IN THE COURT OF APPEALS
STATE OF GEORGIA

JENNA MILES,	:	
	:	
Appellant,	:	
v.	:	DOCKET NO. A24A1332
	:	
STEPHEN H. KAHLER, M.D. and TANNER MEDICAL CENTER d/b/a WEST GEORGIA CENTER FOR PLASTIC SURGERY (plus John Does),	:	(From State Court of Carroll County STCV2021000904)
	:	
Appellees.	:	

BRIEF OF APPELLANT

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BRIEF OF APPELLANT

COMES NOW, Jenna Miles, Appellant in the above-styled action and Plaintiff below, and files this Brief, showing this Court the following:

INTRODUCTION

This is a case about a teenager who, for medical reasons, underwent bilateral breast reduction surgery performed by Dr. Stephen Kahler, a plastic surgeon and employee of Tanner Medical Center. Following the surgery, Ms. Miles experienced delayed healing and infections in her left breast, including an open wound that persisted for more than five months, leaving her with significant disfiguring scarring.

Plaintiff-Appellant's evidence shows that in two brief appointments before surgery, Dr. Kahler told Ms. Miles that she was an excellent candidate for breast reduction surgery and that the incisions would leave only barely visible fine lines, and he showed her photos of previous patients with only favorable outcomes. Dr.

Kahler also failed to inform her of less invasive and risky alternative treatments. Although Ms. Miles signed "consent" documents that contained information about potential complications and varying outcomes, they were not presented until her second and last pre-op visit, she was encouraged to sign without reading them, and they were not reviewed with her by Dr. Kahler or other Tanner medical staff.

In this appeal, Ms. Miles seeks reversal of the trial court's one-page order granting Defendants' Motion for Partial Summary Judgment on her claim for medical malpractice based on lack of informed consent pursuant to O.C.G.A. 31-9-6.1, fraud, and medical battery, with a dependent claim for punitive damages. Defendants' alleged malpractice arising from surgery and resulting complications continue to be litigated, and are not part of this appeal.

JURISDICTIONAL STATEMENT

This appeal of a grant of partial summary judgment is authorized under O.C.G.A. § 5-6-34 (a) (1). This court has jurisdiction because the case is not of a type reserved to the Supreme Court. O.C.G.A. § 15-3-3.1 (a) (6) as set forth in Ga. Const. Art. VI, § VI, Para. III.

The trial court order was entered January 5, 2024. (R-417.) Notice of Appeal was timely filed on January 31, 2024. (R-1.) The appeal was docketed on April 16, and this Court granted an extension for Appellant to file her Brief through May 28.

ENUMERATIONS OF ERROR

1) The trial court erred in granting summary judgment on Plaintiff's second count of medical malpractice arising from Dr. Kahler's failure to disclose generally recognized material risks and alternatives, of which there was evidence sufficient to rebut any presumption of informed consent.
2) The trial court erred in granting summary judgment on Plaintiff's claim of fraud because there was circumstantial evidence to raise an inference of fraud that must be determined by a jury.
3) The trial court erred in granting summary judgment on Plaintiff's claim of medical battery because there is evidence the consent was fraudulently obtained and the surgery varied from the consented-to procedure.
4) The trial court erred in granting summary judgment on Plaintiff's claim for punitive damages arising from the intentional torts of fraud and battery.

STATEMENT OF THE CASE[1]

On April 26, 2019, eighteen-year-old Jenna Miles consulted with Dr. Stephen Kahler for possible breast reduction surgery, seeking to alleviate back and neck pain from her disproportionately large breasts. *Kahler dep.* at 130; *Miles dep.* at 31. Ms. Miles testified that, after taking her history and completing a physical exam, Dr. Kahler "showed me pictures of what my scars would come out like, and he kept ensuring [sic] me that I was a great candidate for surgery" (*Miles dep.* at 34) and that "my scars would be nothing more than a fine line after I was done." *Id.* at 35. "All of the pictures he showed me showed very fine, thin scars that he promised would be my outcome." *Id*. at 111. See *Amended Verified Complaint*, R-93. Dr. Kahler did not show Ms. Miles pictures of breast reduction patients with severe scarring. *Kahler dep.* at 141-142.

