

2009 Ga. App. LEXIS 428,*

ROBERTS v. NESSIM. GWINNETT HOSPITAL SYSTEM, INC. v. ROBERTS.

A08A2341. A08A2342.

COURT OF APPEALS OF GEORGIA, FIRST DIVISION

2009 Ga. App. LEXIS 428

March 10, 2009, Decided

NOTICE:

THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BY THE COURT.

DISPOSITION: [*1]

Judgment affirmed.

JUDGES: DOYLE, Judge. Andrews, P. J., and Bernes, J., concur.

OPINION BY: DOYLE

OPINION

Doyle, Judge.

Virginia Roberts's late husband, Lester Roberts, died while a patient at Gwinnett Hospital System, Inc. d/b/a Gwinnett Medical Center ("the Hospital"). Roberts brought a professional negligence and wrongful death action against the Hospital and Dr. Mourad Nessim, who provided medical care to the decedent. She later amended her complaint to allege a fraud claim against the defendants. The trial court granted summary judgment to Dr. Nessim, and Roberts appeals this ruling in Case No. A08A2341. In the same order, the trial court denied the Hospital's motion to dismiss Roberts's fraud claim, and the Hospital challenges that ruling on cross-appeal in Case No. A08A2342. For reasons that follow, we affirm.

The record shows that the decedent was admitted to the Hospital on December 28, 2002, with a history of stroke and diagnoses of hallucinations, progressive dementia, congestive heart failure, atrial fibrillation, and hypertension. After his admission, he had a stroke. The decedent was seen and treated by physicians in multiple specialties, including cardiology, pulmonology, neurology, and internal medicine. [*2] Dr. Nessim, who specializes in internal medicine, began treating him on January 7, 2003. On January 7, 2003, Dr. Nessim ordered that a nasogastric feeding tube be placed in the decedent's

stomach based on the patient's inability to eat. Medical staff placed the feeding tube in the decedent, and the placement was confirmed by a radiologist via x-ray. On January 8, 2003, another x-ray was taken, and it revealed that the feeding tube was then located in his lungs. The feeding tube was then removed and reinserted, and its placement was again confirmed by an x-ray. The decedent died on January 10, 2003.

Roberts filed suit against the Hospital and Dr. Nessim, asserting professional negligence and fraud claims. In support of her claims, she submitted the affidavit of Dr. Mark Tidswell. Dr. Nessim moved for summary judgment, relying in part upon his own affidavit, stating that his treatment of the decedent did not fall below the standard of care and that no action or inaction by him caused or contributed to any injury alleged by Roberts. The trial court granted the motion, indicating in its order that Tidswell's

affidavit fails to establish that [the decedent's] injuries were proximate [sic] [*3] caused by [a] breach of the standard of care alleged therein. [Tidswell's] affidavit concludes that Plaintiff's decedent's death was the result of the lack of appropriate treatment for pneumonia. [Tidswell's] affidavit does not contain any basis for this conclusion, neither does it contain an allegation that Defendant Nessim was medically responsible for or involved in such treatment or lack thereof. Moreover, [Tidswell's] affidavit does not show an appropriate standard of care or set out any "particulars in which the defendant's treatment of the plaintiff was negligent," as required to overcome Defendant's motion for summary judgment. n1The order further specifies that Roberts could not prevail on her fraud claim against Dr. Nessim because she "has not shown that a material fact exists to be tried as to Dr. Nessim's professional negligence."

----- Footnotes -----1

The trial court's order cites *Bregman-Rodoski v. Rozas*, 273 Ga. App. 835 (616 SE2d 171) (2005) and *Sparks v. Hoff*, 186 Ga. App. 907 (368 SE2d 830) (1988).

----- End Footnotes-----

The Hospital filed a motion to dismiss or, in the alternative, a motion for more definite statement on Roberts's fraud claim. The trial court denied the motion to dismiss, but granted the Hospital's [*4] motion for a more definite statement, requiring Roberts to amend her fraud claim within 35 days "to include the specificity required by OCGA § 9-11-9."

