Mercer Law Review

Volume 46
Number 4 *Annual Eleventh Circuit Survey*

Article 17

7-1995

Hewitt v. Kalish: Qualifying as an "Expert Competent To Testify" Under O.C.G.A Section 9-11-9.1

Richard T. Hills

Hewitt v. Kalish: Qualifying as an "Expert Competent To Testify" Under O.C.G.A. Section 9-11-9.1

In *Hewett v. Kalish*,[1] plaintiff, Hewett, sued Kalish, a podiatrist, for the negligent treatment of her tarsal tunnel syndrome condition.[2] As required by Official Code of Georgia Annotated section 9-11-9.1,[3] plaintiff filed with her complaint the affidavit of an orthopedic surgeon, Dr. Alan D. Davis.[4] The affidavit set forth Dr. Davis' professional credentials, his hospital affiliations, and his curriculum vitae.[5] The relevant portion of the affidavit provided:

> I am . . . competent to testify as an expert on behalf of [plaintiff] in an action for professional malpractice arising out of the diagnosis, care and treatment of [plaintiff] from January 1988 through March 1992. I have personal knowledge of the facts recited in this Affidavit. My opinions in this Affidavit are based upon my education, training and experience in practicing orthopedics, together with my own professional and careful examination of [plaintiff], as well as review of [her] medical records . . . .[6]

The affidavit then went on to state that in the affiant's opinion, defendant failed to exercise the proper standard of care in the evaluation

---

1. 264 Ga. 183, 442 S.E.2d 233 (1994).

2. *Id.* at 183, 442 S.E.2d at 234. Plaintiff alleged the defendant podiatrist, Stanley Kalish, failed to exercise the degree of care and skill generally exercised by podiatrists while performing a posterior tibial nerve resection and epineuroplasty. Hewett v. Kalish, 210 Ga. App. 584, 584, 436 S.E.2d 710, 711 (1993). Plaintiff claimed this failure resulted in the loss of sensation over most of the sole of her left foot. *Id.* at 584, 436 S.E.2d at 711-12.

3. O.C.G.A. § 9-11-9.1 (1993). O.C.G.A. § 9-11-9.1(a) provides:

> In any action for damages alleging professional malpractice, the plaintiff shall be required to file with the complaint an affidavit of an expert competent to testify, which affidavit shall set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim.

Id. (emphasis added).

4. 264 Ga. at 183, 442 S.E.2d at 234.

5. 210 Ga. App. at 585, 436 S.E.2d at 712.

6. *Id.* (alteration in original) (quoting the affidavit).

and treatment of plaintiff's tarsal tunnel syndrome and in the performance of the posterior tibial nerve resection.[7] The trial court dismissed the complaint because the affidavit failed to meet the "expert competent to testify" requirements of section 9-11-9.1.[8] The court of appeals affirmed.[9] The court of appeals determined the issue of an expert's competency is to be evaluated by an evidentiary standard and must be satisfied at the pleading stage.[10] The court of appeals then declared the affidavit of Dr. Davis to be insufficient because he was from a different professional school than defendant and the affidavit "lacked evidence that [Dr. Davis] employed like methods of treatment as are employed in podiatry, so as to establish the expertise necessary to state an opinion regarding the standard of care to which the podiatrist defendant is held."[11] On appeal, the Georgia Supreme Court reversed.[12] The supreme court held section 9-11-9.1 simply imposes an initial pleading requirement on the plaintiff.[13] In order for the complaint in a professional malpractice action to be subject to dismissal for failure to state a claim, the affidavit must "'disclose with certainty that the plaintiff would not be entitled to relief under any state of provable facts.'"[14]

The Georgia General Assembly enacted the requirement of an expert affidavit in a professional malpractice action in 1987.[15] The purpose behind the statute is "to prevent the filing of a professional malpractice action without fact and opinion to support a claim and relying on discovery to produce the necessary fact and opinion to sustain a claim."[16] The goal is "to reduce the number of frivolous malpractice

---

7. *Id.*
8. 264 Ga. at 183, 442 S.E.2d at 234.
9. 210 Ga. App. at 584, 436 S.E.2d at 711.
10. *Id.* at 585-86, 436 S.E.2d at 712. The court stated:

> It is required that the affiant be "competent to testify," which means that the affiant's qualification as an expert must be established at the very onset of the lawsuit. *See* O.C.G.A. § 24-9-67. Otherwise, the required statement setting forth "at least one negligent act or omission . . . and the factual basis for each such claim," O.C.G.A. § 9-11-9.1(a), would be superfluous and irrelevant.

