

## **Arbitration**

Triad Health Management of Georgia, III, LLC v. Johnson, 298 Ga. App. 204 (2009)

Plaintiff sued a nursing home, alleging that as a result of the facility's negligence, his father developed bed sores, which led to his development of sepsis and his subsequent hospitalization, illness and death. The nursing home filed a motion to compel arbitration and stay proceedings based on an arbitration provision contained in the patient's admission contract and signed by plaintiff on behalf of the patient under a general power of attorney. The trial court denied the motion, and the defendant appealed. On appeal, plaintiff argued that the arbitration provision was unenforceable in light of O.C.G.A. § 9-9-62. O.C.G.A. § 9-9-62 provides that agreements to arbitrate medical malpractice claims are unenforceable unless "the agreement was made subsequent to the alleged malpractice and after a dispute or controversy has occurred and unless the claimant is represented by an attorney at law at the time the agreement is entered into." The Court of Appeals rejected plaintiff's argument, holding that the FAA preempts "any state law that conflicts with its provisions or undermines the enforcement of private arbitration agreements." Because O.C.G.A. § 9-9-62 restricts the enforceability of a certain class of arbitration agreements, it is preempted by the FAA. The arbitration provision contained in the nursing home contract was thus enforceable with respect to plaintiff's medical malpractice claim.

Life Care Centers of America v. Smith, 681 S.E.2d 182, 2009 Ga. App. Lexis 704 (2009)

The defendant nursing home sought to compel arbitration in this wrongful death claim brought by the decedent's daughter. Upon the decedent's admission to the nursing home facility, the plaintiff signed admission documents, including the agreement to arbitrate, under a durable power of attorney for health care designating plaintiff as the decedent's agent. The power of attorney gave plaintiff the authority to make "any and all decisions for [the decedent] concerning [her] personal care, medical treatment, hospitalization, and health care." The trial court found, and the Court of Appeals agreed, that the plain language of the healthcare power of attorney did not give plaintiff the power to sign away her mother's right to a jury trial. The Court specifically distinguished healthcare powers of attorney from general powers of attorney, stating that the former is insufficient to bind a principal to an arbitration agreement. Thus, the trial court did not err in denying defendant's motion to compel arbitration.

## **Battery**

Paden v. Rudd, 294 Ga. App. 603, 669 S.E.2d 548 (2008)

Plaintiff filed a lawsuit for medical malpractice and battery against her dentist. She claimed that the dentist negligently failed to take the plaintiff's medical and dental history and to examine her blood pressure before beginning a root canal procedure. She further contended that the dentist negligently injected her nerve, vein, and eye with an anesthetic which caused her permanent facial swelling and paralysis. She also argued that the dentist negligently failed to provide her with proper medical care and to arrange for emergency medical treatment for excessive facial swelling after the root canal and failed to consult with another dentist concerning the swelling. The trial court dismissed the battery claim for failure to state a claim. The plaintiff, however, argued that she had made a claim for battery in her lawsuit because the plaintiff did not consent to perform the root canal. More specifically, the plaintiff argued that she would not have

consented to the root canal if she had been properly informed of the material risks, the likelihood of successful root canal, and the practical options to the root canal procedure and anesthetic injections. The Court of Appeals affirmed the trial court's dismissal, even absent a motion by the defense counsel. The Court of Appeals ruled that there was no allegation in the complaint to support a claim for battery, and the plaintiff alleged in her complaint that, in fact, she consented to the root canal procedure.

## **Causation**

Pruette v. Phoebe Putney Memorial Hospital, 295 Ga. App. 335, 671 S.E.2d 844 (2008)

Plaintiff brought a wrongful death action alleging medical malpractice for the death of her mother who allegedly died as the result of receiving an overdose of morphine. The 79-year-old patient suffered from end stage chronic obstructive pulmonary disease ("COPD"), a lung disorder that resulted in airway obstruction and difficulty breathing. She had been hospitalized several times for complications relating to her COPD. While a patient at the hospital, the patient's condition significantly worsened such that she went into respiratory arrest. Members of the hospital staff responded to an emergency code such that the patient began breathing again on her own. A pulmonary critical care physician who responded to the emergency code began making preparations to place the patient on a mechanical ventilator. However, the attending physician entered the hospital room and informed the pulmonary critical care physician that the patient did not wish to be intubated. As a result, the pulmonary critical care physician stopped as requested and left the room. The attending physician subsequently ordered 2 mg of morphine for every 30 minutes to 1 hour as needed for pain, distress, and shortness of breath. Immediately below that order, the pulmonary critical care physician wrote an additional order for a single dose of 20 mg of morphine to be administered by an IV push. Immediately after the code, the patient sat up in bed, said hello to her granddaughter who had come into the room, and began talking with the plaintiff about her favorite television show. As they spoke, a nurse entered the room and gave the 20 mg dose of morphine as ordered by the pulmonary critical care physician. The patient's eyes immediately closed, and she never regained consciousness, dying approximately 3.5 hours later. When the nursing staff saw that the patient had stopped breathing, they did not call an emergency code in light of the patient's prior decision that no additional life-saving measures should be administered. The plaintiff subsequently filed the lawsuit against the pulmonary critical care physician and the hospital for the wrongful death of her mother. The plaintiff alleged that the pulmonary critical care physician breached the standard of care by ordering the IV push of 20 mg of morphine into an end stage COPD patient and that the administration of such a high dose of morphine caused the patient's death. The pulmonary critical care physician, as well as the hospital, moved for summary judgment. With regard to the pulmonary critical care physician's motion for summary judgment, he argued that there is no wrongful death cause of action for a loss of chance for extended survival under Georgia law in accordance with Dowling v. Lopez. In Dowling, the Court of Appeals determined that if the decedent suffered from an incurable medical condition at the time of the alleged misdiagnosis, then proximate cause could not be established for the failure to diagnose case. The Court of Appeals, here, distinguished Dowling, ruling that the plaintiff presented evidence of an affirmative act of medical negligence resulting in the patient's premature death. The Court of Appeals determined that a jury must determine whether the patient's death was proximately

caused by the affirmative actions of the pulmonary critical care physician or the end stage COPD. As a result, the Court of Appeals ruled that the trial court properly denied summary judgment to the pulmonary critical care specialist on the issue of proximate cause.

