

IN THE STATE COURT OF DEKALB COUNTY

STATE OF GEORGIA

HARRIETTE D. WIGGINS, as Widow:  
and Personal Representative of:  
Raymond C. Wiggins and as :  
Executrix of the Estate of :  
Raymond C. Wiggins, :  
 :  
 :  
Plaintiff, :  
 :  
 : Civil Action File  
vs. :  
 :  
 : No. 99A-54244-4  
DEKALB MEDICAL CENTER, INC.; :  
CHAPEL HILL MEDICAL & PROFES- :  
SIONAL CENTER, INC;<sup>1</sup> ANDRE :  
LEWIS, M.D.; NANCY RAMPELL, :  
M.D.; and DANIEL KIM, M.D., :  
 :  
 :  
Defendants. :

O R D E R

Upon consideration of the motions to exclude expert testimony filed by four of the Defendants<sup>2</sup> herein on April 8, 2005 (Defendants Rampell and Kim) and April 19, 2005 (Defendants Lewis and DeKalb); after reviewing the motions, supporting and opposing briefs and other documents in the file and hearing, on May 11, 2005, the arguments of counsel, the Court rules as follows.

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<sup>1</sup>A note at the end of ¶ 5 of the Amended Consolidated Pretrial Order herein states that Defendant Chapel Hill "is not a proper party . . . as it . . . was involuntarily dissolved in 1988." An original sixth defendant, a Dr. Stirne, was dismissed without prejudice on April 14, 1999.

<sup>2</sup>Chapel Hill Medical & Professional Center, Inc. (see n.1, *supra*) did not file a motion to exclude expert testimony.

I. Constitutionality of Applying New OCGA § 24-9-67.1 to this Case

Section 15(b) of Act 1 (SB 3) of the 2005 session of the Georgia General Assembly ("the act" or "the new act") states, in substance, that new OCGA § 24-9-67.1 applies to causes of action, like this one, pending on the effective date of the act "unless such application would be unconstitutional." It is, of course, true that "[a] constitutional question will not be decided unless it is essential to the resolution of the case"<sup>3</sup>; but since the motions are based upon portions of OCGA § 24-9-67.1, it is essential to decide at least this constitutional question.<sup>4</sup>

Plaintiff contends (first brief opposing the motions, p. 20) that application of new OCGA § 24-9-67.1 to this case "is prohibited by the Georgia Constitution". The Georgia Court of Appeals has held, however, that

[W]here a statute governs only procedure of the courts, *including the rules of evidence*, it is to be given retroactive effect absent an expressed contrary intention.<sup>5</sup>

Here, not only is there no "expressed contrary intention," there is an expressed intention that new OCGA § 24-9-67.1 is to apply to

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<sup>3</sup>Bell v. Austin, 278 Ga. 844 (1) (607 SE2d 569) (2005) (citation omitted).

<sup>4</sup>As will appear below, the Court also finds it essential to decide some of Plaintiff's attacks on the constitutionality of the new act.

<sup>5</sup>Morgan Driveaway, Inc. v. Canal Ins. Co., 266 Ga. App. 765, 769 (2) (598 SE2d 38), *cert. denied*, 266 Ga. App. 910 (2004) (punctuation and citations omitted; emphasis added).

causes of action pending on the effective date of the new act.

Moreover,

The prohibition in Art. I, Sec. I, Par. X of the Georgia Constitution of 1983 against retroactive laws applies only to those laws which affect or impair substantive rights under prior law which have vested at the time the subsequent law takes effect. Where an amendment to a statute changes procedure or *rules of evidence*, it does not affect or impair vested substantive rights, and it is to be given retroactive effect absent the legislature's expressed contrary intention.<sup>6</sup>

Accordingly, since new OCGA § 24-9-67.1 represents merely a change<sup>7</sup> in the rules of evidence,<sup>8</sup> its application to this case is not unconstitutional under the Georgia constitution.<sup>9</sup>

## II. