

Professional Liability Case Law Update

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***Gliemmo v. Cousineau* S09A1807, 2010 Ga. LEXIS 218 (March 15, 2010).**

In *Gliemmo*, a divided Georgia Supreme Court rejected a constitutional challenge to that portion of Senate Bill 3 that elevated the burden of proof and lowered the standard of care required by physicians and medical providers who administer emergency medical care.

Justice Carley, writing for a four-person majority, upheld the constitutionality of O.C.G.A. § 51-1-29.5(c) against several challenges to the statute. The majority first held that O.C.G.A. § 51-1-29.5(c) “is not a special law affecting only a limited activity in a specific industry during a limited time frame. Rather . . . it is a general law because it operates uniformly upon all health care liability claims arising from emergency medical care as provided in the statute, and . . . that classification of the designated class is neither arbitrary nor unreasonable.”

In response to a challenge that the statute violated the Georgia equal protection guarantee, the majority held, “Since the code section ‘does not disadvantage a suspect class or interfere with the exercise of a fundamental right . . . it need only bear a reasonable relationship to a legitimate state purpose.’” The majority cited the enacting legislation within the Tort Reform Act of 2005 and held, “Promoting affordable liability insurance for health care providers and hospitals, and thereby promoting the availability of quality health care services, are certainly legitimate legislative purposes.

Furthermore, it is entirely logical to assume that emergency medical care provided in hospital emergency rooms is different from medical care provided in other settings, and that establishing a stan-

dard of care and a burden of proof that reduces the potential liability of the providers of such care will achieve those legitimate legislative goals.” The majority noted that “the equal protection argument made by Appellants ‘boils down to nothing more than [a] claim that the General Assembly has made a bad policy judgment . . . and [such a claim] should be directed to the General Assembly and the



Governor rather than this Court.”

Finally, the majority held that the term “gross negligence” has a commonly understood meaning as defined by O.C.G.A. § 51-1-4, is not unconstitutionally vague, and therefore is not violative of due process.

The majority declined to consider the constitutional vagueness challenge to the definition of “emergency medical care” set forth in O.C.G.A. § 51-1-29.5(a)(5), because this issue was not properly raised in the trial court or addressed by the trial judge. Only time will tell whether the court’s silence as to this narrow issue leaves open the possibility of the statute being found unconstitutional in the future. Certainly not all medical care dispensed by health care providers in a hospital emergency department, obstetri-

cal unit, or surgical suite could be deemed “emergency medical care.” However, the majority does not seem to allow for this reasoning based upon its conclusion that “it is entirely logical to assume that emergency medical care provided in a hospital emergency room is different from medical care provided in other settings, and that establishing a standard of care and a burden of proof that reduces the potential liability of the providers of such care will help achieve those legitimate legislative goals.”

Justice Benham, along with C.J. Hunstein and J.J. Thompson, authored the dissent and argued that the statute was unconstitutional on two separate grounds.

The dissent concluded that O.C.G.A. § 51-1-29.5(c) is a special law that regulates subject matter already addressed by a general law: “Here, the General Assembly has already enacted O.C.G.A. § 51-1-27, a general law which states the standard of care in medical malpractice cases to be ‘reasonable care.’ Because O.C.G.A. § 51-1-29.5(c) is a special law that regulates the same subject matter as O.C.G.A. § 51-1-27, it is unconstitutional under the Georgia Constitution of 1983.”

The dissent further opined that the statute failed to pass constitutional muster because the statute is a special law, and its application results in an arbitrary and unreasonable classification. The dissent noted that “all health-care providers,” not merely those who dispense emergency medical care in a hospital emergency room, are incurring difficulty in locating affordable liability insurance. As written, the statute is arbitrary because it applies only to emer-

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gency medical care dispensed at certain locations identified by statute. The statute is unreasonable in that it differentiates between the standards of liability physicians providing the same medical care in different locations.

**Atlanta Oculoplastic Surgery v. Nestlehutt
So9A1432, 2010 Ga. LEXIS 272 (March 22, 2010).**

Within a week of issuing the *Gliemmo* opinion, a previously-divided Georgia Supreme Court issued a unanimous opinion in the long-awaited *Nestlehutt* case and held unconstitutional the limitation imposed by O.C.G.A. § 51-13-1 on noneconomic damages in medical malpractice cases

Chief Justice Hunstein authored the opinion for the court, with Justice Nahmias concurring specially along with P.J. Carley and J. Hines. The majority held that the noneconomic damages caps in O.C.G.A. § 51-13-1 violate the constitutional right to trial by jury. The scholarly nature of the opinion underscores the importance that the supreme court placed on its ruling. The majority opinion goes to great lengths to cite the constitutional, statutory, and common law bases addressing the right to a jury trial to recover damages in medical malpractice cases.

The majority's opinion is anchored in the provision of the Georgia Constitution providing that "the right to trial by jury shall remain inviolate." Ga. Const. of 1983, Art. I, Sec. I, Par. XI (a). The opinion cites the origins of the State's common law right to a jury trial as it existed at the time of the adoption of the Georgia Constitution in 1798. The majority concludes that the right to a jury trial in a medical malpractice claim is clearly encompassed within the Georgia Constitution of 1798 and in Georgia's earliest reported case law.

The majority then confirmed that the determination of damages rests "peculiarly within the

province of the jury." Likewise, "the right to a jury trial includes the right to have a jury determine the amount of . . . damages, if any, awarded to the [plaintiff]." Extending this analysis further, the court held that "noneconomic damages have long been recognized as an element of total damages in tort cases, including those

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involving medical negligence." In summing up its analysis, the majority states, "Based on the foregoing, we conclude that at the time of the adoption of our Constitution of 1798, there did exist the common law right to a jury trial for claims involving the negligence of a health care provider, with an attendant right to the award of the full measure of damages, including noneconomic damages, as determined by the jury."

Requiring a court to reduce noneconomic damages as calculated by a jury would clearly nullify and undermine the jury's basic function, as guaranteed by the Georgia Constitution. "The very existence of caps, in any amount, is violative of the right to trial by jury." The constitutional analysis which is applicable to caps on noneconomic damages is distinguishable from the analysis of

punitive damages or treble damages, because those types of damages do not address protections afforded by the Constitution. Likewise, a trial court's authority to issue a remittitur "is a corollary of the courts' constitutionally derived authority to grant new trials."

In footnote 8, the majority confirms its consideration of authority from other jurisdictions and concludes that jurisdictions which have upheld similar statutes are governed by constitutional jury trial provisions which are less comprehensive than Georgia's.

After analyzing the constitutionality of the statute, the court next addressed whether striking the cap on noneconomic damages would be an improper retroactive application as to the appellant. The court noted that "the general rule is that an unconstitutional statute is wholly void and of no force from the date it was enacted." Although exceptions may be made to this general rule, the applicable analysis does not "militate in favor of deviation from the general rule of retroactivity." Interestingly, the court noted that the appellant could not have concluded that the "caps' validity was assured," given the political environment which was attendant to, and after, the enactment of the Tort Reform bill. The court found to be insufficient the appellant's contention that its litigation strategy would have been different if it had known that the caps were invalid. The court also held that there was no basis for granting the appellant a new trial.

Justice Nahmias, joined by P.J. Carley and J. Hines, concurred specially. Importantly, the concurrence agreed with the majority's finding that the caps violate the State's constitutional guarantee of the right to trial by jury. The concurrence also agreed that this decision should apply to all pending cases, not just cases filed following this opinion. However, the concurrence differed in the analysis which the majority had used in reaching its conclusion that the ruling should apply retroactively. ♦