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## ***Doreika v. Blotner. Affirming Ketchup Against Judicial Mustard***

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# Casenote

## ***Doreika v. Blotner: Affirming Ketchup Against Judicial Mustard***

### I. INTRODUCTION

The doctrine of informed medical consent has been a point of contention in Georgia for over thirty-five years. While this doctrine is well-established throughout the United States, courts in Georgia have struggled to determine its availability and scope. In *Doreika v. Blotner*,<sup>1</sup> the Georgia Court of Appeals applied the common law doctrine of informed medical consent to a chiropractor.<sup>2</sup> The highly contested decision revived the debate over the existence and applicability of the common law doctrine in Georgia. The Georgia Supreme Court has granted certiorari to review the availability of the common law doctrine of informed medical consent and its applicability to chiropractors in Georgia.<sup>3</sup>

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1. 292 Ga. App. 850, 666 S.E.2d 21 (2008).

2. *Id.* at 851, 666 S.E.2d at 23.

3. Georgia Supreme Court, 2008 Granted Certiorari, S08G2016 (Nov. 4, 2008), available at [http://www.gasupreme.us/granted\\_certs/gc\\_08.php?s08c1898](http://www.gasupreme.us/granted_certs/gc_08.php?s08c1898). The Georgia Supreme Court accepted certiorari on November 3, 2008, and oral arguments were heard on February 16, 2009. *Id.*

## II. FACTUAL BACKGROUND

Paul Doreika alleged that he sustained injuries as a result of chiropractor Dr. Gregg Blotner's treatment. Specifically, Doreika argued that Dr. Blotner did not inform him about the risks of neck adjustments and treatment alternatives prior to the procedure which either caused a herniated disc or aggravated a pre-existing disc condition. As a result of Dr. Blotner's alleged failure to inform Doreika of such risks and alternatives, Doreika asked the trial court to give several jury charges on the issue of informed consent.<sup>4</sup> However, because Georgia's informed consent statute<sup>5</sup> does not enumerate this chiropractic procedure, the trial court found the doctrine of informed consent inapplicable to chiropractors and refused to give the requested charges.<sup>6</sup> The jury subsequently found in favor of Dr. Blotner, and Doreika appealed.<sup>7</sup>

In a 7-5 decision, the Georgia Court of Appeals reversed the lower court's judgment.<sup>8</sup> Writing for the majority, Presiding Judge Johnson held that the common law doctrine of informed consent applies to all medical professionals in Georgia, including chiropractors.<sup>9</sup> Dr. Blotner has appealed this holding to the Georgia Supreme Court, which has granted certiorari.<sup>10</sup>

## III. LEGAL BACKGROUND

The common law doctrine of informed medical consent requires that a doctor disclose certain risks to a patient before obtaining consent for a proposed procedure.<sup>11</sup> The foundation of the doctrine is the principle that human dignity requires that each person be afforded control over her own body.<sup>12</sup> This doctrine experienced a fast rise to popularity.

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4. *Doreika v. Blotner*, 292 Ga. App. 850, 850-51, 666 S.E.2d 21, 23 (2008).

5. O.C.G.A. § 31-9-6.1 (2006).

6. *See Doreika*, 292 Ga. App. at 857, 666 S.E.2d at 27 (Andrews, J., dissenting).

7. *Id.* at 850-51, 666 S.E.2d at 23 (majority opinion).

8. *Id.* at 850, 857, 666 S.E.2d at 23, 27.

9. *Id.* at 850-51, 666 S.E.2d at 23.

10. Georgia Supreme Court 2008 Granted Certiorari, SO8C2016 (Nov. 4, 2008), available at [http://www.gasupreme.us/granted\\_certs/gc\\_08.php#s08c1898](http://www.gasupreme.us/granted_certs/gc_08.php#s08c1898). Counsel for Dr. Blotner filed a petition for certiorari on August 12, 2008, and the Georgia Supreme Court granted this request on November 3, 2008. *Id.*

11. *Ketchup v. Howard*, 247 Ga. App. 54, 54, 543 S.E.2d 371, 372-73 (2000).

12. Suzanne K. Ketler, Note, *The Rebirth of Informed Consent: A Cultural Analysis of the Informed Consent Doctrine After Schreiber v. Physicians Insurance Co. of Wisconsin*, 95 NW. U. L. REV. 1029, 1034-35 (2001).

After its first adoption by the state of California in 1957,<sup>13</sup> the doctrine became the prevailing law in the United States by 1972.<sup>14</sup> However, the development of this doctrine in Georgia has not been easy because even today questions persist about the extent of its applicability.

Parts A and B of the following analysis explore the history of the common law doctrine of informed consent and track its development to its current status as the prevailing law in the United States. Part C analyzes informed consent in Georgia, including all pertinent events preceding this litigation.

#### A. Early History of the Doctrine of Informed Consent

In their beginning stages, the ethical rules of the medical profession diametrically opposed today's doctrine of informed consent.<sup>15</sup> The famous ancient physician Hippocrates advocated a different approach: doctors should not share any information with patients because the information could potentially upset the patient and thereby worsen the patient's condition.<sup>16</sup> The Greek philosopher Plato even believed that a physician should say whatever necessary, including lies and misrepresentations, to persuade the patient to accept treatment.<sup>17</sup> This paternalistic approach presupposed that the doctor was always right and that the patient was to blindly obey the doctor's orders.<sup>18</sup> Nonetheless, this view remained steadfast as the prevailing approach until the end of the nineteenth century.<sup>19</sup>

The first significant change to Hippocrates's approach occurred in 1889 when the Maryland Court of Appeals in *State v. Housekeeper*<sup>20</sup> held that a doctor had to receive his patient's consent prior to performing a medical procedure.<sup>21</sup> Sixteen years later, in *Mohr v. Williams*,<sup>22</sup> the Minnesota Supreme Court continued this trend by holding that a doctor, who had operated on a patient's left ear, was liable for battery because

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13. *Salgo v. Leland Stanford Jr. Univ. Bd. of Tr.*, 317 P.2d 170 (Cal. App. 1957); see Ketler, *supra* note 12, at 1036.

