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Have You Properly Obtained Informed Consent?

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In June, the Pennsylvania Supreme Court issued a controversial opinion holding that a physician had to have face-to-face interaction with the patient to effectively obtain informed consent. This has raised heightened awareness of a physician's obligations to obtain informed consent from their patients and caused many to evaluate their own practice of obtaining informed consent.

In *Shinol v. Toms*, a patient brought a medical malpractice case against a neurosurgeon alleging he failed to obtain informed consent. (2017 WL 2655387). The record and testimony at trial established that that the physician met with the patient on two occasions prior to surgery to discuss potential complications. The physician testified that he explained the different approaches and options for surgery. The patient also had a telephone conversation with a certified physician assistant ("PA") who worked for the physician, and just before surgery, the patient met with the PA who obtained her medical history, conducted a physical examination and obtained an executed informed consent form. The form gave the physician permission to perform "'a resection of recurrent craniopharyngioma." The patient's signature acknowledged that she had discussed the advantages and disadvantages of alternative treatments, that the form had been fully explained to her, that she had an opportunity to ask questions, and that she had sufficient information to give her informed consent.

Despite her signature on the consent form, the patient alleged in the lawsuit that she was not fully informed of her options (total versus subtotal resection of a non-malignant brain tumor). According to the patient, if she had been given the option of a subtotal resection, she would have chosen the less aggressive form of surgery.

After the physician received a jury verdict in his favor, the state supreme court declared a mistrial based on an improper jury instruction related to informed consent. The jury had been instructed that it could consider any relevant information it found was communicated to the patient by "any qualified person acting as an assistant to the physician." In granting a new trial, the Pennsylvania Supreme Court held that the surgeon himself had to have face-to-face conversations with the patient about the risks of surgery in order for him to have properly obtained informed consent from his patient. In other words, evidence of the discussions with the PA could not be considered by the jury in their deliberations of whether informed consent was properly obtained. The court's opinion was an extension of a previous opinion that held informed consent could not be delegated to a hospital; the physician was responsible for obtaining it.

Similar to Pennsylvania, Alabama courts have found that a hospital and its staff do not have an independent obligation to obtain informed consent from a patient. *Wells v. Storey*, 792 So. 2d 1034 (Ala. 1999). However, this does not necessarily equate to the ruling in *Shinol*. Based on

Shinol's strict interpretation and possible increased scrutiny as a result of the holding, a review of Alabama law on informed consent is warranted.

It is the duty of the physician to inform the patient of the risks and obtain their consent, and if the physician fails to get informed consent, a patient has a cause of action under the Alabama Medical Liability Act ("AMLA"). Historically, the cause of action for a failure to obtain informed consent evolved through the legal theory of battery. The reason being that a person has the "'right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault for which he is liable in damages.'" *See Fain v. Smith*, 479 So. 2d 1150 (Ala. 1985) (quoting *Schloendorff v. Society of New York Hospital*, 105 N.E. 92, 93 (1914)).

The elements of the claim are 1) the physician's failure to inform the patient of all material risks associated with the procedure, and 2) a showing that a reasonably prudent patient, with all the characteristics of the plaintiff and in the position of the plaintiff, would have declined the procedure had the patient been properly informed by the physician. The test for determining whether the physician has disclosed all material risks to the patient is "a professional one, i.e. whether the physician had disclosed all the risks which a medical doctor practicing in the same field and in the same community would have disclosed. Expert testimony is required to establish what the practice is in the general community." *Giles v. Brookwood Health Services*, 5 So. 3d 533 (Ala. 2008).

In one Alabama case, the physician entered into evidence an informed consent form signed by the patient. Although the patient stated she did not give consent, the court found the forms alone sufficient to dismiss the patient's claims for assault and battery. There was no discussion in the court's opinion as to how the form was presented to the patient or whether there was detailed discussion between the patient and the physician.

In another Alabama case involving the scope of consent, the physician obtained an executed form from the patient consenting to a specific procedure but also stating that the physician was authorized to perform "such additional operations/procedures during the course of the above as are considered therapeutically necessary or advisable in the exercise of professional judgment." The patient alleged that the consent form did not give the physician "carte blanche" to perform any procedure. In this case, the physician had mistakenly removed an ectopic kidney the physician thought was a tumor. The Alabama Supreme Court overturned the lower court's ruling in favor of the patient on the issue of informed consent and stated that there must be expert testimony as to whether the procedure performed by the physician was reasonable in light of the findings during the surgery.

Although the cases and elements mentioned above require the physician to inform the patient, there are no cases in Alabama that specifically require a face-to-face meeting/encounter with the patient to give informed consent (although this is definitely best practice) and certainly nothing in our case law that says a PA or other qualified health care professional may not explain the risks associated with a procedure. The law requires a physician to exercise that level of reasonable care, skill and diligence as a similarly situated physician and this rule should be followed when it

comes to informed consent. It would also be wise to review consent forms to ensure they are not too limited in the grant of consent and ensure you are documenting all discussions with patients about the risks of procedures.

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