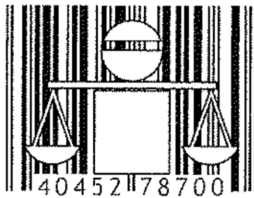

PRODUCT LIABILITY

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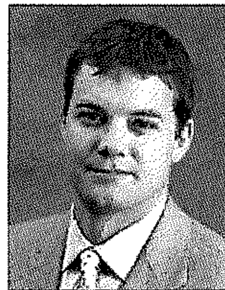
Georgia's New Tort Reform:

It's Not Just A Medical Malpractice Statute

Dart Meadows and Jason M. Tate from Balch & Bingham, LLP



Wellington called the Battle of Waterloo a "close run thing." But for a few different decisions by a few different men, the outcome of that famous battle might have been very different. Litigation, too, can be a "close run thing." And different actions by different people can drastically affect your trial and products liability case. Given that the Newsletter has devoted past articles to important practical topics, such as service of process, other similar incidents, and so on, we decided to focus on something of a more philosophical bent.

On February 16, 2005, Governor Sonny Perdue signed the "Georgia Tort Reform Act". A number of the reforms passed are limited to health care providers, medical services, health care professionals, and medical malpractice lawsuits. Many others apply to product liability litigation.

The major reforms that are universally applicable can essentially be categorized into: (1) the elimination of joint and several liability; (2) heightened expert testimony requirements; (3) changes to venue provisions; and (4) new methods to recover attorneys' fees and litigation costs.

I. Elimination of joint and several liability

Prior to the enactment of this legislation, multiple defendants were joint tortfeasors if they: (1) tortiously acted in concert; or (2) acted separately to cause a single, indivisible injury. Previously, joint tortfeasors were jointly and severally liable for any judgment entered. The new tort reform statute abolishes joint and several liability and abolishes a co-defendant's right of contribution. Under the new legislation, the trier of fact must determine the degree of fault for all persons who contributed to the alleged injury, including the plaintiff. If a plaintiff is more than 50% at fault, the claim still fails like before. The trier of fact will now apportion damages to all persons who contributed to the injury. A defendant that is found negligent is only responsible for their relative share of the damages.

In apportioning liability, the trier of fact must consider the fault of all persons alleged to have contributed to the injury, regardless of whether they were or could have been named as a party. This includes non-parties. To introduce evidence of the fault of a non-party, a defending party must file a pleading no later than 120 days prior to the date of trial identifying the nonparty, their last known address, and brief statement of the basis for the non-party's fault. The finding of negligence of a non-party is not binding on that person or entity; it is merely to assist the trier of fact in properly allocating fault and apportioning liability.

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II. Adoption of the Daubert standard for the admission of expert testimony

The new tort reform bill strikes the language of O.C.G.A. § 24-9-67 and replaces it with new requirements that specifically adopts the federal Daubert standard to determine the admissibility of expert testimony. Previously, expert testimony was admissible upon a finding by the court that the technique on which the expert's opinion was based had reached a "scientific stage of verifiable certainty." Jordan v. Georgia Power Co., 219 Ga.App. 690, 466 S.E.2d 601 (1995). Opinions were almost always left to the jury to weigh.

Daubert v. Merrel Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786 (1993), focuses on the expert's principles and methodology. The Daubert standard prevents the admission of "junk science" in favor of techniques and methods that are considered scientifically reliable. Through Daubert, judges perform a gate keeping role to "ensure that any and all scientific testimony or evidence is not only relevant, but reliable." The court considers the following factors in determining if a technique is scientifically reliable: general acceptance in the field; peer review and publication; rate of error; and the existence and maintenance of standards. Id.

The new Daubert standard applies to actual testimony proffered at trial and to affidavits submitted in professional malpractice actions. The tort reform statute replaces the requirements for professional affidavits set forth in O.C.G.A. § 9-11-9.1, in part, to reflect the change in the standard for the admission of expert testimony. For an expert affidavit to be sufficient, the expert must be able to withstand a Daubert challenge. This is particularly important in light of the extended time period this code section gives a defendant to file a motion to dismiss based on the sufficiency of the affidavit. Previously, a defendant had to file a motion to dismiss based on the sufficiency of an affidavit with the first responsive pleading. Now, the defendant can file such a motion up to the end of discovery. If a defendant files a motion to dismiss arguing plaintiff's affidavit is defective, then plaintiff's complaint is subject to dismissal for failure to state a claim, except that the plaintiff has 30 days from service of the motion to cure the defect. It is important to note that the plaintiff has 30 days to cure from the service of defendant's motion, not 30 days from a court's finding that the affidavit is in fact defective. The significance of this extension is that if a defendant is successful in challenging an affidavit and the statute of limitations has run on the cause of action, then the plaintiff's claim is barred.

III. Venue

The foundation for proper venue is established by the Georgia Constitution and supplemented by statutory provisions. Some constitutional provisions identify the venue for a specific cause of action. For every cause of action that is not specifically addressed, however, the default rule is that a defendant has a right to be sued in the county in which he resides. Art. VI Par. IV, Sec. 2 of the Georgia Constitution supplements all other venue provisions and provides that where multiple defendants are sued as joint obligors, joint tortfeasors, joint promisors, copartners, or joint trespassers, then venue is proper in the resident county of any defendant.

