

Addendum

The case was remanded to the District Court for the Central District of Illinois (*Johnson v. Tinwalla*, 2017 U.S. Dist. LEXIS 185422 (Nov. 8, 2017)). There, the inmate plaintiff was provided counsel and moved for summary dismissal on his initial claims and in light of the Seventh Circuit’s ruling. The district court denied Mr. Johnson’s motion for summary judgment against Dr. Tinwalla. The court cited evidence contrary to what had been presented previously, including that Mr. Johnson did know he was taking risperidone during the relevant times. Dr. Tinwalla explained later in a deposition that he had told Mr. Johnson, after he had crossed out his signature on the consent form, that he was going to prescribe the medication so that Mr. Johnson had access to it. In addition, the nurse who processed the prescription testified that her standard practice included informing the patients of a new prescription. The court said that a reasonable jury could conclude that Dr. Tinwalla did not violate Mr. Johnson’s rights, defeating Mr. Johnson’s motion for summary judgment.

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## Delegation of Physician Responsibility in Obtaining Informed Consent

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### State Supreme Court Overrules Prior Law Suggesting That Physicians May Rely on Subordinates to Carry Out Informed Consent Duty

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In *Shinal v. Toms*, 162 A.3d 429 (Pa.2017), the Supreme Court of Pennsylvania overturned a lower court’s decision to uphold prior Pennsylvania case

law that permitted disclosures by qualified individuals other than the treating physician to obtain a patient’s informed consent for treatment. In reaching its decision, the Pennsylvania Supreme Court rejected the defendant’s assertion that disclosures by a physician’s subordinate to a patient regarding treatment satisfies the duty of informed consent. The court emphasized that the physician–patient relationship demands direct communication between physician and patient to obtain valid informed consent.

#### Facts of the Case

In 2007, Megan Shinal was diagnosed with a recurrence of a nonmalignant brain tumor, which had been partially resected in the past, but later developed into a mass compromising her eyesight and carotid artery. On November 26, 2007, Mrs. Shinal met with Dr. Steven Toms, a neurosurgeon, for an initial 20-minute consultation regarding the tumor. According to Dr. Toms’ testimony regarding that consultation, he and Mrs. Shinal discussed her goals and expectations in life, and the risks of different surgical approaches, including possible damage to the carotid artery and the optic nerve. According to Dr. Toms, Mrs. Shinal stated that she “wanted to be there for her child” (*Shinal*, p 433), which Dr. Toms understood to mean that “she wanted me to push forward if I got in a situation where I thought I could [remove all of the tumor] with a reasonable risk” (*Shinal*, p 433).

Dr. Toms testified that he reviewed with Mrs. Shinal the alternatives, risks, and benefits of total versus subtotal resection and he shared his opinion that, although a less aggressive surgical approach was safer in the short term, it would likely result in the tumor growing back. Dr. Toms also testified that he informed Mrs. Shinal that total resection would deliver the highest chance for long-term survival. At the conclusion of the visit, Mrs. Shinal decided to undergo surgery, but did not decide on the surgical approach.

On December 19, 2007, Mrs. Shinal spoke with Dr. Toms’ physician assistant (PA) and asked about postsurgical scarring, whether postsurgical radiation treatment would be necessary, and about the date of surgery. Medical records indicated that Dr. Toms’ PA also answered Mrs. Shinal’s questions about the craniotomy incision. On January 17, 2008, Mrs. Shinal met Dr. Toms’ PA at the neurosurgery clinic,

where the PA obtained Mrs. Shinal's medical history, conducted a physical examination, and provided information about the surgery. Mrs. Shinal signed an informed consent form. During the surgical procedure, Dr. Toms perforated Mrs. Shinal's carotid artery, causing partial blindness, hemorrhage, stroke, and brain injury.

On December 17, 2009, Ms. Shinal and her husband filed a medical malpractice action against Dr. Toms for failure to obtain informed consent. During her testimony, Mrs. Shinal stated that other than the risks of coma and death, she was unable to recall being informed of the relative risks of the surgical procedure. She further testified that had she known alternative approaches to the surgery, she would have chosen a safer and less aggressive approach.

At trial, the jury instructions regarding Dr. Toms' duty to obtain informed consent were as follows: "[I]n considering whether [Dr. Toms] provided consent to [Mrs. Shinal], you may consider any relevant information you find was communicated to [Mrs. Shinal] by any qualified person acting as an assistant to [Dr. Toms]" (*Shinal*, p 436).

On April 21, 2014, the jury returned a verdict in favor of Dr. Toms. The Shinals appealed to the Pennsylvania Supreme Court asserting that the jury instructions misapplied the common law and was inconsistent with Pennsylvania law when stating that the informed consent process could include information communicated by "any qualified person acting as an assistant" to Dr. Toms (*Shinal*, p 436). The Medical Care Availability and Reduction of Error (MCARE) Act (P.L. 154, No. 13 40 (2002)) requires a physician to obtain informed consent for performing surgery, administering radiation or chemotherapy, administering blood transfusions, inserting surgical devices, and administering experimental medications or devices.

#### Ruling and Reasoning

On June 20, 2017, the Pennsylvania Supreme Court ruled that physicians could not delegate their duty of providing information during the consent process. The court reasoned that "Without direct dialogue and a two-way exchange between the physician and patient, the physician cannot be confident that the patient comprehends the risks, benefits, likelihood of success, and alternatives" (*Shinal*, p 453).

