12/18/18

No. 18-799

In The
Supreme Court of the United States

DEBORAH J. DAVIS, and in behalf of
Deceased Spouse, Frank H. Davis, Jr.,

Petitioner(s),

v.

MEHUL BHATT, M.D.,

Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of Georgia

PETITION FOR WRIT OF CERTIORARI

Deborah J. Davis, *Pro Se*
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QUESTIONS PRESENTED

1. Whether applying O.C.G.A. 9-11-9.1 to claims of battery disallowing a claim of battery without an expert witness affidavit is lawful and violates the inviolability of a person's right to control their body.

2. Whether an attempt or the holding of a County Superior Court hearing to dismiss without having a court reporter present to record the hearing violates the right to due process.

3. Whether requiring one party in litigation to notify the other parties of hearing dates rather than the court doing so violates right to due process and equal protection.

LIST OF PARTIES

Deborah J Davis, Petitioner
and in behalf of deceased spouse Frank H. Davis, Jr.
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RULE 29 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner states that it has no parent companies or nonwholly owned subsidiaries.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions, Statutes and Rules

Other Authorities

OPINION BELOW

In an order January 27, 2017, granting dismissal of Deborah J. Davis, INDIVIDUALLY AND AS SURVIVING SPOUSE OF FRANK HOMER DAVIS, JR., v. MEHUL BHATT, M.D., CIVIL ACTION NO. 16-CV-14230, Judge David Cannon of Cherokee County Superior Court, State of Georgia ruled that Plaintiff's claim of battery sounded in medical negligence and pursuant to O.C.G.A. 9-11-9.1 and Plaintiff was required to file an expert witness affidavit with a claim of battery but did not.

The Court of Appeals of Georgia affirmed the dismissal and denied reconsideration as did the Supreme Court of Georgia without opinion.

JURISDICTON

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (a) the Supreme Court of Georgia having denied reconsideration September 24, 2018.

STATEMENT OF CASE

Petitioner commenced a complaint of battery against Appellee based on a medication having been prescribed to be administered Frank Homer Davis, Jr. without consent, the result of which was suffering of Mr. Davis prior to death.

BACKGROUND

Mr. Davis's medical records indicate he had

memory impairment from a stroke. Mr. Davis was not capable of giving consent for such a serious procedure, one of the side effects of which was the possibility of death. Petitioner Deborah J. Davis received a thirty-eight second phone call which did not advise any information about the planned procedure, just that the patient was being moved and was not asked for consent to the procedure. Mr. Davis suffered from the administration of the medication as shown in medical records stopping the medication when there was an adverse reaction. A screen showing the thirty-eight second phone call, a request to know the name of the medication after the death of Mr. Davis, and a form which was blanket consent for admission marked with a "0" of procedures consented to were submitted with Petitioner's complaint, constitute a prima facie case for the medication having been given without consent, resulting in a battery. The fraud and battery continued July 30 when Deborah Davis directly asked Respondent if Mr. Davis had another heart attack during the night. At that time, Respondent denied a heart attack indicating a reaction to the medication only. Respondent had knowledge of a rapid response call during the night, testing currently being done to indicate the status of the Mr. Davis's heart, that there was the possibility of heart damage having occurred and still occurring, but fraudulently did not advise Deborah Davis of the rapid response call and current status so that she could seek other care for Mr. Davis, know to file a criminal battery complaint on July 30, or request an autopsy after Mr. Davis's death, the effect was to eliminate other treatment which could have resulted in expert witnesses. The events of July

30, 2014 were not known to Deborah J Davis until the medical records were received and reviewed.

Additionally, twice after the passing of Frank Davis Respondent continued to withhold information about the rapid response and true account of events afterward. Respondent called Plaintiff Deborah Davis in the ICU unit after the passing of Frank Davis and after Deborah Davis requested to know the name of the medication given Frank Davis via Respondent's web portal. Respondent initially wrote orders for the medication to be administered stat, absent an emergency, though it took five hours until it was administered at such a time as no oversight by Frank Davis caregiver Plaintiff Deborah Davis was likely.