Following insurance approval, Ms. Miles returned on August 8, 2019, for her "preoperative evaluation" (*Kahler dep.* at 135), her second and last appointment before surgery only five days later. By then, Dr. Kahler testified, usually the patient has already decided to move forward, and the visit is in anticipation of the surgery. *Kahler dep.* at 136, lines 9-13. This last visit is the first time that the detailed consent form is shown to the patient (*Kahler dep.* at 34), and

[1] Appellant cites to filed deposition transcripts of the following individuals: Dr. Stephen Kahler ("*Kahler dep.*"); Jenna Miles ("*Miles dep.*"); nurse Krista Reeves ("*Reeves dep.*"); Lloyd Krieger, M.D. in 2022 ("*Krieger dep I.*"); Lloyd Krieger, M.D. in 2023 ("*Krieger dep. II*").

Dr. Kahler's practice does not give its patients the consent forms to review before the visit (*Id.* at 143). Dr. Kahler does not recall going over the forms with Ms. Miles and he does not typically go over consents form with his patients; rather, "my nurse often does that." *Kahler dep.* at 35. Dr. Kahler's nurse, Krista Reeves has no memory of reviewing the forms with Ms. Miles or the specifics of any conversation with Ms. Miles (*Reeves dep.* at 57), and her signature on the form indicates she witnessed the patient sign, not that she reviewed the form's contents with the patient. *Id.*

Ms. Miles admitted to signing the consent forms, but in a perfunctory manner, without reading them and without Dr. Kahler or anyone from Tanner reviewing them with her. "When I was handed this document right here, it was more like, here, sign this to proceed forward with the surgery. He never specifically went over all the contents in the packet with me." *Miles dep.* at 109. The only risk of which Ms. Miles was informed was that she would not be able to breastfeed in the future. (*Miles dep.* at 38).

It is undisputed that Dr. Kahler did not discuss "liposuction alone" as an option, and there is no evidence that he explained that liposuction would be part of the procedure.

> Q. Do you recall or do you know one way or another whether your surgery involved any liposuction?
>
> A. It did, and I was not aware that it was going to.

> Q. So let me go back and ask you that. During any of your consultations prior to surgery with Dr. Kahler and/or any of his staff, did he discuss that part of the procedure of removing part of your breasts would be done via liposuction?
>
> A. No, sir.
>
> Q. And when is the first time you found out about liposuction?
>
> A. After my surgery when he was explaining what all he did when he had to go in there. That's what caused the diminished sensation that I have on my sides.

Miles dep. at 126-127.

Dr. Lloyd Krieger, Appellant's expert, reviewed Ms. Miles medical records (see R. 17-18), as well as the depositions of Dr. Kahler and Ms. Miles. *Id.* at 7-8; He opined that Jenna Miles was a candidate for a liposuction-only breast reduction, and that the severe scarring she suffered would not have occurred with a liposuction-only procedure:

> [Dr. Kahler] did what could be called a miniscule breast reduction through the traditional method. What he could have done was the liposuction and the amount that he did and then used a small half-moon or crescent-shaped scar on the right areola to elevate that slightly so the two sides matched better. He would have gotten about 80 percent of the reduction that he wanted, that he wound up getting. And he would have also corrected the asymmetry in terms of nipple position. This would have made the procedure considerably or even tremendously less prone to complications.
>
> …
>
> There would be -- there would be essentially -- the only visible scar would be a one-and-a-quarter-inch half-moon that blended into the

> top of the right areola. There would be no other vertical or longitudinal scars. She would not have that anchor-shaped scar.

Krieger dep. I at 136-137.

To support his opinion, Dr. Krieger cited two medical journal articles that explain the viability of liposuction-only breast reductions and the results obtainable, with before and after pictures showing actual results obtained with the lipo-only breast reductions procedure. See *Affidavit of Lloyd Krieger, M.D.*, attached as Exhibit 33 to *Krieger dep. II* at 21-23 and 53-57.

After the August 13 surgery, Ms. Miles endured delayed wound healing and severe scarring, documented throughout the record. See, e.g., *Kahler dep* at 171, Line 1 (characterizing her scarring as "on the severe side"); *Kahler dep.* at 142;[2] *Lawrence dep.* at 71 ("poor scarring"), and scar revision surgeries by Dr. Rudderman. *Miles dep.* at 88-89, 93-96, 100-101.

[2] "Q. How many -- if you can give me an estimate, how many post-healing wounds or scarring are, you know, worse than Jenna's? A. This is an outlier. Q. Okay. A. She's in the lower 2 or 3 percent."

