III. The Use of Medical Narratives under O.C.G.A. §24-3-18 Is Improper and Unconstitutional.

Plaintiff has filed seven notices of intent to introduce medical narratives in accordance with O.C.G.A. §24-3-18. Defendants reassert and reincorporate their objections to each of these purported medical narratives, which objections and purported narratives are attached hereto as Exhibit "C." Additionally, Defendants object to each of these narrative reports being read to the jury on constitutional grounds as set out below. From the outset, it bears noting that certain constitutional arguments were raised and dismissed in *Bell v. Austin*, 278 Ga. 844, 607 S.E.2d 569 (2005) and Defendants have no intention of reintroducing issues already decided by the Court of Appeals. However, this case presents several novel constitutional conflicts that have not yet been addressed by any appellate court in conjunction with the medical narrative statute:

A. O.C.G.A. § 24-3-18 Violates the Constitutional Right to Due Process

1. The code section violates the constitutional right to confront witnesses.

"In almost every setting where important decisions turn on questions of fact, **due process requires an opportunity to**

confront and cross-examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011 (1970)(*emphasis added*); *see also Sinderman v. Perry,* 430 F.2d 939 (1970) (holding that to comply with due process a hearing "must include the right to produce witnesses and evidence and the right to confront and cross-examine witnesses produced by the opposition"); *see also In Re Wiggins*, 144 Ga.App. 707, 242 S.E.2d 290 (1978) (finding denial of due process when petitioner was not afforded opportunity to confront witnesses); *see also City of Kenosha v. Bruno*, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973).

To permit a jury to entertain medical narratives, which are not even made under oath, while obstructing effective cross-examination violates the fundamental due process right established by the 4th and 15th Amendments to the United States Constitution and contravenes the well-founded principle established by the Georgia Supreme Court in *Camp vs. Camp*, 213 Ga. 65, 97 S.E.2d 125 (1957), which held:

> 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.

While O.C.G.A. § 24-3-18 provides that "…any adverse party shall have the right to cross-examine the person signing the report and provide rebuttal testimony," this provision is insufficient to protect these constitutionally vested rights.

No true right to confrontation is afforded under this statute, which provides that, in order to secure the right of cross-examination, the onus is placed on the party *opposing* the witness to subpoena the witness for the purpose of cross-examination and to bear the burden of paying an expert witness whose testimony is contrary to that party's case. This allows the party producing the report to incur no costs while forcing an often-insurmountable hurdle to cross-examine the witness.

The constitutional ramifications of abuse of this statute are quite apparent in this case. Here, Plaintiff has tendered purported medical narratives from **twenty-four** health care providers.[1] One of the records bears a signature that is completely illegible, which renders it utterly impossible for Defendants to cross-examine its author. Defendants lack the clairvoyance necessary to determine which of these reports and which of these witnesses Plaintiff actually intend to rely upon, because Plaintiff has taken the birdshot approach of tendering almost every medical record produced in conjunction with his care, fully aware that most did not even comply with the requirements of O.C.G.A. § 24-3-18, and leaving it for Defendants to sort out the mess.

[1] (omitted list of physicians)

Even for those physicians who can be identified, it would unduly burdensome and time-consuming to require Defendants, who do not bear the burden of proof as to causation and injury, to subpoena and depose twenty-one health care providers (three have been deposed) and extremely costly to pay witness fees for these professionals. Excluding attorneys fees, Defendants incurred costs in the amount of $1631.40 ($3,142.90 including attorneys fees) for the taking of the deposition of Dr. Kelley and would anticipate similar costs associated with the taking of the depositions of the authors of the other twenty-one medical narratives offered by Plaintiff. Therefore, the cost for cross-examination of all of these witnesses (even excluding attorneys fees which could run in excess of $40,000) is projected to exceed $34,000, *which is more than the cost of Plaintiff's spinal surgery*. As such, this statute, especially as applied in this case, effectively robs Defendants of the right to confront adversarial witnesses and violates Defendants' right to due process.

2. The code section violates the constitutional rights to substantive and procedural due process of law.

Moreover, by requiring the party opposing the medical expert to pay for and obtain the expert's testimony, O.C.G.A. § 24-3-18 unlawfully shifts the burden of proof from the party

asserting the matter to the party opposing the matter. There is no more basic tenet in tort law than that, "[t]he burden of proof generally lies upon the party who is asserting or affirming a fact and to the existence of whose case or defense the proof of such fact is essential." O.C.G.A. § 24-4-1; *see also* *Turpin v. North Am. Acceptance Corp*., 119 Ga.App. 212, 166 S.E.2d 588 (1969), (holding that, "the plaintiff in every action has the burden of establishing his right to recover"); *see also* *Grimsley v. Morgan*, 178 Ga. 40, 172 S.E. 49 (1933), (recognizing that, "where plaintiff alleges right to recover, and defendant denies his allegation, plaintiff, upon case as whole, carries burden of showing his right to recover by preponderance of evidence.")

