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Brief in Support of Motion to Disallow Medical Narrative Report

See also Motion to Disallow

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IN THE STATE OF _______________ COUNTY

STATE OF GEORGIA

John Doe,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIVIL ACTION
	)	
Richard Roe,	)	
	)	
Defendant.	)	

BRIEF IN SUPPORT OF MOTION

TO BAR USE OF CERTAIN

DOCUMENTS AT THE TRIAL

I. INTRODUCTION

The Plaintiff's counsel has notified Defendant's counsel, pursuant to O.C.G.A. 24-3-18, of the Plaintiff's intent to use certain documents as evidence at the trial of this case. This Motion challenges the Constitutionality of such procedure under the 14th Amendment to the Constitution of the Untied States and the Due Process and Equal Protection clauses of the Georgia Constitution, and also challenges the applicability of the new statute to the particular medical narrative report sought to be used as evidence at trial by the Plaintiff.

II. THE NEW STATUTE

O.C.G.A. 24-3-18 provides:

(a) "Upon the trial of any civil case involving injury or disease, any medical report in narrative form which has been signed and dated by an examining or treating licensed medical doctor, dentist, orthodontist, podiatrist, physical or occupational therapist, doctor of chiropractic, psychologist, advanced practice nurse, social worker, professional counselor, or marriage and family therapist shall be admissible and received in evidence insofar as it purports to represent the history, examination, diagnosis, treatment, prognosis, or interpretation of tests or examinations, including the basis therefor, by the person signing the report, the same as if that person were present at trial and testifying as a witness; provided, however, that such report and notice of intention to introduce such report must first be provided to the adverse party at least 60 days prior to trial. A statement of the qualifications of the person signing the report may be included as part of the basis for providing the information contained therein, and the opinion of the person signing the report with regard to the etiology of the injury or disease may be included as part of the diagnosis. Any adverse party may object to the admissibility of any portion of the report, other than on the ground that it is hearsay, within 15 days of being provided with the report. Further, any adverse party shall have the right to cross-examine the person signing the report and provide rebuttal testimony. The party tendering the report may also introduce testimony of the person signing the report for the purpose of supplementing the report or otherwise.

(b) The medical narrative shall be presented to the jury as depositions are presented to the jury and shall not go out with the jury as documentary evidence.

III. GENERAL OBJECTIONS TO THE NEW PROCEDURE

A. The Medical Narrative Report is Not made Under Oath

From the time of the first Georgia Code in 1863 to the present time, Georgia law has required that "The sanction of an oath or affirmation equivalent thereto shall be necessary to the reception of any oral evidence…" O.C.G.A. 24-9-60. This statute was not repealed or amended with the adoption of O.C.G.A. 24-3-18. By requirement of the Constitution of the State of Georgia, no section of the Georgia Code may be amended or repealed except by an amending or repealing Act which "shall distinctly describe the law or Code section to be amended or repealed as well as the alteration to be made," Article 3, Section 3, Paragraph 4, Georgia Constitution of 1983. Subsection (b) of the new O.C.G.A. 24-3-18 provides that "The medical narrative shall be presented to the jury as depositions are presented…", which apparently means that the narrative will be read into the record before the jury, since it cannot be placed in evidence as documentary evidence or be sent out with the jury. The medical narrative report submitted by the Plaintiff's counsel was not made under oath. Since it is to be presented as "oral evidence" pursuant to the new procedure which Plaintiff seeks to employ, it violates O.C.G.A. 24-9-60, and the narrative report should be excluded.

B. The Medical Narrative Report Procedure is a Violation of the Right to Confront Witnesses

Due Process of law includes the right of confrontation of witnesses. O.C.G.A. 24-9-64 provides "The right of a thorough and sifting cross-examination shall belong to every party as to the witnesses called against him." The new statute does not require that the records or narratives in question be verified or made under oath, but even if they were in the form of *ex parte* affidavits, their use in a civil trial would be barred by the above cited Code Section. *Camp vs. Camp*, 213 Ga. 65, 97 SE2d 125 (1957); *Hunsucker vs. Balkcom*, 220 Ga. 73, 137 SE2d 43 (1964); *Hartley vs. Caldwell*, 233 Ga. 333, 155 SE2d 389 (1967). While it is true that the "confrontation" right is specifically mentioned only in the Georgia Constitution in Article 1, Section 1, Paragraph 14, which applies only to criminal trials, all persons in civil trials are nonetheless entitled to the Due Process of Law, pursuant to both the 5th and 14th Amendments to the United States Constitution and pursuant to the Constitution of the State of Georgia. Article 1, Section 1, Paragraph 1, Constitution of 1983. Due process of law includes the right of cross-examination. As the Supreme Court said in *Camp vs. Camp*, supra, "We know that men's rights and liberties are jeopardized when courts abandon the tried and proven court procedure of admitting only relevant evidence and producing witnesses who are subject to cross-examination." 97 SE2d at 126.

