

# 2006-2007 UPDATE ON THE LAW OF MEDICAL NEGLIGENCE

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## **1. Appeal**

### **Steele v. Atlanta Maternal-Fetal Med., P.C., 283 Ga. App. 274 (2007)**

Plaintiffs filed a malpractice action against Dr. Browne and his practice, alleging medical malpractice for negligent failure to hospitalize Mrs. Steele when he discovered that her blood pressure had spiked and resulted in the death of her fetus. Following a verdict for the defendants, Plaintiffs motioned for a new trial, then appealed when the motion was denied. Plaintiffs challenged that the trial court erred in: 1) instructing the jury when it allowed the defense to use portions of a medical text during the doctor's re-direct examination, 2) denying Plaintiffs' requests to strike two jurors, and 3) allowing the introduction of certain evidence. However, the Court affirmed the jury verdict, holding that the Plaintiffs failed to cite to the record where the medical text was mentioned, and the Court refused to "cull the voluminous record on their behalf." Further, the Court held that Plaintiffs did not show any harm caused by the mention of the medical text. Again, Plaintiffs objected to a portion of testimony, but in objecting, did not provide the Court with a citation or copy of any relevant text that they were challenging. The Court affirmed, holding: "In the absence of a sufficient record, we must assume that the trial court's ruling was proper." The Court also ruled that Plaintiffs were not entitled to reversal on the jury selection because Plaintiffs had not exhausted their peremptory strikes.

## **2. Causation**

### **King v. Zakaria, 280 Ga. App. 570 (2006).**

Dr. Zakaria performed surgery to remove a cancerous tumor from the patient's lung. At surgery, he determined it would be necessary to remove the patient's entire lung. In doing so, he needed to close major blood vessels with sutures. Postoperative x-rays were

normal. When the doctor left the hospital on that evening of surgery, the decedent was resting comfortably, in stable condition, and he did not change significantly during the night. However, after additional postoperative x-rays were obtained the following morning, the patient suddenly began to have trouble breathing and his condition quickly deteriorated. He eventually went into cardiac arrest, and the doctor was paged. Dr. Zakaria immediately went to the hospital, examined the patient, and ordered tests, but the patient could not be revived. On autopsy, the pathologists concluded that the patient died from massive bleeding from the pulmonary artery where the artery should have been tied closed.

The executrix of the estate filed suit against the doctor alleging that the doctor failed to properly close the pulmonary artery during surgery. Plaintiff further alleged that the doctor's postoperative monitoring and treatment violated the standard of care in that he should have been available to review the postoperative x-rays the following morning. Finally, the plaintiff alleged that the doctor abandoned the decedent after surgery by not having a qualified physician immediately available in the event of a complication requiring surgical intervention.

The evidence established that post-operative suture failure was a recognized risk and complication of this surgery, which could occur in the absence of negligence. The undisputed evidence further established that if the artery had been left untied during surgery, the patient would have bled to death within a matter of minutes. Finally, the undisputed evidence at trial showed that once the decedent patient started bleeding from a loosened suture at the artery, even if surgery was started, it could probably not be performed in time to save his life. There was further evidence that once the patient began to bleed post-operatively, his condition was "unsalvageable." The Court of Appeals held

that there was insufficient expert testimony, to a reasonable degree of medical probability, that the decedent's life would have been saved if Dr. Zakaria or a qualified surgeon had been present.

Further, the Court held that there was no evidence to show to a reasonable degree of medical certainty that the decedent would not have died, but for the surgeon's failure to read the x-rays in question. The Court acknowledged the evidence showing that the x-rays taken on the first postoperative day showed an increased opacity in the chest cavity, which could have indicated internal bleeding. However, the evidence also established that once the patient began to bleed postoperatively, his condition was essentially unsalvageable. Therefore, the Court held that the plaintiff did not meet her burden to show that the failure to read the x-rays caused injury.

The plaintiff pointed out that, on cross examination of one of the defense experts, the expert stated that the surgeon "possibly could have had a chance" to return the patient to the operating room and save his life. The Court held that this testimony was also insufficient to meet the plaintiff's burden to establish proximate cause.

**Groover v. Jonston, 277 Ga. App. 12 (2005)**

Plaintiff filed a medical malpractice case individually and as representative of his incapacitated wife, asserting claims of negligence and negligence per se against an anesthesiologist and his employer. It was established that the defendant anesthesiologist allowed hospital nurses to select and administer narcotic medications pursuant to "verbal standing orders." Plaintiff filed a motion for partial summary judgment on the basis that the anesthesiologist violated O.C.G.A. § 43-34-26.1 (relating to a physician's delegation to

RNs of the ability to order medications, pursuant to a written protocol), and that the violation constituted negligence per se. The trial court denied the motion.

The Court of Appeals explained a violation of a statute does not necessarily constitute negligence per se, but instead includes a consideration of various factors. A trial court must consider the purpose of the legislation to determine whether a certain violation in a particular instance constitutes negligence per se. Then the Court must decide whether the person harmed falls within the class of the person the legislation was intended to protect. The Court must also determine whether the harm or injury actually suffered was the same harm against which the statute was intended to guard. And finally, the violation must also be capable of having a causal connection between it and the damage inflicted.

The relevant statute provides that a doctor may delegate certain tasks to certified nurses. The Court analyzed each of the criteria above and applied them to this case, which led this Court of Appeals to reverse the trial court's finding of no negligence per se. This Court found that all elements were present and supported a finding that the doctor was negligent per se.

The Court of Appeals held that although negligence per se was established, proximate cause must still be proved. In order for the plaintiff to recover under a negligence per se theory, the plaintiff must establish that the doctor's violation of the statutes proximately caused the injury. Therefore, even though negligence per se was established, partial summary judgment for the plaintiff was not appropriate because the plaintiff had not shown proximate cause. Given that a judgment right for any reason must be affirmed, the Court of Appeals affirmed the trial court's denial of the plaintiff's motion for partial summary judgment because plaintiff failed to show proximate cause.

**EHCA Dunwoody v. Daniel, 277 Ga. App. 783 (2006).**

Plaintiff patient sued defendant hospital for medical malpractice when the patient, who had informed the hospital of her latex allergy, nevertheless had a latex catheter inserted. The jury found in favor of plaintiff, then defendant moved for judgment notwithstanding the verdict (“JNOV”). The Court of Appeals affirmed the trial court’s decision to deny the motion. The Court noted that a party is entitled to JNOV only when there is no conflict as to any material issue and the evidence introduced, including all reasonable deductions from that evidence, is such that only one reasonable conclusion may be drawn as to the proper judgment. If any evidence supports the jury’s verdict, then JNOV should not be granted.

The trial evidence showed that the plaintiff developed interstitial cystitis (“IC”), a chronic bladder disorder, after her treatment at the hospital. The issue of causation was a central issue to the case given that at least one of the doctors testified that IC is an “enigma” because doctors do not know what causes it or how best to treat it. The disorder usually begins with some sort of event that makes the inside of the bladder very sensitive. It was the testimony of one expert that in his opinion, the use of a latex catheter caused the plaintiff’s condition. The defendant hospital claimed that it was entitled to JNOV because the plaintiff failed to prove that its conduct was the proximate cause of her condition and that the testimony of the physician expert constituted mere conjecture and speculation, which cannot establish causation.

The Court of Appeals explained that although absolute certainty is not required, the expert’s testimony has to provide a causal connection that is more than chance or speculation. The testimony must show as an evidentiary threshold that the expert’s opinion

regarding causation is based, at the least, on the determination that there was a reasonable probability that the negligence caused the injury. The Court disagreed with defendant hospital's position, and said that given all of the factors surrounding the plaintiff's condition, including the fact that she did not suffer from IC prior to insertion of the latex catheter, it was not speculation when the doctor concluded that to a reasonable degree of medical certainty the latex exposure caused the condition. The doctor provided testimony about the reasonable probability based on the evidence.

Defendants also claimed that the expert erroneously based his conclusion on a temporal relationship between the alleged negligence and the injury, which is insufficient to establish causation. But the Court of Appeals found that even if a temporal relationship alone cannot support causation testimony, here, the doctor did not rely solely on that relationship. Overall, the Court of Appeals held that the record shows that the testifying doctor presented some evidence of causation, which was a valid basis for the trial court to deny the hospital's motion for JNOV.

