No. 18-799

In The
Supreme Court of the United States

DEBORAH J. DAVIS, and in behalf of
Deceased Spouse, Frank H. Davis, Jr.,
Petititioner(s),

v.

MEHUL BHATT, M.D.,
Respondent.

On Petition for Certiorari to the
Supreme Court of Georgia

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioner respectfully and timely petitions this Court for rehearing of its February 19, 2019 order denying a writ of certiorari. This case can seem rather convoluted but it is actually simple. It has involved a law directed at frivolous medical malpractice suits requiring an expert witness affidavit be filed with a medical malpractice claim even though the claim is battery and not medical malpractice or medical negligence. Hence, O.C.G.A. 9-11-9.1 should not apply to the instant claim and petitioner(s) should be allowed to bring a claim of battery as filed. There have been issues of consent, informed consent, and battery. A good reading of the record will reveal that the issue of a patient being able to file a battery complaint should exist and be protected by the courts.

I am not an attorney. just a grandma trying to correct a wrong. No law degree is necessary to see this wrong. The act which resulted in a filing of this battery claim cannot be undone, but there should be some consequences of the act as filed upon and some action to set in motion that it is not inflicted upon others in a similar situation. Every first-year law student probably understands that medical malpractice or medical negligence is the act of something done with consent done in error. Battery is something done without consent causing harm to another, the dividing line between malpractice and battery being consent.

The Georgia legislature has required that claims of professional malpractice require an expert witness affidavit to be filed. They have not legislated that battery claims are subject to the expert witness affidavit requirement. In Georgia law battery is maintained separate from other torts. The Georgia Courts have spoken in declaring several times that a complaint of battery does not require an expert witness affidavit pursuant to O.C.G.A. 9-11-9.1. Local and appellate courts refusing to allow a claim of battery against a medical professional violates the doctrines of stare decisis and separation of powers in allowing courts to write law to include that claims of battery require the filing of an expert witness affidavit.

FACTUAL AND PROCEDURAL BACKGROUND

A. Proceedings Below

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. 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.

B. Proceedings Before This Court

Still proceeding pro se, petitioner timely filed a petition for a writ of certiorari in this Court. As far as petitioner is aware no response was requested from respondents. February 19, 2019 this Court denied a writ of certiorari.

REASONS FOR GRANTING THE PETITION

Georgia law allows for a claim of battery. O.C.G.A. 51-1-13 (2010) 51-1-13. Cause of action for physical injury; intention considered in assessing damages. A physical injury done to another shall give a right of action to the injured party, whatever may be the intention of the person causing the injury, unless he is justified under some rule of law. However intention shall be considered in the assessment of damages.

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, "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).

There is some question as to the type of consent required in Georgia. *Ketchup v. Howard* Georgia Court of appeals statement declaring that Georgia shall henceforth recognize the common law doctrine of informed constent (247 Ga. App. 54, 543 S.E.2d 371 (2000) KETCHUP v. HOWARD No. A00A0987 Court of Appeals of Georgia) was overruled in the Supreme Court of Georgia in *Blotner v. Doreika* 678 SE 2d 80, 285 Ga. 481 - Ga: Supreme Court, 2009. Blotner further states that "As recognized by Georgia's appellate courts, this common law rule could be changed only by legislative act. That occurred in 1988, when the General Assembly adopted the Informed Consent Doctrine, OCGA § 31-9-6.1, which became effective on January 1, 1989. Section 31-9-6.1 sets forth six specified categories of information that must be disclosed by medical care providers to their patients before they undergo certain specified surgical or diagnostic procedures. The Georgia informed consent statute does not impose a general requirement of disclosure upon physicians; rather, it requires physicians to disclose only those factors listed in OCGA § 31-9-6.1(a)." Whereas OCGA § 31-9-6.1 set forth certain patients that were to give informed consent, not providing the same to all patients would violate the equal protection clause of the United States Constitution. *Blotner* further states that an informed consent could only be changed by a legislative act. Applying O.C.G.A. 9-11-9.1 to a claim of battery would also require a legislative act to comply with separation of powers otherwise courts and attorneys for

defendants are writing law which is not in their authority to do.

OCGA § 31-9-6 (d), which provides:

> A consent to surgical or medical treatment which discloses in general terms the treatment or course of treatment in connection with which it is given and which is duly evidenced in writing and signed by the patient or other person or persons authorized to consent pursuant to the terms of this chapter shall be conclusively presumed to be a valid consent in the absence of fraudulent misrepresentations of material facts in obtaining the same.