The General Assembly apparently purports to have solved this Due Process problem by providing that "…any adverse party shall have the right to cross-examine the person signing the report and provide rebuttal testimony." The problem, however, is that the witness is not at the trial for the purpose of such cross-examination. This means that in order to secure the right of cross-examination the Defendant (or other party against whom such evidence is being offered) must either subpoena the expert to appear at trail for the purpose of cross-examination, or must take the deposition of the expert in advance of trial. If the defendant proceeds by deposition he must, under O.C.G.A. 9-11-26(b)(4)(A)(ii) pay "a reasonable fee for the time spent in responding to discovery by that expert", heretofore paid by the party seeking to use the witness's testimony on direct, which means that Defendant's Due Process right of cross-examination has been impermissibly conditioned upon a financial burden which may be of significant magnitude. If, on the other hand, the defendant proceeds by subpoena, he may (a) be unable to serve the expert, particularly if the expert is from another jurisdiction, or (b) may have to tender witness fees and mileage, as well as pay the expert's fee, which again conditions his right of cross-examination on the expenditure of funds, or (c) may not be able "to secure (the expert's) personal attendance without manifest inconvenience to the public or third persons…" O.C.G.A. 9-11-32(a)(3)(E). Under either scenario, it is an unconstitutional denial of Due Process of law to require a party to pay to exercise his right of cross examination. For all practical purposes, therefore, the right of cross-examination is not unfettered and absolute but it is considerably diminished through the new statute.

C. The New Procedure Has No Requirement of Qualifying Evidence

O.C.G.A. 24-9-67 provides that "the opinions of experts on any question of science, skill, trade, or like questions shall always be admissible; and such opinions may be given on the facts as proved by other witnesses." But the qualification of the person as an "expert" is in the sound discretion of the trial court. *Clary vs. State*, 8 Ga. App. 92, 68 SE 615 (1910) and other cases gathered at p. 7600 of the 1995 edition

of the Evidence title of O.C.G.A. In order for the trial court to make this determination, his qualification as such must be first proved. *Knudsen vs. Duffee-Freeman, Inc.*, 95 Ga. App. 872, 99 SE2d 370 (1957); *Martin vs. Baldwin*, 215 Ga. 293, 110 SE2d 344 (1959).

The new statute provides that "A statement of the qualifications of the person signing the report **may** be included as part of the basis for providing the information contained therein…." Therefore, the General Assembly has attempted in this Statute to take away the judge's discretion in ruling on the qualifications of the author of the document sought to be admitted. This violates O.C.G.A. 24-9-67 and the case precedents interpreting it and also violates the separation of powers of the three branches of government. Under this statue, a court would arguably be compelled to accept the opinion of a person into evidence without any showing of his or her expertise. Not even proof of licensure is required.

D. The New Procedure Provides The Jury No Opportunity To Judge The Credibility of The Witness.

The Pattern Superior Court jury charges, approved by the Council of Superior Court Judges, provides as follows:

"D. **Credibility of Witnesses**

> The jury must determine the credibility of the witnesses. In deciding this, you may consider all the facts and circumstances of the case, including the witnesses' manner of testifying, their intelligence, means and opportunity of knowing the facts to which they testify, the nature of the facts to which they testify, the probability or improbability of their testimony, their interest or lack of interest, and their personal credibility as you observe it. While you may consider the number of witnesses on each side, you are not required to decide in favor of the side with the most witnesses. You make all decisions as to the facts of this case, under the law as given you in this charge.

O.C.G.A. §2-5-4

E. **Expert Witnesses**

> Testimony has been given in this case by certain witnesses who are termed experts. Expert witnesses are those who because of their training and experience possess knowledge in a particular field which is not common knowledge or known to the average citizen.
>
> The law permits expert witnesses to give their opinions based upon their training and experience.
>
> You are not required to accept the testimony of any witnesses, expert or otherwise. Testimony of an expert, like that of all witnesses, is to be given only such weight and credit as you think it is properly entitled to receive."

Thus, adherence to the new procedure makes it impossible for the jury to adequately follow the Court's instructions to judge the witnesses' credibility by taking into account "all the facts and circumstances of the case, including the witnesses' manner of testifying, their intelligence, means and opportunity of knowing the facts to which they testify, the nature of the facts to which they testify, the probability or improbability of their testimony, their interest or lack of interest, and their personal credibility as [the jurors] observe it." That is because the jurors will never see the person who wrote the report, and will have no opportunity to observe his or her manner of testifying, their intelligence or lack of it, or their personal credibility as the jurors observe it.

