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The Status of Tort Reform (S.B. 3) 4 Years Later

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1 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).

–The proper relief for an erroneous transfer under this statute is to transfer the case back to the original forum.

Hospital Authority of Gwinnett County v. Rapson, 283 Ga. App. 297 (2007).

2 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. The key factor appears to be that the statute gives the *court*, not a party, the power to determine proper venue.

> 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)

–When a court applies this statute, it must make findings of fact on the record reflecting an analysis of the seven factors listed in the statute (Hewett v. Raytheon Aircraft Co., 273 Ga. App. 242 (2005); Kennestone Hosp. Inc. v. Lamb, 288 Ga. App. 289 (2007).

The trial court's ruling is reviewed under an abuse of discretion standard. R.J. Taylor Memorial Hospital,

Inc. v. Beck, 280 Ga. 660 (2006); Federal Ins. Co. v. Chicago Ins. Co., 281 Ga. App. 152 (2006).

3 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)

–The ordinary standard of review is whether the affidavit attached to the complaint discloses with certainty that the plaintiff would not be entitled to relief. Hewett v. Kalish, 264 Ga. 183 (1994); Handson v. HCA Health Servs., 264 Ga. 293 (1994)

–However, the standard of review is "abuse of discretion" if

(a) an evidentiary hearing is conducted under O.C.G.A. § 24-9-67.1(d). Spacht v. Troyer, 288 Ga. App. 898 (2007); or

(b) where evidence is evaluated in connection with a motion for summary

judgment. MCG Health, Inc. v. Barton, 285 Ga. App. 577 (2007).

4 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 HIPPA (42 U.S.C. § 1320-7(a)(2). The Georgia law conflicted with the federal law is 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

See also, Moreland v. Austin, 2008 Ga. Lexis 864 (November 3, 2008) (HIPPA also precludes ex parte contact by the defendant doctor's attorney with the patient's prior treating physicians).

5 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.

–this statute has been amended since its 2005 enactment to make the statue more even handed and to eliminate the most of the poorly drafted portions of this provision

–a number of trial courts held that this provision was unconstitutional on a variety of grounds. Muenster v. Suh, Case No., 03-A-01873-4 (Superior Court of Gwinnett County, September 22, 2005) (access to the courts; special legislation; retroactivity); Harris v. Henna Autoplex, LLC, Case No. 03-SC-1247 (State Court of Cherokee County, March 21, 2006) (similar); Dowland v. Fowler Properties Inc., Case No. 02-SC-1625 (State Court of Cherokee County, September 15, 2006 (same); Cash v. Cochran, Case No. 02CV-1747 (Superior Court of Forsyth County, July 31, 2006) (access to courts and retroactivity).

–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).

6 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).

7 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.

–Numerous lower court decisions applying the Daubert standards to admit or exclude expert testimony. E.g., Shiver v. Ga. & Fla. Railnet, Inc., 287 Ga. App. 828 (2007) (excluding the testimony of plaintiff's treating physician regarding causation in a toxic tort case when that opinion was based on an incomplete medical history of the plaintiff); Hawkins v. OB-GYN Assoc., P.A., 290 Ga. App. 892 (2008) (excluding testimony of plaintiff's expert on cause of shoulder injury; opinion was not based on any scientifically reliable method).

Numerous lower court decisions applying the professional malpractice expert qualification sections. E.g. Mays v. Ellis, 283 Ga. App. 195 (2007) (gastroenterologist who had never practiced surgery is qualified to testify against an OB/GYN in a case that "involved" surgery, but where the issue of liability turned on the diagnosis, not the surgery); Tenent Healthcare Corp. v. Gilbert, 277 Ga. App. 895 (2006) (the relevant time frame in which to evaluate whether an expert witness satisfies the statutory standards for qualifications is measured from the date of tort, not the time of trial).

8 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.

–This provision applies only to causes of actions that accrue after the date of the enactment of S.B. 3. Willingham v. Hudson, 274 Ga. App. 200 (2005).

–What constitutes clear and convincing evidence of gross negligence? See Pottinger v. Smith, 293 Ga. App. 626 (2008) (trial court denied the defendant's motion for summary judgment; the Court of Appeals reversed, stating:

> In support of his contention that the record contains clear and convincing evidence proving that Pottinger's actions were grossly negligent, Smith points to medical records showing that Pottinger failed to recognize a serious leg fracture shown by the x-rays, and that Pottinger failed to call an orthopedic surgeon to the emergency room to consult about his leg injury. Smith also points to the physician's opinion in his OCGA § 9-11-9.1 expert affidavit that these failures were below the standard of care and were grossly

> negligent. Pottinger, however, points to evidence that she immediately ordered x-rays on Smith's injured leg; that the x-rays were read by a radiologist; that she relied on the radiologist's finding that the x-rays did not show a serious fracture, and that, based on this finding, there was no need for an orthopedic surgeon to consult in the emergency room about Smith's leg injury. In Pottinger's opinion, her actions met or exceeded the standard of care....On the present record, this is such a plain and indisputable case. Even assuming there was evidence sufficient to create a jury issue as to whether Pottinger's actions were negligent, there is no evidence, and certainly no clear and convincing evidence, by which a jury could reasonably conclude that Pottinger failed to exercise even slight care and was therefore grossly negligent.

–I expect an equal protection constitutional challenge to this provision, but I do not know of any cases addressing that issue.

9 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.

10 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. Specifically, he maintains that the retention of O.C.G.A. § 51-12-32 authorizing contribution and the application of traditional principles of statutory construction yield the conclusion that § 51-12-33 merely clarifies the law as it existed prior to the enactment of S.B. 3–that joint and several liability is abolished only when the

plaintiff is at fault. 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.

–there are a host of issues yet to be resolved in a reported decision, including:

–does this provision abolish joint and several liability in general?

–does this provision authorize juries to assign percentages of fault to *any* person or entity the defendant claims is partially at fault?

–would this include *unidentified persons* (e.g., the driver of an alleged swerving car who drove off without being identified) or *intentional wrongdoers*? (E.g.,in a suit brought against the owner of an apartment whose negligent security contributed to the criminal assault of the plaintiff, should a percentage of fault be assigned to the criminal?).

–If the answer to the above questions is 'yes' as a matter of statutory construction, does this construction raise constitutional issues? Cf., Plumb v. The Fourth Judicial District Court, 927 P.2d 1011 (Mont. 1996) (striking down Montana statute). See generally, Nancy Marcus, Phantom Parties and Other Practical Problems with the Attempted Abolition of Joint and Several Liability, 60 Ark. L. Rev. 437 (2007).

11 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.

– This statute was held to violate a variety of Georgia constitutional provisions in Park v. Wellstar Health Systems, Inc., Case No. 2007 CV135208 (Fulton County Superior Court, April 30, 2008). This ruling was appealed to the Georgia Supreme Court. The plaintiffs argued that the damage cap violated state constitutional provisions pertaining to the right to a jury trial, separation of powers, equal protection, and special legislation. The case was full briefed and set for oral argument in November. Four days before oral argument, the case was settled and the appeal was dismissed.