ARGUMENT AND CITATION TO AUTHORITY

Standard of Review

A de novo standard of review applies to an appeal from a grant of summary judgment, and the evidence, and all reasonable conclusions and inferences drawn from it, are viewed in the light most favorable to the nonmovant. *Matjoulis v. Integon Gen. Ins. Corp.*, 226 Ga. App. 459, 459, 486 S.E.2d 684 (1997); *Tuten v. Costrini*, 238 Ga. App. 350, 350, 518 S.E.2d 751 (1999)

Under OCGA § 9-11-56(c) summary judgment can only be granted when there is no genuine issue of material fact, and the movant is entitled to a judgment as a matter of law. *Lau's Corp. v. Haskins*, 261 Ga. 491 (1991).

I. Appellant presented sufficient evidence to rebut the presumption of informed consent under O.C.G.A. 31-9-6.1, thus supporting her claim for medical malpractice based on O.C.G.A. 31-9-6.1 (d).

A plaintiff claiming medical malpractice must show (1) doctor-patient relationship giving rise to a duty (2) one or more breaches of duty by failing to exercise the requisite degree of skill and care; and (3) damages proximately caused by that breach. *Cannon v. Jeffries*, 250 Ga. App. 371, 372-373, 551 S.E.2d 777 (2001). One of the duties of doctor performing surgery under general anesthesia is to meet the informed consent requirements of O.C.G.A. § 31-9-6.1, and a breach of that duty, while it does not give rise to a separate claim, will support a claim for medical malpractice. O.C.G.A. § 31-9-6.1 (d).

This is the relevant portion of the statute:

(a) Except as otherwise provided in this Code section, any person who undergoes any surgical procedure under general anesthesia … must consent to such procedure and shall be informed in general terms of the following:

(1) A diagnosis of the patient's condition requiring such proposed surgical or diagnostic procedure;

(2) The nature and purpose of such proposed surgical or diagnostic procedure;

(3) The material risks generally recognized and accepted by reasonably prudent physicians of infection, … disfiguring scar, … which, if disclosed to a reasonably prudent person in the patient's position, could reasonably be expected to cause such prudent person to decline such proposed surgical or diagnostic procedure on the basis of the material risk of injury that could result from such proposed surgical or diagnostic procedure;

(4) The likelihood of success of such proposed surgical or diagnostic procedure;

(5) The practical alternatives to such proposed surgical or diagnostic procedure which are generally recognized and accepted by reasonably prudent physicians; and

(6) The prognosis of the patient's condition if such proposed surgical or diagnostic procedure is rejected.

(b) …

(2) If a consent to a diagnostic or surgical procedure is required to be obtained under this Code section and such consent discloses in general terms the information required in subsection (a) of this Code section, is duly evidenced in writing, and is signed by the patient or other person or persons authorized to consent pursuant to the terms of this chapter, then such consent shall be rebuttably presumed to be a valid consent.

> (c) … The information provided for in this Code section may be disclosed through the use of video tapes, audio tapes, pamphlets, booklets, or other means of communication or through conversations with nurses, physician assistants, trained counselors, patient educators, or other similar persons ….
>
> (d) A failure to comply with the requirements of this Code section shall not constitute a separate cause of action but may give rise to an action for medical malpractice …. upon a showing:
>
> > (1) That the patient suffered an injury which was proximately caused by the surgical or diagnostic procedure;
> >
> > (2) That information concerning the injury suffered was not disclosed as required by this Code section; and
> >
> > (3) That a reasonably prudent patient would have refused the surgical or diagnostic procedure or would have chosen a practical alternative to such proposed surgical or diagnostic procedure if such information had been disclosed; ….

O.C.G.A. § 31-9-6.1

It is important to note that this statute, which governs surgical procedures, varies from O.C.G.A. § 31-9-6, which governs medical treatment more broadly. O.C.G.A. § 31-9-6.1, sets a higher standard by requiring the disclosure of specific information and, unlike the general statute, evidence of a written, signed consent form is not conclusive proof of consent, but raises only a rebuttable presumption of valid consent. In such a case, the determination is whether, viewing the facts in the light most favorable to the plaintiff, a reasonable jury could conclude that the consent was not valid. See , e.g. *S. Fulton Med. Ctr. v. Jaya Pr*,, 237 Ga. App. 396, 397, 514 S.E.2d 233 (1999). Furthermore, while O.C.G.A. § 31-9-6 specifically

states that consent obtained by a fraudulent misrepresentation (actual or constructive) will invalidate the consent, but mere negligence will not (see *Smith v. Wilfong*, 218 Ga. App. 503, 507, 462 S.E.2d 163 (1995)), that requirement is nowhere found in O.C.G.A. § 31-9-6.1.[3]

Here, there is evidence to rebut the presumption of informed consent. First, Appellant was told to initial and sign the form even though she did not read it and it was not reviewed with her, and Dr. Kahler not only failed to discuss the risks and potential adverse outcomes, but affirmatively controverted the known risks in the consent form. An informed consent form is not a contract to buy a house or car, and it is not subject to the merger doctrine; by downplaying and misrepresenting the risks, Dr. Kahler negated what was contained in the informed consent document, and therefore did not fulfill the requirement of subsection (a) (3).