It is respectfully submitted that the new procedure which the Plaintiff attempts to employ here deprives the Defendant of Due Process of Law, and deprives the jury of the ability to follow the Court's instructions.

IV. PARTICULAR OBJECTIONS TO THE DOCUMENTS TENDERED

A. SPECIFIC OBJECTIONS TO THE DOCTOR'S LETTER

In addition to the general objections set forth above to the procedure itself, Defendant objects to the following particular portions of the Plaintiff's proffered medical narrative report as follows:

1. The final sentence of the third paragraph on the first page, which reads as follows: "All these licenses, memberships and certifications acknowledge me as having met a high standard of medical competence among my peers." This constitutes an impermissible attempt on the part of Dr. __________ to vouch for his own veracity and to bolster his own credibility.

2. The first sentence of the fourth paragraph on page one, which reads as follows: "In regards to Mr. _________, he is a 43 year old male who was apparently driving his pick-up truck when another smaller truck hit him on 8-10-97." This sentence contradicts the facts of the case. The uncontroverted evidence is that Mr. _____________ was driving a large dump truck, and that Mr. _________ drove the dump truck in to the rear portion of a mini sized pick-up trick and a light-weight trailer being pulled by the pickup truck. The Doctor's report assumes facts which are not and will not be in evidence, and it is therefore inadmissible.

3. The second sentence of paragraph four on page one, which reads as follows: "At the time of the accident, the patient complained of pain in his neck and back with burning pain down his right and left leg." This sentence contradicts the facts of the case. There is no evidence that Mr. _________ complained of any such problem at the time of the accident. The report again assumes facts not in evidence, and should not be admitted.

4. The last sentence on page one, which reads as follows: There is no information indicating he head been involved in an accident such as this before or had previous problems with his back before." These statements are not supported by the evidence in the case, and in fact are contradicted by the evidence. Mr. _________ has testified that he has had two other accidents wherein his truck struck another vehicle, and that he has had spasms in his back prior to this wreck. Again, the report assumes the truth of facts which are not and will not be in evidence, and the report should be excluded from evidence.

5. The portion of the second paragraph on page 2 which reads as follows: "This was reviewed with Dr. ___________, a radiologist who specializes in MRI interpretations. It was felt that this disc extrusion was most likely not there before the accident, especially since the patient had not had any pain previous to this accident of 8-10-95." This portion is objected to on the basis that it is double hearsay, and relies upon the opinion of a doctor who is not subject to cross examination, whose qualifications, if any, have not been proved, and who has not signed the report.

6. The first paragraph of page three, which reads as follows: "It is my opinion that this patient is a candidate for surgery. This surgery will cost $15,000.00 and would include the surgeon's fee, facility fee, hospital fees, hardware, physical therapy rehabilitation and medications." This is objected to on the basis that the doctor does not state that the patient needs surgery, that surgery is medically necessary, or that it is more likely than not that the patient will have or needs to have surgery, but merely that he is a "candidate" for surgery. Neither should the expense of such surgery be admissible as evidence, in the absence of testimony that it is likely that Mr. ____________ will have such surgery.

7. The second paragraph on page three is objected to, which reads as follows: "It is my opinion, based upon a reasonable degree of medical certainty, that the injuries Mr. __________ sustained on 8-10-95 and for which I first treated him on 8-24-95 and continue to treat for pain on an as-needed-basis were directly caused by the automobile accident in which he was involved on 8-10-95 as he described to me on his initial exam of 8-24-95." This paragraph is objected to on the basis that it purports to state an opinion as to the ultimate issue for the jury. If Dr. ___________

were to be present in the courtroom, he would not be allowed to testify as set forth in the letter. Thus, the letter certainly should not be allowed in evidence, or its contents.

8. Any statement in the report as to what medical treatment will be needed in the future, since Dr. __________, by his own admission, does not know how Mr. __________ has done since November of 1995. His last visit was on November 2, 1995, almost 2 years ago. It is entirely improper to allow Dr. _____________ to offer in evidence an opinion that Mr. _____________ is a candidate for surgery, since he has no idea what his condition is or how he is doing.

WHEREFORE, for all these reasons, the document should be excluded unless Dr. __________ appears and is available for cross-examination after he testifies. The narrative, even if he were present, would not be admissible for the reasons shown above. He should first be required to offer admissible testimony, and then subject himself to cross-examination in the traditional manner.

Respectfully Submitted:

LAW FIRM, LLP.

By:____________________________

____

Ga. Bar No. _________

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