

Court of Appeals of the State of Georgia

ATLANTA, August 12, 2003

The Court of Appeals hereby passes the following order:

A03A1773. RAYMOND L. DAVIS v. EHCA WEST PACES, LLC D/B/A WEST PACES MEDICAL CENTER ET AL.

In this professional malpractice action, Raymond L. Davis filed a direct appeal of the trial court's grant of EHCA West Paces, LLC d/b/a West Paces Medical Center's motion to dismiss the complaint for failure to file an expert affidavit pursuant to OCGA § 9-11-9.1, while the case was still pending below. Davis then abandoned his appeal by failing to file his brief and enumeration of errors, which were due on May 22, 2003.

EHCA West Paces LLC filed a motion for penalties due to frivolous appeal. The record shows that the incident giving rise to this action occurred on February 23, 1998, at West Paces Medical Center; that Davis filed a lawsuit alleging professional malpractice on January 11, 2000, which he voluntarily dismissed after EHCA West Paces LLC moved for dismissal for failure to meet OCGA § 9-11-9.1's affidavit requirement; that Davis refiled his complaint and again failed to attach an expert affidavit, admitting that the affidavit was required but that it was not included due to time constraints and would be supplied within 45 days; and that the affidavit was not filed until July 22, 2002, when Davis filed a motion to reconsider the trial court's order dismissing his complaint for failure to file the affidavit, in which he then argued that the affidavit was unnecessary.

This case involves the question of whether the side rails on the bed of a patient who had been admitted to the hospital should have been in the "up" or "down" position. We have previously held that this is a question of professional skill, necessitating the filing of an expert affidavit. *Robinson v. Medical Center of Central*

Georgia, 217 Ga. App. 8, 9 (456 SE2d 254) (1995). In this case, when Davis finally filed the affidavit, attached thereto were emergency room policies and regulations pertaining to side rails, although this incident involved a patient who was not in the emergency department. Also attached were nursing assessment policies which were, on their face, applicable to Barrow Medical Center, not West Paces Medical Center.

In light of the above, we find that Davis's appeal was indeed frivolous and that sanctions against him are appropriate. Accordingly, we GRANT EHCA West Paces, LLC's motion for penalties due to frivolous appeal and ORDER that Davis pay sanctions in the amount of \$300.

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Clerk's Office, Atlanta AUG 12 2003

*I certify that the above is a true extract from
the minutes of the Court of Appeals of Georgia.*

*Witness my signature and the seal of said court
hereto affixed the day and year last above written.*

William L. Martin, Jr.

....., Clerk.