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The Status of Tort Reform (S.B.3): Almost 5 Years Later

Presented By
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The Status of Tort Reform (S.B. 3): Almost 5 Years Later

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Venue in Medical Malpractice Cases, O.C.G.A. § 9-10-31(c) (S.B. 3, § 2)

–This provision required the transfer of a case from the county of residence of one joint tortfeasor to the county where the tort occurred

– Held to violate Art. VI, Sec. II, Para IV of the Georgia Constitution which directly addresses venue in cases involving joint obligors

EHCA Cartersville, LLC v. Turner, 280 Ga. 333 (2006); R.J. Taylor Memorial Hospital, Inc. v. Beck, 280 Ga. 660 (2006); Woodruff v. Gould, 280 Ga. 757 (2007).

Venue and Forum Non Conveniens,
O.C.G.A. §9-10-31.1(S.B. 3 § 2)

-- This provision authorizes the transfer of a case filed in a statutorily appropriate venue to another forum under the doctrine of forum non conveniens (7 factors).

-- Held to be constitutional under authority granted by Art. VI, Sec. II, Para VIII of the Georgia Constitution.

EHCA Cartersville, LLC v. Turner, 280 Ga. 333 (2006); R.J. Taylor Memorial Hospital, Inc. v. Beck, 280 Ga. 660 (2006); Hawthorn Suites Golf Resorts, LLC v. Feneck, 282 Ga. 554 (2007).

Expert Affidavits, O.C.G.A. §9-11-9.1 and Its Interaction with O.C.G.A. §24-9-67.1 (S.B. 3 § 3)

--The amended § 9-11-9.1 provides that § 24-9-67.1 governs the competence of experts who sign affidavits that must accompany the filing of a malpractice suit.

--"It is thus the expert's qualifications, and not the defendant doctor's area of practice, that control the admissibility of the expert's testimony." Abramson v. Williams, 281 Ga. App. 617 (2006)

Medical Authorizations, O.C.G.A. § 9-11-9.2 (S.B. 3 § 4)

-This provision requires a medical malpractice plaintiff to sign a medical authorization form and file it with the complaint. The medical form authorizes the defendant's attorney to obtain and disclose the plaintiff's medical records and to discuss the plaintiff's care and treatment with the plaintiff's treating physicians.

-In *Allen v. Wright*, 282 Ga. 9 (2007) the Court held that this provision is preempted by HIPAA (42 U.S.C. § 1320-7(a)(2)). The Georgia law conflicted with the federal law in two respects:

-the Georgia statute did not include a "right to revoke" the authorization as required by HIPPA; and

-the Georgia statute did not include a "specific and meaningful identification of information to be disclosed" as required by HIPPA

Moreland v. Austin, 284 Ga. 730, 670 S.E.2d 68 (2008)

- HIPPA also precludes ex part contact by a defendant doctor's attorney with the plaintiff patient's prior treating physician

Offers of Settlement, O.C.G.A. § 9-11-68
(S.B. 3 § 5)

-This gist of this provision is that a plaintiff who fails to obtain a final judgment of at least 75% of a defendant's "offer of settlement" must pay the defendant's attorneys fees; and a defendant who rejects a plaintiff's "offer of settlement" must pay the plaintiff's attorneys fees if the plaintiff obtains a final judgment that is greater than 125% of the offer.

-The Georgia Supreme Court struck down the statute on the grounds that it had an unconstitutional retroactive effect and did not reach the access to courts or special legislation issues. Fowler Properties, Inc., v. Dowland, 282 Ga. 76 (2007).

-A voluntary dismissal is not considered a "final judgment" triggering Rule 68 sanctions. McKesson Corp. v. Green, 286 Ga. App. 110 (2007).

Current Constitutional Challenge: Smith v. Salon Baptiste, Case No. S09A1543

- -access to the courts, Art. I, Sec. 1, Para 12
- -prohibition against "special laws", Art. III, Sec. 6, Para. 4

Expressions of Sympathy, O.C.G.A. § 24-3-37.1 (S.B. 3 § 6)

-This provision states that "conduct, statements or activities constituting...expressions of benevolence, regret, mistake, error...[etc.] should not be considered an admission of liability."

