

IN THE STATE COURT OF COBB COUNTY

STATE OF GEORGIA

ARVIN RITCHEY MASON and :

CLAUDIA MASON, :

Plaintiffs, :

vs. :

Civil Action Number 97-A-5105-1

HOME DEPOT U.S.A., INC. and :

THE FLECTO COMPANY, INC., :

Defendants. :

**ORDER ON DEFENDANTS' MOTIONS TO EXCLUDE CERTAIN  
WITNESSES FROM TESTIFYING AS EXPERT WITNESSES**

This case comes before the Court on two motions filed by Defendants to exclude the expert testimony of two witnesses, Grace Ziem, M.D. and Ronald Huggins, Ph.D. These motions, which were filed on Friday, February 11, 2005, seek to have the testimony of the Plaintiffs' expert witnesses excluded from the trial of the above-stated case, based upon allegations that said witnesses are not qualified to testify as experts.

The first question that must be addressed in ruling on these motions is: What is the standard to be applied to the qualification of expert witnesses in this case?

On Monday, February 14, 2005, the Georgia General Assembly passed a bill designated Senate Bill 3, more popularly known as the Tort Reform Act. Said legislation was sent to the Governor on February 15. The Governor signed said bill into law on Wednesday, February 16, 2005. The new law purports to change the qualifications of expert witnesses in civil cases in Georgia from that previously found in O.C.G.A. § 24-9-

FILED IN THIS OFFICE  
THIS 21 DAY OF Feb 20 05  
Diane Webb  
Clerk of Court  
Cobb County

67 to the more stringent Daubert standard, as set forth in a new code section, O.C.G.A. § 24-9-67.1. Said law specifically provides that this provision is to apply to causes of action pending on its effective date, that being the date of the Governor's signature.

Plaintiffs urge this court to find the newly-enacted O.C.G.A. § 24-9-67.1 unconstitutional on several grounds. They argue that said statute is unconstitutional on its face because it violates the separation of powers, because it denies equal protection and because it is impermissibly vague. This court does not reach any of these arguments, because a decision on the facial constitutionality of the new statute is not necessary for a decision on the motions under consideration in the instant case.

Plaintiffs' remaining argument is that if the new standard is applied it may result in the exclusion of the testimony of these two expert witnesses. This, they contend, would violate their rights to due process and deny them meaningful access to the courts.

Section 15 of Senate Bill 5 states as follows:

- (a) This Act shall become effective upon its approval by the Governor or upon its becoming law without such approval.
- (b) Code Sections 51-12-31 and 51-12-33, as amended by this Act, and Code Section 51-1-29.5, 51-2-5.1, and 51-13-1, as enacted by this Act, shall apply only with respect to causes of action arising on or after the effective date of this Act, and any prior causes of action shall continue to be governed by prior law. It is the intention of the General Assembly that all other provisions of this act shall apply to causes of action pending on its effective date, unless such application would be unconstitutional.

Defendants argue that the provisions of this new Act should be utilized in determining the admissibility of the testimony of these two expert witnesses and argue further that the said evidence should be excluded based upon an application of the provisions of this Act and/or upon the arguments made in their brief filed prior to the adoption of the Act.

The court, while specifically declining to rule on the facial validity of the Act, finds that its application in this case would be unconstitutional, under the present facts. This case has been pending since 1997 and involves an alleged injury sustained in 1996.<sup>1</sup>

Because of the age of this case, the court put it on a preemptory calendar on August 12, 2004, to inquire of counsel about its status. At that time, November 8, 2004, was set as the date for hearing motions and the pre-trial conference. It was determined that, because almost all of the witnesses and parties to this action live outside the state of Georgia and because the case was estimated to take two weeks to try, the case should be specially set; it was agreed that the parties would submit a proposed pre-trial order during December 2004. On November 15, 2004, this court entered an order specially setting this case for trial on February 21, 2005.

On February 9, 2005, due to the parties' inability to consolidate a pre-trial order and because additional motions were filed, this court entered another order specially setting this case for a motions hearing on February 17, 2005. Two days after the entry of that order, approximately three months after the entry of the order specially setting the trial date and just 10 days prior to trial, the instant motions to disqualify expert witnesses

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<sup>1</sup> This court is unaware of all of the reasons this case did not go to trial before now. However, it was not due to any backlog in this court.

were filed. One day before that hearing, just five days prior to trial, the Governor of Georgia signed into law Senate Bill 3.

On Thursday, February 17, this court heard the various motions in limine in the above-styled action. The motions under consideration here were discussed at said hearing and the parties were granted time to submit briefs on the constitutionality of the new statute and its applicability to the instant case. Said briefs were submitted to the undersigned by e-mail on Friday, February 18, 2005, with the understanding that the originals will be filed with the Clerk of this Court on Monday, February 21, 2005.