14. Sheldon F. Kurtz, *The Law of Informed Consent: From "Doctor is Right" to "Patient has Rights,"* 50 SYRACUSE L. REV. 1243, 1252 (2000).

15. See *id.* at 1243.

16. *Id.* (citing 2 HIPPOCRATES, DECORUM 297 (W. Jones trans., Harvard Univ. Press 1967)).

17. *Id.*

18. *Id.*

19. *Id.*

20. 16 A. 382 (Md. 1889).

21. *Id.* at 384; see Ketler, *supra* note 12, at 1034-35.

22. 104 N.W. 12 (Minn. 1905).

the patient had consented only to an operation on her right ear.<sup>23</sup> The court held that even in the doctor-patient relationship, touching the person of another without consent amounts to battery.<sup>24</sup> Justice Cardozo expressed this idea of basic consent more eloquently in 1914 when he stated in *Schloendorff v. Society of New York Hospital*<sup>25</sup> that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body."<sup>26</sup>

This concept of the patient's right to self-determination over her body laid the foundation for the doctrine of informed consent.<sup>27</sup> The early basic consent cases merely required the patient's consent to a procedure to avoid a doctor's liability for battery.<sup>28</sup> Forty-three years after *Schloendorff*, the California Court of Appeals in *Salgo v. Leland Stanford University Board of Trustees*,<sup>29</sup> expanded on Justice Cardozo's notion of the right of self-determination, thereby giving birth to the doctrine of informed consent.<sup>30</sup> The California court not only required basic consent but also required that a doctor first adequately inform a patient about the proposed procedure in order for the consent to be valid.<sup>31</sup>

### B. Modern Day Informed Consent

The 1957 ruling of the California Court of Appeals in *Salgo* was significant not only for adding the disclosure requirement but also because the court found an action for failure to give informed consent in the law of negligence as opposed to the intentional tort of battery.<sup>32</sup> Other courts quickly followed suit; only three years later, the Kansas Supreme Court in *Natanson v. Kline*<sup>33</sup> adopted the common law doctrine of informed consent.<sup>34</sup> The Kansas court applied a "reasonably prudent physician" standard as the measure for juries to determine whether a doctor has disclosed sufficient information for the consent of the patient to be valid.<sup>35</sup> Under this standard, a doctor must disclose

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23. *Id.* at 13, 16.

24. *Id.* at 16.

25. 105 N.E. 92 (N.Y. 1914).

26. *Id.* at 93.

27. Ketler, *supra* note 12, at 1034.

28. *Id.* at 1035.

29. 317 P.2d 170 (Cal. App. 1957).

30. *See id.* at 181.

31. *Id.*

32. *See id.* at 172.

33. 350 P.2d 1093 (Kan. 1960).

34. *Id.* at 1106.

35. *Id.* at 1106-07.

what a reasonably prudent physician in the same practice area would have disclosed under similar circumstances.<sup>36</sup>

Twelve years later, the United States Court of Appeals for the District of Columbia adopted a different version of the doctrine of informed consent in *Canterbury v. Spence*.<sup>37</sup> The D.C. Circuit required a "reasonably prudent patient" standard as the measure for juries to use in determining the sufficiency of the disclosure.<sup>38</sup> Under this standard, a doctor must disclose all information that a reasonably prudent patient would find material in deciding whether to consent to a proposed procedure.<sup>39</sup> This includes disclosure of all material risks and potential alternative measures.<sup>40</sup> The D.C. Circuit rejected the reasonable physician standard adopted in Kansas as contradicting the doctrine's premise of ensuring patient control over the patient's body; the reasonable physician standard of Kansas allows doctors to exercise the paternalistic discretion the doctrine seeks to prevent, thus undermining the premise of the doctrine.<sup>41</sup>

Kansas and the D.C. Circuit base the doctrine of informed consent on two different rationales.<sup>42</sup> The distinction is subtle but quite significant: the Kansas approach bases the duty to give informed consent on professional custom,<sup>43</sup> while the D.C. Circuit bases the duty on the patient's right to self-determination.<sup>44</sup> In the custom rationale of Kansas, the duty to disclose arises from the medical profession's standard—the same standard applied in other medical malpractice cases.<sup>45</sup> To prevail under this standard, a plaintiff must show that a reasonable doctor under similar circumstances would have disclosed more than the defendant-doctor disclosed in a particular case.<sup>46</sup> In contrast, the self-determination approach of the D.C. Circuit imposes the duty upon all doctors by law, regardless of the custom within the profession.<sup>47</sup> This rationale ranks the patient's right to self-determination above any custom of the profession.<sup>48</sup> Today, about half of all

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36. *Id.* at 1107.

37. 464 F.2d 772 (D.C. Cir. 1972).

38. *Id.* at 786-87.

39. *Id.*

40. *Id.* at 787-88.

41. *Id.* at 786.

42. *See id.*

43. *See Natanson*, 350 P.2d at 1107.

44. *Canterbury*, 464 F.2d at 786.

45. *Id.* at 783.

46. *See id.*

47. *Id.* at 784.

