OVERVIEW OF RECENT TRENDS IN MEDICAL MALPRACTICE

By: James E. Looper, Jr.*

Attorneys who prosecute or defend medical malpractice, sometimes referred to as med. mal., cases are faced with unique challenges. Med. mal. in Georgia has elements of tort and contract.[1] It has unique pleading requirements that prohibit any dollar amount larger than $10,000.00 from being mentioned in the complaint and that require an expert's affidavit be attached to the complaint.[2] Med. mal. has its own statutes of limitation and repose and these periods are not necessarily tolled for disabilities as they are in other *ex delicto* and *ex contractu* actions.[3] Med. mal. encompasses cases involving health-care professionals and health-care entities, such as hospitals (for purposes of simplification, this article will refer only to physicians and will make note should there be a distinction for others).

THE BASICS OF MEDICAL MALPRACTICE

In order to bring a cause of action for medical malpractice the plaintiff must prove:

(1) the duty inherent in the doctor-patient relationship;

---

* James E. Looper, Jr. is a senior associate in the Atlanta office of Hall, Booth, Smith & Slover, P.C., where he practices in the areas of medical malpractice defense, and hearings before the Composite State Board. He received his J.D. Degree from Mercer University. While at Mercer, James was elected to the National Order of Barristers, competed on the Intrastate and National Moot Court teams, won outstanding first year oralist awards, and served on Mercer's Law Review. He received his Bachelor of Science Degree in Biology and his Bachelor of Arts Degree in History from Furman University, attended the University of South Carolina=s Graduate School in Pharmacology and attended the College of Medicine at the Medical University of South Carolina. James remains involved with the Intrastate Moot Committee of the State Bar of Georgia. James has spoken to the Atlanta Claims Convention, the ICLE Medical Malpractice Institute, the Medical Education Services Seminar on Mental Health and the law in Georgia, and the Georgia Society for Hospital Risk Managers on various medico-legal issues. He is a member of the Defense Research Institute, American Bar Association, Georgia Defense Lawyers Association, and the State Bar of Georgia.

(2) breach of that duty by failing to exercise the requisite degree of skill and care; and

(3) that this failure is the proximate cause of the injuries sustained.[4]

Prong one is established by showing that the physician undertook the care and treatment of the patient.[5] Prongs two and three are established through expert testimony. In order to prove these two prongs, the plaintiff must overcome the presumption in medical malpractice cases that the physician performed his care in an ordinary and skillful manner.[6] The plaintiff does not satisfy her burden by showing that the testifying physician would have done something differently; rather, the plaintiff must offer expert medical testimony that the defendant doctor "failed to exercise that degree of care and skill which would ordinarily have been employed by the medical profession generally *under the circumstances*."[7] In order to show proximate cause, the plaintiff must present expert medical testimony that the alleged deviation from the standard of care probably (more likely than not) caused the injury.[8] The Court of Appeals has noted that a reasonable degree of medical probability has no greater meaning than preponderance of the evidence as to medical causation and, in fact, has expressly held that charging the jury that the plaintiff must prove the alleged deviation caused the injury within a reasonable degree of medical *certainty* is harmful error.[9]

THE MEDICAL MALPRACTICE STATUTES OF LIMITATION AND REPOSE

One of the most important areas in med. mal. is determining when the statute of limitation expired or will expire. This seems simple on its face; however, it is anything but simple. Georgia requires that "an action for medical malpractice shall be brought

within two years after the date on which an injury or death arising from a negligent or wrongful act or omission occurred."[10] This time period is different if dealing with a retained instrument or an injured infant.[11] [12]

Furthermore, the statute of limitation is treated somewhat differently if the alleged deviation resulted in death.[13] In this situation, the wrongful death action must be brought within two years of the date of death; however, the claims for special damages, pain and suffering, and punitive damages (the estate's claim) must be brought within two years of the alleged negligent act.[14] It is important to note that the time computation for the estate's claim will be tolled while awaiting the appointment of the personal representative.[15] This can be especially troubling when dealing with the impending expiration of the time to file the survivor's wrongful death claim and the interaction with O.C.G.A. § 9-11-9.1 (b).[16]

