IN THE COURT OF APPEALS
STATE OF GEORGIA

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

BRIEF OF APPELEES

Appellees and Defendants below Stephen H. Kahler, M.D. and Tanner Medical Center file this Brief, showing this Court the following:

INTRODUCTION

The trial court properly granted summary judgment on Appellant Plaintiff's informed consent claim because she signed a detailed four-page consent to surgery listing the specific risks, benefits, and alternatives of her surgery and because she did not testify she would have refused her surgery if she had known the risks she alleges she was not told, which the informed consent statute requires her to do.

The trial court properly granted summary judgment on Plaintiff's fraud and battery claims, rejecting Plaintiff's argument that alleged fraud and battery invalidated her informed consent and created separate causes of action. A failure to

comply with the requirements of the informed consent statute did not create a different claim separate from the medical malpractice claim. Moreover, Plaintiff failed to prove fraud and battery because she and her expert admit Dr. Kahler intended to help not hurt her, and there was a difference of opinion, not facts, about the risks of the surgery. Thus, Dr. Kahler did not intentionally misrepresent medical facts, and Plaintiff cannot recover on her fraud and battery claims.

Finally, the trial court properly granted summary judgment on Plaintiff's claims of punitive damages and against John Doe Defendants because she consented to dismissal of those claims before the trial court.

This Court should affirm the trial court's grant of partial summary judgment on Plaintiff's claims for informed consent, fraud, battery, punitive damages, and John Doe Defendants. The trial court reviewed the extensive briefs in the case and held a hearing producing a transcript of nearly sixty pages. (V10.) Should this Court affirm the trial court's grant of partial summary judgment, Plaintiff's medical malpractice claim concerning her treatment will still go forward and be tried by a jury.

STATEMENT OF THE CASE

Plaintiff saw Dr. Kahler because she wanted a breast reduction surgery to treat her back, neck, and shoulder pain caused by her large breasts. (V5-31–32) Dr.

Kahler saw Plaintiff for a normal preoperative surgical evaluation like he does for all his surgical patients. He examined her and made detailed breast measurements, which indicated the need for a medical, not a mere cosmetic breast or mammary reduction surgery. (V5-62; V8-131)

All medical experts in the case agree that Dr. Kahler properly showed Plaintiff before and after breast reduction surgery pictures of other patients showing a range of different results from better to worse. (V7-47–48; V8-138-9; V9-55–56) Plaintiff's expert testified Plaintiff was a proper candidate for the specific breast reduction surgery that Dr. Kahler performed. (V7-46–47)

Plaintiff signed two informed consents fully meeting the requirements of the informed consent statute OCGA 31-9-6.1, identifying the diagnosis, risk, benefits, and alternatives. (V5-41; V5-134–37) She acknowledged that she read, understood, signed and initialed each page of a four-page informed consent for breast reduction surgery. (V5-40–59; V5-131–42.)

She acknowledged the information had been explained to her in a way that she understood, there may be alternative procedures or methods of treatment, and received in substantial detail further explanation of the procedure or treatment, other alternative procedures or methods or treatment, and information about the material risk of the procedure or treatment. (V5-134–37)

The informed consent states in detail the risks, benefits, and alternatives to the surgery, which included alternatives and the risks of delayed healing and wound disruption, scarring, and the need for additional surgery. (Id.) The signed consent states in part:

Skin Scarring – *all surgical incisions produce scarring. The quality of these scars is unpredictable. Abnormal scars may occur within the skin and deeper tissue. In some cases, scars may require surgical revision or other treatments.*

Unsatisfactory Result – There is the *possibility for poor result* from reduction mammoplasty surgery. You may be disappointed in the shape of your breasts.

. . .

ADDITIONAL SURGERY NECESSARY

. . .