**Walker v. Giles, 276 Ga. App. 632 (2005).**

Plaintiff parents individually, and as surviving parents of their unborn child, brought a medical malpractice action against doctors and their OB/GYN practice on the basis that the doctors failed to properly diagnose and treat the plaintiff mother's acute appendicitis, causing her to suffer severe physical and cognitive damage and the loss of her fetus after her appendix ruptured. After the jury trial began and the parents had presented their case in chief, the doctors moved for a directed verdict on the grounds that the plaintiffs had failed to present evidence showing cause in fact and proximate cause. The trial court granted the motion for directed verdict, but the Court of Appeals reversed that decision.

In the doctors' motion for directed verdict, they conceded that the plaintiff parents had presented evidence creating a genuine issue of material fact as to whether the doctors had committed negligence and on the issue of damages. However, the doctors argued that the plaintiffs failed to come forward with evidence of cause in fact or proximate cause. They argued that the plaintiffs could not show cause in fact, because there was no evidence that the alleged negligence of the doctors caused the patient's ruptured appendix or the loss of her unborn child. Further, the doctors argued that the plaintiffs could not show proximate cause because the negligence of two other doctors during the course of the patient's second admission was an intervening cause that superseded and ended any negligence attributable to the first doctors as a matter of law.

The Court of Appeals noted that causation must be established through expert testimony in a medical malpractice case. The Court found that the plaintiffs did come forward with some evidence of causation and thus were entitled to have a jury resolve the issue. The testimony of a general surgeon and an obstetrician on behalf of the plaintiff that timely intervention would have prevented rupture of the patient's appendix, constituted evidence that showed to a reasonable degree of medical certainty that had the doctors abided by the applicable standard of care, the mother would not have suffered her alleged deficits and loss of her fetus. The Court further noted that the plaintiff's presented additional expert testimony as to when patient's appendix ruptured, and noted that causation could be established by linking the testimony of several experts.

The Court of Appeals also disagreed with the trial court's holding that the negligence of two doctors following the plaintiff's second admission constituted an intervening act as a matter of law. The Court of Appeals relied on a 2003 case, Schriever v. Maddox, 259 Ga.

App. 558 (2003), where the Court held that a second physician's negligence actions were not intervening but similar to the first physician's actions, and therefore, merely compounded the initial negligence of the first physician and did not end that initial negligence. The Court of Appeals also referred to previous Georgia cases permitting joint and several liability of two or more physicians who independently treated a patient at different times but together caused an indivisible injury to the plaintiff. The Court of Appeals also held that the trial court's finding was erroneous because the liability of the tortfeasor whose actions started the chain of events leading to the victim's injury is superseded only if the intervening act was a distinct, successive, unrelated, efficient cause of the injury.

Further, the intervening act exception is not applicable when the nature of the intervening act could have been reasonably anticipated or foreseen by the original wrongdoer. The Court of Appeals held that a jury would be entitled to conclude that it was reasonably foreseeable that the treatment following the initial treatment could be rendered in a negligent manner.

### **3. Contribution**

#### **Campbell, Odom & Griffith, P.C. v. The Doctors Company, 281 Ga. App. 684, 637 S.E.2d 108 (2006)**

In a preceding medical malpractice trial, Plaintiffs obtained a jury verdict of \$2,214,237.60 against Defendants Campbell, Odom & Griffith, P.C. f/k/a Cobb Surgical Associates, P.C. ("Cobb Surgical") and The Doctors Company's ("TDC") insured doctor. The defendants were jointly and severally liable, with the pro rata share of each being 50 percent. Cobb Surgical paid Plaintiffs \$900,000.00 to settle its portion of the judgment, and TDC paid \$1,100,000 to settle its portion. Plaintiffs therefore filed a satisfaction of judgment and a dismissal with prejudice.

TDC then filed a contribution claim against Cobb Surgical for the remaining portion and the parties filed cross-motions for summary judgment. After the trial court found in favor of TDC, Cobb Surgical appealed on the grounds that TDC was not entitled to contribution. The sole issue was whether the "common burden," which the parties are equally bound to bear, is: (a) the amount of the post-verdict judgment; or (b) the compromise amount that Cobb Surgical and TDC ultimately paid the Plaintiffs. The Court held that the parties are equally bound to bear the post-judgment settlement amount, and that Cobb Surgical owed TDC \$100,000.00 in contribution.

### **4. Directed Verdict**

#### **King v. Zakaria, 280 Ga. App. 570 (2006).**

The facts of this case have been discussed above, where the doctor used sutures to close off blood vessels leading to and from the lung before he removed it, but on the following day, the patient began having trouble breathing and required resuscitative efforts.

At autopsy, it was determined that one of the sutures for the arterial vessels that was closed at surgery had loosened.

At trial, the plaintiff contended that the surgeon was negligent for failing to properly close the decedent's pulmonary artery during surgery, and was negligent in the post-operative care, including failing to timely read the decedent's x-rays which were obtained the morning after surgery. Additionally, the plaintiff claimed that the surgeon abandoned the patient after surgery, and the plaintiff sought punitive damages based upon that allegation.

Upon the trial of the case, the defendant moved for directed verdict as to the plaintiff's claim for abandonment, which the trial court granted. The Court pointed out that with respect to an abandonment claim, the plaintiff must show (1) that the physician became unavailable to treat the patient at the time that the physician knew the patient was at a critical stage of treatment, and (2) that the physician failed to provide sufficient notice to enable the patient to obtain another physician or to arrange for a competent physician to care for the patient in his absence. The Court further noted that such claims are allegations of medical negligence, which must be supported by expert testimony.

The Court held that there was no evidence presented by the plaintiff that showed that the surgeon violated the standard of care by failing to be at the hospital at the time his post-operative complication occurred. The Court pointed out that the evidence showed that the patient was stable the prior evening, and that the doctor was not aware of the patient's subsequent complication the next morning, until after it occurred. Given the absence of expert testimony to establish that the physician knew of any situation that required he stay at the hospital or have a qualified back up surgeon available to be present with the patient,

the Court held that the defendant was entitled to directed verdict on the abandonment claim. The Court further held that the defendant was entitled to directed verdict on the punitive damages claim, which was predicated on the abandonment claim.

With respect to the claim that the surgeon was negligent for failing to read the decedent's x-rays in a timely manner on the day after surgery, the Court noted that there was no expert testimony to establish that the failure to read the x-rays taken the next day in a timely manner was negligent.

**Snider v. Basilio, 276 Ga. App. 315 (2005)**

In this case, the pediatrician defendant was the family pediatrician for the minor plaintiff. The parents called the office of the defendant pediatrician on a weekend, and spoke to an unlicensed nurse employee of the practice, who gave advice but did not call the physician. The child was subsequently diagnosed with bacterial meningitis, which caused brain damage and quadriplegia. The plaintiff alleged that the pediatrician violated the standard of care, by allowing her unlicensed nurse to take calls from and give advice to patients without consulting the pediatrician. The trial court granted a directed verdict to the pediatrician, on the grounds that the nurse was an employee of the practice, and there was no testimony that the pediatrician was individually negligent.

The Court of Appeals held that a directed verdict is proper only when there is no conflict in the evidence as to any material issue, which was inappropriate in the underlying case because two expert witnesses testified that the doctor had violated standard of care by permitting an unlicensed nurse to give advice to patients without first consulting the doctor. The Court of Appeals stated that the claims asserted by the plaintiff and the expert testimony were referring to the supervising doctor, and not the professional corporation.

Consequently, the Court held that the defendant doctor could not shield herself from individual liability for her own acts, simply because she had established a professional corporation.

## **5. Evidence**

### **King v. Zakaria, 280 Ga. App. 570 (2006).**

In the above-described case, where the patient died as a result of massive bleeding from his pulmonary artery the morning after Dr. Zakaria performed surgery to remove a cancerous tumor, admissibility of certain evidence was also addressed by the Court. Plaintiff contended that the doctor's professional liability insurance policy endorsement should have been introduced as impeachment evidence and was erroneously excluded by the trial court. Plaintiff sought the introduction of the information because it indicated that the doctor was "semi-retired," though the doctor had testified during cross examination that he was not semi-retired. However, the Court of Appeals upheld the trial court's exclusion of evidence of liability insurance, even if it was a prior inconsistent statement, holding that it was evidence involving a collateral matter to the issues on trial and was more prejudicial than probative.