Roberts v. Nessim, 297 Ga. App. 278, 676 S.E.2d 734 (2009)

Plaintiff brought a wrongful death action against a physician and hospital, alleging that the physician failed to properly diagnose and treat the decedent's feeding tube aspiration and that the aspiration caused the decedent's pneumonia. The plaintiff further alleged that the physician failed to appropriately treat the pneumonia which caused the decedent's death. The trial court granted summary judgment to the defendant physician on the grounds that the plaintiff provided no evidence of causation other than the expert affidavit. Furthermore, in this case, the defendant physician provided his own affidavit stating that there was no causation. The plaintiff relied solely on his expert's affidavit to meet the burden of proof relating to causation. However, the Court of Appeals ruled that the trial court properly granted summary judgment because once a defendant refutes causation, the plaintiff must present medical expert opinion to satisfy its burden of proof instead of relying upon an expert's unsupported, conclusory affidavit. The plaintiff in this case had the burden to produce evidence about the essential element of causation. Because the expert's affidavit was insufficient to create a jury issue on causation, the trial court properly granted summary judgment to the physician.

### **Directed Verdict**

Gilley v. Hudson, 2009 Ga. App. LEXIS 782 (2009)

Plaintiff, a twelve-year-old child, dislocated his hip while playing football. The defendant physician was nearby and, upon a bystander's request, examined plaintiff and accompanied him to the emergency room. After they arrived at the emergency room, the physician assumed responsibility for the child's care and reduced the dislocation, moving the femur back into the hip socket. An x-ray later showed that the head of the femur had separated from the child's femur, ultimately resulting in permanent physical limitations. As a result, the child subsequently sued the physician. During trial, one of the plaintiff's expert witnesses described the dislocated as an orthopedic emergency that needed to be treated within a six to eight-hour window. Based on the expert's testimony, defendant moved for a directed verdict on the ground that he was immune from liability under the "Good Samaritan" statute. The trial court refused to grant the physician a directed verdict because even in light of the expert's testimony, a jury question still existed as to whether the physician provided the patient with emergency care upon circumstances requiring immediate action. The Court of Appeals agreed and upheld the trial court's denial of the defendant's motion for a directed verdict.

### **Evidence**

Hamilton v. Shumpert, 2009 Ga App. LEXIS 852 (2009)

The Court of Appeals ruled that the trial did not err by limiting the plaintiffs' use of a treating physician's note during their cross examination of an expert witness. "Control of the nature and scope of cross examination of a witness is a matter within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion." The information cited in the treating

physician's note was cumulative of his testimony as well as of other notes that were previously published to the jury. Accordingly, the Court found no error in the trial court's curtailment of the use of the note.

Griffin v. Bankston, 295 Ga. App. 387, 671 S.E.2d 873 (2008)

The plaintiff patient brought a dental malpractice action against the physician and his group alleging the physician acted negligently by not administering or prescribing an antibiotic in connection with the surgical extraction of her wisdom teeth. As a result, the plaintiff developed a bacterial infection that was determined to be from the extracted teeth. The case went to trial and the jury returned a verdict in favor of the defendants. On appeal the plaintiff contended the trial judge committed reversible error in several ways including the exclusion of deposition testimony from one of her treating physicians concerning the physician's personal practice of administering an antibiotic as a preventive measure. The Court of appeals held the testimony of the physician regarding his personal oral surgery practices was correctly excluded from the trial. Under established precedent, testimony concerning what course of treatment an expert physician personally would have followed is irrelevant in a medical malpractice action and is inadmissible either to directly establish the applicable standard of care or to impeach the expert's testimony concerning what standard should apply. As such, the judgment of the trial court was affirmed.

### **Expert Affidavit and Testimony**

Chandler v. Opensided MRI of Atlanta, LLC, 2009 Ga. App. LEXIS 846 (2009)

Overruling inconsistent prior decisions, the Court of Appeals ruled a plaintiff who fails to file an expert affidavit with its complaint may renew the complaint after the running of the statute of limitation if the defendant fails to file a motion to dismiss contemporaneously with the answer. O.C.G.A. § 9-11-9.1 specifically restricts a plaintiff's ability to use the renewal statute to re-file an affidavit-less complaint after the expiration of the statute of limitation. However, in order for this limitation to apply, the statute requires the defendant to raise the failure to file an expert affidavit "by motion to dismiss filed contemporaneously with its initial responsive pleading." On this point, the Court specifically stated that nothing short of a motion to dismiss will satisfy this prerequisite. With respect to the renewability of a complaint filed without an expert affidavit, the Court emphasized that lack of an expert affidavit renders a complaint voidable but not void. Because the renewal statute "allow[s] renewal if the previous action was merely voidable," a plaintiff who fails to attach an expert affidavit to its complaint may nonetheless re-file the cause of action after the applicable period of limitation has run.