The new legislation strikes the language of O.C.G.A. § 9-10-31 and completely replaces it.[1] The new language of O.C.G.A. § 9-10-31 provides, in part, that Art. VI Par. IV, Sec. 2 provides the *only time* a defendant may be sued outside of the county of his residence. This language appears to be intended to overrule Natpar v. E.T. Kassinger, Inc. 258 Ga. 102, 365 S.E.2d 442 (1988). In Natpar, the Georgia Supreme Court ruled that "where a plaintiff brings suit in the same county on two claims arising from the same transaction and the Georgia Constitution designates that county as the venue for one of those claims, the trial court has the discretion to entertain both claims." Id. at 443-444. Prior to Natpar, courts examined whether venue was proper as to each claim asserted. If venue was not proper to a claim, then it was dismissed or transferred to the proper forum.[2] This system produced multiple suits in different forums that arose out of the same facts. Natpar eliminated this practice in the interests of "judicial economy, convenience to the litigants and witnesses, and fairness to the parties." Id. at 444.

In light of the new language of O.C.G.A. § 9-10-31, it appears that plaintiffs can no longer piggyback claims in one forum. Under this new legislation, trial courts should independently examine whether venue is proper for each claim asserted.

Two other major venue changes implemented by the new tort reform are: (1) the return of vanishing venue; and (2) the adoption of a comprehensive application of the doctrine of *forum non conveniens*.

A. Vanishing Venue

The new language of O.C.G.A. § 9-10-31 revives the application of vanishing venue which allows a non-resident defendant to transfer a case under certain circumstances. In light of the discussion above, a defendant may be sued outside of the county in which he resides only where a joint obligor, joint tortfeasor, joint promisor, copartner, or joint trespasser relationship exists. In these cases, a plaintiff has a choice of forums in which he can file. Vanishing venue arises when the resident defendant, upon whom venue is deemed proper, is dismissed from the lawsuit, leaving only non-resident defendants. Once the resident defendant is dismissed, the basis for venue against the non-resident defendants disappears. The non-resident defendants can move to transfer the case to the proper venue. Under the doctrine of vanishing venue, cases can be transferred both before and after trial begins. The new version of O.C.G.A. § 9-10-31 differs from the previous version because a non-resident defendant now has the right to transfer a case after trial has commenced.

B. Forum Non Conveniens

Georgia's tort reform bill also adopts a comprehensive doctrine of *forum non conveniens*, which allows a trial court to dismiss or transfer a suit that otherwise meets all of the jurisdiction and venue requirements because of administrative efficiency and convenience. Traditionally, Georgia courts have refused to adopt the doctrine of *forum non conveniens*. See Southern Railway Co. v. Goodman, 259 Ga. 339, 380 S.E.2d 460 (1989); Atlantic Coast Line R.R. v. Wiggins, 77 Ga. App. 756, 49 S.E.2d 909 (1948). The logic behind this reluctance was a desire to provide plaintiffs, especially resident plaintiffs, access to the courts of their choosing.[3] The Supreme Court deferred to the will of the General Assembly noting that "because the courts of Georgia have no inherent authority to decline to exercise the jurisdiction otherwise granted by our constitution, the doctrine of *forum non conveniens* is generally controlled by statutory provisions." Holtsclaw v. Holtsclaw, 269 Ga. 163, 164, 496 S.E.2d 262, 263 (1998).

In 1998, on the heels of a limited adoption of *forum non conveniens* by the General Assembly,[4] the Georgia Supreme

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Court adopted a limited application of its own allowing courts to deny jurisdiction for actions that arose outside the country and involved a nonresident alien. See AT&T Corp. v. Sigala, 274 Ga. 137, 549 S.E.2d 373, 375 (2001)("...we adopt the doctrine of *forum non conveniens* and hold that Georgia courts may exercise their inherent power and dismiss cases involving nonresident aliens when an adequate alternative forum exists and dismissal serves the interests of justice and convenience of the parties"). In 2003 the General Assembly amended O.C.G.A. § 50-2-21, allowing Georgia courts to decline exercising jurisdiction in a civil action involving a nonresident that arises outside of the state, if there is another forum which has jurisdiction. See O.C.G.A. § 50-2-21. Sigala and O.C.G.A. § 50-2-21 only apply to nonresidents.

O.C.G.A. § 9-10-31.1 supplements Sigala and O.C.G.A. § 50-2-21 and provide Georgia courts with the authority to refuse to exercise its jurisdiction in cases involving a resident that arise outside of the state. In addition, it also allows a court to transfer a case to another court within the state where venue is more appropriate. To determine if a case should be dismissed or transferred under *forum non conveniens* a court should consider: (1) relative ease of access to sources of proof; (2) availability and cost of compulsory process for attendance of unwilling witnesses; (3) possibility of viewing the premises; (4) unnecessary expense or trouble to the defendant not necessary to the plaintiff's own right to pursue his or her remedy; (5) administrative difficulties for the forum court; (6) existence of local interests in deciding the case; and (7) the traditional deference given to a plaintiff's choice of forum.