Id. at 586, 436 S.E.2d at 712.
11. 210 Ga. App. at 587, 436 S.E.2d at 713.
12. *Hewett*, 264 Ga. at 187, 442 S.E.2d at 236.
13. *Id.* at 184, 442 S.E.2d at 234.
14. *Id.* (quoting Bowen v. Adams, 203 Ga. App. 123, 123-24, 416 S.E.2d 102, 103 (1992)).
15. 1987 Ga. Laws 887 (codified as amended at O.C.G.A. § 9-11-9.1 (1993)).
16. HARDY GREGORY, JR., GEORGIA CIVIL PRACTICE § 3-3 (1990).

suits being filed."[17] As a result, plaintiffs are required to bring forth their proof at an earlier stage.[18] The statute does not clarify the meaning of the phrase "expert competent to testify."[19] Rather, it has been left to the Georgia appellate courts to give this phrase meaning in light of the underlying purpose and goals of the statute. The traditional rule in Georgia regarding the competency of an expert to testify in a malpractice action when the expert is from a different professional school than the defendant was stated by the Georgia Court of Appeals in *Sandford v. Howard*.[20] The court explained:

> The general rule is that a member of a school of practice other than that to which defendant belongs is not competent to testify as an expert in a malpractice case . . . . [However], [w]here there is proof by competent evidence that the methods of treatment are the same despite the difference in the nomenclature of the schools involved, the witness is competent to testify.[21]

This rule was reaffirmed three years later in *Bethea v. Smith*.[22] In *Bethea*, plaintiff in a medical malpractice action presented the expert affidavit of a podiatrist in opposing the summary judgment motion of defendant orthopedic surgeon.[23] The court of appeals determined the affidavit was not competent expert medical evidence.[24] In order to fall within the exception to *Sandford's* general rule, the affiant must produce

---

17. 0-1 Doctors Memorial Holding Co. v. Moore, 190 Ga. App. 286, 288, 378 S.E.2d 708, 710 (1989).

18. GREGORY, *supra* note 16.

19. O.C.G.A. § 9-11-9.1(a) (1993). *See supra* note 3.

20. 161 Ga. App. 495, 288 S.E.2d 739 (1982). This case was decided prior to the enactment of the expert affidavit requirement of section 9-11-9.1. The defendant filed a motion in limine to prevent the use by plaintiff of orthopedic surgeons not licensed as podiatrists as expert witnesses on the standard of care requirement of podiatrists. 161 Ga. App. at 496, 288 S.E.2d at 740.

21. *Id.* at 497, 288 S.E.2d at 740-41. The court went on to hold that the orthopedic surgeons produced sufficient evidence that the methods of treatment were the same as those employed by podiatrists, and declared them competent to testify as experts. *Id.* at 497, 288 S.E.2d at 741. The court stated, "[I]nsofar as the human foot and leg are concerned, a podiatrist is capable of rendering the same treatment an orthopedist may give, short of amputation." *Id.* at 496, 288 S.E.2d at 740. Compare this result to the decision reached by the court of appeals in the present case in which it was determined that the orthopedist failed to demonstrate "that he employed like methods of treatment as are employed in podiatry . . . ." 210 Ga. App. at 587, 436 S.E.2d at 713.

22. 176 Ga. App. 467, 336 S.E.2d 295 (1985).

23. *Id.* at 467, 336 S.E.2d at 296. The podiatrist's affidavit declared he was familiar with the standard of care and treatment practiced by the medical profession generally with respect to the treatment provided to plaintiff by defendant. *Id.*, 336 S.E.2d at 296-97.

