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Albany Urology Clinic, P.C. v. Cleveland: Why You Should Always Ask Your Urologiest if He Is a Cocaine Addict

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Albany Urology Clinic, P.C. v. Cleveland: Why You Should Always Ask Your Urologist if He Is a Cocaine Addict

In *Albany Urology Clinic, P.C. v. Cleveland*,[1] the Georgia Supreme Court ruled that neither state common law nor Georgia's informed consent statutes require physicians affirmatively to disclose negative personal life factors, such as illegal drug use, before treating patients.[2] Consequently, patients injured during certain surgical or diagnostic procedures are severely impeded from pursuing an action of fraud or battery against physicians who fail to divulge their illegal drug use during the course of their patients' medical treatment.

I. FACTS

William Cleveland filed suit in the superior court of Dougherty County against urologist Timothy Trulock and his practice, Albany Urology Clinic, P.C., for medical negligence. Alternatively, Cleveland alleged fraudulent concealment and misrepresentation, as well as battery claims. Cleveland consulted with Trulock in 1993 about a lump on the underside of his penis. Trulock erroneously diagnosed the lump as cancerous and

1. 272 Ga. 296, 528 S.E.2d 777 (2000).
2. *Id.* at 296-97, 528 S.E.2d at 778.

recommended surgical removal.[3] Trulock described the procedure to Cleveland, saying, "This is simple. I'll make a half-inch incision . . . . I'll give you a couple of stitches, and you'll be back to work Monday morning."[4] Because it was necessary to put Cleveland under general anesthesia, Cleveland signed an informed consent statement asserting that he had been apprised of all the required factors set out in the Official Code of Georgia Annotated ("O.C.G.A.") section 31-9-6.1(d). After the surgery, Cleveland experienced a painful ninety-degree curvature of his penis upon obtaining an erection, and thus was unable to have sexual intercourse. Cleveland had suffered no such trouble before the operation.[5]

Cleveland brought suit, claiming that Dr. Trulock performed an unnecessary and unwanted medical procedure. Charles Horton, Jr., M.D., an expert witness, testified at trial that the lump was caused by Peyronie's Disease, a common benign condition usually treated with Vitamin E supplements. Dr. Horton further testified that Trulock "breached the applicable standard of care in both his diagnosis and treatment."[6] Cleveland's medical records prepared by Dr. Trulock, including the consent form Cleveland had signed, indicated that Trulock had failed to consider a possible diagnosis of Peyronie's Disease. Todd Jarrell, M.D., another expert witness, testified that this failure "deviated from the proper standard of care" and that the scar left on Cleveland's penis from the surgery likely caused the abnormal curvature.[7]

Cleveland also asserted that Dr. Trulock "had fraudulently concealed or misrepresented his 'illegal use and abuse of cocaine, substance abuse problem, and impairment' at the time of [his] treatment."[8] Dr. Trulock's drug use became known when he suffered a cocaine-induced seizure, and had to be admitted to the emergency room of an Atlanta hospital.[9] At trial Trulock selectively answered questions concerning his drug addiction but allegedly admitted "that he deliberately and intentionally concealed his cocaine use from all his 10,000 patients because he intended for them to believe that he did not use cocaine."[10] To the

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3. *Id.* at 297, 528 S.E.2d at 778.

4. Cleveland v. Albany Urology Clinic, P.C., 235 Ga. App. 838, 843 n.5, 509 S.E.2d 664, 669 n.5 (1998).

5. 272 Ga. at 297, 528 S.E.2d at 778.

6. 235 Ga. App. at 839, 509 S.E.2d at 666.

7. *Id.* at 841, 509 S.E.2d at 668.

8. 272 Ga. at 297, 528 S.E.2d at 778.

9. Supplemental Brief of the Respondents at 15, Albany Urology Associates v. Cleveland, 272 Ga. 296, 528 S.E.2d 777 (2000).