48. *Id.*

jurisdictions have adopted the reasonably prudent patient standard while the other half still employ the reasonably prudent physician standard.<sup>49</sup>

While there are two alternative rationales underlying the doctrine of informed consent, the basic premise that a doctor must disclose certain risks of treatment to a patient for the consent to be valid is now the established law in the United States.<sup>50</sup> Beyond its historical roots in the common law, the doctrine received further support in 1990 when the United States Supreme Court decided *Cruzan v. Director, Missouri Department of Health*.<sup>51</sup> This holding added a constitutional dimension by announcing a person's right to control her body as anchored in the Due Process Clause of the Fourteenth Amendment.<sup>52</sup> Forty-nine states have either codified the doctrine of informed consent or have extensive caselaw to provide guidance to lower courts regarding the application of the doctrine.<sup>53</sup> However, the adoption of the doctrine of informed consent has been difficult in Georgia and questions remain as to what extent the doctrine exists and if so which version might apply.

### C. *Informed Consent in Georgia*

The history of informed consent in Georgia features four distinct time periods. Initially, the common law prior to legislative intervention in 1971 did not conclude whether the doctrine existed in Georgia. Then, the legislature enacted a basic consent statute,<sup>54</sup> which the Georgia Court of Appeals interpreted as preempting the entire field and thus precluding the recognition of a common law doctrine of informed consent.<sup>55</sup> Following this period, the legislature added a disclosure requirement for specific cases when it enacted a second statute in 1988.<sup>56</sup> Finally, the court of appeals overruled its prior decision and announced the existence of a common law doctrine of informed consent in Georgia.<sup>57</sup>

#### 1. 1733–1971: The Common Law Rule in Georgia Prior to Legislative Intervention. The first mention of the term “informed

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49. Ketler, *supra* note 12, at 1037.

50. *Ketchup*, 247 Ga. App. at 54, 543 S.E.2d at 372-73.

51. 497 U.S. 261 (1990).

52. U.S. CONST. amend XIV; see *Cruzan*, 497 U.S. at 269, 278.

53. See *Ketchup*, 247 Ga. App. at 66-74, 543 S.E.2d at 381-86. The case's appendix gives a comprehensive overview of the law in every state other than Georgia. See *id.*

54. 1971 Ga. Laws 438 (codified as amended at O.C.G.A. § 31-9-6 (2006)).

55. See *Young v. Yarn*, 136 Ga. App. 737, 738-39, 222 S.E.2d 113, 114 (1975).

56. 1988 Ga. Laws 1443 (codified as amended at O.C.G.A. § 31-9-6.1 (2006)).

57. See *Ketchup*, 247 Ga. App. at 54, 543 S.E.2d at 372-73.

consent" in Georgia caselaw occurred in 1966 in *Mull v. Emory University, Inc.*<sup>58</sup> The Georgia Court of Appeals referred to the doctrine as one that was effective in other states<sup>59</sup> but did not conclude whether informed consent was applicable in Georgia.<sup>60</sup> The controversy before the court did not require a decision on the availability of the doctrine because the plaintiff's theory would have failed even if the doctrine applied.<sup>61</sup> Subsequent cases also left open the question of the doctrine's availability because the controversies before the courts could be resolved without deciding whether informed consent was available in Georgia.<sup>62</sup> No reported case in Georgia expressly applied the doctrine of informed consent prior to 1971. Its availability remained an undecided question.

However, legislative intervention came in the form of the Official Code of Georgia Annotated (O.C.G.A.) § 31-9-6<sup>63</sup> in 1971. This statute created a basic consent provision by requiring that the general terms of a medical treatment be disclosed for consent to be valid.<sup>64</sup> Whether the statute was meant to encompass a disclosure requirement similar to those prevalent in other states was not answered until the court of appeals interpreted the statute in 1975.<sup>65</sup>

**2. 1971-1988: The Apparent Death of the Common Law Doctrine in Georgia.** In the case of *Young v. Yarn*,<sup>66</sup> the Georgia Court of Appeals held that beyond the disclosure of general terms required by O.C.G.A. § 31-9-6, a doctor had no duty to give informed consent.<sup>67</sup> The Georgia General Assembly, through the statute, had declared general terms as the only disclosure requirement for Georgia doctors.<sup>68</sup> The court thus concluded that a common law doctrine of informed consent was not a viable option in Georgia.<sup>69</sup>

Subsequent cases followed this holding by refusing to require any disclosure beyond the general terms demanded by the statute.<sup>70</sup> In one

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58. 114 Ga. App. 63, 150 S.E.2d 276 (1966).

59. *Id.* at 65, 150 S.E.2d at 292.

60. *See id.* at 65-66, 150 S.E.2d at 292.

61. *Id.* at 66, 150 S.E.2d at 292.

62. *See, e.g.,* *Pierce v. Dowman*, 135 Ga. App. 783, 783, 219 S.E.2d 8, 9 (1975).

63. O.C.G.A. § 31-9-6 (2006).

64. *Id.* § 31-9-6(d).

65. *See Yarn*, 136 Ga. App. at 738-39, 222 S.E.2d at 114.

66. 136 Ga. App. 737, 222 S.E.2d 113 (1975).

67. *Id.* at 738-39, 222 S.E. at 114.

68. *Id.*

69. *Id.* at 739, 222 S.E.2d at 114.