24. *Id.* at 470, 336 S.E.2d at 299.

some evidence of education, training or experience demonstrating his or her similar expert qualifications as to the diagnosis and treatment employed by defendant.[25] "Whether or not the same treatment would ordinarily be afforded as a matter of general practice by both schools of medicine is . . . an evidentiary issue."[26] The first case in which the court of appeals interpreted the "expert competent to testify" language of section 9-11-9.1 was *Piedmont Hospital, Inc. v. Milton*.[27] In *Milton*, plaintiff sued Piedmont Hospital alleging medical malpractice of the nursing staff for injuries suffered in a fall while recovering from surgery.[28] Pursuant to section 9-11-9.1, plaintiffs filed with their complaint the affidavit of Dr. William Scaljon, the doctor who performed plaintiff's surgery prior to the fall that led to his injuries.[29] The court of appeals held the affidavit failed to satisfy the requirements of section 9-11-9.1 because it failed to demonstrate the affiant was "an expert competent to testify" in the field of nursing.[30] While not explicitly referring to the rule established in *Sandford*, the court's requirement that the affiant produce evidence of his qualifications as an expert in the field of nursing leads to the conclusion that the court adopted *Sandford* in applying the competency element of section 9-11-9.1.[31] In *Milligan v. Manno*,[32] the court of appeals expressly applied the rule from *Sandford* to the expert affidavit requirement.[33] In *Milligan*, plaintiff filed the affidavit of an osteopathic physician in her medical malpractice action against an allopathic physician.[34] The affiant concluded that the defendant failed to exercise the proper standard of care, but provided no

---

25. *Id.* at 469, 336 S.E.2d at 298.
26. *Id.*
27. 189 Ga. App. 563, 377 S.E.2d 198 (1988).
28. *Id.* at 563, 377 S.E.2d at 199.
29. *Id.* The affidavit provided that Dr. Scaljon:

> performed surgery on Mr. Milton on December 15, 1986, and that after surgery he gave defendant's nursing staff "instruction for the patient to remain [in the] 'supine position today'". Dr. Scaljon further deposed that "it was brought to his attention that in the early morning of December 16, 1986, that Mr. Milton fell and broke his hip while being assisted to the bathroom[;] that walking the patient to the bathroom by a nurse or a nursing assistant was contrary to [his] directions [and that he] did not anticipate that a nurse or nursing assistant would walk the patient to the bathroom under the instructions given."

Id. at 563-64, 377 S.E.2d at 199 (alterations in original) (quoting the affidavit).
30. *Id.* at 564, 377 S.E.2d at 199.
31. *Id.*; *Sandford*, 161 Ga. App. at 497, 28 S.E.2d at 741; *see also Belthea*, 176 Ga. App. at 469, 336 S.E.2d at 298.
32. 197 Ga. App. 171, 397 S.E.2d 713 (1990).
33. *Id.* at 172, 397 S.E.2d at 715.
34. *Id.* at 171, 397 S.E.2d at 714.

evidence as to how the standards of care or methods of treatment of allopaths and osteopaths overlapped.[35] The court of appeals held the affidavit to be insufficient under the requirements of section 9-11-9.1.[36] The court of appeals stated:

> Now that the law requires the affidavit of a competent expert witness to be filed with a malpractice complaint, the rule set forth in *Sandford* governing the competence of a member of one school of medical practice to testify against a member of another school applies not only to testimony presented at trial but also to the affidavit required to be filed with the complaint.[37]

The holding in *Milligan*, therefore, established that the competency of the expert for purposes of the section 9-11-9.1 affidavit is to be evaluated according to the same evidentiary standards used in summary judgment proceedings and at trial.[38] In *Chandler v. Koenig*,[39] the court of appeals set forth in greater detail the requirements for an affiant from a different professional school in order to qualify as an expert for purposes of section 9-11-9.1.[40] The court of appeals stated:

> [C]ompetency as an expert is not demonstrated by mere familiarity. During the course of one's education, training or experience as a [pharmacologist], it is possible to become "familiar" with the standard of care and treatment generally employed by [medical doctors]. Such familiarity would not, however, qualify one as an expert in that regard. An expert witness is one who through education, training, or experi-

---

35. *Id.*

36. *Id.* at 172, 397 S.E.2d at 715.

37. *Id. But see* 0-1 Doctors Memorial Holding Co. v. Moore, 190 Ga. App. 286, 287, 378 S.E.2d 708, 710 ("Nothing in the affidavit requirements in O.C.G.A. § 9-11-9.1 demands that the standard of care be set forth, that a plaintiff's expert state he is familiar with the appropriate standard of care, or that the affiant detail the manner in which the defendant deviated from that standard.").