10. Brief of Respondents at 2, Albany Urology Associates v. Cleveland, 272 Ga. 296, 528 S.E.2d 777 (2000).

question, "'When's the last time you used cocaine before you operated on Mr. Cleveland,'" Trulock answered "that he did not 'have a clue.'"[11] When he was asked, "'We're not ever going to get you to tell us the whole truth about your cocaine use, are we?' Trulock answered, 'No, sir.'"[12] Throughout his deposition and trial testimony, Trulock purportedly invoked his Fifth Amendment privilege against self-incrimination over a hundred times in response to questions concerning his drug use in connection with his treatment of patients.[13] Cleveland testified that if he had known Trulock was using cocaine at the time of his treatment, he would not have consented to the surgery.[14]

Before trial, the superior court dismissed Cleveland's battery claim, finding it defective under O.C.G.A. section 31-9-6.1(a). The trial court also prohibited Cleveland from introducing evidence of a prior lawsuit that would have allowed a jury to infer that Trulock's medical judgment was impaired by his cocaine use. The jury found for the defendants on the medical malpractice claim, but awarded $650,000 in compensatory damages and $35,000 in punitive damages after finding that Trulock had fraudulently misrepresented and/or concealed material facts from Cleveland. The superior court granted defendants' motion for judgment notwithstanding the verdict ("j.n.o.v.") holding that the plaintiff's fraud claim failed as a matter of law for the following reasons: (1) neither O.C.G.A. section 31-9-6.1, nor Georgia's common law imposed a duty upon doctors to reveal illegal drug use; and (2) the evidence failed to prove that there was any intent to harm Cleveland, thus barring a recovery for fraud.[15]

On appeal the Georgia Court of Appeals reversed both the superior court's grant of j.n.o.v. and the dismissal of the battery claim.[16] The court of appeals reasoned that when a confidential relationship like a doctor-patient relationship exists, failure to disclose material information, such as drug abuse, constitutes fraudulent and willful misrepresentation.[17] Absent Cleveland's knowledge that Trulock was using cocaine,

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11. 235 Ga. App. at 841, 509 S.E.2d at 667.

12. *Id.*

13. Brief of Respondents, *supra* note 10, at 23. It is important to note that in a civil trial, the jury may draw all inferences *against* a person who claims their Fifth Amendment privilege. O.C.G.A. § 24-4-22 (1995); *In re* Meier, 256 Ga. 72, 75, 344 S.E.2d 212, 214 (1986).

14. 235 Ga. App. at 841, 509 S.E.2d at 668.

15. *Id.* at 839, 509 S.E.2d at 666-67.

16. 272 Ga. at 297-98, 528 S.E.2d at 779.

17. 235 Ga. App. at 840, 509 S.E.2d at 667.

Cleveland's consent to the surgery was vitiated because it was uninformed; therefore, the court upheld his battery claim.[18]

The Supreme Court of Georgia granted defendants' motion for certiorari to determine whether a patient is "authorized to bring a claim against a physician for the latter's failure to disclose his use of illegal drugs," and specifically whether such a failure could support Cleveland's claims for fraud and battery.[19] The supreme court held that absent a patient's or client's direct inquiry, professionals have no statutory or common law duty to "disclose to their patients or clients unspecified life factors which might be subjectively considered to adversely affect the professional's performance."[20] Thus, a claim for fraud or battery cannot be maintained solely on this failure to disclose.[21]

II. LEGAL BACKGROUND

The informed consent doctrine, which holds that "a consent to a treatment or diagnostic test obtained without disclosure of the hazards or dangers involved, is no consent,"[22] is rooted in both battery and negligence actions. A claim for medical battery may be brought when a plaintiff was not informed of the nature of the medical touching; as with all battery claims, she does not have to prove that an actual injury occurred from the uninformed touching.[23] An example of this is when a patient consents to an appendectomy, but the surgeon performs a tonsillectomy. Additionally, a surgeon who receives a patient's consent to a medical procedure through fraud or deceit may be liable to the patient under a theory of battery.[24] However, in most states a medical battery claim is only permissible when there has been absolutely no consent to the medical procedure.[25] Generally speaking, punitive damages are appropriate in a medical battery case when there has been deceit, a breach of fiduciary duty, a total disregard for the patient's wishes, or gross recklessness.[26]

