

# **Update on SB3, The Georgia Tort Reform Law** (Updated 3/22/2010)

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## **Update on SB3, The Georgia Tort Reform Law** (Updated 3/22/2010)

### **I. Damage Caps (O.C.G.A. § 51-13-1)**

This section provides for a \$350,000 cap on non-economic damages in medical malpractice cases. Such damages include physical pain and suffering, discomfort, anxiety, loss of enjoyment of life, loss of consortium, injury to reputation, and other damages which cannot be fixed in a definite amount. Non-economic damages do not include medical expenses, wages, funeral and burial expenses, or any other monetary losses. There is a maximum recovery of \$350,000 against individual health care professionals, regardless of the number of individual professionals involved. There is a maximum recovery of \$350,000 when one facility is involved. When more than one facility is involved, the maximum recovery against the multiple facilities is limited to \$700,000, but not more than \$350,000 against any one facility. Finally, in no event shall the aggregate total of non-economic damages exceed \$1,050,000. This provision only applies to lawsuits filed after February 16, 2005.

**Current Status:** In a decision issued on 3/22/2010, the Georgia Supreme Court struck down these caps as unconstitutional. See Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, Case No. S09A1432.

### **II. Joint and Several Liability (O.C.G.A. § 51-12-31 and § 51-12-33)**

The legislature effectively provided an end to joint and several liability with its amendments to these sections. First, it states that no defendant will ever have to pay more than his share for any injury, as determined by the jury. Second, the statutes compel a jury to apportion fault between all defendants, the plaintiff (when appropriate), and any nonparty to the litigation. Additionally, if the plaintiff is attributed 50% or more of the fault in any action, then the plaintiff is not entitled to any recovery. These statutes only apply to lawsuits filed after February 16, 2005.

**Current Status:** These provisions remain in effect.

### **III. Emergency Care (O.C.G.A. § 51-1-29.5)**

In actions involving health care liability claims arising from the giving of emergency medical care in a hospital emergency department, obstetrical unit, or surgical suite, the Plaintiff is required to prove that the physician's or health care provider's actions showed *gross negligence by clear and convincing evidence*.

**Current Status:** In a decision issued on 3/15/2010, the Georgia Supreme Court upheld the constitutionality of this statute. See Gliemmo v. Cousineau, Case No. S09A1807.

### **IV. Agency (O.C.G.A. § 51-2-5.1)**

This statute provides that no hospital complying with one of two prerequisites can be held liable for the act or omission of a health care professional unless the professional is an actual agent or employee of the hospital. The hospital can either post a notice that complies with the prescriptions of the statute *or* have the patient or the patient's representative sign a written acknowledgment which contains the language described in the statute. This section also provides clear guidelines for the courts to follow when deciding whether an employment or agency relationship exists between a particular hospital and healthcare professional. Generally, employment status is determined by the language of the contract. When there is no contract or the contract is unclear, then "a health care professional shall only be considered the hospital's employee or actual agent if it can be shown by a preponderance of the evidence that the hospital reserves the right to control the time, manner, or method in which the health care professional performs [their services.]" The court provides a list of 6 factors the court *may* consider, and a list of 6 factors the court *may not* consider.

**Current Status:** These provisions remain in effect.

**V. Offers of Judgment (O.C.G.A. § 9-11-68)**

Either party may make a Written Offer of Settlement to the opposing party, which may entitle the party making the Offer to an award of attorney's fees in certain situations. The offer can be made at any time 30 days after service of process, but not less than 30 days before trial. The offer must remain open for 30 days, or until withdrawn in writing or rejected in writing. As originally drafted, an offeree who rejected the offer of judgment would risk the threat of paying the offeror's attorney's fees and expenses if did not recover 125% of the offer at trial.

**Current Status:** The statute was subsequently revised. Now, a defendant is entitled to fees if the final judgment is one of no liability or less than **75%** of the offer. The Plaintiff is entitled to fees if the final judgment is an amount greater than 125% of the plaintiff's offer. Fees and expenses are computed from the date of rejection through the entry of judgment. In the 2007 case of Fowler Properties, Inc. v. Dowland, 282 Ga. 76 (2007), the Georgia Supreme Court ruled that it does not apply retrospectively to cases filed before February 16, 2005. With these revisions in place, the Georgia Supreme Court upheld the constitutionality of the statute in a decision issued on 3/15/2010. See Smith v. Baptiste, case No. S09A1543.

**VI. Experts (O.C.G.A. § 9-11-9.1 and § 24-9-67.1)**

**A. O.C.G.A. § 9-11-9.1**

Requires an expert affidavit to be filed contemporaneously with the Complaint for any action regarding professional malpractice. The 2005 tort reform abolished the provision that had previously allowed Plaintiffs a 45 day grace period when the Complaint was filed close to the expiration of the statute of limitations. However, this grace period has since been reinstated.