38. 197 Ga. App. at 171, 397 S.E.2d at 715; *see also Belthea*, 176 Ga. App. at 470, 336 S.E.2d at 299 (evidentiary standard used to determine competency of expert in summary judgment proceeding).

39. 203 Ga. App. 684, 417 S.E.2d 715 (1992).

40. *Id.* at 687, 417 S.E.2d at 717. The plaintiff brought a medical malpractice action against a doctor and hospital. With the complaint, plaintiff filed the affidavit of a professor of pharmacology and toxicology. *Id.* at 684, 417 S.E.2d at 715. The affiant opined he was "familiar with the standard of care required and the properties and interactions of the drugs prescribed to [plaintiff] by [defendants]" and was "competent to testify regarding the standards of care and recommended use" of those drugs. *Id.* at 687, 417 S.E.2d at 717 (quoting the affidavit).

> ence has peculiar knowledge concerning some matter of science or skill to which his testimony relates.[41]

A bare assertion of familiarity with the applicable standard of care is not sufficient to meet the requirements of section 9-11-9.1.[42] However, in the absence of evidence of the affiant's expertise regarding defendant's standard of care, the affidavit will still be sufficient if evidence is produced demonstrating that the treatment is identical in the two schools.[43] In *Nowak v. High*,[44] the court of appeals held a registered nurse was competent to testify, for purposes of the section 9-11-9.1 affidavit, in a malpractice action against a doctor who was allegedly negligent in the giving of a phenergan injection.[45] The affidavit provided that the practice of giving phenergan injections is usually performed by registered nurses, but medical doctors also engage in the practice.[46] The affiant concluded, "I am familiar with the standard of care exercised in the United States for the giving of injections of phenergan, as well as the standard of care exercised in the medical community in the United States for performing such injections."[47] The court of appeals held the affidavit satisfied section 9-11-9.1 because "the affidavit itself shows that the practice of giving phenergan injections is shared by the nursing and medical professions, and is an area in which

---

41. *Id.* at 687, 417 S.E.2d at 717 (alteration in original). The court went on to state the affidavit must set forth some evidence indicating an overlap of expert qualifications between the differing professional schools. *Id.* The mere fact a pharmacologist has expert knowledge relating to the drugs and medication does not translate into "expert knowledge of the standard of care in the prescribing of drugs ordinarily employed throughout the general medical profession by physicians who are years removed from the intensive pharmacological training they received in medical school and for whom the prescribing of drugs is but one facet of their practice." *Id.* at 687, 417 S.E.2d at 717.

42. *Id.* The court indicated when the affiant and defendant are from the same professional school, there is no need for the affiant to produce evidence of the applicable standard of care. *Id.* at 685-86, 417 S.E.2d at 716-17 (citing 0-1 Doctors Memorial Holding Co. v. Moore, 190 Ga. App. 286, 378 S.E.2d 708 (1989)); *see also* HCA Health Serv. of Ga., Inc. v. Hampshire, 206 Ga. App. 108, 111, 424 S.E.2d 293, 296 (To qualify as an expert competent to testify, the affiant must either be from the same professional school as defendant or demonstrate how the methods of treatment between the two schools are the same).

43. Nowak v. High, 209 Ga. App. 536, 433 S.E.2d 602 (1993); *see also* Tye v. Wilson, 208 Ga. App. 253, 254, 430 S.E.2d 129, 130 (1993).

44. 209 Ga. App. 536, 433 S.E.2d 602.

45. *Id.* at 536, 433 S.E.2d at 603.