### **EHCA Dunwoody v. Daniel, 277 Ga. App. 783 (2006).**

In this above-summarized case where the hospital was being sued by a patient with an alleged latex allergic reaction, the defendant hospital also argued that even if it were not entitled to JNOV, it should have been granted a motion for new trial because improper hearsay evidence was admitted at trial, specifically: (1) hearsay medical records; and (2) oral statements made to the expert by treating physicians who did not testify at trial.

The trial court admitted into evidence a letter from a doctor who treated the patient the morning after her discharge from the hospital and another doctor who was her psychiatrist. The Court of Appeals disagreed with defendant Hospital because while some of the evidence was indeed inadmissible hearsay, admission of that evidence was harmless. Admission of the letters was harmless because they simply summarized the admissible video deposition of another doctor. Admission of the psychiatric letter was also harmless because it was one piece of evidence among extensive evidence showing a link between the plaintiff's condition and her mental health problems. Therefore, even if admission were in error, it provided no basis for a new trial.

### **Medical Records**

Defendant Hospital argued that the trial court erroneously admitted hearsay records of individuals who did not testify at trial, but the Court of Appeals rejected the hospital's argument on the basis that it made no effort to show or even argue how the admission of the evidence was harmful. The Court saw no reason how the admission of said records likely contributed to the verdict or harmed the defendant hospital, especially when the information contained in the evidence was also in the testimony of plaintiff and in other evidence. The admission of hearsay or immaterial evidence without harmful effect to the complaining party is not grounds for a new trial.

### **Statements Made By Physicians**

The hospital claimed that the trial court improperly allowed the patient to testify about hearsay statements made to her by her physicians. However, the Court found that it was not harmful because the record contained other evidence supporting the information in

those statements and even assuming error, the Court failed to see how the admission of the testimony harmed the hospital.

Lastly, the hospital argued that the plaintiff should not have been allowed to testify about statements made to her by an allergist. According to the patient, the allergist told her that although the allergy tests were inconclusive, the results did not rule out a latex allergy. The Court of Appeals held that regardless of whether the testimony constituted hearsay its admission was harmless, especially because the hospital's own allergy expert testified that latex allergy tests can produce false negative results. Another expert similarly testified that a negative result does not mean a person has no latex allergy. Therefore, the Court found it unlikely that the testimony regarding the allergist's statements impacted the verdict.

**Snider v. Basilio, 276 Ga. App. 315 (2005)**

The plaintiffs filed suit against multiple healthcare professionals after their son was misdiagnosed over the phone by an unlicensed nurse. The child was ultimately diagnosed with bacterial meningitis, which caused brain damage and left him a quadriplegic.

The Court addressed the issue of the admissibility of evidence that a doctor failed a Board examination. The Court of Appeals upheld the trial court's exclusion of the evidence on the basis that the nurse's inability to pass licensure examinations did not make probable her negligent performance of a specific procedure. Evidence regarding failure of the Board licensure examination had little, if any, relevance to the issue of whether the nurse complied with the standard of care required in the treatment in the given case.

The Court also considered whether the trial court improperly restricted the plaintiff's right to cross-examine one of the defense experts on an unrelated case. Plaintiff's counsel wanted to inquire about a case in which the testifying expert was a defendant. The Court of

Appeals upheld the decision that such evidence does not necessarily show bias on the part of the witness and is not unequivocally relevant to a case in which the expert is testifying.

## **6. Expert Affidavit**

### **Brown v. Tift County Hospital Authority, 280 Ga. App. 847 (2006).**

Plaintiff Brown was admitted into Tift Regional Medical Center after suffering a stroke. She had a high risk of falling, which was well documented in her hospital records and included on a sign on her door. While under the care of a licensed occupational therapist, the plaintiff fell in the hospital shower and broke her leg.

The patient filed a claim against the hospital, but failed to contemporaneously file an expert affidavit. The Court of Appeals of Georgia agreed with the plaintiff's argument on appeal that her complaint did not require an expert affidavit, because it asserted claims of ordinary, not professional, negligence.

The Court distinguished between medical questions that concern highly specialized expert knowledge about which a layman would have no knowledge at all, and require an affidavit, versus issues of ordinary negligence. If it is clear that specific information known to the defendant is such that the jury may determine (without the help of expert testimony) whether the defendant exercised due care in failing to prevent the patient's fall, the claim sounds in ordinary negligence and no expert affidavit is required.

The Court held that the trial court's grant of summary judgment against the patient for her failure to attach an expert affidavit was erroneous and that plaintiff was entitled to pursue her ordinary negligence claim without an expert affidavit.

**Wallace D. Mays, M.D. v. Sharon Ellis, 283 Ga. App. 195 (2007)**

Sharon Ellis was a patient of Dr. Mays, who is an OB/GYN. Throughout that period, Ellis had hyperlipidemia and a family history of pancreatitis. While a patient of Dr. Mays, from 1987 to 1998, Dr. Mays did not refer Ellis to a specialist to evaluate her chronic hyperlipidemia. In 1998, Ellis complained of pain in her abdomen, and Dr. Mays planned to perform laparoscopic surgery to remove Ellis' right ovary at the end of August. Dr. Mays referred Ellis to an internist for a pre-operative exam, but the operation was canceled when an internist determined that Ellis's levels of triglyceride, cholesterol, and blood glucose were too elevated for surgery.

When Ellis later visited the ER for worsening abdominal pain, tenderness, nausea, and vomiting, Dr. Mays concluded that Ellis' symptoms indicated either appendicitis or an ovarian torsion. Dr. Mays did not consider pancreatitis, nor did he consult with a specialist. Dr. Mays performed emergency exploratory surgery with the intention of removing either Ellis' ovary or appendix, but realized during the surgery that she had neither appendicitis nor an ovarian torsion. Another surgeon took over the surgery, and Ellis' condition was subsequently diagnosed as pancreatitis.

Plaintiff Ellis filed a medical malpractice action against Dr. Mays. Dr. Mays motioned to exclude the testimony of Ellis' expert witness on the grounds that the expert witness was a gastroenterologist, not an OB/GYN or a surgeon, which was Dr. Mays' specialty. The appeals court disagreed, holding that O.C.G.A. § 24-9-67.1(c) contemplated that the testifying expert in a medical malpractice suit could have a different area of practice than defendant doctor. Instead the court held that the expert's qualifications, rather than defendant doctor's specialty or area of practice, controlled whether the trial

court should allow the expert's testimony. On the ultimate issues of whether the doctor committed medical malpractice by misdiagnosing the patient's condition and whether the surgery could have been avoided, the patient's expert had the requisite knowledge and experience to offer his standard of care opinion.

Further, the court relied on the 2006 Cotten and Abramson holdings by rejecting the Doctor's argument that that the gastroenterologist may not offer expert testimony "involving the performance of a surgical procedure by a licensed OB/GYN" when he was neither an OB/GYN nor a surgeon. The Court held that the expert need only have "actual professional knowledge and experience in the area of practice or specialty *in which the opinion is to be given*" under subsection (c) (2).

**Scott v. Martin, 280 Ga. App. 311 (2006).**

Plaintiff filed the medical malpractice action against a doctor and his clinic without attaching an expert affidavit to the complaint. Plaintiff relied on the former version of O.C.G.A. § 9-11-9.1, and moved for an extension of time to file his expert affidavit, which the trial court granted. The Court of Appeals reversed the extension because O.C.G.A. § 9-11-9.1, as amended on February 16, 2005, eliminated the grace period within which to file a belated expert affidavit. The Court held that unless a statutory exception applies, failing to contemporaneously file an expert affidavit subjects the complaint to dismissal for failure to state a claim.

**James v. Hospital Authority of the City of Bainbridge, 278 Ga. App. 657 (2006).**

Plaintiff filed a claim alleging medical negligence for failure to evaluate and treat the plaintiff during his emergency room visit. Plaintiff failed to file an expert affidavit in

support of his medical negligence claims and defendants filed a motion to dismiss the complaint.