The instant case was dismissed in Cherokee County Georgia Superior Court January 27, 2017 as sounding in medical negligence and for failure to file an expert witness affidavit as required by O.C.G.A. 9-11-9.1 in cases of medical malpractice or medical negligence. See Appendix (a) 2. Subsequently appeal was made to the Court of Appeals of Georgia and dismissal was affirmed. Motion to reconsider was denied and appeal was made to the Supreme Court of Georgia and dismissal was affirmed. Motion to reconsider was denied by the Supreme Court of Georgia September 24, 2018. There is a companion case filed against the hospital also for battery and additional claims which to the knowledge of Petitioner is at this time pending in the Supreme Court of Georgia. The inviolability of one's person issue was raised in pleadings, Dismissal hearing held

January 14, 2017 and in appeals.

At the Superior Court prior to a dismissal hearing, motions to recuse were made regarding what were deemed inappropriate court procedures and actions displaying a bias against Plaintiff and recusal was denied. The issues of right to due process and equal protection were raised in recusal motions.

ARGUMENT

Question 1 The Court has misconstrued O.C.G.A. 9-11-9.1 requiring an expert witness affidavit in a professional malpractice complaint to apply in the instant complaint of battery. No medical negligence is claimed in Petitioner's complaint, singularly the Petitioner(s) claim that the medication was prescribed and administered *without consent* and constitutes battery, and thus no expert witness affidavit was required.

> In *Harris v. Leader*, 231 Ga.App. 709, 710, 499 S.E.2d 374 (1998). "An action for battery arises in the medical context when a medical professional makes unauthorized contact with a patient during examination, treatment, or surgery. Unless consensual, "[i]n the interest of one's general right of inviolability of his person, any unlawful touching of that type is a physical injury to the person and is actionable." "A cause of action for battery exists when objected-to treatment is performed

> without the consent of, or after withdrawal of consent by, the patient. OCGA § 51-1-13;"
> *Joiner v. Lee,* 197 Ga.App. 754, 756(1), 399 S.E.2d 516 (1990).

"[A] medical `touching' without consent is like any other touching without consent: it constitutes the intentional tort of battery for which an action will lie. *Ketchup v. Howard,* 247 Ga.App. 54, 56, 543 S.E.2d 371 (2000)."

The Georgia Court of Appeals has previously ruled that the law of this state shall be that the common law doctrine of informed consent will be recognized.

> The common law doctrine of informed consent provides that physicians and dentists have a duty to inform patients of the known material risks of a proposed treatment or procedure and to inform patients of available treatment alternatives. All of the states except Georgia now recognize the informed consent doctrine. Since the Court of Appeals decision in *Young v. Yarn,* Georgia has not recognized any duty on the part of medical professionals to advise their patients of the known material risks of a proposed treatment or procedure nor any duty to advise of the availability of reasonable alternative treatments, thus implicitly rejecting the

> common law doctrine of informed consent. Because *Young v. Yarn* was wrongly decided, because physicians and dentists have adopted the doctrine of informed consent into their own professional ethical standards, and because of developments in Georgia law since *Young v. Yarn* was decided, we now overrule that decision and all the cases which have followed it. Henceforth the law of this state, like that of the other 49 states, will recognize the common law doctrine of informed consent. *Ketchup v. Howard*, supra.

As there was no consent and particularly no informed consent as required pursuant to the above for the administration of milrinone to Frank Homer Davis, Jr., the administration of such constituted the tort of battery which is the claim of Petitioner(s) in their complaint.

Since the reversal of *Yarn* of the Court of Appeals and the Court of Appeals decision in this case, the Court of Appeals has consistently upheld a person's right to control their own body as a patient resulting in a myriad of battery cases being appealed and probably many more not appealed. O.C.G.A. 9-11-9.1 was passed in an attempt to prevent frivolous lawsuits by the legislature at the behest of the Medical Association of Georgia.

However, O.C.G.A. 9-11-9.1 does not protect all professionals licensed by the state. For example if a

barber cuts someone while shaving them, they are not protected from malpractice for what can be considered an accident. Further, Mr. Davis, was a truck driver prior to his stroke holding a CDL license issued by the state. In a fast-happening accident with Appellee he could have been sued and yet on Mr. Davis's behalf suit against Appellee for actions in which they had five hours to change their conduct has not been heretofore allowed.