In recent years, most cases based upon a patient's uninformed consent to the risks of a medical procedure have arisen in negligence, rather

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18. *Id.* at 842-43, 509 S.E.2d at 669.
19. 272 Ga. at 296, 528 S.E.2d at 778.
20. *Id.*
21. *Id.*
22. Mull v. Emory Univ., Inc., 114 Ga. App. 63, 65-66, 150 S.E.2d 276, 292 (1966).
23. 1 BARRY R. FURROW, ET. AL., HEALTH LAW 410 (1995).
24. *Id.* at 411.
25. *Id.* Pennsylvania is currently the only state that allows for a battery claim to be established if a doctor does not obtain a patient's fully informed consent prior to treatment. *Id.*
26. *Id.* at 411-12.

than battery.[27] This trend reflects a judicial movement towards allowing doctors more medical discretion.[28] Because these cases are founded in negligence theories, a standard for medical disclosures to patients must be established by which to judge an individual doctor's conduct.[29] Some states have preferred a standard that is determined by the doctor's professional peers, requiring a plaintiff to produce expert testimony regarding what a similarly situated doctor would disclose under similar circumstances.[30] Other states have opted for a reasonable person standard, assessing what a reasonable patient would want to know before consenting to a medical procedure and weighing the doctor's disclosures against that criteria.[31] Importantly, no state has ever employed a subjective person standard to the question of whether a doctor has adequately informed her patient about a medical procedure.[32]

The Georgia courts left open the question of whether the informed consent rule applied to the state's common law until 1966. In 1966 the court of appeals first touched on the issue in obiter dicta in *Mull v. Emory University*.[33] In *Mull* plaintiff alleged in part that her doctor failed to inform her adequately of the risks inherent in the diagnostic procedure to which she consented because the doctor did not tell her what would foreseeably happen if the procedure went awry.[34] The court of appeals, while declining to decide whether informed consent applied to Georgia law, held that even if informed consent was incorporated into Georgia common law physicians would only be required to disclose "the hazards of a correct and proper procedure" and would have no duty to warn of the dangers of an improperly performed procedure.[35]

In 1971 the General Assembly enacted the Georgia Medical Consent Law.[36] Section 31-9-6(d) of this statute 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 . . . shall be conclusively presumed to be a valid consent in the absence of

27. *Id.* at 412.
28. *Id.*
29. *Id.*
30. *Id.* at 413.
31. *Id.* at 412.
32. *Id.* at 415.
33. 114 Ga. App. 63, 150 S.E.2d 276.
34. *Id.* at 65-66, 150 S.E.2d at 292.
35. *Id.*
36. Georgia Medical Consent Law, 1971 Ga. Laws 438-41 (codified as amended at O.C.G.A. § 31-9-6 (1996)).

fraudulent misrepresentations of material facts . . . ."[37] The appellate court in *Young v. Yarn*[38] interpreted this section to mean that physicians must reveal the general nature of their patients' treatment, but are not required "to warn of the risks of treatment" to obtain valid consent from the patient.[39] Thus, the court implicitly rejected the doctrine of informed consent.

The courts unanimously followed *Young*, holding that "there was no cause of action for informed consent in Georgia"[40] despite criticism that Georgia was the only state to eschew the informed consent rule.[41] The appellate court in *Simpson v. Dickson*[42] recognized the controversy surrounding Georgia's reluctance to adopt the informed consent doctrine, but stated: "'If this Court has been wrong from the beginning on this subject, let the legislative power be invoked to prescribe a new rule for the future . . . .'"[43] Finally, in 1988 the General Assembly adopted O.C.G.A. section 31-9-6.1.[44] Section (a) of this statute "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."[45] Unfortunately, the narrow scope of this statute provides little protection to the many patients who undergo more general, yet inherently risky, medical procedures.