70. *See, e.g.,* *McMullen v. Vaughan*, 138 Ga. App. 718, 721, 227 S.E.2d 440, 442 (1976); *Hyles v. Cockrill*, 169 Ga. App. 132, 133, 312 S.E.2d 124, 127 (1983).



case, *Simpson v. Dickson*,<sup>71</sup> the court criticized the rigid holding of *Yarn* by inviting the legislature to refine the disclosure requirement but ultimately applied the holding under stare decisis.<sup>72</sup> The strict adherence to *Yarn* from 1975 to 1988 left only a small exception under which a patient could recover for a doctor's failure to give adequate disclosure: if the doctor had made a misrepresentation as part of the disclosure, courts would allow a plaintiff to recover under a fraud theory.<sup>73</sup> A doctor had to tell the truth for the consent to be valid.<sup>74</sup> However, silence when a doctor ought to speak was not considered fraud as long as the doctor met the basic general terms disclosure requirement.<sup>75</sup> This small but significant exception illustrates that Georgia courts have allowed an alternative route of recovery for inadequate disclosure beyond the language of the statutes when traditional theories like fraud applied. Nonetheless, real change to the strict adherence to *Yarn* did not occur in Georgia until 1988, when the legislature added a new disclosure requirement in O.C.G.A. § 31-9-6.1.<sup>76</sup>

**3. 1988-2000: A Limited Statutory Version of Informed Consent.** The death of State Senator Jim Tolleson due to complications from a medical procedure prompted the Georgia General Assembly to add a disclosure requirement to the basic consent statute with the enactment of O.C.G.A. § 31-9-6.1.<sup>77</sup> While the new statute enumerates the cause of the state representative's tragic death as a procedure requiring informed consent,<sup>78</sup> the statute is not the equivalent of the common law doctrine of informed consent that is well-established in other states.<sup>79</sup> The statute expressly requires disclosure in certain medical procedures and specifically enumerates what must be disclosed.<sup>80</sup> Six categories of information must be disclosed to "any person who undergoes any surgical procedure under general anesthesia, spinal

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71. 167 Ga. App. 344, 306 S.E.2d 404 (1983).

72. See *id.* at 347, 306 S.E.2d at 406-07.

73. See, e.g., *Spikes v. Heath*, 175 Ga. App. 187, 189-90, 332 S.E.2d 889, 892 (1985).

74. *Campbell v. Breedlove*, 244 Ga. App. 819, 821, 535 S.E.2d 308, 311 (2000).

75. *Padgett v. Ferrier*, 172 Ga. App. 335, 335-36, 323 S.E.2d 166, 167 (1984).

76. O.C.G.A. § 31-9-6.1 (2006).

77. *Id.*; S. Bawtinheimer, *Legislative Review, Surgical and Medical Treatment: Provide for Informed Consent*, 5 GA. ST. U. L. REV. 426, 427 (1988).

78. See O.C.G.A. § 31-9-6.1(a). State Senator Tolleson passed away from a diagnostic dye test, which is enumerated in O.C.G.A. § 31-9-6.1(a) as a "procedure which involves the intravenous or intraductal injection of a contrast material." *Id.*; see Bawtinheimer, *supra* note 77, at 427.

79. See *Ketchup*, 247 Ga. App. at 66-74, 543 S.E.2d at 381-86. The appendix to the case gives a comprehensive overview of the law in every state other than Georgia. See *id.*

80. See O.C.G.A. § 31-9-6.1.

anesthesia, or major regional anesthesia or to any person who undergoes an amniocentesis diagnostic procedure or a diagnostic procedure that involves the intravenous or intraductal injection of a contrast material.<sup>81</sup> This statute differs from the broader common law doctrine that requires all medical professionals to disclose any information necessary for a patient to make an informed decision of consent.<sup>82</sup> The legislative review does not indicate, however, that the legislature intended to preempt the entire field and preclude any future development of a common law doctrine.<sup>83</sup>

From the enactment of the new statute in 1988 until 2000, courts in Georgia held that the disclosure requirement was limited to the situations explicitly covered in O.C.G.A. § 31-9-6.1.<sup>84</sup> For any situation not enumerated in this expanded statutory right of recovery, the rigid holding of *Yarn* still applied: no common law duty of informed consent existed in Georgia.<sup>85</sup> Thus, a doctor had no duty to give informed consent unless the statute enumerated the situation.<sup>86</sup>

The Georgia Supreme Court seemed to subscribe to this position in *Albany Urology Clinic, P.C. v. Cleveland*,<sup>87</sup> holding that a doctor was under no duty to disclose a cocaine addiction to his patient because cocaine addiction was not covered by the disclosure requirements of O.C.G.A. § 31-9-6.1.<sup>88</sup> The court stated that the statute was in derogation of the common law, and the court thus concluded that it was required to construe the statute strictly.<sup>89</sup> As a result, courts could not impose requirements not already imposed by the legislature.<sup>90</sup> If a situation was not covered by the statute, the common law had to apply.<sup>91</sup> Because the common law in Georgia did not feature the doctrine of informed consent,<sup>92</sup> the court could not impose such a duty

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81. *Id.*

82. *See, e.g., Hudson v. Parvin*, 582 So. 2d 403, 410 (Miss. 1991) (holding that a Mississippi physician must disclose known risks material to a prudent patient in determining whether to undergo the proposed procedure).

83. *See Bawtinhimer, supra* note 77, at 426-31.

84. O.C.G.A. § 31-9-6.1 (2006); *see generally* J. Harold Richards, Comment, *Informed Confusion: The Doctrine of Informed Consent in Georgia*, 37 GA. L. REV. 1129, 1144-47 (2003).

85. *See generally id.*

86. *See generally id.*

87. 272 Ga. 296, 528 S.E.2d 777 (2000).

88. *Id.* at 298-99, 528 S.E.2d at 780; *see* O.C.G.A. § 31-9-6.1 (2006).

89. 272 Ga. at 299, 528 S.E.2d at 780.