The trial court granted the motion to dismiss and the Court of Appeals affirmed the decision based on the O.C.G.A. § 9-11-9.1 requirement to contemporaneously file an expert affidavit with a professional malpractice claim. The Court pointed out that the patient's claims stemmed from the allegation that the defendants failed to diagnose and properly treat his appendicitis. The Court rejected the argument that the complaint advanced a simple negligence claim.

**Hardwick v. Atkins, 278 Ga. App. 79 (2006).**

The husband of a patient decedent filed a wrongful death suit against a doctor and healthcare provider on the grounds that a doctor negligently caused the death of his wife by issuing a do not resuscitate order. Plaintiff husband failed to attach an expert affidavit as required by O.C.G.A. § 9-11-9.1 and the Court of Appeals affirmed the trial court's dismissal of the complaint. The Court held that the claim was one of professional negligence rather than simple negligence and required expert testimony. Likewise, the Court held that a contention about whether the doctor's actions caused his wife's death is also a professional negligence claim.

**Tenet Healthcare Corp. v. Gilbert, 277 Ga. App. 895 (February 15, 2006).**

A patient's widow alleged that her husband died as a result of negligent medical treatment and attached an expert affidavit to her complaint. Defendants filed a motion to dismiss, asserting that plaintiff's expert affidavit was insufficient.

Defendant doctors and nurses sought to dismiss the claim based on the fact that the medical license of the expert witness had been revoked for substance abuse, just months

prior to the time he signed the affidavit. The hospital defendants also claimed that the affidavit failed to specify an act of negligence against either of them, but the trial court denied all of the motions to dismiss for the following reasons: (1) holding a license was not required of an expert in order to execute an affidavit, and (2) no specific act of negligence had to be identified with regard to the hospital defendants.

O.C.G.A. § 9-11-9.1 requires only that an expert competent to testify file the affidavit. The Court noted that the issue of whether the execution of the affidavit constitutes a criminal violation may be used at trial and towards the credibility of the affidavit, but is not relevant to the fact that the affidavit is valid as long as it meets the requirements set forth in O.C.G.A. § 9-11-9.1. The Court of Appeals held that the affidavit was valid even though the physician was not licensed at the time he executed the affidavit.

With regard to the expertise of the expert in the area of nursing care, the Court of Appeals held that in the medical malpractice action against nurses, a physician must show that the physician is an expert competent to testify in the field of nursing, which was indeed lacking in this expert's affidavit. However, the Court pointed out that the nurses failed to make that argument in their motion filed with the trial court. The Court also rejected the defense of Tenet Healthcare and Tenet Health System based on the fact that neither entity is a licensed healthcare facility, which is the only employer entity to which the expert affidavit requirement applies, according to the Court.

**Gaddis v. Chatsworth Health Care Ctr., Inc., 282 Ga. App. 615 (2006)**

Plaintiffs filed suit after their mother sustained injuries from a fall at a Chatsworth's nursing home. Defendant filed a Motion to Dismiss on the grounds that Plaintiffs claimed professional negligence yet failed to file an Affidavit with the Complaint as required by

O.C.G.A. § 9-11-9.1(a). When Plaintiffs were not able to cure the defect by amendment of the Complaint, they amended the Complaint to be an ordinary negligence claim. However, the trial court granted, and the Court affirmed, Chatsworth's Motion to Dismiss, which was converted to Summary Judgment, on the grounds that the professional negligence claims were unsupported by the required Affidavit, and the ordinary negligence claims were unsupported.

**Murrah v. Fender et al.**, 282 Ga. App. 634 (2006)

Plaintiff Fender alleged fraud, misrepresentation, and deceit against Dr. Murrah after Fender relied on Dr. Murrah's representation that South Georgia Medical Center had the same equipment as Tallahassee Memorial Hospital and could perform his heart bypass surgery just as well as Tallahassee. A complication arose during Fender's surgery at South Georgia and he had to be transported mid-surgery to Tallahassee after all. Defendant filed a Motion to Dismiss under O.C.G.A. § 9-11-9.1 because Fender failed to attach an expert affidavit. However, the Court affirmed the trial court's denial of Defendant's Motion to Dismiss holding that no affidavit was necessary because Fender's claim was an intentional misconduct allegation, and not based on medical skills or judgment. That said, Judge Andrews dissent is noteworthy for his explanation that the doctor exercised professional judgment when he considered the type of surgery that Fender required and determined that, therefore, the South Georgia hospital had the requisite equipment to conduct that surgery.

**Howell v. Shumans**, 281 Ga. App. 459 (2006)

Plaintiff Howell filed suit against her doctor for a breach in the duty to maintain confidentiality of health information when one of the doctor's employees relayed

confidential medical information to Howell's husband over the telephone, but was overheard by two other individuals. The trial court dismissed her complaint for failing to attach an affidavit under O.C.G.A. § 9-11-9.1, but the Court of Appeals reversed on the grounds that her complaint was not alleging professional malpractice.

## **7. Fair Business Practices Act**

### **Henderson v. Gandy, 280 Ga. 95 (2005).**

The appellant's husband was admitted to the hospital by his physician, Dr. Gandy, for emergency bypass surgery. Following surgery, the patient developed a decubitus ulcer (which later became necrotic and ultimately resulted in the patient's death). Dr. Gandy requested that the patient be treated by hospital nurses who specialized in wound ostomy care. The plaintiff brought a malpractice action against the defendant.

During discovery, it was established that Dr. Gandy did not continue to verbally order each specific treatment recommended by the wound ostomy nurses, and that it was the policy of Dr. Gandy's group to allow those nurses to use their discretion in managing the wound treatment of the patients. Upon learning this information, the plaintiff amended her complaint to add claims for violation of the Fair Business Practices Act. The trial court granted summary judgment on the Fair Businesses Practice Act claims, indicating that they had not occurred within the "public consumer market place." The Court of Appeals affirmed, holding that the actions of the nurses pursuant to the group's policy did not fall within the stream of commerce required to maintain a Fair Businesses Practice Act claim.

On appeal, the Supreme Court also affirmed. The Supreme Court held that FBPA allegations involving the entrepreneurial or business aspect of the provision of services, aside from medical competence, could provide the basis for an FBPA claim. However, such

a claim would not exist with respect to issues concerning malpractice or misconduct in the actual performance of medical services or in the practice of medicine. The Court held that the allegations in the underlying case did not involve the entrepreneurial, commercial, or business aspect of Dr. Gandy's practice and therefore, were not actionable under the FBPA.

## **8. Immunity**

### **Travick v. Wade, 278 Ga. App. 823 (March 30, 2006)**

Plaintiff, as administratrix of the estate of a decedent patient, brought medical malpractice action against a doctor on the basis that he negligently failed to treat a swollen mass in the patient's neck, which resulted in his death. The defendant doctor filed a motion for summary judgment based on O.C.G.A. § 51-1-29.1, asserting that because he treated the patient voluntarily and without the expectation or receipt of compensation, he was entitled to immunity. The doctor was a voluntary, on-call doctor who was required to see patients regardless of their ability to pay. He further asserted that no bill was ever sent to the patient and no payment was ever received. O.C.G.A. § 51-1-29.1 provides that no licensed healthcare provider who voluntarily provides professional services shall be liable for damages alleged to have been sustained by reason for an act or omission in the rendering of the gratuitous services (unless there is some act of gross negligence).

The plaintiff opposed the motion with an affidavit of the decedent's girlfriend, who asserted that there was discussion between the decedent and the physician's office about an arrangement for payment. The trial court denied the motion. Subsequently, on deposition, the girlfriend could not support her previous affidavit testimony. Similarly, the mother of the patient could not support the girlfriend's version of the events, as expressed in her

affidavit. The motion was refiled, and the trial court granted summary judgment for the doctor under the immunity provided in the statute.

The Court of Appeals reversed the trial court's grant of summary judgment on the basis that conflicting testimony created an issue of fact for the jury. The Court of Appeals held that the trial court erroneously held that the contradictory testimony would be construed against the witnesses. The Court of Appeals explained that the contradictory testimony rule in Prophecy Corp. v. Rossignol, 256 Ga. 27 (1986), is only applicable to the testimony of party to the litigation, and the rule did not apply to the testimony of witnesses who were not parties, even if the witnesses stood to benefit from the case.