Smith v. Harris, 294 Ga. App. 333, 670 S.E.2d 136 (2008)

Plaintiff brought this medical malpractice action against various healthcare providers, alleging that a physician's negligent administration of an antibiotic resulted in injuries including renal damage and inner ear damage. At trial, Plaintiff relied primarily on the expert testimony of a pharmacist to establish the physician's negligence. The Court of Appeals ruled that the trial court's allowance of the pharmacist's expert testimony was error. In so ruling, the Court explained that O.C.G.A. § 24-9-67.1(c) plainly requires a medical expert to be a member of the same profession as the person whose performance he is evaluating. Under Georgia law, a pharmacist is not a member of the same profession as a medical doctor. The trial court thus

abused its discretion in allowing the pharmacist to offer expert testimony against the defendant physician.

Long v. Natarajan, 291 Ga. App. 814, 662 S.E.2d 876 (2008)

In this action involving a patient's and her husband's claims against a surgeon, the plaintiffs offered the expert testimony of a family practice physician. The trial court excluded the expert affidavit because the expert was neither a surgeon nor otherwise familiar with the standard of care applicable to a surgeon. The Court of Appeals found no abuse of discretion in the trial court's exclusion of the expert affidavit.

Carter v. Smith, 294 Ga. App. 590, 669 S.E. 2d 425 (November 17, 2008, certiorari denied February 23, 2009)

This medical malpractice alleged failure to timely examine and treat a patient for a fracture hip after he fell at a long-term care facility. Following a jury trial where the jury returned a \$140,000.00 verdict, the Superior Court judge entered judgment for the patient and denied the physician's motion for judgment notwithstanding the verdict (JNOP). The physician then appealed the court's ruling on a number of among other things, the competency of the plaintiff's expert as well on a number of jury charge issues.

The Court held that the current practice of the patient's expert physician of examining patients at a long-term facility, including patients with acute problems, provided the expert with an appropriate level of knowledge to offer an opinion in a medical malpractice action that the defendant deviated from the standard of care by not examining the patient after a fall at the long-term care facility to which the patient attributed the fractured hip. The Court reasoned that because the "treatment which is alleged to have been rendered negligently" as provided by O.C.G.A. § 24-9-67.1 was a simple examination of the patient by his physician and therefore the trial court did not abuse its discretion in finding that the expert's current practice of examining patients in long-term care facilities provided him with an appropriate level of knowledge to offer this opinion. The simple fact that the physician had experience in showing up and examining a patient made him qualified to testify that the defendant should have shown up and examined the patient. Therefore, the trial court did not abuse its discretion in finding that the plaintiff's expert satisfied the expert requirements of O.C.G.A. § 24-9-67.1.

Atlanta Women's Health Group, P.C. v. Clemons, 681 S.E.2d 754, 2009 Ga. App. LEXIS 839 (2009)

In this medical malpractice action against a corporation, the Court of Appeals ruled that former O.C.G.A. § 9-11-9.1(a) required expert affidavits to be attached to all complaints involving a medical question, regardless of the identity of the defendant. Former O.C.G.A. § 9-11-9.1(a) provides that an expert affidavit must accompany the complaint "in any action for damages alleging professional malpractice against a professional licensed by the State of Georgia...or against any licensed health care facility..." Here, since the defendant was a nonmedical corporate entity, rather than a licensed professional or licensed healthcare facility, the plaintiff attempted to dispose of the expert affidavit requirement. However, the Court rejected plaintiff's position, stating: "If the issue of negligence involved is a medical question, O.C.G.A. § 9-11-9.1 applies, and the plaintiff is required to attach an expert affidavit to his complaint." Thus,

whether an expert affidavit is required under former O.C.G.A. § 9-11-9.1 depends not upon the identity of the defendant but upon the cause of action alleged in the complaint.

Peck v. Bishop, 294 Ga. App. 132, 668 S.E.2d 558 (2009)

Plaintiff filed a medical malpractice action pro se against a physician and a professional organization. The plaintiff failed to file an expert affidavit with the complaint or an affidavit from an attorney stating that the law firm was not retained more than 90 days before the expiration of the statute of limitations. Having filed neither an expert affidavit nor an affidavit of an attorney attesting to the fact that the plaintiff retained counsel within 90 days of the expiration of the statute of limitations, the Court of Appeals affirmed the trial court's dismissal of the medical malpractice action for failure to comply with O.C.G.A. § 9-11-9.1.

Akers v. Elsey, 294 Ga. App. 359 670 S.E. 2d 142 (2008)

In this medical malpractice action, the plaintiffs brought a case against physician who they alleged negligently performed a laparoscopic fundoplication surgery. The Superior Court granted the physician's motion to dismiss on the grounds that plaintiffs' experts failed to meet the statutory competency requirements. Plaintiff appealed this judgment. The Court of Appeals held that the evidence available at the pre-trial hearing failed to show that plaintiff's expert had actual professional knowledge and experience through active practice or by teaching during at least three to five years, as required, by the statute. Therefore, the Court of Appeals upheld the granting of the defendant's motion to dismiss on these grounds.

The plaintiffs in this case argued that the trial court erred in excluding their expert witnesses and dismissing their action. They further argued that both experts were well qualified and knowledgeable about the fundoplication procedure although neither had performed it laparoscopically. The defendants responded that aside from their experience with the surgical procedure at issues – laparoscopic versus open – the evidence clearly established that neither expert had practiced or taught in this area for at least three of the five years as required by O.C.G.A. § 24-9-67.1. Because the evidence was insufficient to show that either expert had experience through active practice or teaching at least three to five years, the Court reasoned that they were unqualified under the evidentiary standard for experts and therefore the case had to be dismissed. One of the plaintiff's experts stated that he had performed an open fundoplication before he retired sometime in the 1990's and also taught a procedure probably in 1990. This clearly did not meet the three to five years prior to the date of incident test. The other expert simply indicated that he had practiced general surgery within the previous five years and had “performed many nissen fundoplications and laparoscopic procedures.” Neither testimony met the expert qualifications under O.C.G.A. § 24-9-67.1.

