

IN THE STATE COURT OF CHATHAM COUNTY
STATE OF GEORGIA

LISA ZIPPERER KICKLIGHTER,)
INDIVIDUALLY AND AS)
ADMINISTRATRIX OF THE ESTATE)
OF ALFRED VANBUREN ZIPPERER, JR.,)
)
Plaintiff,)

v.)

Civil Action No: STCV05-00806

MARK JENKINS, M.D., CARDIOVASCULAR)
CONSULTANTS, P.C., EFFINGHAM)
HOSPITAL, MEMORIAL HEALTH)
UNIVERSITY MEDICAL CENTER, INC., and)
MEMORIAL HEALTH, INC.,)
)
Defendants.)

**MEMORIAL HEALTH UNIVERSITY MEDICAL CENTER, INC.
AND MEMORIAL HEALTH, INC.'S MOTION TO
DISMISS PLAINTIFF'S COMPLAINT AND BRIEF IN SUPPORT**

NOW COME MEMORIAL HEALTH UNIVERSITY MEDICAL CENTER, INC. ("MHUMC") and MEMORIAL HEALTH, INC. ("Memorial") and move to dismiss Plaintiff's Complaint for failure to comply with the provisions of O.C.G.A. § 9-11-9.1 and O.C.G.A. § 9-11-9.12. In support of such motion, Defendants show the Court the following:

I. FACTS

Plaintiff filed a wrongful death action on or about March 18, 2005, alleging that Dr. Mark Jenkins failed to provide appropriate care and treatment for Alfred Zipperer on March 25, 2003, at Effingham County Hospital, and that as a result, on April 2, 2003, Mr. Zipperer went into cardiac arrest and died. In support of this claim, Plaintiff has attached an Affidavit of John Speer Schroeder, M.D. who provides conclusory complaints relating to Dr. Jenkins' care and treatment. Since Dr. Jenkins is not an employee or agent of MHUMC or Memorial, this Affidavit does not satisfy the statutory requirement as to them. As a result, they should be dismissed from this suit.

Further, while Plaintiff filed an "Authorization" with her Complaint, it fails to satisfy the requirements of O.C.G.A. § 9-1-9.2. As a result, Plaintiff's complaint should be dismissed.

II. ARGUMENT AND CITATIONS OF AUTHORITY

A. Plaintiff failed to provide a medical affidavit against Memorial Health University Medical Center, Inc. and Memorial Health, Inc.

O.C.G.A. § 9-11-9.1 requires Plaintiff to file an expert affidavit with a medical malpractice complaint, setting forth specifically at least one negligent act or omission on the part of the defendant and the factual basis for each of plaintiff's claims. O.C.G.A. § 9-11-9.1. To the extent that a complaint alleges hospital liability under the doctrine of *respondeat superior*, the affidavit must demonstrate the negligent act or omission of the hospital employee or agent in question. Legum v. Crouch, 208 Ga. App. 185 (1993).

The Court has held that conclusions of negligence alone are insufficient to satisfy the statutory requirements. Edwards v. Vanstrom, 206 Ga. App. 21 (1992); Candler Hospital, Inc. v. Carter, 224 Ga. App. 425 (1997). The Affidavit of Dr. Schroeder merely states a conclusory opinion that he believes the evaluation and treatment by **Dr. Jenkins** fell below the standard of care. Not only does the Affidavit fail to state with any specificity the factual basis for such allegation, but given that Dr. Jenkins is not an employee or agent of MHUMC or Memorial, such allegation is not sufficient as to Plaintiff's claims against these Defendants. There being no Affidavit alleging any negligence against MHUMC and Memorial, Plaintiff's Complaint should be dismissed against them.

B. Plaintiff's "Authorization" does not meet the requirements of O.C.G.A. § 9-11-9.2 and the Complaint should be dismissed as a result.