-This provision has been held to exclude from evidence the statement "it was my fault" that was made by a doctor before the enactment of S.B. 3. Airasian v. Shaak, 289 Ga. App. 540 (2008).

Expert Witness Rules, O.C.G.A. §24-9-67.1 (S.B. 3 § 7)

-This provision addresses, perhaps inconsistently, the foundation for expert testimony, imposes new and specific qualifications for expert witnesses in professional malpractice actions, and incorporates Daubert standards for challenging the admissibility of expert testimony in civil cases.

-Mason v. Home Depot U.S.A., Inc., 283 Ga. 271 (2008).

--The Court held that establishing Daubert standards for civil but not criminal cases did not deprive the civil plaintiff of equal protection, due process or violate the principles of separation of powers.

-experts can base their opinions on facts and data that are not admissible, relying on 24-9-67.1(a) and disregarding the seemingly conflicting language of 24-9-67.1(b) (1)

-Nathans v. Diamond, 282 Ga. 804 (2007).
The Court held that this statute could be applied retroactively.

Emergency Room Standard of Care,
O.C.G.A. § 51-1-29.5 (S.B. 3 § 10)

-This provision elevates the plaintiff's burden of proof to "clear and convincing evidence" and imposes a "gross negligence" standard of liability.

-What constitutes clear and convincing evidence of gross negligence? See Pottinger v. Smith, 293 Ga. App. 626 (2008).

Current Constitutional Challenge: Gliemma v. Cousineau, Case No. S09A1807

- -prohibition against "special laws", Art. III, Sec. 6, Para. 4
- -right to trial by jury
- -equal protection
- -due process (vagueness)

Apparent Agency, O.C.G.A. § 51-2-5.1 (S.B. 3 § 11)

-This provision provides a blue print for hospitals to avoid liability under the doctrine of apparent agency.

-I am not aware of any reported decisions construing this provision.

Joint and Several Liability/Apportionment of Liability, O.C.G.A. § 51-12-33 (S.B. 3 § 12)

-This is a complex and awkwardly phrased amendment of an existing statute. It raises important issues of statutory construction and, perhaps, constitutional validity that have yet to be addressed in reported decisions.

-- subsection (a) appears to require that a jury separately determine percentages of fault and damages; and then the judge shall reduce the award to account for the plaintiff's percentage of fault. See Turner v. New Horizon's Community Service Bd., 287 Ga. App. 329 (2007) (approving of such a procedure)

-subsection (b) would appear to eliminate the doctrine of joint and several liability in all cases. However, my colleague, Michael Wells, has argued that the precise language used fails to do so. See Michael Wells, Joint Liability Rules, 39 Georgia Law Advocate 18 (Spring/Summer 2005) (Alumni Magazine)

-subsection (c) would appear to authorize the assignment of percentages of fault to persons or entities who are not nor could have been named parties to the suit.

-Unresolved issues:

-does the statute abolish joint and several liability?

-does the statute authorize juries to assign percentages of fault anyone? (E.g., phantom driver and intentional tortfeasor)

-if so, does the statute violate due process?

Caps on Non-Economic Damages in Medical Malpractice Cases, O.C.G.A. § 51-13-1 (S.B. 3 § 13)

-This provision places a statutory limit on recovery for non-economic damages (broadly defined) in medical malpractice actions. The cap is \$350,000 for all "medical providers" (e.g., doctors); a second \$350,000 may be recovered against a "medical facility" (e.g., hospital); and a third \$350,000 may be recovered if there is an additional "medical facility" held liable.

**Current Constitutional Challenge:
Atlanta Oculoplastic Surgery v. Nestlehutt, Case No. S09A1432**

- -right to trial by jury, Art. I, Sec. 1, Para. 11
- -separation of powers, Art. I, Sec. 2, Para 3
- -equal protection, Art. I, Sec. 1, Para. 2
- -special laws, Art. III, Sec. 6, Para. 4