Patterson v. Bates, 295 Ga. App. 141, 671 S.E.2d 195 (2008)

Plaintiff brought a medical malpractice lawsuit against a surgeon and a clinic after the implantation of a pacemaker. The plaintiff alleged that the surgeon was negligent in reversing the pacemaker leads at the connection to the pulse generator. The plaintiff further alleged that the clinic failed to diagnose the patient's condition caused by the reversal of the pacemaker leads. The plaintiff attached to the complaint the affidavit of a treating physician who supported the allegations of negligence. At a subsequent deposition, however, the expert affiant testified

that he had reviewed additional medical records that were not provided to him at the time he signed the initial affidavit. Based upon the additional medical records and information, the expert affiant testified that the leads to the pacemaker might have become dislodged instead of being improperly reversed during the initial implantation. The expert affiant also equivocated on his earlier opinion that the clinic was negligent in failing to detect the problem with the plaintiff's pacemaker. As a result of this conflicting testimony, the defendants filed motions for summary judgment, which the court granted. The trial court reasoned that the self-contradictory testimony rule as set forth in *Prophecy Corp. v. Charles Rossignol, Inc.* did not apply because the expert affiant's initial opinions were not based on a complete set of the plaintiff's medical records. As a result, the trial court ruled that the expert affiant did not provide a contradictory opinion and, therefore, the self-contradictory rule did not apply. The Court of Appeals reversed the decision of the trial court because it was impermissible for the trial court to disregard the expert's affidavit. The Court of Appeals reasoned that although the self-contradictory testimony rule did not apply to non-party expert witnesses, it was for the jury to determine the credibility of the expert affiant. In other words, the conflicting testimony went to the credibility of the affiant, but not to the admissibility of such evidence. In sum, the Court of Appeals ruled that it was improper for the trial court to grant summary judgment because the certified medical records were not attached to the expert's affidavit.

Dawson v. Leder, 294 Ga. App. 717, 669 S.E. 2d 720 (2008)

In this case, the patient's wife brought a medical malpractice and wrongful death action against the surgeon and physician who provided post-operative care to the patient after the patient died of respiratory arrest following a cervical spine surgery. The State Court granted summary judgment to the defendant and the plaintiff appealed. On appeal, the Court of Appeals held that the trial court did not abuse its discretion in concluding that the expert witness of the plaintiff was unqualified to render an opinion as to the conduct of the physicians. The expert admitted she had never managed and airway of a patient who had undergone a similar surgery, nor had she performed such surgery, and that the post-surgical care was generally performed by an anesthesiologist and conceded that she did not have anesthesiology training. For these reasons, the trial court excluded the expert's testimony on the grounds that she was unqualified to render an opinion as to standard of care as set forth in O.C.G.A. § 24-9-67.1. The Court notes that O.C.G.A. § 24-9-67.1 requires the witness to have actual and sufficient professional knowledge and experience in the area of practice of specialty in which the opinion is to be given. Here, the expert's vague assumptions that she was "airway training" and that "managing airway compromising looking at ways to prevent it" failed within her area of expertise, she never established that she taught and/or practiced in the area of post-surgical airway management with sufficient frequency to establish an appropriate level of knowledge so as to meet the criteria set forth in the statute. Summary judgment was appropriate for the defendants, as the trial court did not abuse its discretion to strike the expert.

Collins v. Dickman, 295 Ga. App. 601, 672 S.E. 2d 433 (2008)

In this case, the plaintiff and his wife filed a medical malpractice action against the physician and the hospital in connection with a stroke suffered after knee replacement surgery. The Superior Court granted summary judgment to the defendants and the plaintiff appealed. The Court of Appeals affirmed the summary judgment on several grounds including: (1) the trial court did not

err in refusing to admit a second expert affidavit submitted by plaintiffs; (2) the trial court did not abuse its discretion in concluding that the physician designated experts failed to meet statutory requirements; and (3) the trial court properly concluded that the registered nurse expert did not satisfy the statutory requirements for expert testimony on the nursing malpractice claim against the hospital.

The plaintiff in the case tried to add the affidavit of a new expert after the trial court had entered a scheduling order determining the time period in which they can identify such experts. The Court of Appeals upheld the trial court's decision to strike the new expert as being untimely as it was in violation of the court's scheduling order.

The physician expert identified by the plaintiff, an anesthesiologist, was held to not be engaged in the active practice or teaching of anesthesiology for three to five years prior to the date of incident. The facts should he had had no direct patient contact or responsibility in a hospital setting for 12 years and had not administered anesthesia in 16 years. Further, he was never employed by a university where he had claimed to have been a consulting physician and was never a surgeon even though his resume suggested otherwise. His CV listed him as a "deputy chief surgeon" for New York and Amtrak police. It turns out it was more a consulting position and was not a surgeon. For all of these reasons, the court held that he did not meet the statutory requirement of O.C.G.A. § 24-9-67.1.

The plaintiff also attached the affidavit of Charles Smith, RN. He initially indicated that the hospital nurses had breached the standard of care in a number of respects. At his deposition, Nurse Smith testified that he could not say the breaches in the standard of care caused the plaintiff's poor outcome. Additionally, Nurse Smith's resume showed that he assumed his current administrative position more than four years prior to the date of incident and in his deposition testified that he had not engaged in actual clinical patient for "many years." He also testified that his part-time teaching is limited to 12 hours a week. The Court held that this evidence supported trial court's determination that Nurse Smith was not qualified as a medical expert.