90. *Id.*

91. *Id.*

92. *Id.* at 298, 528 S.E.2d at 779.

on the doctor in this case.<sup>93</sup> The court, however, left open the possibility for a patient to recover for battery under a basic consent theory if a doctor obtained the consent by fraud or misrepresentation.<sup>94</sup> In that case, the consent would be invalid; the procedure would amount to the unwanted touching of the person of another.<sup>95</sup> But beyond this fraud theory, recovery for a failure to adequately inform the patient appeared limited to the situations enumerated in O.C.G.A. § 31-9-6.1.<sup>96</sup> Only seven months later, however, the situation changed when the Georgia Court of Appeals overruled *Yarn* and announced that the common law doctrine of informed consent existed in Georgia and that recovery for inadequate disclosure is not limited to the situations enumerated in O.C.G.A. § 31-9-6.1.<sup>97</sup>

**4. 2000-2008: The Resurrection of the Common Law Doctrine of Informed Consent.** In *Ketchup v. Howard*,<sup>98</sup> the Georgia Court of Appeals overruled *Yarn*, thereby bringing Georgia in line with the other forty-nine states by recognizing the common law doctrine of informed consent.<sup>99</sup> The court held that informed consent applied to a dentist, even though the profession of dentistry was not specifically enumerated in O.C.G.A. § 31-9-6.1.<sup>100</sup>

According to Chief Judge Johnson's majority opinion in *Ketchup*, *Yarn* was wrongly decided for three main reasons. First, the court in *Yarn* had misinterpreted the language of the first statute, O.C.G.A. § 31-9-6,<sup>101</sup> as legislative intent to preempt a common law doctrine of informed consent.<sup>102</sup> Rather, the court concluded that the statute only codified basic consent and did not address a disclosure requirement.<sup>103</sup> Second, the holding in *Yarn* deprived the people of Georgia of the right to have control over their bodies.<sup>104</sup> This right, according to *Cruzan v. Director, Missouri Department of Health*<sup>105</sup> is anchored in the Due Process Clause of the Fourteenth Amendment to the United States

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93. *Id.* at 299, 528 S.E.2d at 780.

94. *Id.* at 300-01, 528 S.E.2d at 781.

95. *Id.*

96. See O.C.G.A. § 31-9-6.1 (2006).

97. See *id.*; *Ketchup*, 247 Ga. App. at 54, 543 S.E.2d at 373.

98. 247 Ga. App. 54, 543 S.E.2d 371 (2000).

99. *Id.* at 54 & n.1, 543 S.E.2d at 373 n.1.

100. *Id.* at 59, 543 S.E.2d at 376; see O.C.G.A. § 31-9-6.1 (2006).

101. O.C.G.A. § 31-9-6 (2006).

102. *Ketchup*, 247 Ga. App. at 56-57, 543 S.E.2d at 374-75.

103. *Id.* at 57, 543 S.E.2d at 375.

104. *Id.* at 59, 543 S.E.2d at 376.

105. 497 U.S. 261 (1990).

Constitution.<sup>106</sup> Third, Judge Johnson stated that the court in *Yarn* determined the standard of care for the medical profession in a manner inconsistent with the profession's own customary standard of requiring adequate disclosure.<sup>107</sup> This violated the well-established principle of allowing professions to determine the applicable standard of care instead of a court imposing a standard.<sup>108</sup> In sum, the holdings of *Yarn* and its progeny could no longer stand, thus paving the way for the recognition of the common law doctrine of informed consent in Georgia.<sup>109</sup> The court announced that beyond the specific requirements enumerated in the statute, medical professionals are certainly held to the customary standard of their profession.<sup>110</sup>

In his concurrence, Judge Andrews sharply criticized the majority's decision to overrule *Yarn* and adopt the common law doctrine of informed consent.<sup>111</sup> Specifically, Judge Andrews argued that the majority's ruling was inconsistent with *Albany Urology Clinic*, which concluded that it was not within the purview of the judiciary to expand the disclosure requirement beyond the legislative enactment in O.C.G.A. § 31-9-6.1.<sup>112</sup> Commentators also criticized *Ketchup* for its failure to give specific guidance regarding who was required to give disclosure, when disclosure was required, and what information had to be disclosed.<sup>113</sup> The court merely stated that "medical professionals" are required to give disclosure but did not define who was included in this term.<sup>114</sup> This uncertainty gave rise to future controversy because it was unclear to which professions the disclosure requirement applied.<sup>115</sup>

#### IV. COURT'S RATIONALE

##### A. Presiding Judge Johnson's Majority Opinion

Writing for the majority, Presiding Judge Johnson held in *Doreika v. Blotner*<sup>116</sup> that the law required Dr. Gregg Blotner to obtain Paul

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106. *Ketchup*, 247 Ga. App. at 58-59, 543 S.E.2d at 375-76 (citing *Cruzan*, 497 U.S. at 269).

107. *Id.* at 59-60, 543 S.E.2d at 376-77 (citing AMA CODE OF MED. ETHICS § 8.08).

108. *Id.* at 61, 543 S.E.2d at 377.

109. *Id.* at 61-62, 543 S.E.2d at 378.

110. *Id.* at 60, 61-62, 543 S.E.2d at 377-78.

111. *See id.* at 74-75, 543 S.E.2d at 386-87 (Andrews, J., concurring specially).

112. *Id.* at 75, 543 S.E.2d at 386-87 (quoting *Albany Urology Clinic*, 272 Ga. at 298-99, 528 S.E.2d at 779-80).

113. *See, e.g.,* Richards, *supra* note 84, at 1161-63.

114. *Id.* at 1161 (citing *Ketchup*, 247 Ga. App. at 56, 543 S.E.2d at 376).

115. *See Doreika v. Blotner*, 292 Ga. App. 850, 851, 666 S.E.2d 21, 23 (2008).

116. 292 Ga. App. 850, 666 S.E.2d 21 (2008).