O.C.G.A. 9-11-9.1 only governs professional malpractice. it does not and should not have any bearing on battery. Had the legislature meant for it to include battery or if battery can be construed as malpractice that's just a few more words that could have been added but were not. From those words not having been included in the statute it is clear the legislature did not wish to usurp the right to file battery by its citizens who suffered such an act by a professional when presenting for medical care. Judicial decisions that usurp that right, therefore, are against the law passed by the legislature, as well as the Constitution of Georgia and the Fourth and Fourteen amendments to the United States Constitution.

O.C.G.A. 9-11-9.1 is clear. To invoke the necessity of an expert witness affidavit, filing of a complaint of professional negligence or malpractice is required.

> O.C.G.A. 9-11-9.1. Affidavit to accompany charge of professional malpractice (a) In any action for

> damages alleging professional malpractice against: (1) A professional licensed by the State of Georgia and listed in subsection (g) of this Code section; or (2) a domestic or foreign partnership, corporation, professional corporation, business trust, general partnership, limited liability company, limited, liability partnership, association, or any other legal entitiy alleged to be liable based upon the action or inaction of a professional licensed by the State of Georgia and listed in subsection (g) of this Code section; or (3) Any licensed health care facility alleged to be liable based upon the action or inaction of a healthcare professional licensed by the State of Georgia and listed in subsection (g) of this Code section, the plaintiff shall be required to file with the complaint an affidavit of an expert competent to testify , which affidavit shall set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim.

In United States Court of Appeals, District of Columbia Circuit. *Victor Charles FOURSTAR, Jr., Appellant v. GARDEN CITY GROUP, INC., et al., Appellees.* No. 15-5049 Decided: November 28, 2017, *Fourstar v. Garden City Group, Inc.,* No. 15-5049 (D.C. Cir. 2017) courts are bound to interpret the law as written.

> It is not a judge's job to add to or otherwise re-mold statutory text to try to meet a statute's perceived policy objectives. Instead, we must apply the statute as written. See generally *Milner v. Department of the Navy*, 562 U.S. 562, 131 S. Ct. 1259, 179 L.Ed.2d 268 (2011). Kavanaugh, Circuit Judge.

Therefore, O.C.G.A. 9-11-9.1 should not be construed to anything other than claims of professional negligence or malpractice and certainly should not encroach on a person's right to control their own body by being applied to a claim of battery.

> In *Newton v. Porter,* 206 Ga App. 19, 424 S.E. 2d 323 (1992) "In *Joiner v. Lee*, 197 Ga. App. 754, 755 (1), 756 (399 S.E.2d 516), plaintiffs sued Drs. Rottenberg and Lee for battery and loss of consortium claiming they removed her right ovary and fallopian tube without permission. In so doing, plaintiffs stipulated that they were not bringing a medical malpractice action. The trial court granted defendants' motion for summary judgment, ruling, inter alia, that plaintiffs' suit was "in reality a medical malpractice case and the failure of plaintiffs to submit an expert's affidavit in opposition to the defendant-doctors' affidavits and deposition testimony was fatal."

> This Court disagreed and reversed, ruling that insofar as plaintiffs sought damages for a battery, they "need not meet the requisites of a medical malpractice case." Id. We find this holding to be applicable in this case and conclude that it was not incumbent upon plaintiff to file an expert's affidavit pursuant to OCGA § 9-11-9.1. Of course, having alleged battery, and not negligence, plaintiff must provide that defendant intentionally punctured her duodenum. See generally *Hendricks v. Southern Bell Tel. &c. Co.*, 193 Ga. App. 264 (1) (387 SE2d 593). Pointing to OCGA § 9-11-8 (a) (1) (A), defendant urges that this "claim for damages" must be construed as a "medical malpractice case" and that, therefore, plaintiff must comply with the requirements set forth in OCGA § 9-11-9.1. This we cannot do.
>
> By its own terms, the "medical malpractice" definition set forth in OCGA § 9-11-8 applies only to that Code section; it does not apply to OCGA § 9-11-9.1. Judgment reversed. Sognier, C. J., and Cooper, J., concur.