**Wells v. Rogers, 281 Ga. App. 473 (2006)**

Plaintiff filed a complaint against Dr. Rogers and his clinic for negligence in failing to properly treat his brother's complications. Dr. Rogers and the clinic moved for Summary Judgment under the immunity allowed by O.C.G.A. § 51-1-29.1. The trial court granted, and the Court of Appeals affirmed, summary judgment due to the fact that the doctor and clinic voluntarily treated the patient without any expectation of payment.

**9. Jury Instructions**

**Moss v. Weiss, 275 Ga. App. 690 (2005).**

In this matter, the defendant performed knee replacement surgery on the plaintiff. In his post-operative orders, the physician specifically noted that he did not want cold therapy on the patient's knee. However, during rounds the morning after the surgery, the physician observed that the hospital's nurses had placed ice packs on the patient's knees, against his order. The physician told the patient that the ice packs were placed on her knee against his order. He instructed the nurse in the room to remove the ice packs, which she

did. He did not write that instruction in the patient's chart, nor did he document the event, because he did not think it was significant. The defendant explained that he did not expect any problems to develop because of the use of the ice packs.

During a post-operative visit, the defendant observed some tissue around the surgical site that was necrotic. He was not sure of the cause of this problem, but felt that the use of the ice packs could be one possible contributing factor. The patient developed persistent infection around the prosthesis and had multiple skin debridement procedures to treat it. She ultimately had to have the prosthesis replaced. The case went to trial, resulting in a verdict for the defendant. The trial court denied the patient's motion for a new trial, and the patient appealed.

On appeal, the patient contended that the trial court erred when it instructed the jury that a physician is generally not liable for the independent acts of a hospital or its employees. The Court pointed out that the plaintiff had repeatedly characterized the nurse's actions as negligent, though the physician never took that position. The Court of Appeals found that it was appropriate to give a jury instruction that if the jury found that the nurse's actions were negligent, the physician could not be held liable for their actions. The Court of Appeals further held that the trial court did not commit error in refusing to give the patient's requested jury charge on ratification. She claimed that the defendant physician ratified the nurse's negligence when he allegedly concealed it from the patient, by failing to note the event in the medical record. The Court of Appeals indicated that there was no case law authority to support such a jury instruction, and also pointed out that the patient was well aware that the nurse's actions were contrary to the doctor's explicit instructions.

**King v. Zakaria, 280 Ga. App. 570 (2006).**

As summarized above in numerous sections, this case involved surgical treatment of the patient/decedent for lung cancer. The jury reached a verdict for the defendant on the plaintiff's claims of negligence.

On appeal, the plaintiff challenged certain jury instructions that were given to the jury. First, the Court held that it was not reversible error to give a charge that witnesses were presumed to speak the truth. This issue had been decided adversely to the plaintiff in the case of Blackmon v. State, 272 Ga. 858, 860 (2000). The Court also held that it was not error to give the charge that there was a presumption that medical services were performed in an ordinarily skillful manner, citing Beach v. Lipham, 276 Ga. 302 (2003).

The Court further rejected the plaintiff's contention that the Court should have given a contradictory testimony charge under the authority set forth in Prophecy Corp. v. Charles Rossignol, Inc., 256 Ga. 27 (1986). The Court held that this charge was not required, since the surgeon presented other evidence at trial which supported his defense. The Court held that the Prophecy charge is only appropriate where the party who gave contradictory testimony is the sole witness testifying as on his behalf.

Finally, the plaintiff contended that it was error to fail to instruct the jury that an admission in the pleadings, which is inconsistent with the denial by the same party of the admission, prevails over the denial. The Court held that the charge conference was not transcribed, and any error on this issue was waived.

## **10. Jury Selection**

### **Brown v. Columbus Doctors Hospital, Inc., 277 Ga. App. 891 (2006).**

The patient's husband brought a wrongful death and estate claim against the hospital and others alleging that medical negligence caused her injury and death. The case was tried and the jury reached a verdict for all defendants. The sole issue on appeal was whether the trial court committed error by failing to strike a prospective juror for cause.

The prospective juror in question indicated that he would not want someone with his frame of mind to sit as a juror on the case, and that he could not put aside sympathy or prejudice and render a true verdict. Specifically, he mentioned that he had worked for healthcare companies for twenty-six (26) years, and that his company had a current business relationship with the hospital defendant. He indicated that his economic livelihood depended in part on sales to that hospital. He further testified that the malpractice crisis was having a direct effect on his business, and he could not discount that effect on his business, which would tend to color his view of the case from the beginning.

The Court of Appeals further pointed out that when attempts were made to rehabilitate him, the prospective juror never answered that he could be fair and impartial. The Court further stated that the trial court did not ferret out bias, by conducting voir dire of sufficient scope and depth to ascertain the partiality of the juror. Therefore, the Court reversed the judgment in favor of the defendants.

### **Sellers v. Burrowes, 2007 Ga. App. LEXIS 96 (February 8, 2007)**

Following a medical malpractice finding in favor of the Defendants, Plaintiff appealed on the grounds that the trial court erred by failing to dismiss two jurors for cause. The Court of Appeals agreed that one of the jurors should have been dismissed because she specifically

and repeatedly said that doctors should have "special protections" in litigation. The juror explained that she has four doctors in her family and it would take a lot for her to put aside her partiality for doctors, regardless of evidence and the court charges. Despite more than eight different explanations of her partiality, the trial court denied Plaintiff's counsel's motion to strike the juror and counsel exhausted his peremptory strikes. The Court of Appeals held that the trial court abused its discretion by failing to dismiss that juror for cause based on her partiality to doctors and that Plaintiff was entitled to a new trial.

#### **11. Service of Process**

##### **Tenet Healthcare Corp. v. Gilbert, 277 Ga. App. 895 (February 15, 2006).**

The Court addressed the issue of whether the trial court erred in finding that plaintiff did not exercise the greatest due diligence in serving defendants after the statute of limitation had run. The Court of Appeals found that the trial court used the wrong legal standard in determining that plaintiff failed to exercise sufficient due diligence. The Court of Appeals stated that the correct test must be whether the plaintiff showed that he acted in a reasonable and diligent manner in attempting to ensure that proper service was made as quickly as possible. The "greatest due diligence" standard is employed only if a plaintiff is alerted to a service problem. Consequently, the Court of Appeals reversed and remanded the case to the trial court to determine whether the plaintiff's actions constituted that service on each defendant took place in a reasonable and diligent manner.

#### **12. Statute of Limitations**

##### **Kitchens v. Brusman, 280 Ga. App. 163 (2006).**

In this matter, the patient had a breast mass biopsied in October, 1997. The pathologist reviewed the specimen and concluded that it was not malignant. The patient

had no further problems until 1999. She experienced another lump in her breast in February, 1999, and in April or May she experienced breast pain, coughing, and difficulty breathing. In October, 1999, she was diagnosed with advanced breast cancer and metastatic lung cancer. The patient died on October 4, 2000. Her husband was appointed as a temporary administrator of her estate in January, 2002. He filed suit on October 3, 2002 for wrongful death, as well as an estate claim for pain and suffering.

The trial court granted summary judgment on the estate claim for pain and suffering. On appeal, the Court of Appeals pointed out that in most “missed diagnosis” cases, the injury begins immediately upon the missed diagnosis, which in this case was at the time of the allegedly negligent reading of the pathology specimens in 1997. The Court held that if the patient’s symptoms in 1999 were the same injury that existed at the time of the alleged missed diagnosis, then the estate claim would be barred by the two year limitation period. However, the Court concluded that there was an issue of fact as to whether the metastasized lung cancer discovered in 1999 was a new injury, as manifested by the new symptoms that occurred in 1999.

The Court of Appeals went on to point out that the suit was still not filed until October, 2002, approximately thirty (30) months after the new symptoms had developed, which would bar the claim. However, the plaintiff also contended that the statute of limitations was further tolled between October, 2000 and October, 2002, when suit was actually filed, because a permanent administrator had not been appointed for the estate. See O.C.G.A. § 9-3-92. The Court of Appeals pointed out that even though a temporary administrator could file a personal injury action, controlling authority from the Georgia Supreme Court was that the appointment of a temporary administrator did not result in the

representation of the estate for purposes of the running of the statute of limitations, citing Deller v. Smith, 250 Ga. 157 (1982). Accordingly, the statute of limitation period was further tolled from the time of Ms. Kitchens' death until suit was filed. The Court of Appeals reversed the summary judgment on the estate's claim for pain and suffering.

