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DAILY REPORT

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Court probes law helping ER docs

LAWYERS DEBATE IF law requiring med-mal plaintiffs to prove “gross negligence” by ER doctors is constitutional

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THE GEORGIA SUPREME court was asked on Tuesday to rule on the constitutionality of a Georgia law demanding evidence of “gross negligence” on the part of emergency room doctors in order to sustain a medical malpractice claim. The justices responded with a flurry of questions for the attorney who urged the court to overturn the “ER statute.”

“Somebody who counted said I got 27 questions in 20 minutes,” said an unruffled Michael B. Terry, grinning as he exited the chamber where he sparred against supporters of the law over one narrow issue: Whether the law is an unconstitutional “special law” that benefits only a select portion of the medical community, or whether it properly provides added protection

for doctors who provide urgent care for every patient who comes through the door of emergency rooms, often without benefit of medical records or other means to know about a patient’s history.

The ER statute is one part of Senate Bill 3, the comprehensive tort reform package passed by the General Assembly in 2005.

The case stems from a 2007 trip to the emergency room of Columbus’ St. Francis Hospital by Carol Gliemmo, whose husband called an ambulance when she felt a “snapping” in her head and pain behind her eyes. Without ordering a CT scan, ER doctor Mark D. Cousineau diagnosed Gliemmo with a headache caused by stress and high blood pressure and prescribed Valium.

Gliemmo, then 59, continued to



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Roger Sumrall, defending the law, said the ER exception applied to all treatments in ERs.

complain of excruciating pain and was treated for high blood pressure and released, according to court documents. Two days later she had a stroke that left her partially paralyzed.

In their suit filed in Muscogee

County State Court, Gliemmo's attorneys, Traci G. Courville and Samuel W. Oates Jr. of Columbus' Oates & Courville, challenged the constitutionality of the ER statute on a number of grounds. The trial court rejected the challenge but allowed an appeal to the high court, which instructed the parties to respond to the question of whether the statute is a special law.

The Georgia Constitution generally bars laws that focus on a particular group or area when there is already a "general law" that covers the entire class. In this case, Terry—one of three Bondurant, Mixson & Elmore lawyers representing Gliemmo for the appeal—argued that the ER statute arbitrarily creates a special class of health care professionals who are not required to provide the standard of care demanded of the rest of their profession, and then further narrows that class to cover only hospital ERs, obstetric units and patients sent directly from the ER into surgery.

The distinction creates an "unconscionable advantage" for ER doctors and provides a near-insurmountable barrier to patients injured by their negligence, Terry said.

"They and they alone have the burden of proving gross negligence," he added, referring to patients treated by ER doctors.

But Justice Harold D. Melton wondered whether the simple designation of a specific class of doctor created a special law, or simply a specific one.

"Here you have a state law that's more specific than the general stat-

ute," said Melton. "What makes this special?" (Melton was Gov. Sonny Perdue's top lawyer when Perdue signed SB 3 into law; Melton said in 2007 that his role on that bill was minimal and that the passage of time allowed him to stay on cases about SB 3.)

And Justice David E. Nahmias said that Georgia's loophole-riddled tax code offered "hundreds of carve-outs" that, under Terry's analysis, would be prohibited.

But the tax exemptions apply to anyone who desires to meet their requirements, countered Terry, while the ER exemptions are available only to a narrow range of facilities; others, such as nursing homes or hospices, which also might provide emergency care, are left out.



Here you have a state law that's more specific than the general statute. What makes this special?

—Justice Harold D. Melton, asking the plaintiff's lawyer a question in oral argument

Rising to defend the statute, Carlock, Copeland & Stair partner Wade K. Copeland said that the ER exemption does not meet the legal definition of a special law because it does not apply to any particular locale or limited group.

"It's applied to every single hospital throughout the state and to every single patient," he said.

Further, he said, the Legislature had specifically set about to remedy a

"crisis in health care" when it created SB 3, and the ER statute was a key element in trying to attract and retain emergency room doctors.

"Does it apply to every aspect of malpractice?" he asked rhetorically. No, he said, "and it doesn't have to apply to each and every person who may treat someone for an emergency."

ERs are special because they must, by law, be open around the clock, have a doctor on staff and treat anyone, he said.

The justices were somewhat intrigued when Hall Booth Smith & Slover partner Roger Sumrall, accompanying Copeland, posited that the ER exception applied to any treatment provided there—including, in Justice George H. Carley's words, "coughs and headaches"—but generally seemed more interested in the somewhat limited case law in which special laws had been declared void.

Afterward, Copeland pronounced himself "somewhat more confident" having heard the direction of the justices' questions, while Terry declined to speculate on what sort of ruling the court might issue.

Another case involving the ER statute is before the Supreme Court following an August ruling by Fulton County Superior Court Judge Craig L. Schwall, who also turned away a constitutional challenge. The justices have not yet decided whether they will accept that case, *Watkins v. Anegundi*, No. 2008-CV-160682.

Tuesday's case before the high court is *Gliemmo v. Cousineau*, No. S09A1807. DR