46. *Id.*

47. *Id.* The allegation of negligence in the affidavit was that the doctor gave the injection in an area of the patient's hip of high nerve density. *Id.*

the professions overlap."[48] As the above decisions illustrate, the court of appeals firmly embraced the concept of evaluating the competency of a section 9-11-9.1 affiant by an evidentiary standard requiring some proof of the expert's qualifications as to the treatment employed by the defendant.[49]

The supreme court reversed the court of appeals and decided the competency of an expert for purposes of section 9-11-9.1 should be evaluated by a pleading rather than an evidentiary standard.[50] Writing for a unanimous court, Justice Sears-Collins first discussed the presumption in favor of plaintiff at the motion to dismiss stage.[51] The opinion stated:

> "[A] section 9-11-9.1 affidavit should be construed most favorably to the plaintiff and all doubts should be resolved in plaintiff's favor, even if an unfavorable construction of the affidavit may be possible" so long as such construction does not detract from the purpose of section 9-11-9.1 of reducing the number of frivolous malpractice suits.[52]

The supreme court then stated a section 9-11-9.1 affidavit could properly contain conclusions.[53] According to the court, the application of pleading rules to the question of competency will not detract from the statute's purpose "of reducing the number of frivolous malpractice suits being filed for two reasons."[54] First, a complaint that satisfies the application of pleading rules is not likely to be frivolous.[55] Second, a defendant who believes a plaintiff's expert to be incompetent despite the

---

48. *Id.* at 539, 433 S.E.2d at 605. *See also* Avret v. McCormick, 246 Ga. 401, 271 S.E.2d 832 (1980) (nurse qualified as expert witness concerning reasonable care in sterilization of needle used to draw blood because the drawing of blood is not exclusively within the professional skills of medical doctors); Tye v. Wilson, 208 Ga. App. 253, 254, 430 S.E.2d 129, 130 (1993) (doctor is competent to give affidavit against nurse in malpractice action involving the care of postoperative, intubated patient).

49. *Hewett*, 210 Ga. App. at 585-86, 436 S.E.2d at 712.

50. *Hewett*, 264 Ga. at 184, 442 S.E.2d at 234.

51. *Id.* The court stated:

> [T]he sufficiency of the affidavit determines whether a plaintiff's action is subject to dismissal under O.C.G.A. § 9-11-12(b)(6); and that for a complaint to be subject to dismissal for failure to state a claim, the affidavit must "disclose with certainty that the plaintiff would not be entitled to relief under any state of provable facts."

Id. (quoting Bowen v. Adams, 203 Ga. App. 123, 123-24, 416 S.E.2d 102, 103 (1992)).

52. 264 Ga. at 184, 442 S.E.2d at 243 (quoting Gadd v. Wilson & Co., 262 Ga. 234, 235, 416 S.E.2d 285, 286 (1992)). The court noted neither *Bowen* nor *Gadd* dealt with the competency of the affiant, but indicated there was no reason why stricter standard should govern the competency question. *Id.*

53. *Id.* (citing Ledford v. Meyer, 249 Ga. 407, 290 S.E.2d 908 (1982)).

54. *Id.*, 442 S.E.2d at 234-35.

55. *Id.*, 442 S.E.2d at 235.

application of pleading rules would be able to resolve the question at a hearing under O.C.G.A. section 9-11-12(d).[56] The supreme court then applied the pleading rules to the affidavit filed by plaintiff.[57] The rule allowing pleadings to contain conclusions combined with the similarity between podiatry and orthopedics led the court to conclude the affiant's statement regarding his competency satisfied the requirements of section 9-11-9.1.[58] The court concluded:

> Because in many factual situations an orthopedist and a podiatrist will overlap in their medical treatment of the foot, rendering an orthopedist competent to testify against the podiatrist, and because Hewitt's complaint does not disclose with certainty that such is not the case here, Hewitt's complaint should not have been dismissed.[59]

The result of the supreme court's decision is that the competency of plaintiff's expert will be presumed until defendant can demonstrate otherwise.[60] This holding is likely to reduce the growing amount of appellate litigation, at least with respect to competency of expert

---

56. *Id.* O.C.G.A. § 9-11-12(d) (1993) states:

> The defenses specifically enumerated in paragraphs (1) through (7) of subsection (b) of this Code section, whether made in a pleading or by motion, and the motion for judgment mentioned in subsection (c) of this Code section shall be heard and determined before trial on application of any party unless the court order that the hearing and determination thereof be deferred until the trial.