Houston v. Phoebe Putney Memorial Hospital, Inc., 295 Ga. App. 674, 673 S.E.2d 54 (2009)

The plaintiff patient brought a medical malpractice action against an emergency room and the hospital alleging the nurse incorrectly triaged the patient while the patient was having a stroke. The complaint alleged the nurse committed professional negligence because she did not thoroughly and correctly triage the patient. Attached to the complaint were the affidavit and curriculum vitae of a registered nurse expert licensed to practice in Georgia with experience working as a family practice nurse, a labor and delivery nurse, and a clinical nursing instructor. She averred that based on her review of the medical records and education, training and experienced, it was her opinion that the nurse violated the applicable standard of care by not accurately triaging the patient and not assuring the patient was seen by a physician in a timely manner. The defendants moved to dismiss the complaint arguing the nurse expert's affidavit did not meet the statutory expert requirements under O.C.G.A. Section 9-11-9.1. Without conducting an evidentiary hearing and based solely on the complaint and attachments thereto, the trial court granted the defendants' motion to dismiss. The trial court reasoned that the nurse affidavit and curriculum vitae reflected she had no experience working as a triage nurse in an



emergency room. The plaintiff appealed and the Court of Appeals reversed the trial court and stated that O.C.G.A. Section 9-11-9.1 is an initial pleading requirement. A complaint should only be dismissed based on this statute if it is certain the expert would not qualify. The Court of Appeals held the affidavit satisfied this statute by showing the nursing expert showed she had ongoing practical experience in the area of patient triage as well as many years of practical and teaching experience in the area of supervising patient care. This presumably included assessing the acuteness of a patient's condition. As such, the Court of Appeals could not find anything to suggest the assessment and triage of acute patients was exclusively within the professional skills of emergency room nurses. Accordingly, the nursing expert should have been deemed competent to testify under the liberal pleadings rules and at the very early stages of the litigation.

## **HIPAA**

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

The Supreme Court concluded that HIPAA “pre-empts,” or takes precedence over, Georgia’s privacy waiver. Thus, in order for defense counsel to interview an accident victim’s treating physicians, defense counsel must first comply with HIPAA by obtaining a signed authorization or judicial order. The Court concluded: “HIPAA protects a patient from the unauthorized disclosure of protected health information and it is applicable to *ex parte* oral communications between defense counsel and a plaintiff’s prior treating physicians. Accordingly, defense counsel cannot contact a plaintiff’s prior treating physicians to discuss his or her medical history without complying with HIPAA regulations. Although defense counsel can engage in such discussions if a plaintiff gives his or her consent, it must be clear that the plaintiff consented to *ex parte* oral communications. We will not presume a plaintiff consented to such communications simply because the plaintiff did not object when defendant sought plaintiff’s medical records pursuant to a subpoena or request for production of documents.”

Hamilton v. Shumpert, 2009 Ga. App. LEXIS 852 (2009)

The plaintiffs sought the imposition of sanctions upon the defense counsel for his *ex parte* communication with a treating physician. The trial court denied the plaintiffs’ motion for sanctions, and the Court of Appeals subsequently reviewed this denial under an abuse of discretion standard. At the time the lawsuit was filed in 2005, pursuant, one of the plaintiffs signed and filed a medical authorization form pursuant to O.C.G.A. § 9-11-9.2, granting the defendants’ attorneys the right to discuss her care and treatment with all of her physicians. The plaintiffs argued that since the Georgia Supreme Court subsequently ruled in Moreland v. Austin, 284 Ga. 730, 670 S.E.2d 68 (2008) that HIPAA preempts O.C.G.A. § 9-11-9.2, they should not be bound by the medical authorization. However, since the authorization did not in any way restrict discussions between defense counsel and prior treating physicians, the Court did not find that the Moreland decision affected the validity of the authorization.

Alvista Healthcare Center, Inc. v. Miller, 2009 WL 368, 383 (Ga. App.) (February 17, 2009)

In this action, the wife of a deceased man brought a wrongful death action against the nursing home where her husband lived at the time of his death. She also sought injunctive and declaratory relief requiring the operator of the nursing home to release her husband’s records to her. The Superior Court ordered the operator to provide the records. The nursing home appealed

this order. The Court of Appeals held that the wife was entitled under Privacy Rule of Health Insurance Portability and Accountability Act (HIPAA) to access her husband's medical records from the operator of the facility.

The case offers lengthy discussion of the interplay between Georgia statutory law and federal HIPAA law. The court indicated that Georgia's statute, O.C.G.A. § 31-33-2 requires the healthcare provider with custody and control over the patient's medical records to furnish a copy of the records to a surviving spouse of a deceased patient if an executor, administrator, or temporary administrator for the decedent's estate has not been appointed. Additionally, Georgia's wrongful death statute gives the surviving spouse the authority to act on his behalf on investigating and pursuing a wrongful death claim. Because the statute of limitations on the wrongful death claim was soon to expire, the Court found that the wife lacked an adequate remedy at law and injunctive relief was therefore appropriate.