Should complications occur, *additional surgery* or other treatment may be necessary. Even though risks and complications occur infrequently, the risks cited are particularly *associated with breast reduction surgery.* (italics emphasis added) (V5-131–32)

Plaintiff admits she was made aware and had a general awareness of all of the risks of surgery and alternatives. (V5-49) Her expert admits that Dr. Kahler's written informed consent properly identified the risks of the breast reduction surgery Dr. Kahler performed and that Plaintiff reasonably consented to her breast

reduction surgery based on the information provided to her about the surgery. (V7-55–56)

Plaintiff was provided informed consent, as all patients are, at her pre-operative appointment. (V8-33-34) Informed consent can be done by any one of several care givers, including patient educators and nurses. OCGA 31-9-6.1(c) Dr. Kahler and his nurse testified the nurse would review and discuss the informed consent with all patients, including Plaintiff, going section by section, summarizing each section, and giving Plaintiff the opportunity to read the consent line by line. (V8-35-6)(Reeve Dep. pp. 64-65)[1] Contrary to Plaintiff's assertion without citation to the record, Plaintiff did review the consent forms with Dr. Kahler's nurse and was not encouraged to sign without reading them.

Plaintiff did not testify in her sworn deposition that she would have refused or would have chosen a practical alternative to the proposed surgery if certain information had been disclosed. Instead, she testified she did not know whether she would have refused breast reduction surgery even if she knew the risks, benefits, and alternatives that she now knows. (V5-109–10)

Plaintiff signed an informed consent stating she was aware there may be alternative procedures or methods of treatment, including liposuction and had

[1] Appellees filed a motion to supplement the record with the deposition of Nurse Reeves.

received information about other alternative procedures or methods. (V5-134–37) Her expert admits that if Dr. Kahler did not believe she was a candidate for "liposuction only" breast reduction surgery, then it was *not* a breach of the standard of care for him to fail to offer liposuction breast reduction as an option. (V6-64.)

Dr. Kahler properly performed the surgery. (V8-145–46; V5-61) The surgery decreased Plaintiff's neck and back pain. (V5-39, 62–63) She did have scarring, but later had additional revision surgeries, which are a known possibility after the initial surgery, and had a good result that significantly decreased the size and visibility of her scars. (V5-93; V5-131–32) (Dr. Rudderman Dep. pp. 24, 35-36)[2]

STANDARD OF REVIEW

Summary judgment is warranted when any material fact is undisputed, as shown by the pleadings and record evidence, and this fact entitles the moving party to judgment as a matter of law. Strength v. Lovett, 311 Ga. App. 35, 39 (2011). On appeal from the grant of summary judgment, the Court of Appeals applies a de novo standard of review and views the evidence, and all reasonable conclusions

[2] Appellees filed a motion to supplement the record with the deposition of Dr. Rudderman.

and inferences drawn from it, in the light most favorable to the nonmovant. Carnegay v. Wal-Mart Stores, Inc., 370 Ga. App. 688, 689 (2024)

ARGUMENT

I. The trial court properly granted summary judgment to Defendants on Plaintiff's claim of negligent informed consent.

A. Defendants provided Plaintiff with proper informed consent because she signed two written informed consents meeting the requirements of Georgia law.

Defendants provided Plaintiff informed consent that disclosed the information required by O.C.G.A. § 31-9-6.1(a).[3] (V5-40–59) (V8-177–78). Plaintiff admits she was made aware and had a general awareness of all of the risks of surgery and alternatives. (V5-49.) She signed two detailed informed consent forms including the required elements of informed consent.

Informed consent can be disclosed through any single means of communication, including written or oral and does not require disclosure by multiple different means. O.C.G.A. § 31-9-6.1(c) Informed consent can be done by any one of several care givers, including patient educators and nurses. Id.