Doreika's informed consent prior to rendering chiropractic treatment.<sup>117</sup> In so ruling, the majority applied its holding in *Ketchup v. Howard*<sup>118</sup> to chiropractors.<sup>119</sup> The court identified three sources supporting the application of the common law doctrine of informed consent to chiropractors.<sup>120</sup> First, the constitutions of both Georgia and the United States guarantee a patient's right to refuse unwanted medical treatment.<sup>121</sup> Without a common law doctrine of informed consent, this guarantee would be a hollow promise.<sup>122</sup> Second, customary standards adopted by various medical professions, including chiropractics, acknowledge a duty to provide information so that patients can make an informed choice regarding proposed treatments.<sup>123</sup> The American Chiropractic Association Code of Ethics requires chiropractors to "employ their best good faith efforts to provide information . . . to enable the patient to make an informed choice."<sup>124</sup> Imposing a standard on the medical profession that is below its own code of ethics and customary practice violates the long-established principle of letting the medical profession determine its own standard.<sup>125</sup> Third, the limited legislative creation of informed consent in O.C.G.A. § 31-9-6.1<sup>126</sup> manifests a legislative intent to require disclosure of risks but does not preempt a court's recognition of the common law doctrine of informed consent.<sup>127</sup>

The majority distinguished *Albany Urology Clinic, P.C. v. Cleveland*,<sup>128</sup> stating that any reference to the common law doctrine of informed consent in that case was dicta because the applicability of the common law doctrine was not the issue before the court.<sup>129</sup> Instead, the narrow issue in *Albany Urology Clinic* was whether O.C.G.A. § 31-9-6.1 required a doctor to reveal his drug addiction to a patient prior to a

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117. *Id.* at 851, 666 S.E.2d at 23.

118. 247 Ga. App. 54, 543 S.E.2d 371 (2000).

119. *Doreika*, 292 Ga. App. at 851, 666 S.E.2d at 23.

120. *See id.* at 851-53, 666 S.E.2d at 23-25.

121. *Id.* at 851-52, 666 S.E.2d at 23 (citing *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 269 (1990); *State v. McAfee*, 259 Ga. 579, 580, 385 S.E.2d 651, 651-52 (1989)).

122. *Id.* at 852, 666 S.E.2d at 23.

123. *Id.* at 852-53, 666 S.E.2d at 24 (citing AM. CHIROPRACTIC ASSOC. CODE OF ETHICS § V).

124. *Id.* at 852, 666 S.E.2d at 24 (quoting AM. CHIROPRACTIC ASSOC. CODE OF ETHICS § V).

125. *Id.* at 853, 666 S.E.2d at 24.

126. O.C.G.A. § 31-9-6.1 (2006).

127. *Doreika*, 292 Ga. App. at 853, 666 S.E.2d at 24.

128. 272 Ga. 296, 528 S.E.2d 777 (2000).

129. *Doreika*, 292 Ga. App. at 853-54, 666 S.E.2d at 24-25.

procedure.<sup>130</sup> Moreover, the court noted that the Georgia Supreme Court had recently cited *Ketchup* but had not cited *Albany Urology Clinic* since *Ketchup* was decided.<sup>131</sup> Presiding Judge Johnson also warned that overruling *Ketchup* would be a colossal step backwards for the people of Georgia because a consent requirement is meaningless unless the patient has the information necessary to knowingly consent to the proposed procedure.<sup>132</sup> Therefore, the majority reversed the trial court's refusal to give jury instructions on the doctrine of informed consent for a chiropractor.<sup>133</sup>

### B. Judge Andrews's Dissent

In an emphatic dissent, Judge Andrews argued that the majority's opinion directly contradicted the legislative pronouncement defining informed consent in Georgia.<sup>134</sup> Specifically, the dissent noted that O.C.G.A. § 31-9-6.1 did not enumerate chiropractic adjustments as among the procedures requiring informed consent.<sup>135</sup> The dissent advocated a reversal of *Ketchup* because the case was an unauthorized adoption of common law informed consent at odds with the Georgia General Assembly's statutory definition of informed consent.<sup>136</sup>

Judge Andrews further criticized the decision in *Ketchup* as contrary to *Albany Urology Clinic* because there, Judge Andrews contended, the Georgia Supreme Court recognized that the judiciary lacked power to define the doctrine of informed consent in Georgia.<sup>137</sup> In Judge Andrews's view, the power to define the doctrine rests with the people of Georgia, who speak through their elected representatives in the General Assembly.<sup>138</sup> Moreover, the dissent criticized the majority's use of constitutional support for its holding, arguing that the Georgia Court of Appeals as a whole neither has the power or jurisdiction to assess the constitutionality of a statute nor the ability to scold the judgment of the legislature.<sup>139</sup> Instead, according to Judge Andrews, the Georgia Constitution requires the court of appeals to follow both the enactment of the legislature and precedent from the Georgia Supreme

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130. *Id.*, 666 S.E.2d at 25.

131. *Id.* at 854, 666 S.E.2d at 25 (citing *Nathans v. Diamond*, 282 Ga. 804, 805 n.2, 654 S.E.2d 121, 123 n.2 (2007)).

132. *Id.* at 853, 666 S.E.2d at 24.

133. *Id.* at 857, 666 S.E.2d at 26-27.

134. *Id.* at 858, 666 S.E.2d at 27-28 (Andrews, J., dissenting).

135. *Id.*

136. *Id.* at 858-59, 666 S.E.2d at 28.

137. *Id.* at 859, 666 S.E.2d at 28.