### **Immunity**

Porter v. Guill, 681 S.E.2d 230, 2009 Ga. App. LEXIS 791 (2009)

This medical malpractice and wrongful death action involved a five-month-old baby who suffered from respiratory problems and ultimately died from a cardiac arrest following his discharge from MCG. The baby's parents sued his various treating physicians, including a pediatric pulmonologist who provided care to the baby at MCG. The pediatric pulmonologist, who was a faculty member at MCG, obtained summary judgment on the basis of her official immunity as a state employee. On appeal, the plaintiffs argued that the physician's treatment of the baby fell outside the scope of her official duties as a staff physician and faculty member at MCG. The plaintiffs relied on Keenan v. Plouffe, 267 Ga. 791, 482 S.E.2d 253 (1997), a previous Georgia Supreme Court Decision in which the Court held that a physician and faculty member at MCG was not acting within the scope of his state employment when he performed surgery on a private-pay patient. Here, the Court distinguished this case from Keenan because: 1.) the patient was a Medicaid patient; 2.) the defendant doctor was obligated to treat the patient in her capacity as a faculty member at MCG; and 3.) the defendant doctor treated the patient as part of her job as an MCG faculty member. The Court thus agreed with the trial court that the defendant physician was immune from liability as a faculty member of MCG.

### **Jury Instructions**

Gilley v. Hudson, 2009 Ga. App. LEXIS 782 (2009)

In this medical malpractice action involving a physician's treatment of a dislocated hip, the Court of Appeals reversed a defense verdict on the ground that the trial court erred in giving the "hindsight charge" to the jury. The trial court's hindsight charge included the following instruction: "Negligence consists of not foreseeing and guarding against that which is probable and likely to happen, not against that which is only remotely or slightly possible." Quoting the Supreme Court in Smith v. Finch, 2009 Ga. LEXIS 395 (June 29 2009), the Court of Appeals stated that this particular portion of the hindsight charge was "inconsistent with the medical decision-making process, which often requires the consideration of unlikely but serious consequences in the diagnosis and treatment of disease and [was] generally inconsistent with the standard for foreseeability in ... negligence law." The Court further found that this charge

essentially instructed the jury to disregard testimony from the plaintiff's expert on the standard of care and was therefore misleading and prejudicial. Accordingly, the Court reversed the trial court's judgment.

Sagon v. Peachtree Cardiovascular and Thoracic Surgeons, P.A., 297 Ga. App. 379, 677 S.E.2d 351 (2009)

The plaintiff filed a wrongful death lawsuit against a surgical center for the death of her husband caused by pulmonary embolism following a coronary artery bypass grafting surgery. The plaintiff contended that the surgery center was vicariously liable for its nurses and non-physician staff for their negligent failure to advise, assess, diagnose, and treat her husband. Additionally, the plaintiff alleged that the surgery center's physicians, nurses, and staff members failed to maintain complete medical records reflecting her husband's telephone calls and prescriptions, failed to consult with their supervising physicians regarding the post-operative symptoms experienced by her husband, failed to advise her husband to seek appropriate medical attention, and failed to properly examine and treat her husband's condition. In contrast, the surgery center's witnesses and experts testified at trial that the husband did not present any symptoms indicating the existence of a blood clot, deep vein thrombosis, or an acute pulmonary embolism. Such symptoms would have included a unilateral swelling and pain in his non-operative leg combined with shortness of breath. Instead, the medical records noted symptoms of mild shortness of breath and mild edema or swelling in both legs, which were said to be indicative of fluid retention, fatigue from the surgery, and/or anxiety. Additionally, the expert for the surgery center opined that the medical staff members met the standard of care in their examination and treatment of the husband based upon the evidence. At the conclusion of the trial, the jury returned a verdict in favor of the surgery center. However, the plaintiff contended she was entitled to a new trial because the trial court erroneously failed to charge the jury on the standard of care applicable to the nurses and non-physician office staff. The Court of Appeals affirmed the trial court's denial of the motion for the new trial, finding that the trial court properly cited the law applicable to both physicians and nurses. Specifically, the Court found that the jury charge, which set forth the standard of care applicable to "person[s] professing to practice...the administering of medicine for compensation," clearly and sufficiently encompassed the standard of care applicable to nurses.

### **Ordinary Negligence**

Liu v. Boyd, 294 Ga. App. 224, 668 S.E.2d 843 (2008)

The Boyds' son was being treated by Dr. Liu from June 2005 to December 2005 and being prescribed various pain medications. On December 30, 2005, the Boyd's son died as a result of multiple drug toxicity. As a result, the Boyd's filed a wrongful death action against Dr. Liu alleging he breached the duty of reasonable care that he owed to Boyd's son by providing him with various pain medication prescriptions without taking steps to ensure that the prescriptions were not being abused. Boyd's complaint did not include an attached expert affidavit pursuant to O.C.G.A. Section 9-11-9.1. Dr. Liu filed a motion to dismiss for plaintiffs' failure to comply with the expert affidavit requirement. The trial court granted partially granted the motion to dismiss but did not dismiss the entire case as the trial court stated that some allegations were based on ordinary negligence. Dr. Liu appealed the ruling and the Boyds argued that allegations

that Dr. Liu sold pain medication prescriptions to her son without actually treating him and without warning him of the dangers associated with the medications were acts of ordinary negligence. The Court of Appeals did not agree and reversed the trial court holding that all allegations of negligence contained in the plaintiffs' complaint were professional negligence. The Court of Appeals further stated, "If the professional's allegedly negligent action requires the actor to exercise professional skill and judgment to comply with a standard of conduct within the professional's area of expertise, the action is for professional negligence." The Court of Appeals has ruled in other cases that examples of medical questions include cases where the plaintiff alleges the use of inappropriate medication or wrongful administration of medication. As such, all claims of negligence included in the plaintiffs' complaint were of professional negligence and required an expert affidavit.