**Brown v. Coast Dental of Georgia, P.C., 275 Ga. App. 761 (2005).**

In this matter, the patient met with a dentist employed by Coast Dental for a dental consultation. Dr. Choi, the dentist, was a general dentist, and not a surgeon. She first saw the dentist in October, 2000. Dr. Choi did not refer her to any specialist, such as an orthodontist or periodontist. The dentist performed some permanent bridgework on the patient in late December, 2000 and January, 2001. In a followup visit on January 25, 2001, the patient expressed dissatisfaction with the bridgework and complained to the dentist that she was experiencing hot and cold sensitivity as a result. The dentist left the employment of Coast Dental shortly after that. He left no instructions or other directions with any other dentist at Coast Dental regarding the patient's future course of treatment.

The patient ultimately commenced a lawsuit on January 24, 2003. In the expert affidavit attached to her complaint, the expert expressed criticisms of the dentist for his initial evaluation on October 26, 2000, with respect to the dentist's initial evaluation of the patient and the course of treatment recommended. The expert opined that the dentist should never have offered the patient the treatment option that was ultimately performed. The defendants moved to dismiss the complaint on the ground that the two year statute of limitation under O.C.G.A. § 9-3-71(a) had run. The plaintiff contended that the statute of limitations did not begin to run until some time after January 25, 2001, when the injury manifested itself to her in the form of new symptoms. Additionally, the plaintiff asserted

that the limitation period had been tolled by O.C.G.A. 9-3-97.1, because the defendant had not provided her with a complete copy of her requested dental records. The trial court denied the motions to dismiss.

Following discovery, the appellees moved for summary judgment, again contending that the two year statute of limitations had run on the patient's claims, and had not been tolled. The trial court then granted the motions for summary judgment.

On appeal, the Court of Appeals noted that the case was a misdiagnosis case, in which the dentist was accused of misdiagnosing the patient's condition and recommending improper treatment as a result. The Court noted the general rule that in most misdiagnosis cases, the injury begins immediately upon the misdiagnosis, due to pain, suffering or other loss sustained by the patient from that time. The Court of Appeals held that the defendants had not met their burden, at the summary judgment stage, of showing undisputed evidence in the record that the patient actually experienced symptoms, prior to January 25, 2000, as a result of the alleged misdiagnosis and mistreatment. The Court further held that there was insufficient evidence in the record to establish that a bad cosmetic result had been observed by the patient prior to January 25, 2001. From a defense standpoint, the absence of the deposition transcript of the patient was not included in the record, which made it difficult for the Court of Appeals to conclude that there was undisputed evidence of injury prior to January 25, 2001.

**Burt v. James, 276 Ga. App. 370 (2005).**

The plaintiff was a professional hockey player who suffered a back injury during a game in December, 2000. The defendant physician performed a back surgery in January, 2001 to relieve the patient's back pain. Shortly after the surgery, the patient developed an

infection at the incision site. The patient had pain, swelling and other symptoms in his back for a number of months. The defendant attempted to treat the patient with the administration of antibiotics. In March, 2001, the defendant physician performed another surgery to drain fluid from the patient's back. In May, 2001, the patient had a third back surgery, a spinal fusion, performed by another physician. Although his back healed, the patient could no longer compete as a professional hockey player.

The patient commenced a malpractice action in April, 2003, with an affidavit of an expert witness who expressed the opinion that the defendant physician was negligent for failing to treat the patient by surgical means in January, 2001, rather than treating him with antibiotics. Following discovery, a motion for summary judgment was filed by the defendant on the grounds that the statute of limitation had elapsed. The trial court granted this motion.

On appeal, the Court of Appeals affirmed the judgment of the trial court. The Court indicated that this case generally fit in the category of misdiagnosis cases, and the injury began immediately upon the misdiagnosis due to pain suffering or other loss sustained by the patient. The Court rejected the plaintiff's argument that he had a subsequent injury in April, 2001, when he experienced severe back pain and was diagnosed with bacteremia, nerve compression, and osteomyelitis. The Court noted that his and his wife's testimony was that his symptoms remained relatively consistent or similar from January through the time that surgery was done in May, 2001. The Court rejected the plaintiff's argument that this case was similar to the cases of Whitaker v. Zirkle, 188 Ga. App. 706 (1988), and Walker v. Melton, 227 Ga. App. 149 (1997), where there was a long period of time that the patient was asymptomatic, and then manifested new symptoms at a subsequent point in

time. The Court noted that the patient experienced redness, swelling and pain at the incision site on his back from January, 2001 up through April, 2001. Even though the symptoms the patient experienced may have been worse and more debilitating by April, this was simply a matter of degree. The existence of the symptoms in January, 2001 commenced the running of the statute of limitations.

**Ward v. Bergen, 277 Ga. App. 256 (2006).**

In this case, the patient had a routine mammogram in 1998. Because of abnormalities, she was referred to the defendant surgeon, who performed a biopsy. The pathology report indicated that the patient had low grade, intraductal carcinoma in situ (DCIS), which is a precancerous abnormality. The plaintiff contended that the physician failed to tell her of this diagnosis, but informed her that she had abnormal calcifications that were benign, but could increase her risk of developing breast cancer later in life. The defendant physician did not suggest any further treatment to her, other than to get regular mammograms.

Subsequent mammograms in 1999 and 2000 were similar to the 1998 mammogram. She told her treating physicians at that time of those mammograms that a biopsy had been done in 1998, which had been diagnosed as benign changes in the breast. In August, 2002, another routine mammogram showed more changes in the patient's breast tissue. A biopsy was done, which revealed that the patient had developed invasive breast cancer with metastatic disease to the lymph nodes. The patient then had a mastectomy, chemotherapy and radiation therapy.

In July, 2003, the patient sued the surgeon who had performed the original biopsy in 1998, alleging that he had failed to make an accurate diagnosis and recommend proper

treatment for the DCIS. As a result of this failure, the plaintiff alleged that she developed invasive, metastasized cancer of the breast and lymph nodes.

The defendant filed a motion for summary judgment, which the trial court granted, finding that the patient had remained symptomatic following her alleged misdiagnosis and mistreatment, referring to the subsequent mammograms that were obtained in 1999 and 2000.

On appeal, the Court of Appeals held that the patient's invasive cancer was a different disease than the DCIS, and was therefore a new injury that occurred subsequent to the misdiagnosis. The Court indicated that there was no evidence in the record that the patient had experienced any symptoms prior to August, 2002 which had indicated the development of the invasive cancer. The Court pointed out that a jury issue existed as to when the invasive cancer developed and metastasized, and whether the patient had any symptoms of the invasive cancer prior to July, 2001, which was two years before she actually filed suit. The Court reversed the grant of summary judgment to the defendant.

**Pogue v. Goodman, 282 Ga. App. 385 (2006)**

Plaintiff patient had a catheter, which was later discovered to have been placed too high in the spinal canal. Two years after the after the insertion of the catheter, The patient saw a new pain physician who evaluated the pump system and discovered that the catheter actually reached into her cranial cavity. She filed a medical malpractice action against the doctor nearly three years after the surgery, but less than a year after the test revealed the catheter reached too high. Plaintiff claimed that the catheter was a foreign object and that the doctor fraudulently concealed the alleged negligent placement by intentionally withholding information about the misplacement.

The trial court granted the Defendant's Motion for Summary Judgment due to the expiration of the statute of limitations. Plaintiff appealed on the grounds that the catheter was a foreign object as contemplated by O.C.G.A. § 9-3-72 and thus the statute of limitations did not expire until one year after the discovery of the object. However, the Court of Appeals affirmed that a catheter, which was *intentionally* placed in a patient's body, was not a "foreign object." A foreign object includes only those objects inadvertently left within a patient's body. Plaintiff also appealed on the grounds that the statute was tolled by the doctor's fraudulent concealment of his negligence. However, the Court held that the Plaintiff failed to prove fraud when she could not show that the doctor *knew* he had extended the catheter into her cranial cavity.