138. *Id.*

139. *Id.*

Court.<sup>140</sup> In Judge Andrews's view, the majority failed to follow both requirements.<sup>141</sup>

## V. IMPLICATIONS

By granting certiorari, the Georgia Supreme Court can clarify the state of the law in Georgia. This case presents an occasion for the highest court in Georgia to validate the common law doctrine of informed consent and further define the specific requirements of the doctrine to provide better notice and specificity for healthcare professionals.<sup>142</sup> To do so, the supreme court will have to address three major issues.

### A. *Distinguishing Albany Urology Clinic, P.C. v. Cleveland*

On its surface, *Albany Urology Clinic, P.C. v. Cleveland*<sup>143</sup> seems to preclude the holdings of *Ketchup v. Howard*<sup>144</sup> and *Doreika v. Blotner*<sup>145</sup> because the supreme court decided in *Albany Urology Clinic* that in situations not covered by O.C.G.A. § 31-9-6.1,<sup>146</sup> no additional disclosure requirements could be imposed by the judiciary.<sup>147</sup> But a closer look reveals the fine difference between the two rationales supporting the common law doctrine of informed consent.<sup>148</sup> Requiring disclosure in the situation presented in *Albany Urology Clinic* would have imposed a standard on the profession by the judiciary because the American Medical Association does not require a doctor to reveal personal problems, such as drug habits, to a patient prior to a procedure.<sup>149</sup> The supreme court noted that the power to impose such a standard is reserved for the legislature.<sup>150</sup> However, the disclosure requirements in *Ketchup* and *Doreika* are not judicial impositions on the

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140. *Id.*

141. *Id.*

142. For example, the terms "medical professional" and "procedure" could be defined to give adequate notice to healthcare providers. See Richards, *supra* note 84, at 1161.

143. 272 Ga. 296, 528 S.E.2d 777 (2000).

144. 247 Ga. App. 54, 543 S.E.2d 371 (2000).

145. 292 Ga. App. 850, 666 S.E.2d 21 (2008).

146. O.C.G.A. § 31-9-6.1 (2006).

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

148. See *supra* text accompanying notes 41-48.

149. AMA CODE OF ETHICS § 8.08. This section addresses informed consent and requires doctors to disclose medical facts to the patient but does not require disclosure of personal information about the doctor. *Id.* While § 8.15 declares unethical practice under influence of controlled substances, it does not require the disclosure of substance abuse to the patient as part of informed consent. AMA CODE OF ETHICS § 8.15.

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

profession; the two cases merely rely on custom<sup>151</sup> as the standard for the medical profession.<sup>152</sup> Unlike the situation in *Albany Urology Clinic*, the medical professionals in both *Doreika* and *Ketchup* were required to give adequate disclosure of all material risks under the customary standard of their respective professions.<sup>153</sup>

In other words, the Georgia Court of Appeals did not impose a requirement on the medical profession but rather followed the well-established Georgia law principle of allowing the medical profession to set its own standards.<sup>154</sup> These holdings are therefore no different than a court holding a doctor to the standard of the profession when determining whether the performance of a surgery or a diagnosis constituted medical malpractice.<sup>155</sup> This important distinction between a professional custom-based standard and the imposition of a judicially-crafted standard on the profession should lead to a narrow reading of *Albany Urology Clinic* in situations when the judiciary considers imposing a standard on the profession beyond the customary standard. A broad reading of *Albany Urology Clinic* precluding any disclosure requirements beyond the limited statute would also present a potential conflict with the constitutional requirements announced in *Cruzan v. Director, Missouri Department of Health*.<sup>156</sup>

#### B. The Constitutional Right of Self-Determination and Bodily Integrity

The enactment of the informed consent statute in Georgia preceded the United States Supreme Court decision in *Cruzan*.<sup>157</sup> The Georgia

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151. See *supra* text accompanying notes 41-48.

152. *Doreika*, 292 Ga. App. at 852, 666 S.E.2d at 24 (referring to the requirements of the standards set forth by the American Chiropractic Association); *Ketchup*, 247 Ga. App. at 60-61, 543 S.E.2d at 376-77 (referring to the standards set forth by the American Medical Association and the American Dental Association).

153. *Doreika*, 292 Ga. App. at 852, 666 S.E.2d at 24 (referring to the requirements of the standards set forth by the American Chiropractic Association); *Ketchup*, 247 Ga. App. at 60-61, 543 S.E.2d at 376-77 (referring to the standards set forth by the American Medical Association and the American Dental Association).

154. See *Ketchup*, 247 Ga. App. at 60-61, 543 S.E.2d at 377.

155. See, e.g., *Kenney v. Piedmont Hosp.*, 136 Ga. App. 660, 664, 222 S.E.2d 162, 166-67 (1975) (holding that the standard of care is that which under similar conditions is ordinarily employed by the medical profession generally); *Pilgrim v. Landham*, 63 Ga. App. 451, 453, 11 S.E.2d 420, 422 (1940) (holding that a doctor is required to perform a thorough examination of a patient with such methods and diligence as are approved and practiced by members of the medical profession in good standing).

156. 497 U.S. 261 (1990).

157. O.C.G.A. § 31-9-6.1 was enacted in 1988 while *Cruzan* was decided in 1990.



Court of Appeals decision in *Young v. Yarn*,<sup>158</sup> which denied the existence of a common law doctrine of informed consent in Georgia,<sup>159</sup> was also decided prior to *Cruzan*. In light of the United States Supreme Court's interpretation of the Due Process Clause of the Fourteenth Amendment<sup>160</sup> in *Cruzan*,<sup>161</sup> it is now questionable whether a return to the rigid holding of *Yarn* would be constitutional. A reversal of *Doreika* and *Ketchup* would take Georgia back to the days of *Yarn*, depriving Georgia residents of their right of self-determination in any situation not covered by the limited enumerations of O.C.G.A. § 31-9-6.1. *Cruzan* anchors bodily integrity in the due process rights of every person. It is doubtful that the paternalistic approach favored by the dissent in *Doreika* could co-exist with a patient's right of self-determination.