O.C.G.A. section 31-9-6.1(d) additionally provides that "failure to comply with the requirements of this Code section shall not constitute

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37. O.C.G.A. § 31-9-6(d).

38. 136 Ga. App. 737, 222 S.E.2d 113 (1975), *overruled by* Ketchup v. Howard, No. A00A0987, 2000 Ga. App. LEXIS 1418 (Nov. 29, 2000) (holding that the plastic surgeon had no duty to warn the face-lift patient of the possibility of post-operative hypertrophic scarring). *Young* was overruled in November 2000 by the court in *Ketchup*. *See infra* note 82 and accompanying text.

39. 136 Ga. App. at 739, 222 S.E.2d at 114.

40. Campbell v. United States, 795 F. Supp. 1127, 1130 (N.D. Ga. 1991); *see also* Padgett v. Ferrier, 172 Ga. App. 335, 335, 323 S.E.2d 166, 166 (1984).

41. 61 AM. JUR. 2D, *Physicians, Surgeons, and Other Healers* § 187 (1981).

42. 167 Ga. App. 344, 347, 306 S.E.2d 404, 407 (1983).

43. *Id.* (quoting Adams v. Brooks, 35 Ga. 63, 66 (1866)).

44. Health-Informed Consent to Surgical, Medical, or Diagnostic Procedures; Causes of Action; Rules and Regulations, 1988 Ga. Laws 1443-47 (codified as amended at O.C.G.A. § 31-9-6.1 (1996)).

45. *Albany Urology Clinic*, 272 Ga. at 298, 528 S.E.2d at 779. Patients who undergo surgery while under general or spinal anesthesia, or diagnostic procedures involving intravenous or intraductal injection of a contrast material shall be informed of: (1) a diagnosis of the condition requiring the procedure; (2) the nature and purpose of such proposed procedure; (3) the material risks of the procedure generally recognized and accepted by reasonably prudent physicians; (4) the likelihood of the procedure's success; (5) the practical alternatives to the procedure; and (6) the prognosis of the patient's condition if the procedure is not undertaken. O.C.G.A. § 31-9-6.1(a)(1)-(6).

a separate cause of action but may give rise to an action for medical malpractice."[46] The court of appeals has held, however, that when a patient does not authorize a medical procedure, O.C.G.A. section 31-9-6.1(d) will not preclude an action for battery against the treating doctor.[47] A signed consent form that adheres to the requirements of O.C.G.A. section 31-9-6.1(a) merely creates a rebuttable presumption of a patient's consent to a medical or diagnostic procedure.[48] This presumption may be overcome by proving that the responsible physician fraudulently misrepresented material facts of the procedure.[49] However, if a doctor does obtain "valid consent, but fails to provide each disclosure required by OCGA § 31-9-6.1, the failure to strictly comply with [the statute] does not give rise to a separate cause of action for battery. Thus, for a battery claim, the issue remains whether the doctor obtained *valid* consent."[50]

III. THE COURT'S RATIONALE

The supreme court granted certiorari to decide in part whether professionals have a duty to disclose negative personal life factors that could impair their performance and in part whether the nondisclosure of those factors gives rise to an action for battery and/or fraud.[51] In a six to three decision, the supreme court held that physicians in Georgia have no duty to disclose such negative factors and that nondisclosure of these factors would not substantiate a claim of fraud or battery.[52] Justice Carley, with Justices Thompson and Hunstein, concurred that nondisclosure of the factors enumerated in O.C.G.A. section 31-9-6.1(a) could not give rise to an action of fraud, but dissented from the majority's holding that Cleveland could not recover on a claim for battery.[53]

Despite the assertion made in O.C.G.A. section 31-9-6(a) that "[t]his chapter shall be liberally construed,"[54] the court determined that the specific provisions of O.C.G.A. section 31-9-6.1(a) must be strictly

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46. O.C.G.A. § 31-9-6.1(d).