**Current Status:** This provision, with the 45 day grace period in limited situations, remains in effect.

**B. O.C.G.A. § 24-9-67.1**

For *civil actions*, Georgia has adopted Federal Rules of Evidence 702 and 703, re: expert testimony and the bases of their opinions (the "Daubert" standard). The statute also provides that experts testifying in medical malpractice actions must have *actual professional knowledge* and *experience* in the area of practice or specialty in which the opinion is to be given. Experience can be gained by: (1) The *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; or (2) The *teaching* of his or her profession for at least three of the last five years as an employed member of the faculty of an educational institution accredited in the teaching of such profession, with sufficient frequency to establish an appropriate level of knowledge.

**Current Status:** These provisions remain in effect. Furthermore, The Court of Appeals has interpreted O.C.G.A. § 24-9-67.1 in multiple cases, where they considered what counted as "active practice" and whether a physician expert had to practice in the same specialty as the defendant in the case. "Active practice" usually means diagnosing or treating the condition at issue in the lawsuit, but in some cases, teaching others how to diagnose or treat the condition may also count as "active practice." Secondly, the expert does **not** have to practice in the same specialty as the defendant doctor, but does need to demonstrate experience sufficient enough to testify about diagnosing/treating the condition involved in the case. The judge ultimately decides what type of experience makes the expert qualified (or not) to testify. Some recent decisions include:

Cotten v. Phillips, 280 Ga. App. 280 (2006): vascular surgeon testified against orthopedic surgeon.

Tenet Healthcare Corporation v. Gilbert, 277 Ga. App. 895 (2006): physician testified against nurses.

Abramson v. Williams, 281 Ga. App. 617(2006): orthopedic surgery expert testified against a neurosurgeon.

Mays v. Ellis, 283 Ga. App. 195 (2007): gastroenterologist testified against an Ob/Gyn who performed gynecologic surgery.

**VII. Venue (O.C.G.A. § 9-11-31 and § 9-11-31.1)**

**A. O.C.G.A. § 9-11-31**

Subsection (c) allowed a defendant in a medical malpractice case to transfer a case to the county of the *defendant's* residence if the claim's tortious act occurred in the county of the defendant's residence. Subsection (d) revived the concept of "vanishing venue." This situation arises when there are joint tortfeasors and suit is brought in one county, but then the defendant who resides in that

county, is later dismissed. If the remaining defendant does not reside in the county where the suit was filed, then he is allowed to transfer the case to another county in which venue would be proper.

**Current Status:** Subsection (c) was held **unconstitutional** in EHCA Cartersville v. Turner, 280 Ga. 333 (2006). Subsection (d) remains in effect.

**B. O.C.G.A. § 9-11-31.1**

This is a *forum non conveniens* provision that allows a trial court to transfer a case to another county or even to another state in certain situations when another court might be the better venue for a case. The section lists seven factors the court must consider when faced with a venue motion under the *forum non conveniens* provision.

**Current Status:** This provision remains in effect.

**VIII. Statements of Condolence (O.C.G.A. § 24-3-37.1)**

This section makes statements pertaining to an "unanticipated outcome" made by a health care provider, or an agent or employee of any health care provider to a patient inadmissible so long as the statement relates to that patient's "unanticipated outcome."

**Current Status:** This provision remains in effect.

**IX. Reports to the Composite State Board of Medical Examiners (O.C.G.A. § 33-3-27(b))**

This section was modified to remove the \$10,000 floor for reporting a health care provider to the Composite State Board of Medical Examiners. Previously, an insurer was only required to report to the Board settlements or judgments that exceeded \$10,000, or if the particular health care provider had "two or more" verdicts or settlements against it. Under the current version, *all* settlements must be reported, regardless of value or number of prior judgments against the provider.

**Current Status:** This provision remains in effect.

**X. Medical Authorizations (O.C.G.A. § 9-11-9.2)**

This provision states the plaintiff "shall be required to file" a medical authorization along with the Complaint in any medical malpractice claim. The authorization allows the defendants to obtain plaintiff's protected health information and discuss plaintiff's care with plaintiff's treating physicians and allows the particular health care provider to release such information. Failure to comply subjects to the complaint to dismissal.

**Current Status: The Georgia Supreme Court has held this provision is preempted by Federal law**, specifically the Health Insurance Portability and Accountability Act. The court found that the statute does not satisfy the requirements for a valid HIPAA authorization. Allen v. Wright, 282 Ga. 9 (2007).