*C. The Ketchup and Doreika Holdings are Not at Odds with the Legislative Enactments*

The Georgia General Assembly enacted O.C.G.A. § 31-9-6.1 in 1988 with the assumption that the common law doctrine of informed consent was not the law in Georgia under the holding of *Yarn*.<sup>162</sup> The death of a valued colleague due to complications from a medical procedure prompted three Georgia legislators<sup>163</sup> to take the initiative and create some form of informed consent.<sup>164</sup> The legislative review does not show any intent by the legislature to preempt the entire field or to preclude the judiciary from holding the medical profession to its own standards.<sup>165</sup> It was certainly within the purview of the Georgia Court of Appeals in *Ketchup* to overrule its own decision in *Yarn*. Such an overruling does not present a contradiction with the legislative enactment because the rigid and questionable holding of *Yarn* prompted the legislature to take action in the first place.<sup>166</sup> Judge Andrews, in

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158. 136 Ga. App. 737, 222 S.E.2d 113 (1975).

159. *Id.* at 738, 222 S.E.2d at 114.

160. U.S. CONST. amend. XIV.

161. *See Cruzan*, 497 U.S. at 269.

162. *Ketchup*, 247 Ga. App. at 61-62, 543 S.E.2d at 378.

163. The three legislators were Senator Donn Peavy of the forty-eighth district, Senator Thomas Allgood of the twenty-second district, and Senator Lawrence (Bud) Stumbaugh of the fifty-fifth district. Ga. S.J., Reg. Sess. 1988, Volume II (Feb. 24-Mar. 7, 1988), p. 2000 (SB 367).

164. Bawtinheimer, *supra* note 77, at 427.

165. *See id.* at 426-31.

166. *Id.* at 427. The three legislators sought to create a remedy for patients like their colleague Jim Tolleson that did not exist in Georgia law at the time under the holding of *Yarn*. *Id.*; *Yarn*, 136 Ga. App. at 738, 222 S.E.2d at 114.

his concurrence in *Ketchup* and his dissent in *Doreika*, argued that the people of Georgia, through their elected representatives, have decided on a limited scope of informed consent.<sup>167</sup> However, neither the text nor the legislative review of O.C.G.A. § 31-9-6.1 reveal that the legislature intended to preempt the field.<sup>168</sup> It is difficult to fathom that patients in Columbus, Georgia would not want the same level of self-determination and control that is afforded to their neighbors across the state-line in Phenix City, Alabama.

In addition, strict construction of O.C.G.A. § 31-9-6.1 is unnecessary because after the overruling of *Yarn* in *Ketchup*, the statute is not in derogation of the common law. The supreme court in *Albany Urology Clinic* felt obligated to construe O.C.G.A. § 31-9-6.1 strictly because at that time the statute appeared to be in derogation of the common law.<sup>169</sup> However, this was prior to the overruling of *Yarn*, which had wrongly concluded that the common law in Georgia did not feature the common law doctrine of informed consent.<sup>170</sup> Under the subsequent holding of *Ketchup*, the common law in Georgia features the doctrine of informed consent, which means that O.C.G.A. § 31-9-6.1 does not derogate the common law.<sup>171</sup> Instead, the statute aids or further defines the common law.<sup>172</sup> Therefore, courts may construe the statute liberally.<sup>173</sup>

In sum, the state of the law in Georgia does not require a reversal of *Doreika*. The seemingly adverse precedent in *Albany Urology Clinic* is distinguishable factually and legally upon closer review.<sup>174</sup> Similarly, the legislative enactments do not bar the recognition of a common law doctrine in Georgia.<sup>175</sup> Reversal of *Ketchup* and *Doreika*, however, would again make Georgia the lone state refusing to fully recognize a patient's right to self-determination and bodily integrity. Deferring this

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167. *Ketchup*, 247 Ga. App. at 74, 543 S.E.2d at 386 (Andrews, J., concurring specially); *Doreika*, 292 Ga. App. at 859, 666 S.E.2d at 28 (Andrews, J., dissenting).

168. See O.C.G.A. § 31-9-6.1; Bawtinheimer, *supra* note 77, at 426-31.

169. *Albany Urology Clinic*, 272 Ga. at 299, 528 S.E.2d at 780.

170. See *Ketchup*, 247 Ga. App. at 54, 543 S.E.2d at 372-73; *Yarn*, 136 Ga. App. at 738-39, 222 S.E.2d at 114.

171. Section 31-9-6.1 of the O.C.G.A. did not impose duties or burden or establish rights not recognized by the common law because Georgia common law, under *Ketchup*, recognizes the doctrine of informed consent. See *Ketchup*, 247 Ga. App. at 61-62, 543 S.E.2d at 378; see generally SINGER & SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 61:1 (7th ed. 2008).

172. O.C.G.A. § 31-9-6.1 offers a specific list and detailed instructions on how disclosure should occur in the enumerated situations. See O.C.G.A. § 31-9-6.1.

173. See SINGER & SINGER, *supra* note 171, § 61:1.

174. See *supra* text accompanying notes 143-56.

175. See *supra* text accompanying notes 162-73.

issue to the legislature could mean that the people of Georgia may have to wait for another tragedy to occur before patients' rights in Georgia are fully recognized.<sup>176</sup>

VALENTIN LEPPERT

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176. As noted *supra* Part III.C.3., the enactment of O.C.G.A. § 31-9-6.1 came only after the tragic death of state representative Jim Tolleson. See Bawtinheimer, *supra* note 77, at 427.