47. Gillis v. Cardio TVP Surgical Assocs., P.C., 239 Ga. App. 350, 353, 520 S.E.2d 767, 771 (1999), *rev'd*, Cardio TVP Surgical Assocs., P.C. v. Gillis, 272 Ga. 404, 528 S.E.2d 785 (2000).

48. Tuten v. Costrini, 238 Ga. App. 350, 350, 518 S.E.2d 751, 752 (1999), *overruled by* Ezor v. Thompson, 241 Ga. App. 275, 526 S.E.2d 609 (1999).

49. O.C.G.A. § 31-9-6.1(d).

50. 239 Ga. App. at 354, 520 S.E.2d at 771.

51. *Albany Urology Clinic*, 272 Ga. at 298, 528 S.E.2d at 779.

52. *Id.* at 296, 528 S.E.2d at 778.

53. *Id.* at 303, 528 S.E.2d at 783 (Carley, J., concurring in part and dissenting in part).

54. O.C.G.A. § 31-9-6(a).

construed because they are in derogation of "the common law rule against requiring physicians to disclose medical risks to their patients."[55] The supreme court thus held it was "without authority to impose disclosure requirements upon physicians in addition to those requirements already set forth by the General Assembly."[56] Therefore, O.C.G.A. section 31-9-6.1 may not be construed to require a doctor to warn patients of potential personal factors that could negatively affect his performance.

Because the court held that Dr. Trulock had no affirmative duty to disclose any aspect of his personal life, Cleveland's claim for fraud based on Trulock's nondisclosure of his cocaine addiction was thus unsubstantiated.[57] Accordingly, the supreme court reversed the court of appeals ruling.[58]

In the absence of any fraudulent conduct on Trulock's behalf, Cleveland's battery claim was similarly rejected.[59] However, the supreme court held that a claim for battery may survive when a physician has obtained consent to treatment by misrepresenting a factor directly related to the patient-doctor relationship.[60] Therefore, one may construe that a patient's consent would be deemed invalid if a doctor misrepresents a patient's diagnosis or treatment, or if a doctor fails to respond truthfully to a patient's questions. Nonetheless, the court declined to allow a patient to pursue a claim for battery for failure to disclose a negative personal factor when (1) the undisclosed factor is unrelated to the professional relationship and would only impact the patient's consent to be treated because of that patient's subjectively held beliefs, and (2) "there is no direct evidence of record that the physician was impaired or affected by the negative personal life factor at the time consent was obtained and treatment was rendered."[61] Although the court did not question that Cleveland would have refused surgery had he known Trulock was taking drugs, the court took exception with the record's failure to establish a causal nexus between Trulock's drug use and Cleveland's consent to treatment and the resulting injury.[62] Stating "we cannot allow a cause of action for battery to be based upon pure speculation that such a nexus exists," the supreme court decided

55. 272 Ga. at 299, 528 S.E.2d at 780.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 300-01, 528 S.E.2d at 781.
60. *Id.* at 301, 528 S.E.2d at 781.
61. *Id.*
62. *Id.*

that Trulock's cocaine habit "[was] too attenuated from the subject matter of the professional relationship to support a battery claim."[63]

The court also reasoned that public policy would not support a holding that professionals be required to disclose negative personal issues before obtaining valid consent from their clients.[64] First, because each client is unique, it would be nearly impossible to determine what would subjectively impact each client's decision.[65] Thus, in the absence of any good guidelines, a professional may be required to reveal every minute and private aspect of her life before touching upon a subject that the client considers relevant.[66] Second, even the imposition of guidelines relating what a professional must and may not disclose would depend so largely upon the particular profession, the "services being rendered, and . . . the subjective beliefs" of the client, that they would raise constitutional vagueness questions and would be simply impracticable to accomplish.[67]

Justice Carley in an opinion concurring and dissenting in part, with which Justices Hunstein and Thompson joined, agreed with the majority that Trulock's nondisclosure of his drug use could not give rise to an independent tort of fraud.[68] Nonetheless, Carley wrote that Trulock's concealment of his drug use was done deliberately, as Trulock had so testified, and thus constituted a material misrepresentation that would vitiate Cleveland's consent to the procedure.[69] Unconvinced by the supreme court's rationale that O.C.G.A section 31-9-6.1(a) did not specifically include negative life factors as one of the risks of treatment of which patients should be apprised, Carley wrote:

> the General Assembly's mandated disclosure of the general and inherent risks of a medical procedure does not indicate a legislative intent to insulate a physician from liability for the fraudulent concealment of any and all *other* forms of risks to the patient. In my opinion, the concept of valid consent to undergo a medical procedure encompasses more than the procedure itself, and includes the qualifications or lack thereof of the one who is proposing himself as the professional who will perform that procedure.[70]

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63. *Id.*
64. *Id.*, 528 S.E.2d at 781-82.
65. *Id.* at 301-02, 528 S.E.2d at 781-82.
66. *Id.*
67. *Id.* at 302 n.19, 528 S.E.2d at 782 n.19.
68. *Id.* at 303, 528 S.E.2d at 783 (Carley, J., concurring in part and dissenting in part).
69. *Id.* at 304, 305, 528 S.E.2d at 783, 784.
70. *Id.* at 304, 528 S.E.2d at 783.

Thus, Carley reasoned that O.C.G.A. section 31-9-6.1(a) has no bearing on the issue at hand, namely whether Trulock's concealment of his cocaine use was material to Cleveland's consent to treatment.[71]

Because O.C.G.A. section 31-9-6.1(a) did not obviate Trulock's duty to disclose his drug addiction to Cleveland, Carley noted that Trulock's concealment of his drug use was not "clearly and palpably immaterial" to Cleveland's consent to the surgery.[72] Therefore, Carley asserts that a "jury [would be] authorized to believe Mr. Cleveland's contention that the undisclosed cocaine use was material to his decision to accept Dr. Trulock's recommendation, [and] neither the trial court nor this Court is authorized to conclude" that the consent was valid.[73]

Eschewing the majority's public policy argument, Carley stressed that this decision would necessarily be factually limited and that given the facts of this case the test of whether Cleveland would have subjectively decided to refuse the surgery is irrelevant.[74] Carley surmised:

> Trulock has violated the beliefs and standards of society in general and his profession in specific. Regardless of where the line ultimately is drawn [of what a doctor must disclose], Dr. Trulock crossed that line when he obtained Mr. Cleveland's consent without disclosing a factor which could result in the doctor's criminal prosecution and put his professional license in jeopardy.[75]

IV. IMPLICATIONS

The Supreme Court of Georgia appears to have left the door open to a successful suit for battery for plaintiffs who can prove both that (1) their professional's nondisclosures objectively impacted upon their consent and (2) the professional was adversely affected by this negative personal life factor while consent was being obtained and treatment was being rendered. In this case, however, Dr. Trulock admitted that he habitually used cocaine for a full twenty years, a length of time that spanned his entire medical career, and still this admission did not satisfy the supreme court that Dr. Trulock was negatively affected by cocaine during the time he treated Mr. Cleveland. Moreover, because Trulock invoked his Fifth Amendment privilege when asked about his drug use while he treated his patients, the jury should have been entitled to construe this refusal to answer as an admission of Trulock's

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71. *Id.* at 304-05, 528 S.E.2d at 784.
72. *Id.* at 305, 528 S.E.2d at 784.
73. *Id.* at 305-06, 528 S.E.2d at 784.
74. *Id.* at 305, 528 S.E.2d at 784.
75. *Id.*

drug-related impairment when treating Cleveland.[76] Thus, according to the supreme court's decision in Cleveland, the burden of proving the second element of this claim is nearly impossible. Albeit, the Dougherty County Medical Society shares the supreme court's opinion that persistent cocaine abuse has no per se negative impact upon a doctor's performance; the Society elected Trulock president less than a year after he was discharged from his rehabilitation center.[77]

