

IN THE SUPERIOR COURT OF CAMDEN COUNTY
STATE OF GEORGIA

MELINDA NEESMITH-PICARD,)
)
 Plaintiff,)
)
 vs.) CIVIL ACTION NO: 05V0623
)
 SOUTHEAST GEORGIA HEALTH)
 SYSTEM d/b/a SOUTHEAST GEORGIA)
 REGIONAL MEDICAL CENTER,)
 RICHARD BRANDON, M.D. And)
 MICHAEL HOWINGTON, M.D.)
)
 Defendants.)

MOTION TO DISMISS

COME NOW Southeast Georgia Health System d/b/a Southeast Georgia Regional Medical Center, Richard Brandon, M.D., and Michael Howington, M.D., Defendants in the above-styled action, and respectfully move this Court to grant their Motion to Dismiss against Plaintiff Melinda Neesmith-Picard, based on O.C.G.A. §§ 9-11-9.1.

I.

STATEMENT OF FACTS

On June 10, 2005, Plaintiff filed with this Court her Complaint. Service was perfected on June 10, 2005 through personal service upon Defendants. Plaintiffs' Complaint alleges that the Defendants are liable to Plaintiff for injuries she sustained during an operation on or about June 13, 2003.

Paragraph 36 of the Complaint alleges that Plaintiff was unable to prepare, obtain and file contemporaneously with this Complaint the Affidavit of an expert as required by O.C.G.A. § 9-11-9.1 because the statute of limitations was set to expire within ten days of the filing of her complaint.

II.

ARGUMENT AND CITATION OF AUTHORITIES

O.C.G.A. § 9-11-9.1 specifically states that in order for a plaintiff to recover under professional negligence, an expert affidavit that fulfills the requirements set forth in the statute must be filed with the Complaint. O.C.G.A. § 9-11-9.1(a). The statute also states that "if a plaintiff fails to file an affidavit as required by this Code section and the defendant raises the failure to file such an affidavit by motion to dismiss filed contemporaneously with its initial responsive pleading, such complaint shall not be subject to the renewal provisions of Code Section 9-2-61 after the expiration of the applicable period of limitation. O.C.G.A. § 9-11-9.1 (c)

As part of the recent tort reform legislation (SB3), the Georgia legislature replaced the previous O.C.G.A. § 9-11-9.1 with a new code provision. The main thrust of § 9-11-9.1 remains, but, as of February 16, 2005, § 9-11-9.1 no longer contains the statute of limitations exception under which a

plaintiff could file a complaint without an affidavit if the statute of limitations was about to run.

The enabling provision of the new tort reform legislation provides that § 9-11-9.1 "shall apply to all causes of action pending on [the] effective date of the legislation." O.C.G.A. § 50-15-1 (Emphasis Added). Currently only one unreported decision has construed the enabling provision of SB3. In Hewett v. Raytheon Aircraft Co., the Court of Appeals concluded that § 9-10-31.1, a forum non conveniens provision enacted February 16, 2005 as part of SB3, applied even though the suit was originally filed August 30, 2002. Since the enabling provision of SB3 provides that, with the exception of several enumerated provisions, all other provisions "shall apply to causes of action pending on [the] effective date", the Hewett court held that § 9-10-31.1 must apply. 2005 WL 1111417 (HN 3) (Ga. App. 2005) (Emphasis Added).

By definition the instant action is still pending before this Court, and O.C.G.A. § 9-11-9.1 is one of the provisions which applies to all causes of action pending on the effective date of SB3. Therefore, under the construction of O.C.G.A. § 50-15-1 offered by the Hewett court, the recently enacted § 9-11-9.1 must apply in this case. As such, Plaintiff can no longer take advantage of the provision which previously allowed plaintiffs in professional malpractice actions to file a

complaint without an affidavit if ten or fewer days remained to file suit. Since Plaintiff failed to file an affidavit along with the Complaint, she cannot maintain this action.

As stated above, Plaintiff failed to attach a competent affidavit to the Complaint. Further, Defendant has raised this failure to file an affidavit in this Motion to Dismiss filed contemporaneously with Defendant's initial responsive pleading. Therefore, pursuant to O.C.G.A. § 9-11-9.1 (c), Plaintiff's Complaint "shall not be subject to the renewal provisions of Code Section 9-2-61 after the expiration of the applicable period of limitation." Therefore, Plaintiff's Complaint should be dismissed.

This 23rd day of June, 2005.

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