The court then outlined how such a hearing would proceed:

> The defendant must raise his or her 12(b)(6) defense by motion or in his or her answer, § 9-11-12(b), and then apply for the necessary hearing under § 9-11-12(d). At that hearing, the defendant must present evidence that the defendant contends shows that the plaintiff's expert is not in fact competent to testify. By presenting matters outside the pleadings, the 12(d) hearing must be treated as one for summary judgment. Accordingly, summary judgment rules of notice must be met, and the plaintiff "shall be given reasonable opportunity to present all material made pertinent to such a motion by Code Section 9-11-56," § 9-11-12(b). If the defendant pierces the plaintiff's pleading affidavit on the issue of competency by offering evidence that the defendant's professional school and the plaintiff's school do not overlap with regard to the method of treatment in question, and the plaintiff offers no further evidence that his or her expert is competent to testify, the trial court would be authorized to grant summary judgment to the defendant.

264 Ga. at 184-85, 442 S.E.2d at 235 (citations omitted).

57. 264 Ga. at 186, 442 S.E.2d at 236.

58. *Id.* The court noted the "only reason a podiatrist does not hold a full medical license . . . is that the practice of medicine is not limited to any one area of the body." *Id.*

59. *Id.* at 186-87, 442 S.E.2d at 236 (citations omitted).

60. *See id. See also* Bowen v. Adams, 203 Ga. App. 123, 123-24, 416 S.E.2d 102, 103 (1992); Gadd v. Wilson & Co., 262 Ga. 234, 235, 416 S.E.2d 285, 286 (1992).

witnesses, concerning section 9-11-9.1.[61] In this regard, it is likely to be seen as a favorable decision.[62] Judges and commentators alike have expressed frustration over the application of section 9-11-9.1.[63] "Five years of surveying section 9.1 cases have forced these writers to the conclusion that the Code section is a useless, self-defeating mess."[64] As Judge Johnson observed:

> Intended to prevent frivolous litigation and all the costs inherent therein for both litigants and courts, this rule has instead caused more litigation. Rather than dealing at the summary judgment stage with the issues the legislature intended to solve, we have added a new layer of litigation at the motion to dismiss stage . . . . Sadly, in the effort to bring some order and predictability to this area of the law, it appears that we have made matters worse.[65]

By assuming the competency of plaintiff's expert and requiring the defendant to challenge the competency of the expert at a summary judgment proceeding, the supreme court's decision adds predictability and removes a layer of litigation in competency questions.[66] However, it is unclear whether this decision will fulfill the purpose behind the statute and result in the reduction of frivolous malpractice suits being filed.[67] The rule adopted by the court of appeals required plaintiff to either: 1) file an affidavit of an expert from the same professional school as defendant;[68] or 2) provide in the affidavit some proof of an overlap in qualifications.[69] The decision of the supreme court again moves back the time "when a plaintiff must come forward with his proof."[70] While the facts of *Hewett* demonstrate a close relationship between the two professional schools involved,[71] the breadth of the court's holding is likely to lead to the application of pleading rules in cases involving

---

61. *See* Cynthia Trimboli Adams & Charles R. Adams, III, *Torts*, 45 MERCER L. REV. 403, 418 (1993).

62. *See id.*

63. *See id. See also* Tye v. Wilson, 208 Ga. App. 253, 256-57, 430 S.E.2d 129, 132 (Johnson, J., dissenting).

64. Adams & Adams, *supra* note 61.

65. *Tye*, 208 Ga. App. at 256, 430 S.E.2d at 132 (Johnson, J., dissenting).

66. *Hewett*, 264, Ga. at 184-85, 442 S.E.2d at 235.

67. *See* 0-1 Doctors Memorial Holding Co. v. Moore, 190 Ga. App. at 288, 378 at 710.

68. *Moore*, 190 Ga. App. 286, 378 S.E.2d 708 (1989).

69. *Milligan*, 197 Ga. App. at 172, 397 S.E.2d at 715.

70. GREGORY, *supra* note 16.

71. *Hewett*, 264 Ga. at 186, 442 S.E.2d at 236.

professional schools with far less in common than orthopedics and podiatry.[72]

RICHARD T. HILLS

72. *See Nowak*, 209 Ga. App. at 537-38, 433 S.E.2d at 604; *Tye*, 208 Ga. App. at 255, 430 S.E.2d at 131; *Chandler*, 203 Ga. App. at 687, 417 S.E.2d at 717-18.