Case No. A08A2341

1. Roberts argues that the trial court erred in granting summary judgment to Dr. Nessim. We disagree.

To prevail at summary judgment, the movant must demonstrate that there is no genuine issue of material fact and that the undisputed facts warrant judgment as a matter of law.

n2

A trial court's grant of summary judgment is reviewed de novo on appeal, construing the evidence in the light most favorable to the nonmovant. Once the party moving for summary judgment has made a prima facie showing that it is entitled to judgment as a matter of law, the nonmovant must then come forward with rebuttal evidence sufficient to show the existence of a genuine issue of material fact. n3

----- Footnotes -----2

See *Walker v. Gwinnett Hosp. System*, 263 Ga. App. 554, 555 (588 SE2d 441) (2003).3

(Citation omitted.) *Collins v. Dickman*, ___ Ga. App. ___, (Case No. A08A1725, decided Dec. 31, 2008).

----- End Footnotes-----

(a) Professional negligence claim.

In support of his motion for summary judgment, Dr. Nessim submitted his affidavit in which he states that his treatment of the decedent did [*5] not fall below the appropriate standard of care and that no action or inaction by him contributed to any injury alleged by Roberts. In opposition to the summary judgment motion, Roberts submitted the amended affidavit of her expert, Tidswell. Therein, Tidswell averred that Dr. Nessim breached the applicable standard of care when he: failed to suspect an aspiration event after the decedent experienced a choking episode; ordered the continuation of the decedent's feeding tube; failed to ensure that the decedent received the pulmonary consult that Dr. Nessim ordered; failed "to evaluate, diagnose, or treat an aspiration in [the decedent's] lungs." Dr. Tidswell further stated that the decedent's chart reflects that his respiratory function continued to decline. Lab results on the morning of January 9, 2003 reveal that Mr. Robert[s] had an elevated white blood cell [sic]. It is my opinion that Mr. Roberts was suffering from pneumonia brought about by tube feeding aspiration. The pneumonia was not treated appropriately by Dr. Nessim [or the treating nurses]. As a result of the lack of treatment, Mr. Roberts died on January 10, 2003."

(i) Roberts alleges that the trial court erred in concluding [*6] that Tidswell's "amended affidavit failed to show that he was qualified to render his expert opinions." But the trial court made no such ruling. Although the court stated in its order that it was "not convinced" that Tidswell's affidavit was sufficient to establish that he was qualified to render the opinions contained therein, the trial court did not actually state a rationale or ruling on this issue. Thus, this enumeration presents no basis for reversal.

Dr. Nessim urges this Court to apply the "right for any reason rule" and affirm the trial court's grant of summary judgment -- applying a de novo standard of review -- on the basis that Tidswell failed to meet the qualification requirements for experts set forth in OCGA § 24-9-67.1. Pretermitted whether Tidswell was qualified to render his opinions in this case, the issue is not properly before us, given the trial court's failure to rule on this issue, the standard of review, and the language of the statute. n4

See *Nathans v. Diamond*, 282 Ga. 804, 806, n. 8 (654 SE2d 121) (2007) (a trial court's finding regarding an expert's qualification made following a pretrial hearing "will only be reversed on appeal if the trial court abused [*7] its discretion in making its ruling"); *MCG Health, Inc. v. Barton*, 285 Ga. App. 577, 580 (1) (647 SE2d 81) (2007) ("[t]he issue of the admissibility or exclusion of expert testimony rests in the broad discretion of the court, and consequently, the trial court's ruling thereon cannot be reversed absent an abuse of discretion") (punctuation omitted); OCGA § 24-9-67.1 (c) (2) (A) (in a medical malpractice action, the opinions of an expert are admissible if the expert was licensed in his or her profession and had "actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given as the result of having been regularly engaged in . . . [t]he active practice of such area of specialty of his or her profession for at least three of the last five years, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in performing the procedure, diagnosing the condition, or rendering the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue") (emphasis supplied).

----- End Footnotes-----

(ii) Roberts further argues that the trial court erred in concluding that Roberts [*8] failed to establish that a breach of the standard of care by Dr. Nessim was the proximate cause of the Plaintiff's injuries. We disagree.

To recover on a professional negligence claim, a plaintiff must demonstrate that the defendant physician violated the applicable medical standard of care and that the violation was the proximate cause of the injury. n5 "Proof of negligence, alone, is insufficient to sustain recovery. It must be proven that the injury complained of proximately resulted from such want of care or skill." n6 Further, "there can be no recovery where there is no showing to any reasonable degree of medical certainty that the injury could have been avoided." n7 If the defendant physician, in his motion for summary judgment gives a medical affidavit that states a medical opinion that the alleged deviation from the standard of care has no causal connection with the injury or aggravated a pre-existing condition, such motion has pierced the plaintiff's pleadings, refuted causation, and shifted the burden to the plaintiff of coming forward with some evidence to create a material issue of fact, because the defendant . . . has disproved the essential element of causation. When causation [*9] is involved, plaintiff has a more complex dilemma where the defendant has given expert testimony that there was no proximate cause, because to merely show a causal link does not refute the defendant's denial of causation and leaves an examination upon the entire record that the evidence does not create a triable issue as to the essential elements of causation, requiring the grant of summary judgment. Thus, the plaintiff must present medical expert opinion as to causation which may be aided by other medical or non-medical evidence that, in totality, shows causation, even though the medical opinion is weak, i.e., showing a reasonable possibility rather than a probability. n8

