

280 Ga.App. 298
Court of Appeals of Georgia.

ROCKDALE HEALTH SYSTEM, INC. et al.

v.
HOLDER.

No. A06A0483. | July 6, 2006.

Synopsis

Background: Administratrix of brother's estate brought medical and nursing malpractice suit against hospital, its parent corporation, a physician, and a nurse after her brother died at hospital from alleged hypothermia. The State Court, Clayton County, [Benfield, J.](#), granted hospital's motions to dismiss for failure to timely file an expert affidavit. On motion from administratrix, the State Court subsequently vacated the order to dismiss and authorized addition of brother's children as parties. Hospital appealed.

Holdings: The Court of Appeals, [Miller, J.](#), held that:

[1] wrongful death statute authorized trial court to vacate its order dismissing the action;

[2] administratrix was entitled to amend her complaint; and

[3] brother's children were entitled to 45-day grace period for filing expert affidavit.

Affirmed.

West Headnotes (5)

[1] Death

🔑 [Conditions Precedent](#)

Health

🔑 [Affidavits of Merit or Meritorious Defense; Expert Affidavits](#)

Wrongful death statute authorized trial court to vacate its order dismissing negligence action brought against hospital by administratrix of brother's estate for failure to timely file an expert affidavit, even though the original complaint

was not styled as wrongful death action, where brother was alleged to have died as a result of hospital's negligence and administratrix sought judgment in excess of \$10,000. West's [Ga.Code Ann. § 51-4-2\(a\)](#).

[Cases that cite this headnote](#)

[2] Death

🔑 [Damages](#)

A party does not need to specifically request the full value of a decedent's life in order to plead a claim for wrongful death.

[Cases that cite this headnote](#)

[3] Death

🔑 [Amended and Supplemental Pleadings](#)

Administratrix was entitled to amend her medical negligence complaint against hospital to reflect that she brought the action as next friend of the brother's minor children as well as in her capacity as administratrix and in adding brother's children as real parties in interest; brother's children reached their majority after complaint was filed, and the addition created no prejudice to the hospital. West's [Ga.Code Ann. §§ 9-11-15\(a, c\), 51-4-2\(a\)](#).

[Cases that cite this headnote](#)

[4] Parties

🔑 [Mode of Bringing in Parties](#)

Parties

🔑 [Parties in Particular Capacity](#)

Complaints may be amended to change the capacity of the plaintiff, as well as to add new plaintiffs.

[Cases that cite this headnote](#)

[5] Health

🔑 [Affidavits of Merit or Meritorious Defense; Expert Affidavits](#)

Version of statute in effect at time complaint was filed applied to entitle brother's children, who were added as real parties in interest to medical

negligence action brought by administratrix of brother's estate, to 45-day grace period after filing of complaint within ten days of the expiration of statute of limitation in which to file expert affidavit, rather than retroactive application of amended statute that omitted grace period; statute was amended while action was pending. West's *Ga.Code Ann.* § 9-3-33; *O.C.G.A.* § 9-11-9.1(b) (2004).

[Cases that cite this headnote](#)

Attorneys and Law Firms

****53** [Francesca G. Townsend](#), [Daniel J. Huff](#), Huff, Power & Bailey, LLC, [Jeffrey D. Braintwain](#), Owen, Gleaton, Egan, Jones & Sweeney, [Amy J. Kolczak](#), Atlanta, for Rockdale Health Systems, Inc.

[Hezekiah Sistrunk, Jr.](#), [Jane L. Sams](#), [Mickiel D. Pete](#), Cochran, Cherry, Givens, Smith & Sistrunk, P.C., Warren D. Sams, Atlanta, for Holder.

Opinion

MILLER, Judge.

***298** Karen Holder, as administratrix of the estate of Michael Hill, brought this medical and nursing malpractice suit against Rockdale Hospital, Inc. (the "Hospital"), its parent corporation, a doctor, and a nurse (collectively "Rockdale"), following the death of Holder's brother at the Hospital from alleged [hypothermia](#). Holder filed suit, however, without attaching an expert affidavit to her complaint. Instead, she relied upon the exception contained in former *OCGA* § 9-11-9.1(b), which entitled her to 45 days after the filing of her complaint to file her expert's affidavit since her complaint was filed within ten days of the expiration of the statute of limitation.