Other than the situations described above, the only time the statute of limitation for med. mal. actions is tolled is when the physician, by fraudulent means, debars and deters a plaintiff from bringing a malpractice claim.[17] This must be actual fraud, that is, more than a mere misdiagnosis.[18]

One of the hardest questions to answer is when did the injury manifest itself. Traditionally the date of the alleged negligent act or misdiagnosis is the date of the injury.[19] This is so due to the fact that the plaintiff usually experiences symptoms at this time and it is so regardless of whether the plaintiff knew the cause of the symptoms.[20] Recently the Court of Appeals attempted to change this rule by overruling a long line of cases by adopting the "continuous treatment doctrine".[21] Under this theory the statute

of limitation would not start to run until the treatment ended regardless of when the negligent act occurred or when symptoms manifested to the plaintiff.[22] On certiorari the Supreme Court reversed the Court of Appeals, holding that the "continuous treatment doctrine" was in direct contradiction of O.C.G.A. § 9-3-71 and that the power to change this rule rested with the General Assembly, not the courts.[23]

Should the plaintiff believe the statute of limitation tolled for some reason, the case still must be filed within the statute of repose.[24] The statute of repose abrogates the cause of action.[25] The statute of repose expires five years from the date of the alleged negligent act regardless of when symptoms may have manifested.[26] Just as with the statute of limitation, the period of repose is treated differently when dealing with retained foreign bodies and infants.[27] [28]

Unlike the statute of limitation, there is no tolling of the statute of repose; however, a defendant may be equitably estopped from raising the defense of the expiration of the statute of repose if the plaintiff was barred and deterred from filing suit as a result of the fraudulent activity of the physician.[29] The *Esener* opinion implicitly overruled prior cases that held the statute of repose would abrogate the claim for medical malpractice when the alleged negligence was discovered prior to the expiration of the statute of repose.[30] Recently, the Court of Appeals has clarified the *Esener* opinion and explained that the fraud necessary to equitably estop the defendant from raising the expiration of the period of repose must be intentional fraud.[31]

EXPERT TESTIMONY AND O.C.G.A. § 9-11-9.1

Without expert testimony, there is no medical malpractice case.[32] The defendant physician may serve as his own expert; however, it would not be advisable to go to trial without additional expert testimony.[33] In order for the case to begin, the plaintiff must comply with O.C.G.A. § 9-11-9.1 and attach an expert's affidavit to the complaint.[34] This affidavit does not have to rise to the level of surviving a motion for summary judgment; rather, it is a pleading requirement.[35] That said, the affidavit must be provided by an expert competent to testify and it must provide one negligent act and the factual support for the alleged act of negligence.[36] O.C.G.A. § 9-11-9.1 does not require a causation statement nor does it require the medical records relied upon by the expert be attached to the affidavit.[37] However, these two criteria must be satisfied in order for the affidavit to be sufficient in response to a motion for summary judgment.[38]

O.C.G.A. § 9-11-9.1 was meant to reduce frivolous litigation; however, it has created its own subset of litigation. In 1997, the General Assembly amended O.C.G.A. § 9-11-9.1 and the amendments applied only to cases filed after July 1, 1997.[39] There were several significant changes to the statute.[40] One of those changes requires a defendant to raise any deficiencies in the affidavit by way of a motion to dismiss filed contemporaneously with the initial responsive pleading.[41] Prior to the amendments, if the deficiency in the affidavit was not obvious on the face of the affidavit, the defendant was not required to raise this defense with the answer.[42] Since the amendments took affect, the appellate courts of Georgia have not addressed in a majority opinion how to deal with a deficiency that is not obvious on the face of the affidavit. In a concurring opinion, Judge Eldridge and Presiding Judge McMurray stated that by requiring a

motion to dismiss be filed contemporaneously with the initial responsive pleading the General Assembly intended for defendants to waive any affidavit defense, including those not obvious on the face of the affidavit, if the motion to dismiss was not filed contemporaneously with the initial responsive pleading.[43] The opinion of Judge Eldridge and Presiding Judge McMurray seems to comport with the Court of Appeals' recent interpretations of O.C.G.A. § 9-11-9.1 requiring strict adherence to the procedural rules.