Plaintiff signed two informed consents containing the required information to be disclosed by O.C.G.A. § 31-9-6.1(a), including the diagnosis, nature and

[3]Plaintiff wrongly cites to S. Fulton Med. Ctr. v. Jaya Prakash, 237 Ga. App. 396, 397 (1999) to state the informed consent standard. Prakash concerns the federal Health Care Quality Improvement Act, not Georgia's informed consent statute.

purpose of the proposed surgical procedure, material risks generally, likelihood of success, practical alternatives, and prognosis. (V5-41, 46–57, 131–37)

No further information was required to be disclosed. A written, signed informed consent form that discloses the statutory requirements of O.C.G.A. § 31–9–6.1 creates a rebuttable presumption that the informed consent is valid. Cardio TVP Surgical Ass., P.C. v. Gillis, 272 Ga. 404, 406 (2000); Tuten v. Costrini, 238 Ga. App. 350, 351 (1999), overruled on other grounds by Ezor v. Thompson, 241 Ga. App. 275 (1999).

The presumption of law does not vanish simply because the opposing party introduces some evidence contrary to the presumption. Beach v. Lipham, 276 Ga. 302, 304 (2003). Here, no alleged failure to orally disclose the information or alleged dispute about what was orally disclosed can overcome the presumption and undo the undisputed valid signed written consent. Even if taken as true, Plaintiff does not dispute and cannot undo the fact that she did read, understand, initial, and sign the informed consent to her surgery acknowledging she was explained the specific risks, benefits, and alternatives of her surgery.

Plaintiff provided no case law to support her assertion that an alleged oral statement contrary to the written informed consent can undo the written consent. Plaintiff's failure to support her assertion is not surprising. If Plaintiff's assertion were upheld, then a physician could never establish consent if a patient alleged she

was not orally told of information disclosed in the written consent. Accepting such an assertion would further invalidate the language in subsection c, requiring that only one means of communication was necessary to provide proper informed consent.

B. Plaintiff failed to prove that she would not have undergone surgery if she had been informed of other information.

Regardless of Plaintiff's allegations about what information was or was not provided to her, Plaintiff cannot recover because she failed to prove that she, a reasonably prudent patient, would have refused the breast reduction surgery or chosen a practical alternative if she had been informed of information about the surgery she alleges she was not informed about pursuant to O.C.G.A. § 31-9-6.1(d)(3)

Plaintiff did not affirmatively testify that she would have refused or would have chosen a practical alternative to the proposed surgery if certain information had been disclosed. Instead, she testified she did not know whether she would have refused breast reduction surgery from Dr. Kahler even if she knew the risks, benefits, and alternatives that she now knows. (V5-109–10)

Plaintiff's later attempt to undo her sworn testimony by creating a self-contradictory affidavit stating she would have undergone a different operation if she had been informed of other information, should be stricken because that testimony contradicts her prior sworn testimony. Prophecy Corp. v. Charles

Rossignol, Inc., 256 Ga. 27 (1986); Whole Foods Mkt. Grp., Inc. v. Shepard, 333 Ga. App. 137, 139 (2015)

Further, Plaintiff's expert testified it was reasonable for Plaintiff to consent to her breast reduction surgery based on the information provided to her about the surgery. (V7-55–56.)

Thus, Plaintiff failed to establish that a reasonably prudent patient would have refused the surgery or chosen an alternative path to surgery if she were informed of information concerning the risk of injury and cannot recover. (V7-47, V7-55–56; V5-109–10) See O.C.G.A. § 31–9–6.1(d); Gillis, 272 Ga. at 406; Tuten 238 Ga. App. at 351

C. Plaintiff signed an informed consent admitting she was aware of alternative procedures including liposuction.

Plaintiff signed an informed consent stating she was aware there may be alternative procedures or methods of treatment, including liposuction and had received information about other alternative procedures or methods. (V5-134–37) Plaintiff cannot overcome the presumption of her signed written consent by asserting she was not also verbally told the same information in the written consent.

