeal, the Administrative Law Judge (ALJ) and the AHCCCS Director affirmed the denial of coverage of these reconstructive services by AHCCCS.

The ALJ found that "As a result of the removal and reconstruction of her oral structures during the surgeries, Complainant has difficulty with speech and swallowing. Complainant often chokes and coughs when eating soft foods. Complainant reports reflux, which sometimes, along with food residue, comes out of her ears. Complainant is at risk for aspiration." *Dodson*, *id*. at ¶ 3.

Remarkably, the ALJ found despite these findings that Ms. Dodson had not shown that she met the AHCCCS definition of "medically necessary dentures" set out in the AHCCCS Medical Policy Manual.

The adverse ALJ decision in Ms. Dodson's case was adopted in its entirety by the AHCCCS Director. He explained that:

> The AHCCCS Medical Policy Manual, Policy 310, expressly provides that the inability to properly masticate does not constitute medical necessity for dentures and that a member's health must be adversely affected by the absence of dentures in order for dentures to be medically necessary. The evidence does not show that Complainant is unable to obtain necessary nutrition without dentures. Indeed, Complainant has been without teeth for five (5) years, but is not underweight for her height. The evidence does not show any medical condition that would make the requested dentures medically necessary.

Connie L. Dodson v. Mercy Care Plan, 08F-77045-AHC ¶ 5 (Director's Decision, May 12, 2009) *motion for reconsideration filed* (June 11, 2009).

B. Lee Ann Yanez

Lee Ann Yanez was diagnosed with stage IV nasopharyngeal carcinoma when she was 19-years-old, in 1992. Her cancer treatment included chemotherapy and high doses of radiation, with a total dose of 6840 cGy. The chemo/radiation treatment damaged her teeth. *Lee A. Yanez, Complainant, v. University Family Care, Respondent*, No. 09F-83710-AHC at ¶ 5, (Administrative Law Judge Decision, January 23, 2009).

Both Ms. Yanez's doctor and dentist asked her AHCCCS health plan, University Health Care, to pay for dental work to repair or replace the radiation damage teeth. The dental plan included (1) porcelain crowns with core build up to cover many of her teeth; (2) partial cast, also known as dentures; (3) debridement; and (4) adult fluoride. *Yanez, id.*, at ¶ 5.

Ms. Yanez's AHCCCS health plan denied coverage of the requested dental services at both the initial and review stages of appeal. On further appeal, the Administrative Law Judge (ALJ) and the AHCCCS Director affirmed the denial of the services requested for her.

The ALJ decision stated that Ms. Yanez had testified at the ALJ hearing that

> her teeth had deteriorated after her cancer treatment and she was not able to use her molars to chew food normally and that she tried to chew solid food with her front teeth and that she [had] difficulty swallowing food and that on at least two occasions, choked on her food necessitating one of her relatives to perform a 'Heimilch' treatment.

Yanez, id., at ¶ 7. The ALJ also found that Ms. Yanez's primary care physician "testified that [her] teeth are very soft and that the teeth are 'chipping away like limestone' and that she [her physician] felt that the requested work was medically necessary for [her] overall health." *Yanez, id.*, at ¶ 9.

Notwithstanding this evidence, the ALJ held that Ms. Yanez had not established that the requested dental work was medically necessary and a covered service under the definition in the AHCCCS regulation at A.A.C. R9-22-1010(B).

The AHCCCS Director adopted the ALJ's denial decision in his Director's Decision. *Lee A. Yanez v. University Family Care*, 09F-83710-AHC, (Director's Decision, Feb. 4, 2009) *motion For reconsideration* (filed February 12, 2009), *appealed*, *Lee Ann Yanez v. Rodgers, et al.*, No. C20093463 (Ariz.Sup.Ct., Pima Co., filed April 24, 2009). The AHCCCS Director reaffirmed the ALJ's conclusion that Ms. Yanez had not established that the dental work was "medically necessary and a covered service," citing the AHCCCS dental regulation and policy manual provisions.

> [T]he AHCCCS Medical Policy Manual, Policy 310, expressly provides that the inability to properly masticate does not constitute medical necessity for dentures and that a member's health must be adversely affected by the absence of dentures to be medically necessary. The evidence does not show that Complainant is unable to obtain adequate nutrition without dentures or other dental work, nor does the evidence show any medical condition that would make the requested work medically necessary."
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> *Yanez, id.* at ¶ 5.

III. AHCCCS Policy That Denies Cancer Patients Dental Treatment Violates the Provision for Coverage of Dentures in the AHCCCS Statute.

The AHCCCS dental policy illustrated in the Dodson and Yanez cases makes no allowance for coverage of dental care as an extension of the patient's medical treatment for oral cancer. Instead, AHCCCS coverage policy focuses on the narrow question of whether the patient can survive on a liquid diet.

As shown above, extensive damage to mouths and teeth is commonly suffered by oral cancer patients as a result of their medical treatment. The repair of such damage to the extent possible is considered by the medical profession to be part of the standard care for such patients. AHCCCS dental policy, however, ignores the causal relationship between cancer treatment and dental treatment, as well as the medical necessity for treatment to promote the cancer patient's current health. Instead, its restrictive interpretation of the statutory provision for dentures, set out in AHCCCS Medical Policy 310, imposes an unreasonably restrictive definition of medical necessity. This AHCCCS policy forecloses coverage of dentures in virtually every situation, even for cancer patients whose teeth, gums and jaws have been destroyed by the treatments that saved their lives.

CONCLUSION

The application of AHCCCS's restrictive dentures coverage policy to deny dental treatment and restoration services needed by cancer patients demonstrates

the unreasonableness of the AHCCCS policy. It shows that the decision of the Court of Appeals in *Sharpe v. AHCCCS et al.* invalidating the AHCCCS policy was correct. Accordingly, *Amici* urge this Court to affirm the lower court's decision.

Dated: July 14, 2009

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 23 and 6(c) of the Arizona Rules of Civil Appellate Procedure and the Court's June 2, 2009, Minute Letter, I certify that the attached Brief of *Amici Curiae* uses proportionately spaced type of 14 points or more, is double-spaced using a Roman font, and contains 2,787 words, and is not more than 20 pages.

Dated: July 14, 2009

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CERTIFICATE OF SERVICE

Pursuant to Rule 15 of the Arizona Rules of Civil Appellate Procedure, I certify that two copies of the foregoing brief were mailed this 15th day of July, 2009, to:

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