

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

JUANITA DAVIS,)
)
 Plaintiff,)
) CIVIL ACTION FILE NO.
 v.) _____
)
 RED HEART HOSPITAL,)
)
 Defendant.)

**PLAINTIFF'S RESPONSE TO DEFENDANT'S STATEMENT
OF MATERIAL FACTS IN DISPUTE**

1. Disputed Fact - Only a pathologist could have made the mistake complained of in this matter.
2. Disputed Fact - The mistake that was made here is the type of mistake that only a doctor could make; accordingly it must be medical negligence.

This 22nd Day of April, 2010

Respectfully Submitted,

Blind Grade 6050

Attorney for Plaintiff

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Atlanta, Georgia 30309
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**IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA**

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| JUANITA DAVIS, |) | |
| |) | |
| Plaintiff, |) | |
| |) | CIVIL ACTION FILE NO. |
| v. |) | _____ |
| |) | |
| RED HEART HOSPITAL, |) | |
| |) | |
| Defendant. |) | |

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

COMES NOW, Plaintiff Juanita Davis, pursuant to O.C.G.A §9-11-56, files this response in opposition to Defendant's Motion for Summary Judgment and shows the court that the Defendant's Motion for Summary Judgment should be denied on the basis that the issue before the court is one of simple negligence which according to O.C.G.A §9-11-9.1 does not require a qualified expert's affidavit as to what the standard of care is. In support of this motion, Plaintiff relies upon O.C.G.A §9-11-56, which states that summary judgment should only be allowed if the moving party can show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Plaintiff also relies upon the pleadings and record in this action as well as Plaintiff's Memorandum submitted contemporaneously within.

[signature on next page]

This 22nd Day of April, 2010

Respectfully Submitted,

Blind Grade 6050

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| Defendant. |) | |

MEMORANDUM IN OPPOSITION OF DEFENDANT'S MOTION

FOR SUMMARY JUDGMENT

COMES NOW, Plaintiff Davis and files this memorandum in opposition of Defendant's Motion for Summary Judgment pursuant to O.C.G.A §9-11-56. In opposition of this motion, Plaintiff Davis shows the court that Davis' claim falls into the realm of simple negligence rather than medical malpractice because this is an issue of simple clerical errors, rather than errors that only doctors of particular knowledge and skill could make. Accordingly Ms. Davis is not required to produce a qualified expert to rebut the presumption of due care and skill in order to set the standard of care. Therefore, the court should deny the Defendant's Motion for Summary Judgment.

RELEVANT FACTS

This is a simple negligence action arising out of the care and treatment rendered to Plaintiff Juanita Davis at Defendant

Red Heart Hospital. This action was filed by Juanita Davis against Defendant for simple negligence.

Juanita Davis is an elderly woman over the age of 70. Even though she was in good health at the time, after some encouragement from her niece, Catelyn, Ms. Davis went to Defendant Hospital on January 3, 2006 to get a general pap smear procedure performed. Depo. Catelyn Davis 2:18-21 (Oct. 21, 2007).

On February 3, 2006, one month after the pap smear, Ms. Davis received a phone call from Dr. Cohen, and was told that she needed to return to Defendant Hospital in order to have a biopsy performed due to slight irregularities in the results of the gynecological examination. Id. at 3:20. Ms. Davis complied, and on February 5, 2006, a biopsy was performed at Defendant Hospital by Dr. Graves, a rumored alcoholic that is known to drink on the job. Depo. Tracy McGaw 5:16 (Oct. 20, 2007).

On or about February, 8, 2006, Ms. Davis received a phone call from an unidentified male doctor stating that Ms. Davis had cervical cancer and needed to have an operation to remove her uterus immediately in order to keep the cancer from spreading. Pl.'s Compl. ¶12 (Feb. 26, 2007). On or about February, 9, 2006, Dr. Jason Leigh at Defendant Red Heart Hospital performed a Total Abdominal Hysterectomy on Ms. Davis. Id.

Ms. Davis spent two days in Defendant hospital for recovery. Depo. Catelyn Davis 4:19 (Oct. 21, 2007). She was in terrible agony, suffered a loss of appetite, and lost fifteen pounds, fostered by the lack of adequate care from the nurses by not giving Ms. Davis enough pain medicine. Id. at 4:20. Ms. Davis was then discharged without any prescription pain medicine after only two days. Id. at 4:22.