If the statute of limitation will expire within ten days of the filing of the complaint, the plaintiff may obtain an additional forty-five days within which to file the affidavits.[44] The plaintiff is required to allege in her complaint that the statute of limitation will expire within ten days of the filing of the complaint and due to time constraints an affidavit could not be prepared.[45] The failure to include this language is an amendable defect; however, the Court of Appeals has held that where the complaint does not include this language the plaintiff is not entitled to the additional forty-five days and the complaint will be dismissed.[46]

Strict adherence to the procedural requirements of O.C.G.A. § 9-11-9.1 is also required of defendants. The Court of Appeals recently held that it was improper for the trial court to dismiss a plaintiff's cause of action against a hospital where the hospital had not raised the lack of an affidavit by way of a motion to dismiss filed with its initial responsive pleading.[47] The Court of Appeals held this despite the fact that the hospital had not answered because of the automatic stay in place as a result of the hospital's voluntary bankruptcy.[48]

While the Court of Appeals has required strict adherence to the requirements of O.C.G.A. § 9-11-9.1 two cases decided on March 6, 2002 create confusion as they have opposite holdings.[49] Both cases deal with a plaintiff alleging that time constraints prohibited the obtaining of an affidavit before the statute of limitation expired.[50] In one case, the Court of Appeals held that the plaintiff is not required to prove this assertion and that basically it could not be challenged by a defendant.[51] However, in the other case (which incidentally was a legal malpractice case), the Court of Appeals held that where the plaintiff did not make the allegation in good faith, the defendant may challenge the assertion and have the case dismissed.[52] The Court held this was basic statutory construction based on the Legislature's use of the word allege and based on the fact that the Legislature did not give an automatic forty-five day extension without making the allegation in the complaint.[53] It remains to be seen how the Supreme Court will reconcile this inconsistency.

In addition to O.C.G.A. § 9-11-9.1, expert testimony is required in med. mal. cases for everything from motions for summary judgment to trial. As stated above, how the expert witness would personally treat the condition is irrelevant; rather, the expert witness must testify to the standard of care and how the defendant physician deviated from the standard of care.[54] While the Supreme Court and the Court of Appeals upheld this long-standing rule regarding expert testimony, the two courts recently reversed the long-standing rule regarding contradictions in expert testimony.[55] Prior to these cases, the self-contradictory testimony rule, or *Prophecy* rule, applied to expert witnesses just as it applies to parties.[56] In fact, the rule was extended regarding experts to not just

self-contradictory statements, but to the addition of an expert by a plaintiff in an attempt to create a question of fact where none existed because of the plaintiff's expert's earlier testimony.[57] Obviously, since the reversal, contradications by an expert or between experts go to the weight of the testimony rather than causing the favorable testimony to be disregarded.[58]

DISMISSAL AND RENEWAL

Ordinarily, a plaintiff may make a one-time election to voluntarily dismiss her complaint without prejudice and renew the action within six months even though the statute of limitation has expired.[59] However, in a med. mal. action, it is not that simple. The statute of limitation, the statute of repose, and the affidavit requirement may adversely affect a plaintiff's right to voluntarily dismiss and renew the action. Renewal after the expiration of the statute of limitation will not be allowed where the plaintiff did not file an expert's affidavit pursuant to O.C.G.A. § 9-11-9.1 with her complaint.[60] In addition, renewal will not be allowed in a med. mal. case after the expiration of the period of repose.[61]