In its decision, the court acknowledged two Pennsylvania Superior Court decisions holding that a phy-

sician may delegate responsibility for obtaining consent. However, it noted that a subsequent Pennsylvania Supreme Court decision, *Valles v. Albert Einstein Medical Center*, 805 A.2d 1232 (Pa. 2002), and the MCARE Act invalidated those lower courts' prior decisions. In *Valles*, the court held that a hospital cannot be held responsible for failure to provide informed consent, given that the responsibility resides with the doctors who have the education and clinical training necessary to advise their patient of surgical risks and are in the best position to know their patients' medical histories and to explain those risks in the context of those particular medical histories. For the same reasons, the court in this case reasoned that "a physician cannot rely upon a subordinate to disclose the information required to obtain informed consent" (*Shinal*, p 453).

The court further pointed out that, although Dr. Toms asserted that it was the information conveyed, rather than the person conveying it that determines informed consent, his testimony indicated his view that the informed consent process was:

... a real compact between the surgeon and the patient that he or she trusts me with their life [,] and I need to know they understand that this is serious, bad things could happen . . . . Truly, we're not allowed to have a [physician assistant] or a resident physician [review the procedure with the patient], I have to do it, I have to hear it, I have to know it [*Shinal*, p 455].

The court remanded the case for a new trial consistent with the opinion.

The decision was a majority opinion, but there were dissenting opinions. Justice Baer's dissent agreed with prior cases in that a doctor could still delegate his obligation of obtaining informed consent to his staff; however, liability remained with the doctor. The remaining dissenting opinions related to separate issues of juror selection.

#### Discussion

The doctrine of informed consent embodies one of the pillars of modern medicine: patient autonomy. Obtaining informed consent is a well-established concept that is performed thousands of times a day and may often seem second nature. However, the nuances of who obtains valid consent may remain in question. That is no longer the case in Pennsylvania, where its Supreme Court held that a physician's duty in the informed consent process is not delegable.

Whereas a prior Pennsylvania case (*Valles*) determined that a doctor cannot delegate the responsibil-

ity of the informed consent process to a hospital, the *Shinal* court determined equally that a physician cannot delegate the responsibility to a subordinate or surrogate. This case is based upon surgical consent and the MCARE Act, which does not directly address psychiatric treatment, but it should be noted that this ruling would be expected to be applied to all areas of medical informed consent in Pennsylvania.

In an ever-changing world of medicine, where it seems that the burden of paperwork and documentation continues to grow, there has been a resulting attrition of the time in which patients interact with their doctors. This ruling to enforce a back-and-forth, face-to-face direct communication between physician and patient to obtain informed consent may be a way to protect against the erosion of the patient doctor relationship.

## School Nurse May Testify About Child’s Statement of Abuse in the Abuser’s Criminal Trial

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**Testimony by a School Nurse About a Child’s Report of Abuse Is Neither Hearsay Nor a Violation of the Right of the Defendant to Confront Witnesses**

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In *Schmidt v. State*, 2017 WY 101 (2 Wyo. 017), the Supreme Court of Wyoming affirmed a trial court’s decision to allow a school nurse’s testimony about a child’s statement regarding sexual abuse victimization. The victim was not competent to testify, and the abuser claimed that his Sixth Amendment right to confront witnesses had been violated. In addition, he claimed that such testimony should be considered inadmissible hearsay.

### Facts of the Case

In October 2015, school officials made a child abuse report against Mr. Schmidt, after his girlfriend’s daughter, D.V., age 6, disclosed to school personnel that “my dog licked the peanut butter off my butt again.” Mr. Schmidt was D.V.’s sole father figure. D.V. had cognitive challenges from physical abuse by her biological father during infancy, requiring a school paraprofessional, Ms. Sanchez. D.V. spontaneously made the disclosure to Ms. Sanchez, repeating it a week later. On the second occasion, Ms. Sanchez became concerned, noting that D.V. did not have the ability to lie or remember things from the previous week with such detail. After the school counselor got involved, D.V. used dolls to demonstrate what had occurred. She repeated this with the school nurse, indicating how Mr. Schmidt removed the peanut butter from the jar with two fingers. She also drew a picture of herself and pointed to her vaginal area to show where he applied the peanut butter. D.V. disclosed that during one of the incidents, the dog bit her. The school officials showed D.V. a container of medicinal ointment and one of SunButter for clarification.

The school reported D.V.’s statements to the Department of Family Services, which contacted law enforcement. An investigation ensued the same day, including interviews of D.V., D.V.’s mother, and Mr. Schmidt and a medical examination of D.V. (finding an injury consistent with a dog bite). A search of the apartment disclosed a jar of peanut butter with an impression of fingers in the contents. A detective found bloodstained tissue paper and paper towels with what appeared to be peanut butter in a trash container in the bathroom across from D.V.’s bedroom.

Mr. Schmidt claimed that after picking up D.V. from daycare, the dog bit her in the vaginal area while she was unclothed before a bath. He reportedly informed D.V.’s mother of this incident when she returned from work. Mr. Schmidt admitted to watching pornography involving incest and bestiality and stated he follows related blogs to learn why people do these things. D.V.’s mother reported that she had refused a previous request from Mr. Schmidt to participate in bestiality after he showed her videos of women having sex with dogs.

Mr. Schmidt pleaded not guilty to one count of sexual exploitation of a child, second-degree sexual