**Stafford-Fox v. Jenkins, 282 Ga. App. 667 (2006)**

Plaintiff was a registered nurse and patient of Defendant Dr. Lonnie Jenkins. She began seeing him for general internal medicine issues in relation to her desire to stop smoking. She had a history of sickle cell anemia and pernicious anemia. On November 12, 1999, Dr. Jenkins performed routine blood work and analysis, which showed a Vitamin B-12 deficiency, but was not followed up on by Dr. Jenkins. The patient returned to Dr. Jenkins office on April 14, 2000, complaining of problems with her lower extremities including her feet, exhibiting itching sensations, ataxia, and gait. He saw her again on May 1, 2000 and referred her to a neurologist, Dr. Joseph Weissman, who diagnosed her B-12 deficiency, left a message on the patient's home machine, and called Dr. Jenkins to advise of the need for B-12 injections. Unfortunately, neither doctor followed up with the patient and the patient did not receive Vitamin B-12 injections or learn that she needed these B-12 injections. A few days later, on May 12, 2000, Plaintiff had a laparoscopic cholecystectomy

and became very ill on May 29, 2000. It was not until June 21, 2000 that Dr. Cook, a neurologist, made the diagnosis and ordered B-12 injections. She improved, but was diagnosed with a condition of the spinal cord that Plaintiff claims is a result of a failure to receive appropriate and adequate B-12 injections.

Plaintiff Stafford-Fox filed a Complaint on May 1, 2002 and claimed that it was within the two-year limitation period of O.C.G.A. § 9-3-71 (a) because her permanent disability did not occur and manifest itself to her until after her May 15, 2000 surgery. Plaintiff's Complaint alleged that she sustained an injury that arose from Dr. Jenkin's misdiagnosis of her vitamin B-12 deficiency during her office visits between January 1999 and May 1, 2000. On May 15, 2000, Plaintiff underwent gall bladder surgery, involving anesthesia that allegedly accelerated and worsened the B-12 deficiency and caused Plaintiff permanent neurological damage.

In an order dated August 21, 2003, the trial court granted Dr. Jenkin's motion for partial summary judgment on the misdiagnosis claim on the basis that Plaintiff failed to file her complaint within the two-year statute of limitation period. The Court held that Plaintiff manifested symptoms of B-12 deficiency after the misdiagnosis, and that no later than April 14, 2000 was the date on which an injury arising from the misdiagnosis occurred. Accordingly, the trial court found that the limitation period commenced no later than April 14, 2000, and thus expired before the complaint was filed on May 1, 2002. However, when Plaintiff presented additional expert evidence that a factual issue existed as to whether the statute of limitation had expired on the misdiagnosis claims, the trial court vacated its earlier ruling that the two-year statute of limitation had expired. Finally, the Court of Appeals found that the trial court erred in denying summary judgment because the

statute had indeed commenced to run from the date of Plaintiff's injury in 1999 and expired before the suit was filed on May 1, 2002.

The Court affirmed the trial court's granting summary judgment on Plaintiff's ordinary negligence and breach of fiduciary claims, because they were actually based on medical skill and judgments and thus, sounded in medical malpractice and subject to the two year statute of limitation.

### **13. Statute of Repose**

#### **Waycross Urology Clinic, P.C. v. Johnson, 279 Ga. App. 195 (2006).**

The plaintiff sought treatment from the defendant urologist for a kidney stone in 1987. The physician was unable to retrieve the stone non-surgically, so it was removed through a surgical incision in the abdomen, and through the patient's ureter. A stent was placed in the ureter. Subsequently, the patient called the physician to report that he had passed the stent and the doctor told him to bring the device to his follow up appointment. At that follow up appointment, the doctor removed the staples and discharged the patient with no further instructions. Twelve years later, the patient fell and injured his back. Subsequent tests revealed the patient's left kidney was enlarged, and was not functioning at all, because of an obstruction in the ureter. His kidney was removed. The patient brought a suit for malpractice, alleging that the doctor was negligent for not replacing the stent, so that one remained there in the ureter for thirty (30) days, and in not advising him to have follow up tests months after the surgery to ensure that the ureter was not blocked. The plaintiff also alleged that the physician intentionally concealed the fact that the patient needed these measures done.

The defendant filed a motion for summary judgment on the two-year statute of limitations and five-year statute of repose. The trial court denied the motion, based on expert evidence that the physician deviated from the standard of care by not informing the patient that the stent needed replacing. A subsequent motion for summary judgment on the fraud issue was also denied, with the Court holding that the physician may not have disclosed all that he should have related to the patient about the possibility of an obstruction developing. Additionally, it was noted that the patient's medical records were destroyed approximately four months after it had been discovered that the patient had lost his kidney function. The trial court held that there was a fact issue on whether the physician's statements or omissions constituted a fraud that equitably estopped the defendant from asserting the statute of repose defense.

On appeal, the Court of Appeals noted that both the defendant and two experts testified that stents were not commonly used in 1987, and that the standard of care did not require the type of follow up recommended by the patient's expert. The Court held that at best, the testimony of the patient's expert created an issue of fact as to whether the treating physician was negligent. There was no record evidence that the physician knew that his treatment or advice to the patient were in error or any evidence that he fraudulently withheld such information from the patient.

With respect to the destruction of records, the Court pointed out that this destruction took place as a matter of routine, to purge patient files when the office needed more space. The evidence showed that if a patient had not been seen in the previous seven years, then the file was shredded. The Court also said that the trial court's finding that the medical record was destroyed four months after the patient returned with the diagnosis of

the non-functioning kidney was not actually supported by the evidence. The Court also pointed out that even the patient's expert testified that he only kept patient records for five years and under the circumstances, the absence of records could not create an inference of fraud.

The Court of Appeals reversed the trial court's order denying summary judgment to the defendant.

**Canas v. Al-Jabi et al., 282 Ga. App. 764 (2006)**

This case is most significant for its holdings concerning statute of limitations, statute of repose, and malpractice v. ordinary negligence claims, which are therefore discussed in detail below; however, the Court also briefly discussed derivative liability under the respondeat superior theory and the admissibility of Canas' experts. Derivative liability was a sidebar unremarkable issue, and regarding the experts- the Court simply applied the Cotten v. Phillips holding that O.C.G.A. § 24-9-67.1 does not require an expert to actively practice in the same area as the professional whose conduct is questioned; The expert need only have the knowledge and experience in the area about which the expert testifies. Also, four writs of certiorari (for each Defendant) were granted on February 26, 2007 and assigned to the Supreme Court's May 2007 calendar, on the issue: "Did the Court of Appeals err in holding that if a plaintiff in a misdiagnosis case presents with additional or significantly increased symptoms of the same misdiagnosed disease, the medical malpractice statute of limitations and statute of repose do not bar the plaintiff's claims? See O.C.G.A. §§ 9-3-71 and 9-3-73."

Two months after Derek Canas was born (in 1984) with a rare and serious heart defect, surgeons at the Medical College of Georgia performed surgery to correct the defect.

However, before he was discharged from the hospital, blood tests revealed problems with his immune system, he developed a complication solved only by a pacemaker, and consequently required ongoing cardiology care and monitoring/maintenance of the pacemaker. Just two weeks after Canas was discharged, the hospital stopped using untested blood for transfusions as an HIV screening test became available for donors. Following recommendations from the CDC, American Association of Blood Banks, American Red Cross, and Presidential Commission on the HIV Epidemic, hospitals implemented either a universal patient notification of the risk of HIV from previous blood transfusions, or a "donor look-back" program where they contacted past recipients of blood from donors who had been HIV positive. The hospital never discovered that any donor to Canas was HIV positive, and therefore, never notified Canas' family to warn them of his possible HIV exposure.