Once a court declines to exercise its jurisdiction under the doctrine of *forum non conveniens*, it may not dismiss the case until the defendant files a written stipulation that all defendants waive their right to assert a statute of limitations defense in all other states of the United States in which the claim was not barred at the time the claim was filed in Georgia. This waiver is not absolute; it merely tolls the statute of limitations period in those states beginning on the date the claim was filed in Georgia and ending on the date the claim is dismissed.

IV. Recovery of Attorney's Fees and Litigation Costs

The adoption of O.C.G.A. § 9-11-68 makes two major changes to the recovery of attorneys' fees and litigation costs: (1) it incorporates a concept known as the "offer of settlement" into the Georgia legal system; and (2) it provides an avenue for a party to ask the fact finder, rather than the court, to determine if fees and costs should be awarded.

The offer of settlement provision provides that in the event a party makes a settlement offer that is rejected, and that party later receives a judgment that is 25% more favorable, then the party making the offer is entitled to recover litigation costs and attorneys' fees from the date of the rejection forward. To recover fees and costs under this provision, a party must: (1) make an offer more than 30 days after the service of the summons and complaint; (2) state in writing it is being made pursuant to O.C.G.A. § 9-11-68; (3) identify the parties making the proposal and the party the proposal is being made to; (4) state the conditions; (5) state the total amount; (6) identify any amount proposed to settle a claim for punitive damages; (7) state whether the offer includes attorneys' fees and costs; (8) include a certificate of service; and (9) be served by certified mail or statutory overnight delivery as required by O.C.G.A. § 9-11-5. In addition, the offer must remain open for 30 days. [5]

If these requirements are met, then within 30 days of the entry of judgment, or after a voluntary or involuntary dismissal, a party may move for fees and costs under this code section. If the court determines that the offer was in fact 25% more favorable, then the party is entitled to fees and costs, unless the court determines that the offer was not made in good faith. The existing avenues to recover litigation costs and attorney's fees from the opposing party, i.e., O.C.G.A. § 13-6-11 and O.C.G.A. § 9-15-14, involve a subjective standard. The new offer of judgment provision is much more objective. If a verdict is 25% more favorable than a rejected settlement offer, litigation costs and attorney's fees will be awarded unless the offer was not made in good faith.

O.C.G.A. § 9-11-68 also provides an alternative to moving for fees and costs under O.C.G.A. § 9-15-14. Pursuant to O.C.G.A. § 9-11-68, at the time of the verdict or judgment the prevailing party may request that the fact finder determine whether the losing party presented a frivolous claim or defense. [6] The standard for recovery under this code section is similar to the standard under O.C.G.A. § 9-15-14. In defining a frivolous claim, both statutes include language concerning the lack of "substantial justification" and the "complete absence of any justiciable issue of law or fact that it could not be reasonably believed that the court would accept the claim." O.C.G.A. § 9-11-68 also defines a frivolous claim as one that is not asserted in good faith, or is asserted with malice or wrongful purpose. The main difference between these two statutes is that the fact finder makes the ultimate determination under O.C.G.A. § 9-11-68.

V. Applicable Dates

The elimination of joint and several liability applies to causes of action that arise on or after, February 16, 2005. All other provisions became effective on February 16, 2005, *unless such application would be unconstitutional.* The highlighted language provides Georgia courts with the authority to decline to apply the reforms passed by this bill if their application would be unconstitutional in light of the specific facts of a case.

Footnotes

[1] *While there are no reported appellate decisions concerning constitutional challenges to the new tort reforms, at least one trial court has ruled that subsection (c) of O.C.G.A. § 9-11-31 is unconstitutional on its face. The basis for this finding was that subsection (c) directly contradicted Art. VI Par. IV, Sec. 2 of the Georgia Constitution. The application of this subsection is limited to medical malpractice actions and therefore is not addressed in this article.*

[2] *Prior to the adoption of the Uniform Transfer Rules in 1984, there was no avenue for the transfer of cases to the proper venue. Therefore, if venue was not proper it had to be dismissed. Now, the case would be transferred in accordance with the Uniform Transfer Rules.*

[3] *The Georgia Supreme Court refused to adopt a comprehensive doctrine of* forum non conveniens *because it refused to deny Georgia residents access to the courts of their home state. See Atlantic Coast Line R.R. v. Wiggins, (1948). From this position, the Georgia Supreme Court had no choice but to extend this right to non-residents under the privileges and immunities clause. See Southern Railway Co. v. Goodman, 259 Ga. 339, 380 S.E.2d 460 (1989).*

[4] *O.C.G.A. §19-9-47 recognized the applicability of the doctrine of* forum non conveniens *in the limited context of the Uniform Child Custody Jurisdiction Act.*

[5] *The only exception to this requirement is if the offer is revoked within the 30 day period.*

[6] *The court will hold a bifurcated hearing to make this determination.*