THEORIES OF LIABILITY OTHER THAN THE TRADITIONAL DEVIATION APPROACH

Recently informed consent and negligence *per se* have been making numerous appearances in med. mal. cases. Consent in Georgia is controlled by O.C.G.A. §§ 31-9-6 and 31-9-6.1. O.C.G.A. § 31-9-6 provides for a general consent applicable to all medical procedures and O.C.G.A. § 31-9-6.1 provides for informed consent that is applicable to certain types of surgical procedures. However, in late 2000, the Court of Appeals altered this by holding that informed consent applies to all medical

procedures.[62] Neither party applied for certiorari, so it is unknown if the Supreme Court will allow this to stand (it seems unlikely in light of the Supreme Court's earlier reversals of the Court of Appeals' attempts to expand informed consent).[63] Since rendering the *Ketchup* opinion, the Court of Appeals has either narrowed or ignored the *Ketchup* case.[64] Attorneys must keep in mind that informed consent does not create another cause of action and that expert testimony plus a 9-11-9.1 affidavit are required in order to sustain a claim for lack of informed consent.[65]

Negligence *per se* cases have also been addressed by the Appellate Courts. The Court of Appeals has held that the violation of certain practice acts is negligence *per se*.[66] This seems to be more of a risk to non-physician health care professionals than it is to physicians. Not all cases have resulted in the Court of Appeals holding that negligence *per se* exists. Recently the Court of Appeals held that the violation of a hospital policy is not negligence *per se*.[67]

Other causes of action have met with mixed success. In a misdiagnosis case the Court of Appeals has held that failing to inform the patient of the misdiagnosis is a separate cause of action but expressed reservations that the plaintiff would be able to link an injury to this alleged act of negligence.[68] The Court of Appeals has not been as willing to create new med. mal. causes of action when dealing with product-type issues. In that regard, pharmacists will not be held strictly liable under a product theory because they are sellers, rather than manufacturers.[69] In addition, a breach of warranty theory against the pharmacist is no different than the standard tort because it also requires expert testimony that the pharmacist deviated from the standard of care.[70] The Court

has also held that manufacturers are not liable under a theory of failure to warn because the physician who prescribes the device is a "learned intermediary."[71]

VICARIOUS LIABILITY

Typically physicians are not employed at the hospitals where they practice. Traditionally this would mean that the hospital could not be held liable for the actions of the physician.[72] The Appellate Courts have determined that policy considerations dictate that there be some way to hold hospitals liable for the acts of the physicians, provided that certain requirements are met, and as a result, the doctrine of apparent agency was adopted in Georgia.[73] Hospitals can avoid liability for the acts of non-employed physicians by posting signs informing the public of the status of the physician and/or having the patient sign a form disclosing the status of the physicians.[74] Recently the Court of Appeals refused to hold a group liable for the independent acts of a physician under the theory of a joint venture.[75]

CONCLUSION

As you can see, prosecuting and defending med. mal. cases provides an exciting opportunity to exercise your legal mind. In reading through the court opinions it should be obvious that most counsel, both plaintiff and defense, who practice med. mal. are creative advocates who will challenge your legal skills in a generally professional manner. What is not obvious in reading the opinions, is that there is probably no more emotional legal practice than med. mal. Both sides are heavily invested in their case. The plaintiff has suffered an injury and the defendant's professional reputation has been

impugned. In short, those who have the privilege of handling med. mal. cases are zealous advocates for a very real and concerned client.

ENDNOTES

[1] *See, e.g.,* St. Joseph's Hosp. v. Mattair, 239 Ga. 674, 238 S. E. 2d 366 (1977); *see also* Robinson v. Williamson, 245 Ga. App. 17, 19(1), 537 S.E. 2d 159 (2000).

[2] O.C.G.A. § 9-11-8(a)(2)(B).

[3] O.C.G.A. § 9-3-71; 9-3-72; 9-3-73.

[4] Bowling v. Foster, 2002 Ga. App. Lexis 384, *6, 2 Fulton County D.R. 1029 (2002) (*quoting* Cannon v. Jeffries, 250 Ga. App. 371, 372-373(1) (551 S.E. 2d 777) (2001)).

[5] *See, e.g.,* Purcell v. Breese, 250 Ga. App. 472, 475-76, 552 S. E. 2d 865 (2001).

[6] Bowling, 2002 Ga. App. Lexis at *6 (*citing* Killingsworth v. Poon, 167 Ga. App. 653, 654, 307 S.E. 2d 123 (1983)).