Medical professionals have requirements placed upon them that the other professionals named in O.C.G.A. 9-11-9.1 do not have due to a person's right to control their own body and O.C.G.A. 9-11-9.1 does not negate, lessen, or change the right of a

person to control their own body or deny them a right to file a battery claim.

Further, allowing construing O.C.G.A. 9-11-9.1 to claims of battery actions and not requiring consent denies all citizens of the State of Georgia who may seek medical care the general right of inviolability of their person. Obtaining consent does not require medical expertise it is the law and as stated above, O.C.G.A. 31-9-7 guarantees a person over eighteen the right to refuse treatment and to refuse treatment one must know of it, be able to understand it and in refusing a treatment is denying consent, thus the effect of O.C.G.A. 31-9-7 is a requirement for consent or refusal of a treatment. O.C.G.A. 31-9-2 stipulates that a spouse may consent for someone unable to consent for themselves. Medicare as Mr. Davis's insurance provider, required informed consent {42 CFR 482.13}. Plaintiffs(s) contend that obtaining or verifying that there was consent was a statutory duty of Respondent and consent was not the exercise of professional judgement, but adherence to law and previous court decision and thus dismissal of Plaintiff's claim for failure to file an expert witness affidavit was in error.

Making consent a statutory requirement and not a matter of medical expertise pursuant to *Ketchup*, supra, the Georgia Court of Appeals has declared it a matter of law and ethics, not medical expertise.

While Respondent counsel has claimed there is a consent signed at hospital admission, that was

twelve days prior to the administration of Milrinone to Frank Davis and further in *Ketchup*, supra, quoting *Yarn* "One cannot consent to that of which he is not aware; it follows then that the patients cannot be held to have consented to the risks of surgery if they are not informed of these risks." Therefore a blanket consent twelve days prior to a treatment which was not known at the time can not be valid consent.

Ketchup, supra, also takes note of protected rights referring to *Cruzan v. Director , Mo. Dept. of Health,*

> In *Cruzan,* the United States Supreme Court held that the Due Process Clause of the Fourteenth Amendment to the federal constitution protects that identical liberty interest. A competent person has a liberty interest under the Due Process Clause in refusing unwanted medical treatment. As the Supreme Court noted in *Cruzan,* the common law doctrine of informed consent is a corollary to this constitutionally protected liberty interest and is firmly reflected in these constitutionally protected rights.

O.C.G.A. 9-11-9.1 is vague as to what expert witness would be acceptable in cases of battery as battery could be determined by anyone of reasonable mind or legal expertise and not by medical expertise. The bigger picture is that Georgia becomes a place where citizens of Georgia, fearful that unconsented to

medical acts can be performed on them unfettered, decline to seek medical attention causing a decline in the need for medical professionals which was opposite the alleged intent of Medical Association of Georgia in lobbying for O.C.G.A. 9-11-9.1 to attract competent medical professionals, (Georgia State Law Review Volume 22 Issue 1 Fall 2005 Article 23, page 224 paragraph 1).

O.C.G.A. 9-11-9.1 is a direct hindrance to filing of valid battery complaints but also effects complaints of medical or professional malpractice or negligence. Expert witnesses are expensive and attorneys who take cases on contingency do not take cases absent an almost guaranteed recovery, leaving many victims unable to seek remedy. Expert witnesses do not usually serve for pro se litigants. Clearly in cases where one has suffered in their body due to battery, medical negligence or malpractice there can be no frivolous lawsuit. Court of origin judges unfamiliar with appellate cases separating battery from malpractice and lawyers convincing them to apply O.C.G.A. 9-11-9.1 in error usurp victims of battery claims at the first stage of seeking justice as do appellate courts who do not maintain their previous decisions as in the instant case.

It is questionable if the legislature has the authority to limit "frivolous" lawsuits since pursuant to the Constitutions the United States and of the State of Georgia everyone is supposed to have equal access and due process in the courts, United States Constitution (ARTICLE XIV.SECTION 1, CONSTITUTION OF THE STATE OF GEORGIA

ARTICLE I.BILL OF RIGHTS RIGHTS OF PERSONS paragraphs I, II, VII, and XII),

An expert witness can not be a replacement for a trier of fact such as a judge or jury. When suits are filed the first response of a defendant is to make a motion to dismiss which stays discovery { O.C.G.A. 9-11-12 (j) (1)}. Without discovery an expert witness affidavit at best could only be incomplete or inaccurate.