The deposition of Grace Ziem, M.D., a treating physician of the plaintiff as well as a proposed expert witness, was taken November 4, 2004, in Frederick, Maryland. The deposition of Ronald Huggins, Ph.D. was taken October 22, 2004, in Atlanta, Georgia. It appears from the record that at least 14 other depositions (expert and otherwise) have been taken during the pendency of this litigation and filed with the Clerk. Said depositions were taken in such disparate locations as Carrollton, Georgia; Palm Springs, California; Galesburg, Illinois; Oakland, California; Fort Worth, Texas; and Dayton, Ohio. All of these depositions were taken under the assumption that the expert witness rule of O.C.G.A. 24-9-67 as it existed prior to the new Act would be the applicable standard in this case.

Based upon the history of this case and pursuant to the Constitutions of the United States and of the State of Georgia, and as contemplated in the Act at Section 15 (b), I find that the application of the new standards for expert witnesses to this case would be unconstitutional.

WHEREFORE, O.C.G.A. § 24-9-67, as it existed prior to the passage of the Act, will govern the admissibility of the testimony of expert witnesses in this case. Based upon the said standard, and after having read the depositions of Grace Ziem, M.D. and Ronald Huggins, Ph.D., and after considering the motions, briefs and arguments of counsel, this court finds that the requisite showing has been made and that these witnesses may testify as experts in the above-styled case. Therefore, said motions are hereby DENIED.

SO ORDERED this 21<sup>st</sup> day of February, 2005.

  
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Melodie H. Clayton, Judge

IN THE STATE COURT OF CLATHAM COUNTY  
STATE OF GEORGIA

MYRTLE SPARKS, as Administrator of the  
Estate of ARTHUR SPARKS, Deceased,

Plaintiff,

v.

MEMORIAL HEALTH UNIVERSITY  
MEDICAL CENTER, INC., LOUIS VON-  
BRUENING, STACIE LINN WONG, M.D.,  
ANESTHESIOLOGY CONSULTANTS and  
ANTHONY AVINO, M.D.

Defendants.

Civil Action No. STCV02-01170-CO

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*Christina, Clerk*

**ORDER ON DEFENDANTS' MOTION TO EXCLUDE EXPERT TESTIMONY AND/OR  
DISMISS ACTION**

Before the Court are Defendants' Motions Objecting to the Plaintiff's Expert's Testimony. Having read and considered said motions, the responses thereto, the oral arguments of the parties, and the applicable law, the Court hereby finds as follows:

This case comes before the Court on several Motions to Dismiss and/or Motions to Exclude the Expert Testimony of the Plaintiff's Expert Witnesses, Stephen Kennedy, M.D. and Brenda Townsend, R.N. The Defendants preface their motions on the passage O.C.G.A. §24-9-67.1, commonly known as the Tort Reform bill which was signed into law on February 16, 2005.

This action was originally filed April 3, 2002. After discovery was completed, the parties prepared for trial and in preparation for said trial, a Consolidated Pretrial Order was prepared and filed by the Court on February 19, 2004. The case was scheduled for trial, but several days before the trial commenced, the Plaintiff died. The case was continued and then transferred to a new judge. The case again was scheduled for trial after a status conference with the parties. Just prior

to the scheduling order prepared by the Court, the new statute was signed into law.

O.C.G.A. §24-9-67.1 purports to change the expert witness qualifications from those previously prescribed in §24-9-67. The new law provides requirements for experts that are more stringent than those previously applied. Further, the new law is to be applied to those cases pending on February 19, 2005. In the instant case, such application may prevent the Plaintiff from offering his experts' testimony on the eve of trial.

Plaintiff provides to this Court arguments similar to those presented to Judge Melodie H. Clayton, in the case of Alvin Ritchey Mason and Claudia Mason v. Home Depot U.S.A., Inc., and Flecto Company Inc., Civil Action Number 97-A-5105-1, Cobb County. The Mason Court evaluated the Plaintiffs' argument that if the new standard was applied, it would violate their right to due process and deny them meaningful access to the courts.

In the Mason case, the action had been pending since 1997. There had been significant discovery completed all over the county, that all of the discovery had been completed under the standards required by the old statute, and the request for the exclusion occurred on the eve of trial. Based on all of the information presented, Judge Clayton concluded that the application of the new law in her case would be unconstitutional.

In the instant case, this Court agrees with the opinion as presented by Judge Clayton, and applies the same standard. Wherefore, O.C.G.A. §24-9-67 will govern the admissibility of testimony of all Plaintiff's and Defendants' experts. After review of the motions, the responses thereto and oral arguments of the issues, this Court finds that the identified expert witnesses may testify. The Defendants' Motions to Exclude the Expert Testimony and the Motions to Dismiss

on the same grounds are DENIED.

SO ORDERED this 15 day of April 2005.

  
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Judge Hermann Coolidge  
Chatham County State Court

cc: Daniel B. Snipes, Esq.  
James B. Franklin, Esq.  
William Franklin, Esq.  
Leslie Pickett Sheehan, Esq.  
Christopher Phillips, Esq