[7] Bowling, 2002 Ga. App. Lexis at *6 - 7 (*citing* McNabb v. Landis, 223 Ga. App. 894, 896 (5) 479 S. E. 2d 194 (1996); Killingsworth v. Poon, 167 Ga. App. at 655).

[8] Thompson v. Zwiren, 2002 Ga. App. Lexis 315, *5 - 7, (2002) ("in medical malpractice cases, 'causation issues can be resolved only by expert medical testimony, standing alone; in which case the testimony sufficient to establish a causal connection must at least show there was a reasonable probability that the negligence caused the injury.' (Citations omitted.) 'Certainty is not required, but the plaintiff must show *probability* rather than merely a *possibility* that the alleged negligence caused the injury or death.'" (Emphasis in original.)) (*quoting* Pilzer v. Jones, 242 Ga. App. 198 201 (1), 529 S. E. 2d 205 (2000); Abdul-Majeed v. Emory Univ. Hosp., 225 Ga. App. 608, 609 484 S. E. 2d 257 (1997), *overruled in part on other grounds,* Ezor v. Thompson, 241 Ga. App. 275, 279, 526 S. E. 2d 609 (1999)).

[9] Thompson, 2002 Ga. App. Lexis at *5 – 7 (citations omitted).

[10] O.C.G.A. § 9-3-71(a).

[11] O.C.G.A. § 9-3-72 ("the limitations of Code Section 9-3-71 shall not apply where a foreign has been left in a patient's body, but in such a case an action shall be brought within one year after the negligent or wrongful act or omission act is discovered. For the purposes of this Code section, the term 'foreign object' shall not include a chemical compound, fixation device, or prosthetic aid or device"). It is important to note that if the discovery of the foreign object occurs within two years of the date of the alleged negligent act that resulted in the foreign object being retained in the plaintiff's body, the two year period provided in O.C.G.A. § 9-3-71 will not be shortened. *See*, *e.g.*, Spivey v. Whiddon, 260 Ga. 502, 503, 397 S.E. 2d 117 (1990)).

[12] O.C.G.A. § 9-3-73 (b) (an action for medical malpractice brought on behalf of an infant under the age of five shall be barred two years after the fifth birthday).

[13] O.C.G.A. § 9-3-71(a); Legum v. Crouch, 208 Ga. App. 185, 187-90, 430 S. E. 2d 360 (1993).

[14] Id.

[15] Id.

[16] Id.

[17] Miller v. Kitchens, 251 Ga. App. 225, 227-29, 553 S. E. 2d 300 (2001) (also explained that the burden of proving the facts necessary to establish tolling is the plaintiff's).

[18] Id. at 227.

[19] Id. at 228-29; *see also* Oliver v. Sutton, 246 Ga. App. 436, 437-38, 540 S. E. 2d 645 (2000).

[20] Miller, 251Ga. App. at 228-29; Oliver, 246 Ga. App. at 437-38.

[21] *See generally* Williams v. Young, 247 Ga. App. 337, 543 S. E. 2d 737 (2000), *rev'd*, Young v. Williams, _____ Ga. _____, 560 S. E. 2d 690 (2002).

[22] Williams, 247 Ga. App. at 340.

[23] Young, _____ Ga. at _____ (2002 Ga. Lexis at *8 – 9).

[24] Miller v. Vitner, 249 Ga. App. 17, 546 S. E. 2d 917 (2000); Hutcherson v. Obstetrics & Gynecology Assocs. of Columbus, P. C. 247 Ga. App. 685, 688, 543 S. E. 2d 805 (2000).

[25] Miller, 249 Ga. App. at 25.

[26] Zechman v. Thigpen, 210 Ga. App. 726, 730, 437 S. E. 2d 475 (1993).

[27] O.C.G.A. § 9-3-73 (e); *see, e.g.*, Abend v. Klaudt, 243 Ga. App. 271, 273-74, 531 S. E. 2d 722 (2000) (the statute of repose does not bar a foreign object medical malpractice action timely filed within the one-year period set forth in O.C.G.A. § 9-3-72).

[28] O.C.G.A. § 9-3-73 (c) (2) (A) and (B) (the period of repose expires on the tenth birthday if the infant was under five years of age on the date of the alleged negligent act and it expires five years from the date of the alleged negligent act if the infant was over five years of age at the time).