In an effort to facilitate the exchange of medical information in a medical malpractice case, the legislature passed a statute which requires a plaintiff to provide an authorization which authorizes the defendants to obtain medical information relating to the party at issue in the suit, and

to discuss care and treatment from the treating physicians, except to the extent such information is privileged. Failure to satisfy this requirement is grounds for dismissal. O.C.G.A. § 9-11-9.2.

Plaintiff has provided a document labeled "Authorization," but has inserted additional restrictions in the document which have the effect of unduly limiting the Authorization, beyond that which is confidential, and rendering it virtually meaningless.

In particular, Plaintiff invokes the protections of HIPAA, which require a specific authorization prior to the release of records. HIPAA does not prevent Plaintiff from releasing records, but proscribes a method to be used in doing so. It is this HIPAA-compliant Authorization that the legislature was seeking to require on the front end, to prevent the needless delay and cost incurred in obtaining such during the course of litigation.

Further, Plaintiff explicitly prevents Defendants ability to meet *ex parte* with Plaintiff's medical providers (or in this case, that of decedent). Instead, such meetings are limited to those where Plaintiff's counsel is present. This creates an uneven playing field, which the legislature did not intend. Under Georgia law informal meetings with treating physicians are permitted as a legitimate means of discovery. *See Orr v. Sievert*, 162 Ga. App. 677, 679-80 (1982) Treating Physicians are fact witnesses. They are not advocates, as are expert witnesses. Plaintiff has unlimited access to treating physicians. Defendants should also have the ability to discuss theories or approaches that would not be otherwise discoverable, as they constitute work product. The statute does not prohibit such *ex parte* discussions, and Plaintiff is not entitled to circumvent the statute.

Plaintiff also limits the duration of the Authorization to six months. While this is the original period of discovery, such Authorization must reasonably last through the date of trial or settlement.

Plaintiff's limitations are counter to the required provisions of this statute, as well as the recognized intent of same. No physician receiving the medical authorization provided by Plaintiff

in connection with this case, would provide such records without an additional authorization from Plaintiff, the very thing that this statute was designed to avoid. The statute mandates that plaintiffs be required to give up access to the medical records, which form the basis of a medical malpractice complaint, and that defendants shall have easy access through this process to obtain such records. Plaintiff's limitations are contrary to this purpose. As a result of Plaintiff's failure to comply with the provisions of O.C.G.A. § 9-11-9.2, Plaintiff's Complaint should be dismissed.

III. CONCLUSION

Plaintiff has failed to provide an expert Affidavit alleging any negligent act or omission against any employee or agent of MHUMC or Memorial. As a result, Plaintiff's Complaint should be dismissed against these Defendants.

Plaintiff failed to provide an Authorization permitting Defendants access to the relevant medical records, with the exception of those that are privileged. As a result of said failure, Plaintiff's Complaint should be dismissed.

WHEREFORE, Defendants pray that the Court will grant their Motion to Dismiss.

This ____ day of April, 2005.

HUNTER, MACLEAN, EXLEY & DUNN, P.C.

Kirby G. Mason
State Bar No. 302310
Attorney for Defendants

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of MHUMC and Memorial's Motion to Dismiss Plaintiff's Complaint and Brief in Support upon all parties to this matter by depositing a true copy of same in the U.S. Mail, proper postage prepaid, properly addressed to the following:

Jeffrey W. Lasky
John L. Vaught
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Atlantic Center Plaza, Suite 900
Atlanta, Georgia 30309-3479

Attorneys for Effingham Hospital

This ____ day of April, 2005.

HUNTER, MACLEAN, EXLEY & DUNN, P.C.

By: _____

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ORDER

Having read and considered Memorial Health University Medical Center, Inc. and Memorial Health, Inc.'s Motion to Dismiss Plaintiff's Complaint and brief in support and any response thereto, it is hereby

ORDERED, DECREED, AND ADJUDGED that Memorial Health University Medical Center, Inc. and Memorial Health, Inc.'s Motion to Dismiss Plaintiff's Complaint is hereby GRANTED.

Georgia

Judge, State Court Of Chatham County,

PREPARED BY:
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