----- Footnotes -----5

See *Allen v. Family Medical Center, P. C.*, 287 Ga. App. 522, 524 (1) (652 SE2d 173) (2007); *Berrell v. Hamilton*, 260 Ga. App. 892, 896 (581 SE2d 398) (2003).6

(Footnote and punctuation omitted.) *Allen*, 287 Ga. App. at 524 (1).7

(Punctuation omitted; emphasis supplied.) *Id.*8

(Punctuation and citations omitted; emphasis supplied.) *Estate of Patterson v. Fulton-DeKalb Hosp. Auth.*, 233 Ga. App. 706, 709-710 (2) (505 SE2d 232) (1998).

----- End Footnotes-----

Here, Dr. Nessim refuted causation and consequently pierced the pleadings by giving his medical [*10] affidavit. n9 Accordingly, Roberts had the burden to produce evidence demonstrating the essential elements of causation; simply showing a causal link between Dr. Nessim's actions or inactions and Roberts's injuries was insufficient. n10 Roberts relied solely on Tidswell's affidavit to meet her burden of production, failing to point to any additional evidence (medical or otherwise) to show causation. But Tidswell's conclusory affidavit is simply insufficient to create a genuine issue of fact as to causation.

----- Footnotes -----9

See *id.*10

See *id.*

----- End Footnotes-----

In his affidavit, Tidswell avers that Dr. Nessim violated the standard of care by failing to properly diagnose and treat the decedent's feeding tube aspiration and that the aspiration caused the decedent's pneumonia. He then concludes that Dr. Nessim's failure to appropriately treat the pneumonia resulted in the decedent's death. n11 Tidswell provides no specifics whatsoever regarding the purported negligence; he offers no testimony as to "the proper method for treating a case such as [the decedent's], i.e., what should have been done, and comparing that to what was actually done, so as to illustrate the professional malfeasance involved." n12 Further, the expert fails [*11] to show to any reasonable degree of medical certainty that Roberts's injuries could have been avoided by some action or inaction by Dr. Nessim. To do so, Tidswell could have stated, for example, that the only apparent cause of [Roberts's] injuries was [Dr. Nessim's] action [or inaction] by presenting overwhelming testimony of experience that, in the absence of the alleged negligence, the patient's condition could have been prevented from worsening, or by stating that the injuries "could have been avoided" in conjunction with a specific explanation regarding what precautions should have been taken by [Dr. Nessim] and a statement that the failures proximately caused the injuries. n13 Under these circumstances, where the only evidence to demonstrate causation was the expert's

unsupported conclusory affidavit, we hold that Roberts failed to carry her burden on summary judgment, and we affirm the trial court's ruling on this basis. n14

----- Footnotes -----11

Tidswell explains in his affidavit that his opinions are based on his review of the depositions of several individuals, including Dr. Nessim and two nurses, as well as the decedent's certified medical records.¹²

Sparks, 186 Ga. App. at 908.¹³

Beasley v. Northside Hosp., Inc., 289 Ga. App. 685, 688-689 (658 SE2d 233) (2008).¹⁴

Compare [*12] *Allen*, 287 Ga. App. at 525 (1). See also *Estate of Patterson*, 233 Ga. App. at 710 (2); *Sparks*, 186 Ga. App. at 908.

----- End Footnotes-----

(b) Roberts also alleges that the trial court erred in granting summary judgment to Dr. Nessim on her fraud claim. Again, we discern no error.

In a single allegation of fraud against Dr. Nessim, Roberts alleges that he "knew or reasonabl[y] should have known" that the decedent aspirated substances from the feeding tube in his lung, but nevertheless "participated in the concealment by failing to proceed with a pulmonology consult that would have revealed his failure to treat the patient and the attending nurses['] failure to recognize that Lester Roberts aspirated substances from the feeding tube." The trial court granted summary judgment to Dr. Nessim, finding that Roberts failed to demonstrate "that a material fact exists to be tried as to Dr. Nessim's professional negligence."