[29] *See generally* Esener v. Kinsey, 240 Ga. App. 21, 522 S. E. 2d 522 (1999).

[30] *See, e.g.,* Hendrix v. Schrecengost, 183 Ga. App. 201, 204, 358 S. E. 2d 486 (1987); Zechman, 210 Ga. App. at 730.

[31] Miller, 249 Ga. App. at 18.

[32] O.C.G.A. § 9-11-9.1; Bowling, 2002 Ga. App. Lexis at *6.

[33] *See, e.g.,* Loving v. Nash, 182 Ga. App. 253, 255, 355 S. E. 2d 448 (1987).

[34] O.C.G.A. § 9-11-9.1; Frieson v. South Fulton Med. Ctr., 2002 Ga. App. Lexis 564, *5 (2002).

[35] *See, e.g.* Crook v. Frank, 214 Ga. App. 213, 214, 447 S. E. 2d 60 (1994).

[36] O.C.G.A. § 9-11-9.1(a).

[37] *See, e.g.,* Ulbrich v. Batts, 206 Ga. App. 74, 75, 424 S. E. 2d 288 (1992).

[38] O.C.G.A. § 9-11-56(e); *see, e.g.,* Estate of Patterson v. Fulton-DeKalb Hosp. Auth., 233 Ga. App. 706, 707, 505 S. E. 2d 232 (1998).

[39] *See generally,* Mug A Bug Pest Control v. Vester, 270 Ga. 407, 509 S. E. 2d 925 (1999), *rev'g,* Vester v. Mug A Bug Pest Control, 231 Ga. App. 644, 500 S. E. 2d 406 (1988).

[40] O.C.G.A. § 9-11-9.1. After the amendments, a defendant is required to file an answer even if the affidavit was not filed with the complaint; the defendant must file a motion to dismiss contemporaneously with the initial responsive pleading alleging the failure to file the affidavit or specifically alleging the defects in the affidavit; the plaintiff is provided thirty days to amend the affidavit and correct the alleged defects; and the professionals to which O.C.G.A. § 9-11-9.1 applies are delineated in the Code Section.

[41] O.C.G.A. § 9-11-9.1 (b) and (d); *see generally* Friesen (note 34 *supra*).

[42] Harris v. Murray, 233 Ga. App. 661, 663-67, 504 S. E. 2d 736 (1998).

[43] Id. at 667-68 ("either the motion to dismiss is made contemporaneously with the responsive pleading or no motion to dismiss can be later filed").

[44] O.C.G.A. § 9-11-9.1(b). It is possible for the plaintiff to obtain more than the forty-five days by filing a motion and showing good cause for the extension. *See, e.g.*, Memorial Hosp. of Adel v. Dunn, 251 Ga. App. 399, 554 S. E. 2d 548 (2001).

[45] O.C.G.A. § 9-11-9.1(b).

[46] Cabey v. DeKalb Med. Ctr., 252 Ga. App. 313, 314-15, 555 S. E. 2d 742 (2001) (this is so even if the plaintiff includes the language in a motion seeking additional time); *see also* Sullivan v. Fredericks, 251 Ga. App. 790, 791, 554 S. E. 2d 809 (2001).

[47] Frieson, 2002 Ga. App. Lexis at *4 - 5.

[48] Id.

[49] Georgia Dermatology Clinic v. Nesmith, 2002 Ga. App. Lexis 285 (2002); Smith v. Morris, Manning & Martin, LLP, 2002 Ga. App. Lexis 282 (2002).

[50] Id.

[51] Georgia Dermatology, 2002 Ga. App. Lexis at *7-10.

[52] Smith, 2002 Ga. App. Lexis at *7-9.

[53] Id.

[54] Thompson, 2002 Ga. Lexis at *10.

[55] Thompson v. Ezor, 272 Ga. 849 (2000), *aff'g,* Ezor v. Thompson 241 Ga. App. 275 (1999).

[56] Id.

[57] Id.

[58] Id.

[59] O.C.G.A. § 9-2-61.

[60] Witherspoon v. Aranas, 2002 Ga. App. Lewis 433, * 4-6, 2 Fulton county D. R. 1110 (2002)

[61] *See generally*, Miller v. Vitner (note 24 *supra*).

[62] Ketchup v. Howard, 247 Ga. App. 54, 543 S.E. 2d 371 (2000).

[63] Albany Urology Clinic v. Cleveland, 272 Ga. 296, 300, 528 S. E. 2d 777 (2000), *rev'g,* Cleveland v. Albany Urology Clinic, 235 Ga. App. 838, 509 S. E. 2d 664 (1998) (holding that informed consent does not require a physician to disclose illegal drug use; informed consent in Georgia is controlled by O.C.G.A. § 31-9-6.1); Cardio TVP Surg. Assocs. v. Gillis, 272 Ga. 404, 406-8, 528 S. E. 2d 785 (2000), *rev'g,* Gillis v. Cardio TVP Surg. Assocs., 239 Ga. App. 350, 520 S. E. 2d 767 (1999) (holding that where patient signs consent form that complies with O.C.G.A. § 31-9-6.1 summary judgment is appropriate for the physician on a claim of battery/lack of informed consent).

[64] Bowling, 2002 Ga. App. Lexis at * 10-13 (the Court cites to O.C.G.A. § 31-9-6.1 and Albany Urology Clinic v. Cleveland, 272 Ga. 296, 300(2), 528 S. E. 2d 777 (2000) in determining that there is no claim for lack of informed consent or battery when the physician complies with O.C.G.A. § 31-9-6.1 and has a signed consent form); Bethea v. Coralli, 248 Ga. App. 853, 854, 546 S. E. 2d 542 (2001) (appropriate to charge the jury on O.C.G.A. § 31-9-6.1 where there is an informed consent claim); Hubert v. Falconer, 248 Ga. App. 243, 244, 545 S. E. 2d 680 (2001).

[65] O.C.G.A. § 31-9-6.1(d).

[66] Rockefeller v. Kaiser Foundation Health Plan Of Ga., 251 Ga. App. 699, 701, 554 S. E. 2d 623 (2001) (violation of the Physician's Assistant Act is negligence *per se*); Brown v. Belinfante, 252 Ga. App. 856, 857, 557 S. E. 2d 399 (2001) (violation of the Dental Practice Act is negligence *per se*).

[67] Leal v. Hobbs, 245 Ga. App. 443, 445-46, 538 S. E. 2d 89 (2000).

[68] Oliver, 246 Ga. App. at 438-39.

[69] Robinson v. Williamson, 245 Ga. App. 17, 19, 537 S. E. 2d 159 (2000).

[70] Id.

[71] *See generally* McCombs v. Synthes, 250 Ga. App. 543, 553 S. E. 2d 17 (2001).

[72] Williamson v. Coastal Phys. Servs. of the S. E., Inc., 251 Ga. App. 667, 669, 554 S. E. 2d 739 (2001) (where the contract provides that the physicians are independent contractors and there is no evidence that showed the alleged principal controlled the time, manner, method or means by which the physician performed his duties, there is no liability for the alleged principal) *see also* Mantooth v. American Nat. Red Cross, 253 Ga. App. 587 _____ S. E. 2d _____ (2002).

[73] *See, e.g.,* Sorrells v. Egleston Children's Hosp., 222 Ga. App. 229, 231, 474 S. E. 2d 60 (1996) (where the hospital posts signs and has the patient sign a consent form that notify the patient of the independent contractor status of the physicians the hospital will not be held liable on a theory of apparent agency); *see also* Mantooth, 253 Ga. App. at 594-95 (patient signed form explicitly explaining the independent contractor status of the physicians).

[74] Id.

[75] Kelleher v. Pain Care of Ga., Inc., 246 Ga. App. 619, 620-21, 540 S. E. 2d 705 (2000) (holding that in order for a joint venture to arise there must be a right of mutual control and that generally corporate defendants cannot be vicariously liable because they do not control the physician's exercise of his independent medical judgment).