

IN THE STATE COURT OF FULTON COUT
STATE OF GEORGIA

LORENZO VAN PELT and GLENDA)
L. VAN PELT,)

Plaintiffs,)

v.)

DAVID J. GOWER, MD and)
NORTHWEST NEUROSURGICAL)
ASSOCIATES, PC,)

Defendants.)

CIVIL ACTION NO.
05VS077736J

HAD [Signature]
AKK
WFL

ORDER DENYING DEFENDANTS' MOTION TO DISMISS

I. INTRODUCTION

Plaintiffs filed the instant suit for medical malpractice alleging a negligently performed posterior cervical laminectomy rendered Plaintiff Lorenzo Van Pelt a permanent C6 paraplegic. Plaintiffs adduced the affidavit of Dr. Battle, a family physician, in support of their complaint. Subsequently, Georgia's legislature changed the law applicable to expert testimony in medical malpractice cases. Now Defendants move to dismiss pursuant to newly enacted O.C.G.A. §24-9-67.1 and revised §9-11-9.1, arguing a family physician is incompetent as a matter of law to testify regarding a posterior cervical laminectomy, a surgical procedure.

Having considered the arguments of the parties, the evidence of record, and all applicable law, this Court finds Dr. Battles' testimony does not comply with these statutes, which are retrospective in application. Nevertheless, this Court, in the exercise of its discretion, grants Plaintiff forty five days to cure the defect.

II. HOLDING

"An affiant must meet the requirements of [O.C.G.A. §24-9-67.1] in order to be deemed qualified to testify as an expert by means of the affidavit required under O.C.G.A. 9-11-9.1" O.C.G.A. §24-9-67.1(e). Thus, an expert testifying about professional malpractice must have

actual professional knowledge in the area of practice or specialty in which the opinion is to be given as the result of having actively engaged in (A) The active practice of such area of specialty of his or her profession for at least three of the past five years, with sufficient frequency, to establish an appropriate level of knowledge, as determined by the judge, in performing the procedure... which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue; or (B) The teaching of his or her profession for at least three of the last five years as an employed member of the faculty of an educational institution accredited in the teaching of such profession, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in teaching others how to perform the procedure... which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue...

Id at (c)(2).

Dr. Battle's affidavit does not indicate he is so qualified and Plaintiffs do not so argue here.

Nevertheless, Plaintiffs contend the affidavit requirements of O.C.G.A. §§9-11-9.1 and 24-9-67.1 are substantive in nature, and may not apply retrospectively.

Although legislation which involves mere procedural or evidentiary changes may operate retrospectively, legislation which affects substantive rights may operate prospectively only. Substantive law is that law which creates rights, duties, and obligations. Procedural law is that law which prescribes the methods of enforcement of rights, duties, and obligations.

Hargis v. Department of Human Resources, 272 Ga. 617, 618, 533 S.E.2d 712 (2000).

However, settled Georgia precedent establishes O.C.G.A. §9-11-9.1's affidavit requirement is procedural in nature and, absent a clear legislative intent to the contrary, applies retroactively. See Devore v. Liberty Mutual Insurance Company, 257 Ga. App. 7,

570 S.E.2d 87 (2002); Mug A Bug Pest Control v. Vester, 270 Ga. 407, 509 S.E.2d 925 (1999); Harris v. Murray, 233 Ga. App. 661, 504 S.E.2d 736 (1998); Kneip v. Southern Engineering Company, 260 Ga. 409; 395 S.E.2d 809 (1990); Precision Planning, Inc. v. Wall, 193 Ga. App. 331, 387 S.E.2d 610 (1989). This Court finds no prospective mandate in the current law. O.C.G.A. §24-9-67.1, also dealing with pleading requirements and expert qualifications, is similarly retroactive.

Nevertheless, Plaintiffs filed the instant suit before this change in law. Dismissal without opportunity to cure would be "manifestly unfair". Kneip v. Southern Engineering Company, 260 Ga. 409; 395 S.E.2d 809 (1990). In the interest of justice and in the exercise of its discretion, see O.C.G.A. §9-11-9.1(b), this Court grants Plaintiffs forty five days to cure the defect or face dismissal of the instant complaint.

SO ORDERED this ___ day of _____, 2005.

/s/
DIANE E. BESSEN, Judge
State Court of Fulton County, Georgia