When O.C.G.A. § 24-3-18 allows a Plaintiff to place before the jury a document that is unverified, not made under oath, and not subject to cross-examination, it creates an improper presumption in Plaintiff's favor and unlawfully shifts the burden of disproving the narrative to Defendants. Simply put, no longer does Plaintiff bear the burden of proof at trial in establishing physical injuries caused by this accident, but, rather, Defendants are forced, at their own expense, to procure medical testimony establishing that Plaintiff did not suffer the physical injuries alleged as a result of this accident. This

contravenes the well-established concept of burden of proof and blatantly violates O.C.G.A. § 24-4-1.

The enactment of O.G.C.A. §24-3-18 did not repeal or amend the burden of proof requirement contained in O.C.G.A. § 24-4-1 and, because the Georgia Code may only be appealed or amended by specific reference, the requirement remains intact. *See* Article 3. Section 5, Paragraph 4, Georgia Constitution of 1983 (providing that legislation repealing or amending an act "shall distinctly describe the law of Code section to be amended or repealed as well as the alteration to be made.") Because O.G.C.A. §24-3-18 places the burden of proof upon Defendants to disprove an unverified document, it violates both O.C.G.A. § 24-4-1 and the clear mandate of the Georgia Constitution.

B. O.C.G.A. § 24-3-18 Permits Introduction of Expert Testimony without Ensuring Qualification of the Expert.

O.C.G.A. § 24-9-67.1 provides:

> (b) If scientific, technical, or other specialized knowledge will assist the trier of fact in any cause of action to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if:
>
> (1) The testimony is based upon sufficient facts or data which are or will be admitted into evidence at the hearing or trial;
> (2) The testimony is the product of reliable principles and methods; and

(3) The witness has applied the principles and methods reliably to the facts of the case.

Permitting Plaintiff to introduce medical narratives under O.C.G.A. § 24-3-18 would completely undermine the General Assembly's recent adoption of this *Daubert* standard and allow the introduction of expert testimony without requiring Plaintiff to show:

1) whether the medical narrative will assist the trier of fact in understanding the evidence or determining a question of fact;

2) whether the author of the medical narrative is "a witness qualified as an expert by knowledge, skill, experience, training, or education;"

3) whether the testimony is based on sufficient facts in evidence;

4) whether the testimony resulted from the application of reliable principles and standards; or

5) whether the author off the medical narrative properly applied these principles and standards.

Not only does O.C.G.A. § 24-3-18 thwart the long-established requirement that the party offering the expert bears the burden of proof as to the qualification of the expert, but it simply

eliminates the requirement of expert qualification altogether. Thus, this code section allows a jury an unfettered ability to consider and give deference to "expert" testimony of unqualified persons applying ill-founded methods in an inappropriate manner. This procedure is inherently unreliable, undermines the integrity of the legal process, and strips the trial court of its obligation to ensure the reliability of expert testimony.

C. O.C.G.A. § 24-3-18 Eliminates the Jury's Responsibility to Determine the Credibility of Witnesses.

O.C.G.A. § 24-4-4 provides that:

> In determining where the preponderance of evidence lies, the jury may consider all the facts and circumstances of the case, the witnesses' manner of testifying, their intelligence, their means and opportunity for knowing the facts to which they testified, the nature of the facts to which they testified, the probability or improbability of their testimony, their interest or want of interest, and their personal credibility so far as the same may legitimately appear from the trial.

In determining how to consider the testimony of an expert witness, jurors are admonished, "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." Suggested Pattern Jury Instructions by the Council of Superior Court Judges of Georgia; *see also* Mayer v. Wylie, 244

Ga.App. 481, 535 S.E.2d 816 (2000); *see also* *Flint v. Department of Transp*., Ga.App. 815, 479 S.E.2d 160 (1996). If medical narratives are read to the jury by an attorney rather than by the report's author, the jury will have no facts whatsoever upon which to base a determination as to the credibility of the author.

In *Zhou v. LaGrange Academy, Inc*., 266 Ga.App. 445, 597 S.E.2d 522 (2004), the Court of Appeals held, "[t]he trier of fact is not required to believe opinion evidence." The Court further concluded that "[a]bsent qualification as an expert witness and tender of the witness as an expert, a witness' opinion is that of a layperson." Such is the case here. O.C.G.A. § 24-3-18 strips the jury of the ability to decide whether or not the expert testimony contained in the medical narrative is credible, and affords no opportunity to consider the demeanor, intelligence, interest, manner of testimony, and means for knowledge of the facts of the purported expert. Rather, the jury is forced to accept without any foundation the proposition that the expert is, as a matter of law, credible and that the facts contained in the narrative are, as a matter of law, true.