During Canas' treatment by Dr. Kaminer (beginning on 1991) and Dr. Al-Jabi (beginning in 1993), Canas displayed multiple and severe signs of pediatric AIDS. However, despite the numerous symptoms, Dr. Kaminer and Dr. Al-Jabi attributed his problems to his heart defect and never referred him to another specialist. Finally, in April of 2001, when his parents took him to various specialists, he was tested and diagnosed with AIDS. Canas filed suit against Dr. Kaminer and Dr. Al-Jabi on December 28, 2001, then later added the Board of Regents and Medical College of Georgia. He alleged medical malpractice and an ordinary negligence claim for failure to notify patients that might have been exposed to HIV. All defendants filed Motions for Summary Judgment, which were *granted* by the court on all claims of medical malpractice where the alleged wrongful act occurred more than 5 years before the date of the suit, but *denied* on all malpractice claims

where the injury occurred within 2 years of the suit and *denied* on all negligence claims where the wrongful act occurred within 5 years of the suit. The Court also denied Defendants' Motions to Exclude Canas' expert witnesses and concluded that the statute of limitations and repose were not violations of the due process or equal protection clauses of the US or Georgia constitutions.

And, thus, the appeals began. Canas appealed the partial summary judgment; Defendants filed cross-appeals of the interlocutory and evidentiary rulings; Dr. Kaminer and the Board each appealed the partial denial of summary judgment and the order denying the motions to disqualify Canas' experts; and, Medical College and Dr. AL-Jabie each appealed the partial denial of summary judgment. Canas' appeal was to the Supreme Court based on the trial court's constitutional rulings, but the Supreme Court transferred the appeal and cross-appeals to the Court of Appeals. The Court affirmed all of the trial court's holdings.

***Statute of Repose-*** Although O.C.G.A. § 9-3-71 establishes that no medical malpractice action may be brought more than five years after the wrongful act, Canas argues that it is tolled until the injured person reaches the age of majority, or else it is unconstitutional for denial to minors of due process., equal protection, and access to the courts. Further, Canas and the doctors disagree about the date of the wrongful act: Canas argues that it is no earlier than the doctor's last treatment of the patient or the date that the patient receives the correct diagnosis; the Defendants argue that the date is the date that the doctor first failed to make the correct diagnosis. The Court here holds that the statute of repose by definition, may not be "tolled" and it constitutionally imposes a five year limit to "prevent stale medical malpractice claims," even specifically addressing the application

of the statute to children. The Court explains that the statute of repose is *never* tolled, not even in the case of fraud. Instead, in the instance of fraud, the defendant is merely estopped from asserting the statute of repose if the defendant's fraud prevented the Plaintiff from learning the cause of the injury. The Court also holds that the determination of the date on which a negligent act occurs generally occurs when the doctor fails to make the correct diagnosis, and the continuing treatment doctrine does not apply, or else it would defeat the purpose of a statute of repose. **However, the Court also holds that where a patient presents new symptoms such that the standard of care requires a reevaluation of the first diagnosis, it can be a new negligent act or omission.**

***Statute of Limitations-*** The Court holds that the statute of limitations codified in O.C.G.A. § 9-3-71 is constitutional and it imposes a 2 year limitation and specifically addresses how it applies to children: the child has two years from the act, or from his fifth birthday, to bring the action. The Court denies that the statute was tolled until Canas reached the age of majority or discovered the wrongful act. The Court also denied that Canas' case fell under the very limited "new injury rule" that provides the actionable injury begins when the patient suffers a new injury that is left untreated because of the misdiagnosis and progresses to a more dangerous condition.

While the Court denied that the statutes were tolled until the date of discovery, the Court did hold that if the patient experiences separate, later, acts of negligence after manifesting significant changes in his condition, summary judgment is not warranted because a jury could find that those later misdiagnoses are *new* negligent acts and thus begin a new date for the calculation of the statutes of limitation and repose.

***Malpractice v. Negligence***- The Court denied that the Plaintiff's failure to warn claim was a medical malpractice claim and thus barred by the statutes of limitation and repose. Instead, the Court held that not every suit to recover against a hospital, or otherwise involving healthcare professionals, is automatically a medical malpractice action. The Court held that the hospital's decision to not warn past patients of an HIV risk from pre-1985 blood transfusions did not require expert medical judgment and thus sounded in ordinary negligence. The hospital's decision not to warn patients was not based on medical judgments, but rather based on concerns about the expense, complexity, and legal implications of a patient notification program. Therefore, Canas' failure to warn claim was based on ordinary negligence and therefore subject to the general personal injury statute of limitations, continuing tort doctrine, and tolled until Canas reached the age of majority.

#### **14. Summary Judgment**

##### **Conley v. Children's Healthcare of Atlanta, Inc., 279 Ga. App. 792 (2006).**

This case involved a claim brought by the parents of a seventeen (17) month old child who died as a result of the alleged negligent care provided by several physicians in the hospital. The defendants filed a motion for summary judgment. In opposition, the plaintiffs presented the affidavit of an expert witness, which referenced certain medical records, but failed to either attach those records to the affidavit or include them in the record before the Court. Therefore, summary judgment was granted to the defendants. This ruling was affirmed on appeal to the Court of Appeals.

## **15. Tort Reform**

### **(a) Expert Qualifications**

The Court of Appeals has addressed the changes in the expert qualifications statute under O.C.G.A. § 24-9-67.1, in the cases of Cotten v. Phillips, 280 Ga. App. 280 (2006), Tenet Healthcare Corporation v. Gilbert, 277 Ga. App. 895 (2006), and in Abramson v. Williams, 281 Ga. App. 617 (September 20, 2006).

### **(b) Medical Authorization**

The medical authorization statute contained in O.C.G.A. § 9-11-9.2 has been addressed by the Court of Appeals in Northlake Medical Center, LLC v. Queen, 280 Ga. App. 510 (2006), Crisp Regional Hospital, Inc. v. Sanders, 281 Ga. App. 393 (2006), Griffin v. Burden, 281 Ga. App. 496 (2006), and Allen v. Wright, 280 Ga. App. 554 (2006).

### **(c) Venue**

The Supreme Court of Georgia has addressed the changes to the venue statute under O.C.G.A. § 9-10-31, in the cases of EHCA Cartersville, LLC v. Turner, 280 Ga. 333 (2006), R.J. Taylor Memorial Hospital, Inc. v. Beck, 280 Ga. 660 (2006), and Woodruff v. Gould, 280 Ga. 757 (2006).

Further, in Hosp. Auth. of Gwinnett County v. Rapson, 283 Ga. App. 297 (2007), the Court affirmed the trial court's grant of an emergency motion by a husband and wife to transfer the case back to the Fulton County. The case was originally filed in Fulton County, then transferred to Gwinnett upon motion by the hospital relying on O.C.G.A. § 9-10-31(c) on the grounds that the alleged negligence occurred in Gwinnett. However, after the EHCA Cartersville case decided by the Supreme Court, held the statute unconstitutional, the trial court transferred the case back to Fulton upon the Rapson's Emergency Motion to transfer.

The Court affirmed the transfer back to Fulton because of the Supreme Court of Georgia finding that O.C.G.A. 9-10-31(c) was unconstitutional, and because the Rapson's participation in the litigation in Gwinnett did not demonstrate a waiver of venue.

## **16. Vicarious Liability – Joint Venture**

### **Kitchens v. Brusman, 280 Ga. App. 163 (2006).**

In this case, which was addressed above, the patient had pain and swelling in her left breast. A mass was drained and a biopsy sample was taken. A specimen was reviewed by a pathologist, who concluded that it was not malignant. The patient commenced suit against the pathologist and the hospital where the biopsy was obtained. The hospital alleged that the plaintiff failed to present any evidence that would support the allegation that it was vicariously liable for the physician's acts and omissions. The plaintiff conceded that the physician was not the actual or apparent agent of the hospital. Instead, the plaintiff contended that the hospital was liable for the physician's actions because the physician's employer and the hospital were joint venturers. He asserted that the hospital held the license to operate a pathology lab, and that the contract with the physician's employer to provide pathology services indicated that the two were joint venturers.

On appeal, the Court of Appeals noted that a joint venture arises where two or more parties combine their property or labor in a joint undertaking for profit, with rights of mutual control. No joint venture can exist without the element of mutual control. The Court of Appeals pointed out that the contract between the hospital and the physician's group specifically provided that the hospital did not have, and could not exercise any control or direction over the manner in which the pathologist provided their services. The contract further provided that the group was responsible for recruiting, contracting,

scheduling, compensating and supervising the physicians. In the absence of evidence of the right of mutual control over the manner in which Dr. Brusman provided pathology services, there could be no joint venture. Summary judgment for the hospital was affirmed.