On or about February 11, 2006, shockingly only four days in recovery after having a full hysterectomy performed, Ms. Davis received a phone call from a Ms. Tracy from Defendant Red Heart Hospital asking Ms. Davis to come down to the hospital for a meeting. Depo. Tracy McGaw 7:13 (Oct. 20, 2007). At the meeting, Ms. Davis was told by Ms. McGaw, Dr. Cohen, and a few other individuals that due to confusion with medical records with another patient at the hospital, Ms. Davis was mistakenly diagnosed with cervical cancer and did not need to have a hysterectomy. Depo. Catelyn Davis 5:17-19 (Oct. 21, 2007).

As a result of the negligence of the Defendant, Ms. Davis has suffered mental and physical agony and will now be permanently dependent upon hormone replacement therapy for an extended period of time due to the egregious nature of the negligence of the Defendant. Pl.'s Compl. ¶16 (Feb. 26, 2007).

ARGUMENT AND CITATION OF AUTHORITY

A. Summary Judgment Standard

To prevail at summary judgment under O.C.G.A § 9-11-56, the moving party must demonstrate that there is no genuine issue of material fact and that the undisputed facts, viewed in the light most favorable to the nonmoving party, warrant judgment as a matter of law. A defendant may do this by showing the court that the documents, affidavits, depositions and other evidence in the record reveal that there is no evidence sufficient to create a jury issue on at least one essential element of plaintiff's case. Steed v. Federal Nat. Mortg. Corp., 301 Ga.App. 801, 802 (2009).

Issues of negligence and diligence, including related issues of lack of ordinary care for one's safety or lack of ordinary care in failing to foresee or observe negligence of another are ordinarily not susceptible of summary adjudication and unless only one conclusion is permissible, issue should be resolved by the jury. Hester v. Baker, 180 Ga.App. 627 (1986).

As shown below, application of these standards in the present case warrants the denial of summary judgment for Defendant.

B. Defendant is not entitled to judgment as a matter of law because Plaintiff Davis' claim is that of Simple Negligence, Not one of Medical Malpractice

Defendant should not be granted Motion for Summary Judgment because it is not definitive from the undisputed material facts that this action is one of medical malpractice or simple

negligence. According to the Court in Chandler v. Opsided MRI of Atlanta, LLC, a dismissal is premature where there is insufficient information in the record to determine whether the claim sounded in ordinary negligence or professional negligence. 299 Ga.App. 145 (2009).

Defendant claims that the issue in this case is one of medical malpractice due to a misdiagnosis on the part of individual doctors that did not meet the standard of care by using their skill, knowledge, or judgment to provide an accurate diagnosis. Def.'s Mot. S.J. 3 (Nov. 23, 2007). However, an analysis of the normal procedures within the pathology lab of the Defendant hospital might lead a potential juror to conclude otherwise. According to Tracy McGaw's deposition, the normal procedure inside the pathology lab is for the doctors to take an entire slide tray, containing ten slides and read each in turn. Depo. McGaw 6:21,22 (Oct. 20, 2007). After each slide on the tray, the doctors make handwritten notations on a form bearing the patient's name. Id. at 6:22,23. At the end of the day, he or she reads the handwritten forms into the dictation system. Id. at 6:24.

Within the normal procedure listed above, at least three possible points of failure from human mistake can be identified. First, the reading of the slides; Secondly, the handwritten notations; Lastly, the reading of the forms into the dictation

system. Id. These three normal procedural tasks do not use the doctor's medical skill, knowledge, or judgment. Rather, these are primitive clerical and routine acts that require a basic understanding of reading, writing, and speaking audibly that a layperson without a medical degree can easily perform.

According to Wellstar Health System, Inc. v. Painter, administrative, clerical, or routine acts demanding no special expertise fall in the realm of simple negligence. 288 Ga.App. 659, 662 (2007). To decide whether an expert affidavit is required for a particular case, the court must determine whether the case involves a "medical question." Id. at 663. If the issue of negligence involved is a medical question, O.C.G.A. § 9-11-9.1 applies, and the plaintiff is required to attach an expert affidavit to his complaint. Id. "Medical questions" have been defined as those "concerning highly specialized expert knowledge with respect to which a layman can have no knowledge at all, and the court and jury must be dependent on expert evidence." Id.

The Defendant in the present action failed to follow a standard of care by a simple, yet costly, failure of not being more careful with Ms. Davis' and other patients' samples. It is a reasonable argument that Ms. Davis' unnecessary hysterectomy was proximately caused not by a misdiagnosis of Ms. Davis' samples, but purely by a misread label, or an incorrect match of patient names with samples within the administrative process of

documenting patients' slides in the pathology lab. The fact that these scenarios are even a possibility is enough to preclude Defendant's Motion for Summary Judgment, since there is a genuine issue of a material fact regarding what actually was the cause of the misdiagnosis that lead to Ms. Davis' unnecessary and painful hysterectomy.