The elements of a fraud claim are: "a false representation by a defendant, scienter, intention to induce the plaintiff to act or refrain from acting, justifiable reliance by plaintiff, and damage to plaintiff. For an action for fraud to survive a motion for summary judgment, there must be some evidence [*13] from which a jury could find each element of the tort." n15

----- Footnotes -----15

(Punctuation omitted.) *Johnson v. Rodier*, 242 Ga. App. 496, 498 (2) (529 SE2d 442) (2000).

----- End Footnotes-----

In his motion for summary judgment, Dr. Nessim argued that (1) the record contained no evidence that he made any false representations to Roberts, that he knew they were false when he made them, or that he made them with an intent to deceive her;" and (2) there was no evidence that Roberts justifiably relied on any alleged false statements made by Dr. Nessim or that the decedent's death "was in any way linked to any alleged false

statements in this case." Once Dr. Nessim pointed to the absence of evidence to support these elements of Roberts's fraud claim, Roberts "had to come forward with specific evidence giving rise to a triable issue." n16 In her response to the summary judgment motion, Roberts "directed the [trial court]" to 11 depositions, Tidswell's affidavit, and the decedent's medical records. However, Roberts failed to specify how any of this evidence supported the requisite elements of her fraud claim, and she also fails to do so on appeal. Under these circumstances, she has not demonstrated reversible error in the trial court's [*14] grant of summary judgment to Dr. Nessim on Roberts's fraud claim. n17

----- Footnotes -----16

(Punctuation omitted.) Id.17

See *Lau's Corp. v. Haskins*, 261 Ga. 491 (405 SE2d 474) (1991); *Wright v. AFLAC, Inc.*, 283 Ga. App. 890, 892 (2) (643 SE2d 233) (2007); *Aliabadi v. McCar Dev. Corp.*, 249 Ga. App. 309, 312-313 (1) (547 SE2d 607) (2001); *Johnson*, 242 Ga. App. at 498-499 (2).

----- End Footnotes-----

Case No. A08A2342

3. In its cross-appeal, the Hospital argues that the trial court erred in denying its motion to dismiss Roberts's fraud claim against the Hospital for failure to plead with particularity. We disagree.

"In deciding a motion to dismiss, all pleadings are to be construed most favorably to the party who filed them, and all doubts regarding such pleadings must be resolved in the filing party's favor." n18

Although fraud must be pled with particularity under OCGA § 9-11-9 (b), a complaint alleging fraud should not be dismissed for failure to state a claim unless it appears beyond a doubt that the pleader can prove no set of facts in support of his claim which would entitle him to relief. Rather than move to dismiss, a defendant seeking greater particularity may either move for a more definite statement or wait for the outcome [*15] of discovery. n19

----- Footnotes -----18

(Punctuation omitted.) *Walker v. Walker*, 293 Ga. App. 872 (668 SE2d 330) (2008).19

(Citations and punctuation omitted.) *Hedquist v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 284 Ga. App. 387, 394 (2) (b) (643 SE2d 864) (2007).

----- End Footnotes-----

Here, Roberts alleged that the Hospital, "through its agents and employees[,] committed fraud by attempting to conceal the events leading to Lester Roberts[s] death." The Hospital filed a "Motion to Dismiss, or in the Alternative, Motion for More Definite Statement on Plaintiff's Allegations of Fraud," arguing that Roberts's fraud claim was insufficient under OCGA § 9-11-9 (b), which requires that "in all averments of fraud . . . , the circumstance constituting fraud . . . shall be stated with particularity." In response to the motion, Roberts argued that the Hospital employees failed to disclose that the decedent's feeding tube was placed in his lung and that he aspirated tube feeding, and the decedent's family members relied on the information conveyed by the Hospital in making decisions about his medical care. n20 The trial court denied the motion to dismiss, but ordered Roberts to amend her fraud claim within 35 days "to include the specificity [*16] required by OCGA § 9-11-9." n21

----- Footnotes -----20

We note that the Hospital makes no argument that Roberts's fraud claim should be dismissed because the alleged false statements were not made to her, and therefore we do not address this argument. This decision should not, however, be construed to render a holding on this issue.²¹

In her response brief, Roberts "requests that, in the exercise of its de novo right of review, this Court should reverse the trial court's order granting [the Hospital's] motion for a more definite statement." Because Roberts did not enumerate as error this ruling in her appeal, the issue is not properly before us.