Chandler v. Opensided MRI of Atlanta, LLC, 2009 Ga. App. LEXIS 846 (2009)

This case involved a patient who fell to the floor and sustained serious injuries while getting down from an MRI table. In the patient's complaint, she alleged that the technician was negligent for failing to lower the MRI table and failing to assist her off the table after the procedure was completed. The patient's complaint did not include an expert affidavit as required by O.C.G.A. § 9-11-9.1(a) in professional malpractice cases. Plaintiff later voluntarily dismissed her initial complaint and re-filed it with an affidavit from a radiology technician, which alleged that the failure to lower the MRI table and assist the patient of the table breached the standard of care for radiological technicians. The defendants then moved to dismiss the re-filed complaint on grounds that the original complaint alleged professional malpractice but failed to include an expert affidavit as required by O.C.G.A. § 9-11-9.1(a) and that the re-filed complaint was barred by the statute of limitation. On review of the trial court's dismissal, the Court of Appeals concluded that the record did not contain sufficient information to show that the case involved only professional negligence. When assessing whether the complaint alleges ordinary negligence, courts must liberally construe the allegations of the complaint and only conclude that ordinary negligence has not been alleged if it is foreclosed by the complaint itself. "In falling patient cases, the distinction between ordinary and professional negligence turns on whether the decision on how to monitor, assist or care for the patient was based on a professional assessment of whether the patient, based on the patient's medical condition, required assistance of some sort." In this case, the Court could only speculate whether the MRI technician had to assess the patient's medical condition to determine whether she could get down from a raised examination table. Thus, the original complaint did not foreclose an ordinary negligence claim, and dismissal for failure to provide an expert affidavit was unwarranted.

### **Peer Review**

Hospital Authority of Valdosta and Lowndes County v. Meeks, 294 Ga. App. 629, 669 S.E.2d 667 (2008)

Georgia's peer review and medical review privileges protect all proceedings and information of a review organization, not just what is included in the physical files. With certain exceptions, the protections afforded by these privileges are absolute. Thus, the trial court's protective order which was limited to the "contents" of a hospital's peer review and medical review files was error. However, the peer review and medical privileges do not extend to all aspects of the

credentialing process. Thus, some credentialing information may be discoverable in civil litigation. On the other hand, certain aspects of the credentialing process may be peer review functions, especially if the process involves the evaluation of a physician's performance of an actual medical procedure. Those aspects of the credentialing process are protected from discovery under the peer review and medical review privileges.

### **Statute of Limitation and Statute of Repose**

Schramm v. Lyon, 285 Ga. 72, 673 S.E.2d 241 (2009)

The plaintiff brought a medical malpractice action against physicians and their medical practices, arising out of their alleged failure to warn her of her risk of developing overwhelming post-splenectomy infection ("OPSI"), to advise her of preventative measures she should take, and to prescribe appropriate medications and vaccinations to reduce the risk of developing OPSI. The Supreme Court ruled that the five-year statute of repose did not bar plaintiff's claims. Although the physicians and their practice groups initially treated the patient more than five years before the filing of the complaint, the plaintiff adequately alleged subsequent separate and independent acts of professional negligence that occurred within the statutory period of repose. As a result, the Court rejected the physicians' characterization of all of these alleged acts of professional negligence as part of their continuing treatment of plaintiff. Multiple breaches of the standard of care may constitute new and separate instances of professional negligence, and more than one negligent act may contribute to a plaintiff's injury. The Supreme Court comments, however, that their ruling does not adopt the continuing treatment doctrine to allow for the tolling of the statute of repose.

Bush v. Sreeram, 298 Ga. App. 68, 679 S.E.2d 87 (2009)

This was a wrongful death case in which the plaintiffs failed to file their complaint within the five-year statute of repose applicable to medical malpractice actions. The trial court granted the defendants' motion to dismiss on the ground that the lawsuit was untimely filed. On appeal, plaintiffs argued that Georgia's statute of repose is unconstitutional on both due process and equal protection grounds. Specifically, the plaintiffs contended that the statute of repose arbitrarily and unreasonably imposes a five-year limit on filing a claim. With respect to their equal protection argument, Plaintiffs stated that the statute of repose arbitrarily treats litigants who die more than five years after the alleged negligence differently than those who die less than five years after the alleged negligence. The Court of Appeals rejected both arguments, citing to a prior Supreme Court ruling that the statute of repose survives rational basis review because "the passage of time provided a rational basis for enacting the five year period" and "the legislature had a legitimate interest in eliminating state claims." In addition to their constitutional challenges to the statute of repose, the plaintiffs also argued that the statute of repose was inapplicable to their right to file a cause of action because the cause of action had not accrued at the time the statute ran. The Court found this argument to be completely unsupported by case law and upheld the trial court's dismissal of the lawsuit.

Smith v. Harris, 294 Ga. App. 333, 670 S.E.2d 136 (2008)

The Court of Appeals held that this medical malpractice action was time-barred under O.C.G.A. § 9-3-71. O.C.G.A. § 9-3-71 provides that a medical malpractice actions must be brought

“within two years after the date on which an injury or death arising from a negligent or wrongful act or omission occurred.” Thus, “the true test to determine when the cause of action accrued is to ascertain the time when the plaintiff could first have maintained his action to a successful result.” Here, the evidence showed that the plaintiff was suffering from antibiotic poisoning, with symptoms including renal damage and inner ear damage, by May 15, 2002. This apparent and continuous condition was the proximate result of the defendant physician’s course of treatment with the drug, is failure to recognize the toxic condition and symptoms resulting from the treatment, or both. The fact that the plaintiff did not know the cause of her symptoms on May 15, 2002 did not lead to a different result because her subsequent inner ear damage was directly related to the doctor’s failure to recognize the antibiotic poisoning. Furthermore, this subsequent inner ear damage could not be treated as a “new injury” giving rise to a new statute of limitation because it was the result of the same condition from which she was suffering on May 15, 2002.