Clerical errors such as these cannot be deemed as issues of medical questions as defined in Wellstar to satisfy Defendant's request for qualified expert affidavits since the errors require no highly specialized knowledge or skill and can be done by a layperson. Id. These types of errors are exacerbated if Defendant hospital staff is under the influence of alcohol which appear to be the case according to Tracy McGaw's deposition where she stated "Dr. Graves is known to drink alcohol on the job." Depo. Tracy McGaw 5:16 (Oct. 20, 2007).

In support of Defendant's motion, Defendant has cited Stafford-Fox v. Jenkins, 282 Ga. App. 667, 671 (2006), which states that "the court should specifically examine the alleged conduct and determine whether it arose out of medical knowledge, skill, or judgment in diagnosing the medical condition." Id.

This claim does not have enough merit to grant Defendant's Motion for Summary Judgment. According to Stafford-Fox, failing to implement or follow procedures to insure that a doctor sees and acts upon test results is not a purely administrative act

but involves the exercise of medical skill, knowledge or judgment. Id. Therefore, even though skill, knowledge, or judgment are indicated as factors, administrative acts are also a prime factor in the analysis. And as stated in Wellstar, administrative acts demanding no special expertise fall in the realm of simple negligence. 288 Ga.App. 659, 662 (2007).

In conclusion, it is the Defendant hospital, not the individual doctors, who has the duty to provide the degree of care and skill ordinarily exercised by hospitals generally under like conditions and similar circumstances. Def.'s Ans. ¶17 (Oct. 29, 2007). This duty was broken by acts of simple negligence which does not fall under O.C.G.A. § 9-11-9.1, therefore Ms. Davis was not required to attach an expert affidavit to her complaint. Defendant's Motion for Summary Judgment should be DENIED.

C. Defendant should not be granted Motion for Summary Judgment because there is a genuine issue of material fact.

Defendant should not be granted Motion for Summary Judgment because there are two genuine issues of material fact. The first issue is that "only a pathologist could have made the mistake complained of in this matter." Def.'s State. of Facts No. 8 (Nov. 23, 2007). The second issue is that "the mistake that was made here is the type of mistake that only a doctor could make." Def.'s State. of Facts No. 9 (Nov. 23, 2007).

To prevail at summary judgment under O.C.G.A § 9-11-56, the moving party must demonstrate that there is no genuine issue of material fact and that the undisputed facts, viewed in the light most favorable to the nonmoving party, warrant judgment as a matter of law. Steed v. Federal Nat. Mortg. Corp., 301 Ga.App. 801, 802 (2009). In viewing the facts most favorable to Ms. Davis, the genuine issue at material fact of whether only a pathologist could have made the error is conclusory and inaccurate. There are not enough facts, other than the deposition of Ms. McGaw as to what the standard procedures are within the pathology lab after she concluded her personal investigation. More discovery or possible witness testimony at trial might be necessary to actually establish what the standard procedures are. This could establish if non-pathology staff members of Defendant hospital reviews or makes changes after the pathologist enters information into the dictation system, or if possible glitches in the computer system might have occurred during the time frame in which Ms. Davis' samples were switched with samples of another patient. The necessary facts should be presented at trial before a trier of fact to determine its validity.

In Baskett v. Atlanta Center for Reproductive Medicine, LLC, the court held that whether an action alleges professional negligence or simple negligence depends on whether the

professional's alleged negligence required the exercise of professional judgment and skill; it is a question of law for the court to decide. 285 Ga.App. 876 (2007).

Even if Defendant's claim that only a doctor could make this mistake, it is still a question of law for the court to decide and therefore should not be decided via Summary Judgment, but rather by a judge or jury at trial.

CONCLUSION

As thus viewed and based upon the foregoing authority, Plaintiff Juanita Davis respectfully requests that the Defendant's Motion for Summary Judgment be DENIED.

This 22nd Day of April, 2010

Respectfully Submitted,

Blind Grade 6050

Attorney for Plaintiff

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of this Plaintiff's Response to Motion for Summary Judgment by Defendant Red Heart Hospital, by and through their attorney, in this matter via hand delivery and by depositing a copy of the same in the United States mail with proper postage attached thereto addressed as follows:

**Dewey, Cheatem, and Howe, P.C.
1201 West Peachtree Street
Atlanta, Georgia 30309.**

This the 22 day of April, 2010.

Blind Grade 6050
Attorney for Plaintiff

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