In one thousand and seventeen pages of medical records in this case there is no consent. Frank Davis's writing hand was disabled by a stroke and he could not sign and Deborah Davis was not asked for and did not grant consent as evidenced by the complaint including a request to know the name of the medication and a thirty eight second phone call from the facility prior to the medication being administered. Further as previously included in Petition for Certiorari, Medicare required that this patient give informed consent and the consent be maintained in the files (42 CFR 482.13).

OCGA § 31-9-2 goes into great detail who is authorized to give medical consent. This does not

exclude any medical procedure or patient. From this we can conclude that the legislature expects medical treatment to be consented to. The only "consent" made was made at the time of admission 12 days prior to the administration of the medication at which time the petitioner(s) did not, could not have known or consented to the administration of milrinone and should not be considered as there having been consent to the unknown.

As far as O.C.G.A. 9-11-9.1 applying to a claim of battery, in dissent, Justice Carley stated "Medical negligence is not the only possible tort which can arise from the doctor-patient relationship. To avoid civil liability for a battery, a physician has the duty to obtain his patient's consent to undergo treatment. OCGA §§ 51-1-13; 51-11-1. "The relation of physician and patient is a consensual one, and a physician who undertakes to treat another without express or implied consent of the patient is guilty of at least a technical battery." *Mims v. Boland*, 110 Ga.App. 477(2), 138 S.E.2d 902 (1964)." O.C.G.A. 9-11-9.1 applying to claims of battery would require legislative action. *BLOTNER v. DOREIKA* 285 Ga. 481, 678 S.E.2d 80 (2009).

Again and again cases stated that claim of battery does not require an expert witness affidavit. "Moreover, to the extent that Head's claims are for simple negligence and not for professional malpractice, then no affidavit is required, even though the action may be against a professional.[8]" "To the extent that this count alleges a claim for

battery, Head may maintain the claim against both the professional and nonprofessional employees and agents of the hospital. A claim for battery is not an allegation of professional negligence and does not require an OCGA § 9-11-9.1 affidavit.[24]" 246 Ga. App. 386 540 S.E.2d 626 (2000) *UPSON COUNTY HOSPITAL, INC. v. HEAD* No. A00A1601 October 13, 2000 Court of Appeals of Georgia.

The decisions in Georgia appellate courts in this case have not agreed with long settled law in guaranteeing a person the right to control their own body. *Ketchup v. Howard, supra*, notes *Cruzan* 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 (U.S. Const., Art. XIV, Sec. 1) 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.

Whether informed consent is the standard in Georgia or not, *Cruzan* should provide the right to

know of what they are consenting to all patients. *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261 (1990). 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 specifically.

In short, thus far petitioner(s)have been denied the right declared to be a basic right of controlling one's own body. Other persons stand subject to having the same right denied them if Georgia courts are allowed to continue denying a right to make a claim of battery against a medical professional without filing an expert witness affidavit. As pursuant to Georgia law, a claim of battery is allowed and is not subject to an expert witness affidavit requirement by law. Appellate cases have noted that battery is separate from medical or professional negligence, and yet in this case Georgia appellate courts as well as county superior courts have violated the separation of powers and stare decisis doctrines by ruling that plaintiff(s) needed to file an expert witness affidavit as is required by Georgia law in claimes of professional malpractice. Dismissal of the writ of certiorari in this case calls into question previous rulings of this Court as well as subjects the very undergirdings of our system of jurisprudence to doubt.

CONCLUSION

For the foregoing reasons, this Court should grand the petition for rehearing, vacate the order denying

the writ of certiorari, and restore this case to its merits docket.

Respectfully submitted,

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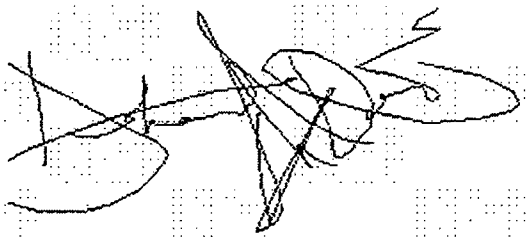
CERTIFICATE OF PETITIONER

I certify that this petition for rehearing is presented in good faith and not for delay.



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