----- End Footnotes-----

Clearly, Roberts's complaint alleging that the Hospital employees "attempt[ed] to conceal the events leading to [the decedent's] death" fails to allege specific facts to support a finding that the Hospital intentionally made false statements about the decedent's condition with the intention of inducing Roberts to rely on them or that Roberts justifiably relied on the alleged false statements. n22 However, we cannot state that "it appears beyond doubt" that Roberts could prove no set of facts in support of her fraud claim that would entitle her to relief. n23 Thus, the [*17] trial court properly denied the Hospital's motion to dismiss. n24

----- Footnotes -----22

See Johnson, 242 Ga. App. at 498 (2) ("[t]he tort of fraud has five elements: a false representation by a defendant, scienter, intention to induce the plaintiff to act or refrain from acting, justifiable reliance by plaintiff, and damage to plaintiff") (punctuation omitted).²³

Cochran v. McCollum, 233 Ga. 104, 105 (210 SE2d 13) (1974).²⁴

See *id.*; *Hedquist*, 284 Ga. App. at 394 (2) (b); *SRH, Inc. v. IFC Credit Corp.*, 275 Ga. App. 18, 19 (619 SE2d 744) (2005).

----- End Footnotes-----

Judgment affirmed. Andrews, P. J., and Bernes, J., concur.

ON MOTION FOR RECONSIDERATION

Roberts has moved for reconsideration and to supplement the record on appeal in Case No. A08A2341, arguing that we should direct the trial court to transmit the deposition transcript of Dr. Nessim that Roberts filed with the trial court in opposition to Dr. Nessim's motion for summary judgment. According to Roberts, Dr. Nessim's deposition contains "matters . . . supporting Appellant Roberts' negligence and fraud claims."

In her notice of appeal, Roberts requested that the trial court clerk "include in the record on appeal all orders, pleadings, motions, amendments affidavits, depositions, [*18] discovery, and documents of any kind or nature filed by the parties prior to and including the date of the filing of [the notice of appeal]." In support of her motion to supplement the record, Roberts refers to a notice of filing of original discovery that she filed in the trial court, which included the deposition of Dr. Nessim. Roberts did not, however, refer to Dr. Nessim's deposition in her appellate brief nor in her brief filed in the trial court opposing summary judgment. Thus, her argument(s) that Dr. Nessim's deposition supports her claims for malpractice and fraud are being made for the first time on motion for reconsideration.

More importantly, "[t]he law is quite clear that it is the primary responsibility of the appropriate parties and not this court to ensure that all documents relevant to the disposition of an appeal be duly filed with the clerk of this court prior to the issuance of our appellate decision." n25 Roberts failed to do so, and she "cannot now perfect a deficiency in her appeal by belatedly attempting to file records, which were missing through no fault of this court at the time of our appellate disposition of this case." n26

----- Footnotes -----25

(Punctuation omitted.) *Keita v. K & S Trading*, 292 Ga. App. 116, 119 (663 SE2d 362) (2008) [*19] (on motion for reconsideration).26

(Punctuation omitted.) *Id.*; see *Wheeling-Culligan v. Allen*, 243 Ga. App. 776, 777 (533 SE2d 797) (2000) (on motion for reconsideration).

----- End Footnotes-----

We have repeatedly held that it is the state of an appellate record and transcript duly before us at the time of our original disposition of an appeal, and not the state of the record as amended in an attempt to support an appellate position argued on motion for reconsideration, that is controlling as to the adequacy of the record for purposes of appellate review. n27Thus, "[w]e may not now properly reconsider the case using documents provided to this Court after the issuance of our opinion." n28

----- Footnotes -----27

(Punctuation omitted.) *Perimeter Realty v. GAPI, Inc.*, 243 Ga. App. 584, 598 (533 SE2d 136) (2000) (on motion for reconsideration).²⁸

Wheeling-Culligan, 243 Ga. App. at 778.

----- End Footnotes-----

Pursuant to Court of Appeals Rule 37 (e), this Court will grant reconsideration "only when it appears that the Court overlooked a material fact in the record, a statute or a decision which is controlling as authority and which would require a different judgment from that rendered, or has erroneously construed or misapplied a provision of law or a controlling [*20] authority." Our review of the opinion and Roberts's motion reveals no basis for reconsideration. Accordingly, Roberts's motion for reconsideration is hereby denied, as is her motion to supplement the record on appeal.