Due to discrepancy between the medical records and the death certificate of Frank H Davis, Jr., as well as other questions regarding matters found in the medical records, without discovery it can not be honestly ascertained if malpractice occurred. While there may have been malpractice, the instant case is a claim of battery because the medication was prescribed without consent and Mr. Davis suffered from such medication. In the order granting Respondent's motion to dismiss the judge states that Dr. Bhatt administered the drug Milrenone, which caused her husband to suffer an injury and ultimately die." As there is a discrepancy between the death certificate and medical records as to the cause of death, let it be noted that "the milrinone caused" Mr. Davis to die" are the preparer's words and Plaintiff(s) have filed no such claim and could not honestly do so without discovery and a clarification as to why the cause of death changed in the interim between treatment and filing the death certificate.

As Mr. Davis suffered memory impairment, a condition which was documented by medical records

in Petitioner's complaint, he was unable to understand and consent to treatment independently himself and his surrogate was not asked for and did not grant consent to the administration of milrinone, the deceased Frank Homer Davis, Jr. suffered battery injury documented in medical records from administration of milrinone.

It is incumbent on Plaintiff Deborah Davis to defend Frank H Davis, Jr. right to control his own body or have a surrogate control his rights, as well as all the citizens of Georgia to not have O.C.G.A. 9-11-9.1 applied to violations of their right to control their own body in claims of battery, and to seek that O.C.G.A. 9-11-9.1 does not apply to claims of battery and courts are prohibited from requiring an expert witness affidavit in cases that are not filed as medical malpractice or negligence. Given that the Georgia Court of Appeals previously ruled battery claims were allowed and did not require an expert witness affidavit, in battery, that court and the Supreme Court of Georgia have not consistently applied previous case law to this case. " The requirements of O.C.G.A. § 9-11-9.1 do not apply to intentional acts, only to allegations of professional negligence. The Plaintiff must establish that defendant acted intentionally in the first instance, and provide an affidavit in the second." *Labovitz v. Hopkinson,* 271 Ga. 330; 519 S.E.2d 672 (Ga.1999). Questions 2 & 3 Regarding appeals resulting from motions to recuse in the Cherokee County Superior Court, Judge David Cannon requires that the parties of litigation seeking a hearing to notify other parties of hearing dates. This is concerning in that intentional, oversight, or

mistake of not being notified timely may result in a party not being notified of a hearing and losing access to the courts by failure to appear, denying a right to due process. Further other courts in the same jurisdiction do not require this and thus this requirement denies litigants in this court equal protection afforded litigants in other courts of the same jurisdiction.

Further, on January 4, 2017 a hearing was scheduled for a dismissal hearing. Judge Cannon attempted to have the hearing without a court reporter present to make a record from which to appeal displaying a bias against the Plaintiff. The hearing was rescheduled for January 18, 2017.

Reference to this is found in the hearing transcript page 5 lines 7-9. Having so acted the Superior Court judge violated rights granted by the United States Constitution ARTICLE XIV.SECTION 1.

CONCLUSION

Because the Trial Court misconstrued O.C.G.A. 9-11-9.1 to apply to the instant case and failed to apply *Ketchup v. Howard,* 247 Ga. App. 54, 543 S.E.2d 371 (2000) to Petitioner's claim of battery, and because the Court overlooked the material fact that Appellee prescribed administration of milrinone to Frank Homer Davis, Jr. without consent, and Mr. Davis suffered injuries contained in medical records filed with the complaint, and appellate courts have affirmed this error, because there can be no license to

commit battery or take advantage of an elderly, disabled patient, Petitioner(s) respectfully requests that this Court grant certiorari or in the alternate rule summarily that Mr. Davis suffered battery and is entitled to file or have a claim of battery filed on his behalf, as O.C.G.A. 9-11-9.1 does not apply in cases of a claim of battery as well as any other relief the Court may deem appropriate.

Respectfully submitted,
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