D. Dr. Kahler was not required to offer "liposuction only" breast reduction as an alternative surgery.

Plaintiff's expert admits that if Dr. Kahler did not believe that Plaintiff Jenna Miles was a candidate for "liposuction only" breast reduction surgery, which he did not, then it was *not* a breach of the standard of care for him to not offer liposuction breast reduction as an option. (V6-64.) Instead, Plaintiff expert's only opinion would be that Dr. Kahler failed to recognize she was a candidate for "liposuction only," *not* that he breached the standard of care concerning informed consent. (Id.). This is consistent with Plaintiff's expert's testimony that 90 percent of patients are not candidates for "liposuction only" procedures and all other experts' testimony that Plaintiff was not a candidate for "liposuction only" breast reduction surgery. (V6-20–22) (V9-74; V9-85–90) Therefore, there was no breach of the standard of care for informed consent for failing to offer "liposuction only" procedure as an alternative.

II. The trial court properly granted summary judgment to Dr. Kahler and Tanner on Plaintiff's claim of fraud.

A. Failure to provide informed consent does not provide a separate cause of action for fraud.

"A failure to comply with the requirements of [O.C.G.A. § 31-9-6.1] shall not constitute a separate cause of action but may give rise to an action for medical malpractice . . . ." Thus, Plaintiff's allegation that informed consent was invalidated because of fraud does not create a separate independent cause of action

for fraud and battery, but instead only a claim of medical malpractice for negligently obtained informed consent. O.C.G.A. § 31-9-6.1(d) Not surprisingly, Plaintiff failed to cite to any case supporting the creation of a separate claim for fraud based on allegations of alleged fraudulent informed consent.

B. Plaintiff failed to prove that Dr. Kahler knowingly and intentionally made fraudulent misrepresentations of fact about her medical condition.

1. Plaintiff failed to prove that Dr. Kahler *knowingly and intentionally* made fraudulent misrepresentations.

A signed consent to a medical procedure is presumed valid unless the informed consent was induced by fraudulent misrepresentations. O.C.G.A. § 31-9-6(d). To establish willful misrepresentation of a material fact concerning alleged medical fraud, Plaintiff must prove more than mere concealment of a material fact and more than an attempt to mislead. Smith v. Wilfong 218 Ga. App. 503, 507 (1995). Plaintiff must present evidence the doctor knowingly with false design and with the intent to deceive the patient made false statements about the patient's factual medical condition. Roberts v. Nessim, 297 Ga. App. 278, 284 (2009); Johnson v. Johnson, 323 Ga. App. 836, 838 (2013) Plaintiff admits she must prove false representation, scienter, and intent to induce the plaintiff to act. (Appellant Brief, p. 13)

In Roberts v. Nessim, 297 Ga. App. 278, 284 (2009), the Court granted summary judgment to a doctor in a similar alleged medical fraud case because the

plaintiff failed to provide specific evidence of scienter and intent by the defendant doctor.

Here, Plaintiff's claim for fraudulent misrepresentation fails because she testified Dr. Kahler intended to try to help her and did not purposefully or intentionally hurt her. (V5-108) Plaintiff's expert and subsequent treating surgeon testified that Dr. Kahler was trying to help Plaintiff and did not intentionally make false factual statements. (V7-118) (Dr. Rudderman Dep., p. 16)[4] Therefore, Plaintiffs fraudulent misrepresentation claim fails to establish purposeful intent and scienter and Dr. Kahler cannot be liable for fraud.

2. Plaintiff failed to prove that Dr. Kahler made fraudulent misrepresentations of *fact* about her medical condition.

Mere differences of opinion between medical experts are insufficient to support a claim of medical fraud. Johnson v. Johnson, 323 Ga. App. 836, 836 (2013). Failing to disclose risks of treatment for consent to surgery is not a knowing and willful misrepresentation of material fact constituting fraud. Holbrook v. Schatten 165 Ga. App. 217, 218 (1983).