### **Summary Judgment**

Clay v. Rippey, 2009 Ga. App. LEXIS 859 (2009)

The plaintiff in this case, a six-year-old child, sued her mother’s treating physicians for a “preconception tort,” alleging that their failure to advise her mother to take folic acid supplements before she was conceived caused her to be born with neurological problems. Prior to giving birth to plaintiff, the mother had sought treatment with the defendant physicians in connection with a previous pregnancy. Eleven weeks into the pregnancy, an ultrasound showed that the baby had a severe neural tube defect; and upon her physicians’ recommendations, the mother terminated the pregnancy. The mother did not follow up with any of her physicians following the termination of her pregnancy. A few years later, the mother discovered that she was pregnant with plaintiff and began treatment with one of her previous physicians. Plaintiff was born with serious neurological defects and sued all the physicians who treated her mother in connection with her first pregnancy, contending that they owed the mother a duty, following the termination of her first pregnancy, to recommend and prescribe folic acid in order to prevent a recurrence of a neural tube defect in a subsequent pregnancy. The trial court granted summary judgment to all of the defendant physicians, finding an insufficient connection between their conduct and the child’s injuries because the physicians only treated the mother in connection with her first pregnancy and she never returned to any of them for post-termination or preconception care, treatment, or consultation. Although the Court of Appeals recognized a preconception tort as a proper cause of action, it nonetheless upheld the trial court’s grant of summary judgment, stating that the standard of care did not require any of the defendant physicians to advise the mother about how to lower the risk of birth defects in potential future pregnancies. The Court further explained that the plaintiff failed to establish through expert testimony that any of the defendant physicians were obligated to follow up with the patient following her termination of the physician-patient relationship with them.

Lee v. Phoebe Putney Memorial Hospital, Inc., 297 Ga. App. 692 (2009)

In this medical malpractice action, the trial court granted a hospital and nurse summary judgment on plaintiff’s claim that these defendants negligently caused her to suffer burns from scalding water. The plaintiff, a diabetic, suffered from a condition which caused her to often be unable to feel pain or heat. During her hospitalization, the plaintiff was administered two different types

of nausea medications, both of which were known to cause drowsiness as a side effect. While under the influence of these medications, the plaintiff informed the defendant nurse that she was drowsy. The nurse nonetheless insisted that plaintiff take a shower and assisted plaintiff into a shower stall, turned on the water, and left. The plaintiff promptly fell asleep and remained asleep until the nurse returned an hour later. A physician subsequently determined that plaintiff had suffered severe burns on her inner thighs from the hot shower water. Finding that the foregoing evidence was sufficient to create a jury issue on the question of negligence, the Court of Appeals held that the trial court erred in granting summary judgment to the defendants. In so finding, the Court defined the duty of care owed by a hospital to a patient to include “safeguarding and protecting the patient from any known or reasonably apprehended danger from himself which may be due to his condition.” Here, the plaintiff presented evidence that the defendant nurse knew of her drowsiness from the medications as well as her inability to perceive pain and heat but nonetheless left her unattended in a hot shower. She also presented evidence that the hot shower water resulted in severe burns. Because plaintiff presented some evidence showing negligence, causation and damages, summary judgment was improper.

Porter v. Guill, 681 S.E.2d 230, 2009 Ga. App. LEXIS 791 (2009)

In this medical malpractice action, the defendant sought summary judgment based on inconsistencies between the causation opinion that the plaintiff’s expert originally attested to in his affidavit and the causation testimony he later provided at his deposition. In upholding the trial court’s denial of the motion for summary judgment, the Court of Appeals stated: “An affidavit of a physician that establishes the necessary causal link in terms of probability or reasonable medical certainty, even though later contradicted by that physician in deposition testimony, is sufficient to withstand summary judgment on the issue of causation.”

Pruette v. Phoebe Putney Memorial Hospital, 295 Ga. App. 335, 671 S.E.2d 844 (2008)

In this medical malpractice action, the facts of which are discussed *supra*, the plaintiff sued the hospital for the allegedly negligent acts of some nurses. The trial court granted the hospital summary judgment on the basis that the nurses were a borrowed servant of the pulmonary critical care specialist. The Court of Appeals reversed, reasoning that although a trial court may grant summary judgment sua sponte; the party against whom summary judgment is granted is required to be given a full and fair notice and opportunity to respond. In this case, the hospital did not raise the borrowed servant defense in its answer, the pretrial order, its summary judgment brief, or at the hearing on the summary judgment motions. Furthermore, the trial court never referenced the borrowed servant defense and never stated that it wanted to hear from the parties on the application of the borrowed servant defense. As a result, the Court of Appeals reversed the grant of summary judgment for the hospital on the grounds that the plaintiff was not given adequate notice and an opportunity to be heard on the issue of whether the borrowed servant defense barred the wrongful death claim against the hospital.

Long v. Natarajan, 291 Ga. App. 814, 662 S.E.2d 876 (2008)

The plaintiff patient and her husband brought an action for battery, loss of consortium and punitive damages against a physician after he removed tissue from the patient’s buttock during a surgery to remove areas of lymphatic tissue from her neck and shoulder. The physician stated

that during the neck and shoulder surgery, he noticed an abscess on the patient's left buttock that was removed. The trial court granted the physician's motion for summary judgment finding that the procedure was permitted under the terms of the consent form the patient signed before her surgery.