Second, Dr. Kahler did not discuss the availability of a well-recognized alternative method of conducting breast reduction via a liposuction-only reduction. Plaintiff's expert, Dr. Krieger, testified that Ms. Miles was an excellent candidate for liposuction-only breast reduction, that some or all of the risks inherent in the "classic procedure" would have been avoided thereby and would have allowed for faster recovery, and that the standard of care required Defendant Kahler to disclose to her this option and, if he did not consider himself qualified or comfortable

[3] Appellant contends that fraudulent misrepresentations were made, but merely points out that they are not required for Appellant to prevail on this count.

performing it, he should have referred Ms. Miles to a plastic surgeon who was. (R-345, ¶¶ 12, 13 and 14.) Therefore, there is evidence that Defendants also did not comply with Subsection (a) (5).

As for Subsection (d) (1) and (2), Appellant suffered wound openings, delayed healing and severe scarring, which are material risks that the defendant was required to disclose but did not, both through omission and contradiction of the consent form. *Miles dep.* at 112, Line 24-25. Lastly, as to (d) (3), Appellant testified that she would have reconsidered going forward with the surgery had she known the risks (*Id.* at 127; R-362), and affirmatively testified that she would have opted for the liposuction-only alternative had it been offered. (R-363.)

Dr. Kahler also never disclosed, at all, that the surgery he planned to perform *included* liposuction, let alone any risks inherent in it. As Dr. Krieger pointed out, Dr. Kahler

> not only didn't consent her for the liposuction, he did not even inform her that that was what he envisioned. Now, also as we discussed in great detail this morning, doing the liposuction for the amount of volume that he did it substantially changed the procedure as it was explained to her without her informed consent. And he didn't explain, for example, that because both of the procedures were being done at the same time, the risks of basically all the complications were higher, most especially of the fluid issues and fluid collections and infections there form as we discussed.

Dr. Krieger dep. I at 135-136.

> Q Is it your opinion that the standard of care for a breast reduction surgery that involves liposuction, that it requires a separate written consent form?
>
> A It is. … The overarching reason is that when you are doing a liposuction along with a breast reduction, it is a different recovery process, and the risks are different. And then, the procedure itself is different.

Id. at 49, Et seq.

There is sufficient evidence in the record to establish a claim that material risks were not disclosed or discussed and, in some cases, were misrepresented, prior to the surgery. In addition, the lipo-only alternative to classic open incision breast reduction surgery was never even mentioned. As such, Jenna Miles has a valid informed consent malpractice claim, that must be submitted to the jury.

II. Sufficient evidence that Dr. Kahler's failure to inform Jenna Miles of the liposuction alternative was not merely negligent, but fraudulent, supports Appellant's fraud claim.[4]

To prevail on a claim of fraud, a plaintiff must show evidence of (1) false representation by defendant; (2) scienter; (3) intent to induce the plaintiff to act or refrain from acting; (4) justifiable reliance by the plaintiff; and (5) damage to the plaintiff." *Ades v. Werther*, 256 Ga. App. 8, 11, 567 S.E.2d 340 (2002). Fraud can seldom be proven by direct evidence, "As fraud is inherently subtle, a claimant may survive summary judgment if there is slight, circumstantial evidence supporting a fraud claim. It is peculiarly the province of the jury to pass on these

[4] Fraud and medical battery were combined into one count, but on further reflection, it may be more appropriate to analyze them separately.

circumstances showing fraud. [Cit.]" *Id.* at 9. Neither Ms. Miles' subjective belief that Dr. Kahler was trying to help her, nor anyone else's opinion, is dispositive.

A treating physician has a fiduciary duty to his patient. *Miller v. Kitchens*, 251 Ga. App. 225, 226, 553 S.E.2d 300 (2001). When a fiduciary relationship has been established, "silence when one should speak, or failure to disclose what ought to be disclosed, is as much a fraud in law as is an actual false representation." *Wright v. Apartment Inv. & Mgmt. Co.*, 315 Ga. App. 587, 594, 726 S.E.2d 779 (2012). This principle applies both to Dr. Kahler's failure to inform Appellant of known risks, and to his failure to inform her of the option to undergo a liposuction-only procedure, which, some evidence shows, was in fact more appropriate. See *Krieger dep. I* at 136-137.