Here, Plaintiff asserts that Dr. Kahler failed to tell her she would have severe scars and told her that her scars would be a fine line after she was done, and she would be a great candidate. Plaintiff's allegations constitute opinions not facts

[4] Appellees filed a motion to supplement the record with the deposition of Dr. Rudderman.

about whether she was a candidate and what types of scars she may have after surgery. They do not constitute material fraudulent statement of fact about the condition of her breasts before surgery. Moreover, Plaintiff's own expert admits that she was a proper candidate for her breast reduction surgery. (V6-54)

Plaintiff's reliance on Smith v Wilfong 218 Ga. App. 503 (1995) and Lloyd v. Kramer, 233 Ga. App. 372 (1998) is misplaced. In Wilfong plaintiff alleged the doctor falsely stated her kidney was enlarged when the CT did not show it was enlarged and the Court found a question of fact existed as to whether material fraudulent statements of fact were made that her kidney was enlarged. In Lloyd v Kramer 233 App 372 (1998) plaintiff alleged the doctor made material fraudulent statement that he had had hammer toe based on altered medical records when she did not.

Here, however, Plaintiff does not allege Dr. Kahler made a factual misrepresentation concerning her current medical condition, but instead told her his opinion as to whether she was a candidate and what types of scars she may have after surgery. Dr. Kahler offered opinions, not facts.

Finally, Plaintiff's speculative and unsupported inference that Dr. Kahler's alleged statements infer that he committed fraud because did not want to lose a patient is not sufficient to preclude summary judgment Patrick v. Macon Housing Authority, 250 Ga. App. 806 (2001) Inferences founded on speculation lack

evidentiary value and cannot prevent summary judgment. Examination Management Services, Inc. v. Steed, 340 Ga. App. 51 (2016); Handberry v. Manning Forestry Services, LLC, 353 Ga. App. 150 (2019) Similarly, inferences that do not necessarily arise from the facts as a matter of law, cannot prevent summary judgment. Service Merchandise, Inc. v. Jackson, 221 Ga. App. 897 (1996) Here, contrary to Plaintiff's improper inferences, Plaintiff and her expert testified that Dr. Kahler wanted to help her, not defraud her. (V5-108) (V7-118)

III. The trial court properly granted summary judgment on Plaintiff's claim of battery

To establish a claim for battery, plaintiff must prove a medical touching without consent. See Pope v. Davis, 261 Ga. App. 309 (2003). Consent to medical treatment can be shown by writing or express words demonstrating the patient's assent to treatment and it may also be shown by acts and conduct. See id.

Moreover, even assuming a lack of *informed* consent under O.C.G.A. § 31-9-6.1, that lack of informed consent does not give rise to a battery claim. See O.C.G.A. § 31-9-6.1(d); Paden v. Rudd, 294 Ga. App. 603, 605 (2008); Pope, 261 Ga. App. at 310. In Paden, the Court of Appeals affirmed the trial court's order dismissing plaintiff's claim of battery because it was based on his claim of professional negligence in failing to obtain informed consent. 294 Ga. App. at 605.

Further, where a patient signed a consent for surgery, a claim of fraud does not invalidate a patient's consent to surgery to create a battery claim. Roberts v.

Connell, 312 Ga. App. 515, 518 (2011); Blotner v. Doreika, 285 Ga. 481, 482 (2009). Instead, a " valid *general* consent negates any actionable claim for battery." (emphasis added) Lloyd v. Kramer, 233 Ga. App. 372, 374 (1998). Here, it is undisputed that Plaintiff signed two valid informed consents before her breast reduction surgery (V5-41-59; V7-53-56; V8-177-78)

Finally, Plaintiff failed to provide any evidence or law that there was a substantial variance in Plaintiff's treatment to invalidate the signed written consents. Plaintiff signed informed consents and had surgery for reduction mammaplasty including liposuction and other possible procedures. (V5-41; V5 134–37) All experts testified that surgeons use liposuction as part of reduction mammaplasty surgery. (V7-117; V8-49; V9-73) There was no substantial variance between the consents for reduction mammaplasty and the same identified reduction mammaplasty surgery simply because liposuction was used in part of the surgery.