299** The Clayton County State Court granted Rockdale's motions to dismiss Holder's complaint for failure to timely file an expert's affidavit. Based on motions from Holder, however, the trial court later vacated its dismissal order and authorized the addition of the decedent's children as parties. On *54** appeal, Rockdale contends that the trial court erred in vacating its order dismissing Holder's complaint, arguing that Holder was not entitled to the 45-day grace period to file

her expert's affidavit under former *OCGA* § 9-11-9.1(b).¹ Discerning no error, we affirm.

[1] [2] As an initial matter, we note that the trial court did not abuse its discretion in vacating its initial order dismissing Holder's complaint for failure to timely file an expert's affidavit. See *Pope v. Pope*, 277 Ga. 333, 334, 588 S.E.2d 736 (2003) ("A trial court's discretion in setting aside a judgment will not be disturbed unless manifestly abused.") (footnote omitted). Rockdale's claims to the contrary notwithstanding, the record reveals that the original complaint, although not styled as a wrongful death action, nonetheless pled that Rockdale's negligence caused the decedent's death and sought judgment against Rockdale "in an amount in excess of \$10,000 for all damages recoverable by law." The wrongful death statute permits the decedent's heirs to recover the full value of the decedent's life where a decedent dies as a result of another's negligence. See *OCGA* § 51-4-2(a). A party does not need to specifically request the full value of a decedent's life in order to plead a claim for wrongful death. See *Morris v. Chewing*, 201 Ga.App. 658, 659, 411 S.E.2d 891 (1991).

[3] [4] Moreover, the record shows that Holder amended her complaint to reflect that she brought the action, not only in her capacity as the administratrix of the decedent's estate, but also as next friend of the decedent's minor children. This was proper. "Complaints may be amended to change the capacity of the plaintiff, as well as to add new plaintiffs." (Citations omitted.) *Morris*, *supra*, 201 Ga.App. at 658, 411 S.E.2d 891. Inasmuch as there is a direct connection between the old and new parties, the complaint, as amended, related back to the original complaint. *Id.* at 658-659, 411 S.E.2d 891; *OCGA* § 9-11-15(c). Thus, there could be no prejudice to Rockdale from the amendment adding the new parties. *Morris*, *supra*, 201 Ga.App. at 659, 411 S.E.2d 891. Further, because the record shows that the decedent's children reached their majority after the complaint was filed, the trial court did not err in adding them as real parties in interest. *OCGA* §§ 9-11-15(a)(c); 51-4-2(a); *Star Jewelers v. Durham*, 147 Ga.App. 68, 71(2), 248 S.E.2d 51 (1978).

[5] ***300** Rockdale concedes that this case, if for wrongful death, was filed within ten days of the expiration of the governing two-year statute of limitation. See *OCGA* § 9-3-33. In considering whether the foregoing entitles the decedent's children to avail themselves of the 45-day grace period allowed by former *OCGA* § 9-11-9.1(b), we must determine whether *OCGA* § 9-11-9.1(b) as amended to eliminate the 45-day grace period, should be applied retroactively. See

Ga. L.2005, p. 3, § 3 and p. 18, § 15. In the amendment, the General Assembly declared its intention “that *all other provisions of this Act [inclusive of OCGA § 9-11-9.1]* shall apply to causes of action *pending* on [the effective date of the amendment, February 16, 2005], unless such application would be unconstitutional.” (Emphasis supplied.) Ga. L.2005, p. 18, § 15.

The Supreme Court of Georgia has made clear that applying the amendment retroactively under circumstances like those present here would be unconstitutional for doing manifest injustice. See *Kneip v. Southern Engineering Co.*, 260 Ga. 409, 411(4), 395 S.E.2d 809 (1990) (dismissal of complaint for failure to file OCGA § 9-11-9.1 expert affidavit would

have been manifestly unjust where dismissal would have occurred based on change in law while action already pending). Since the 45-day grace period under former OCGA § 9-11-9.1(b) here is constitutionally required, Holder is entitled to the benefit of its provisions in this case.

Judgment affirmed.

JOHNSON, P.J., and ELLINGTON, J., concur.

Parallel Citations

640 S.E.2d 52, 06 FCDR 2209

Footnotes

¹ The statute was amended in 2005 to eliminate the 45-day grace period. See Ga. L.2005, p. 3, § 3.