Here, there is evidence that Dr. Kahler's representation to Appellant that she was a "great candidate" for traditional open breast reduction surgery was a misrepresentation, and it may have been made with knowledge of its falsity. His assurance that she would have only fine lines where the incisions were located, when he knew beforehand – as he testified – that there is a wide variety of scarring outcomes, some of which require further surgery, was clearly a misrepresentation and, given his testimony, was made with the required scienter: "Some people have very good scars. Some people have wide scars. Some people have keloid scars." *Kahler dep.* at 138.

Dr. Kahler's intent to induce action is easily inferable. Simply, if Jenna Miles had been fully informed of the risks of breast reduction surgery and decided not to undergo the procedure, Dr. Kahler would lose a patient. Appellant would have opted for a liposuction-only procedure had she been given the option. R-363. But this is not a procedure Dr. Kahler had ever performed (*Kahler dep.* at 50), and it also would not be covered by insurance (*Id.* at 134). Because he would have had to refer Ms. Miles to another physician, Dr. Kahler had a motive to encourage her to consent to a procedure he could perform.

As for reasonable reliance, the confidential doctor-patient relationship fills that requirement. As Ms. Miles testified, she had no reason not to believe him.

Because there is slight, circumstantial evidence of actual fraud by Dr. Kahler, the trial court's grant of summary judgment must be reversed.

III. Evidence of Fraud, as well as the performance of liposuction without Appellant's consent, support the claim for battery.

"Under Georgia law, a plaintiff may recover for a medical battery by establishing either: (i) that there was a lack of consent to the procedure performed; or (ii) that the treatment was at substantial variance with the consent granted. (Citations omitted.) *Morton v. Wellstar Health Sys.*, 288 Ga. App. 301, 302, 653 S.E.2d 756 (2007). "A claim for medical battery also arises when a patient's consent to a procedure is obtained by fraudulent misrepresentations of material facts in obtaining that consent. *Estate of Shannon v. Ahmed*, 304 Ga. App 380, 383

(2010)." *Lloyd v. Kramer*, 223 Ga. App. 372, 375, 477 S.E.2d 663 (1998). Although a merely negligent lack of informed consent cannot support a medical battery claim when basic consent is given for surgery, see *Doctors Hosp. of Augusta, LLC v. Alicea*, 332 Ga. App. 529, 774 S.E.2d 114 (2015), here there is evidence of (1) fraudulent misrepresentation (see supra) and (2) that the procedure performed was at substantial variance with the procedure generally consented to.

Dr. Kahler did not inform Ms. Miles that a significant portion of the breast reduction would involve liposuction which, in the opinion of Dr. Krieger, Appellant's medical expert, entails a separate set of risks and which, in his practice, requires a separate discussion and a separate consent. See supra, *Krieger dep. 1* at 49-51 and 135-136.

The trial court's order granting summary judgment on Appellant's claim for medical battery should be reversed.

IV. Appellant's claim for punitive damages could be authorized if a jury were to find Defendant Kahler liable for fraud or battery.

Punitive damages are derivative of, and may be awarded along with, compensatory damages for the commission of an intentional tort. Both fraud and battery are intentional torts. See *Napier v. Kearney*, 359 Ga. App. 196, 200, 855 S.E.2d 78 (2021)

CONCLUSION

Eighteen-year-old Jenna Miles underwent breast reduction surgery that left her with severe scarring requiring further surgery, after a protracted period of painful delayed wound healing. These were material risks generally recognized and accepted by reasonably prudent physicians. Ms. Miles testified that she was not informed of these risks. She was encouraged to sign the informed consent forms without reading them and without the benefit of Dr. Kahler or his nurse reviewing them. She was given inaccurate, misleading information by Dr. Kahler that flatly contradicted the existence of the risks that were noted in the document. Further, Ms. Miles was never told of an alternative procedure that did not entail these risks, and which her expert testified was appropriate. There is sufficient evidence to rebut any presumption of informed consent that arises from the signed forms, and the trial court erred in dismissing her medical malpractice claim grounded in lack of informed consent.

There is also sufficient circumstantial evidence to support Ms. Miles' claims of fraud and medical battery, which could give rise to punitive damages, all claims that were dismissed by the trial court.

The trial court's grant of partial summary judgment should be reversed.

I hereby certify that this submission does not exceed the word count limit imposed by Court of Appeals Rule 24(f).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served a copy of the above and foregoing BRIEF OF APPELLANT upon opposing counsel in the above-styled case by U.S. Mail First Class, and by e-mail to:

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