IV. The trial court properly granted summary judgment on Plaintiff's claim for punitive damages.

A. Plaintiff consented to dismissal of her claim to punitive damages.

Plaintiff cannot recover punitive damages because she consented to dismissal of her claim to punitive damages in her hearing on the motion for summary judgment before the trial court. (V10-57) A party's admission made in open court during a hearing is considered a judicial admission, which is binding on

the party making the admission. McClarty v. Trigild Incorporated, 339 Ga. App. 691 (2016).

B. Plaintiff failed to present clear and convincing evidence supporting punitive damages.

Plaintiff is required to submit clear and convincing evidence that Dr. Kahler's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences. O.C.G.A. § 51-12-5.1(b). The mere allegation of a tort does not immediately warrant punitive damages being awarded. Instead, there must be some circumstances of "aggravation or outrage" to rise to the level required by O.C.G.A. § 51-12-5.1(b). Roseberry v. Brooks, 218 Ga. App. 202, 209 (1995).

Here, Plaintiff failed to present clear and convincing evidence to demonstrate that Defendants' conduct warrants punitive damages. Plaintiff and her expert admit that Dr. Kahler wanted to help not her and did not intend to defraud her. (V5-110; V7-46,118; V8-131-33) At most Plaintiff has presented evidence of professional medical malpractice for failing to obtain proper informed consent.

C. Alternatively, assuming Defendants could be liable for punitive damages, Defendants are entitled to summary judgment for punitive damages in excess of $250,000.

Under O.C.G.A. § 51-12-5.1, punitive damages are limited to a maximum award of $250,000.00 unless the jury makes a separate and specific finding that the

defendant acted with specific intent to cause harm to the aggrieved party. O.C.G.A. §§ 51-12-5.1 (f), (g) (2006); MacDaniel v. Elliot, 269 Ga. 262, 265 (1998) (holding that the trier of fact must make a separate finding of specific intent to cause harm to avoid the $250,000.00 punitive damages cap).

Therefore, for Plaintiff to recover over $250,000 in punitive damages, she must prove that Dr. Kahler actually intended to or was substantially certain that his actions would cause harm to Plaintiff. Here, the evidence is insufficient to prove that Dr. Kahler acted with a specific intent to harm Plaintiff. To the contrary, Plaintiff and her expert admit that Dr. Kahler was trying to help and not harm Plaintiff. (V5-110; V7-46,118; V8-131-33)

V. The trial court property granted summary judgment on Plaintiff's Count Four – Negligence of John Doe Defendants.

Plaintiff cannot recover on her claim against John Does defendants because she consented to dismissal of that claim in the hearing on the motion for summary judgment before the trial court. (V10-57) See McClarty v. Trigild Incorporated, 339 Ga. App. 691 (2016). Moreover, Plaintiff has never identified any "John Doe Defendant," added any new defendant, or presented any evidence of negligence by an unnamed defendant.

CONCLUSION

Defendants respectfully as this Court to affirm the trial courts' grant of summary judgment on Plaintiff's Count Two for breach of informed consent,

Count Three for fraudulent misrepresentation and battery, Count Four for negligence of John Doe Defendants, and Plaintiff's claim for punitive damages.

This 17th day of June, 2024.

This submission does not exceed the word count limit imposed by Rule 24(f)(1).

TISINGER VANCE, P.C.

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CERTIFICATE OF SERVICE

Under Rule 6, I hereby certify that I have this day served a true and exact copy of the above and foregoing **BRIEF OF APPELLEE STEPHEN H. KAHLER AND TANNER MEDICAL CENTER, INC.** upon:

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by depositing the same in the United States Postal Service with adequate first-class postage affixed thereon to assure delivery.

This 17th day of June, 2024.

TISINGER VANCE, P.C.

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