Ironically, in the same year that *Cleveland* was decided, this same court held per curiam in *In re Watkins*[78] that a lawyer may be disbarred for entering into a business deal with a client when the lawyer's and the client's interests are adverse if the client has an expectation that the lawyer is working for the client's best interests and the client has not given his *informed consent* to the business arrangement.[79] Similarly, the supreme court in 1998 upheld the disbarment of an attorney for the same kind of misconduct perpetrated by Dr. Trulock, even though no client was harmed by the attorney's drug use and the attorney voluntarily sought treatment for his addiction.[80] Apparently the supreme court, among other entities, believes that a lawyer's duty to preserve the best fiduciary interests of her clients is more important than a doctor's duty to preserve her clients' health and physical well being.[81]

In November of 2000, the appellate court overruled *Young* in *Ketchup v. Howard,*[82] thus ruling that the informed consent doctrine will apply to Georgia law prospectively from the date of its decision.[83] The court in *Ketchup* held that when deciding *Young* the 1975 court of appeals misconstrued the language of O.C.G.A. section 31-9-6 as pertaining to informed consent as a negligence theory (when consent is obtained without full knowledge of the inherent risks).[84] In *Ketchup* the court found that the legislature intended the statute to apply to medical battery cases (when consent to the medical touching is never ob-

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76. Brief of Respondents, *supra* note 13, at 23.

77. Supplemental Brief of the Respondents, *supra* note 9, at 19.

78. 272 Ga. 769, 534 S.E.2d 794 (2000).

79. *Id.* at 769-71, 534 S.E.2d at 794-96.

80. *In re* Swearingen, 269 Ga. 515, 516-17, 501 S.E.2d 200, 201 (1998).

81. The Author acknowledges that the legal standard for upholding damage awards differs from the standard used to uphold an attorney's disbarment. However, the practical effect of this court's decisions is that for similar conduct an attorney will lose her livelihood while a doctor could potentially have to file an award for redress with her malpractice insurance company. Perhaps a comparison is in order between the Bar's and Medical Board's standards and their enforcement of those standards for current members.

82. No. A00A0987, 2000 Ga. App. LEXIS 1418 (Nov. 29, 2000).

83. *Id.* at *3.

84. *Id.* at *5-7.

tained).[85] The court of appeals recognized that all other forty-nine states in the United States employ either a professional standard or reasonable person standard by which to judge the doctor's own disclosures to her patient,[86] and from the legislative language of O.C.G.A. section 31-9-6.1, the court of appeals concluded that the Georgia legislature favors adopting the reasonable person standard.[87] The supreme court has not yet reviewed the holding in *Ketchup*, plausibly because the court of appeals decision to apply the informed consent doctrine prospectively to Georgia common law makes *Ketchup* itself an unlikely case to be presented to the supreme court for consideration. When this point of law does present itself for review, it will be interesting to ascertain whether a majority of the Georgia Supreme Court will, or can, continue to evade implementing a doctrine that has long been law in every other state in the Union.[88]

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85. *Id.*

86. By recognizing that all other states employ something other than a subjective person standard to assess what a medical professional should disclose to her patient, the court of appeals has acknowledged what both the majority of the supreme court in *Cleveland* and the Medical Association of Georgia has failed to admit. The majority wrote that public policy would not allow for the implications of requiring a medical professional to disclose anything personal to a patient, because the floodgates would proverbially open—allowing for any of the physician's minute personal details to be fair game for a litigious patient. The Medical Association of Georgia wrote in its online update concerning *Albany Urology Clinic v. Cleveland* and the amicus curiae brief it filed, "The Court also agreed with MAG [Medical Association of Georgia] that there would be no other way to define, or in any other way limit, the categories of personal information that the physician would have to voluntarily disclose [sic] under the decision of the Court of Appeals." The article concluded that "[t]his is a significant VICTORY for physicians." [emphasis in original]. *GA Supreme Court Agrees to MAG's Request to Reject "Fraudulent Concealment" Tort* (visited March 15, 2001) <www.mag.org/legislative_affairs/Complaints/trulock_update.-htm>.

87. 2000 Ga. App. LEXIS at *24-25.

88. *See id.* at *33-52.