Professional Malpractice
Case Law Update

William J. Hunter, Esq. and Andrew M. Wilkes, Esq.
Oliver Maner & Gray LLP

The following case law update was provided by the GDLA's Professional Liability Substantive Law Committee.

The appellate courts of Georgia have continued to issue opinions on Senate Bill 3 since its enactment on February 16, 2005. During calendar year 2006, the appellate courts issued opinions addressing the medical authorization, expert qualifications, and venue provisions.

O.C.G.A. § 9-11-9.2–Medical Authorization

Northlake Medical Center, LLC v. Queen, 280 Ga. App. 510, 634 S.E.2d 486 (2006). In Northlake, the Court of Appeals held that O.C.G.A. § 9-11-9.2 was preempted by HIPAA because it did not provide the privacy protections afforded to patients by HIPAA and it was not possible to comply with the state statute without violating the federal statute. The Court of Appeals found that O.C.G.A. § 9-11-9.2 did not have certain safeguards related to the disclosure of protected health information that are provided by HIPAA. In contrast to the majority's finding, the dissent concluded that the provisions of 9-11-9.2 were consistent with the core elements provided by HIPAA. The opinion begs the question as to whether the legislative addition of the privacy safeguards alleged to be lacking by the majority could ultimately bring the statute into compliance with HIPAA.

Allen v. Wright, 280 Ga. App. 554, 634 S.E.2d 518 (2006). The Court of Appeals affirmed the trial court's denial of defendant's motion to dismiss based on a defective medical authorization. In a short opinion, the Court of Appeals found Northlake Med. Ctr. to be controlling precedent. The defendants were granted certiorari by the Georgia Supreme Court, and oral arguments were scheduled to be heard on February 13, 2007.

Two additional reported decisions addressing O.C.G.A § 9-11-9.2 were also issued by the Court of Appeals. See Crisp Regional Hospital, Inc. v. Sanders, 281 Ga. App. 393, 636 S.E.2d 123 (2006); Griffin v. Burden, 281 Ga. App. 496, 636 S.E.2d 686 (2006). Both opinions cited the holdings in Northlake and Allen in concluding that O.C.G.A. § 9-11-9.2 is preempted by HIPAA.

O.C.G.A. § 24-9-67.1--Expert Opinions

The Georgia Court of Appeals issued several opinions addressing the admissibility of expert witness testimony in medical malpractice cases in light of the provisions found in O.C.G.A. § 24-9-67.1, which was also part of Senate Bill 3.

In Cotten v. Phillips, 280 Ga. App. 280, 633 S.E.2d 655 (2006), the Court of Appeals rejected the proposition that O.C.G.A. § 24-9-67.1(c)(2) required that an expert testifying about the standard of care in a medical malpractice case actively practice in the same specialty or practice area as the professional whose conduct was alleged to be negligent. Instead, the statute requires simply that an expert must have knowledge and experience in the area of practice or specialty about which the expert is providing testimony. See also Mays v. Ellis, 2007 Ga. App. LEXIS 9 (January 5, 2007)(the statute's plain language "contemplates that the expert may very well have a different area of practice than the defendant doctor."); Canas v. Al-Jabi, 2006 Ga. App. LEXIS 1431 (November 20, 2006).

The application of O.C.G.A. § 24-9-67.1(c)(2) to expert affidavits was examined by the Court of Appeals in Abramson v. Williams, 281 Ga. App. 617, 636 S.E.2d 765 (2006). In Abramson, the defendants alleged that the expert affidavit was defective because it was executed by a physician (orthopedist) who practiced in a different specialty than the defendant (neurosurgeon). Consistent with the findings in Cotten, the Court held that section 24-9-67.1(c)(2) did not require that a plaintiff's expert be a member of the same specialty as a defendant doctor, so long as the affidavit showed he had the requisite knowledge and experience to give his opinion on the alleged professional negligence within the Complaint.

In Tenet Healthcare Corporation v. Gilbert, 277 Ga. App. 895, 627 S. E.2d 821 (2006), the Georgia Court of Appeals addressed whether a physician who signs an affidavit pursuant to O.C.G.A. § 9-11-9.1 must be licensed at the time the affidavit was signed in light of O.C.G.A. § 24-9-67.1. The Court found the affidavit in this case was not deficient pursuant to O.C.G.A. § 9-11-9.1. The Court further noted, "[w]hether the execution of the affidavit constitutes a criminal violation may be used to challenge its credibility, but such is not relevant to the fact that the affidavit is valid testimony duly sworn to and executed before an authorized official, who has affixed the proper certification." Id. at 898, 627 S.E.2d at 825.

The Court then addressed whether this physician was competent to sign an expert affidavit after the enactment of O.C.G.A.§ 24-9-67.1. Finding that O.C.G.A. § 24-9-67.1 only requires that the expert be licensed by the appropriate regulatory agency to practice his or her profession "at the time the act or omission is alleged to have occurred," the Court affirmed the trial court's denial of the motion to dismiss, and opined that "in a twist of irony, appellant's argument that the 2005 enactment should apply here would only strengthen [the physician's] credentials for giving the affidavit." Id. at 900, 627 S.E.2d at 827.

O.C.G.A. §§ 9-10-31 and 9-10-31.1- Venue

In a combined opinion styled EHCA Cartersville, LLC v. Turner and Garland v. Earle, 280 Ga. 333, 626 S.E.2d 482 (2006), the Georgia Supreme Court struck down as unconstitutional O.C.G.A. § 9-10-31(c), but constitutionally upheld O.C.G.A. § 9-10-31.1(a).

The Court in Turner found that O.C.G.A. § 9-10-31(c) violated the joint tortfeasor provision of the Constitution. The Court similarly rejected the defendants' argument that O.C.G.A. § 9-10-31

was authorized by Art. VI, Sec. II, Par. VIII of the Constitution, which vested the superior and state courts with the power to change venue. The Court acknowledged that the trial courts are vested with this authority but disagreed that OCGA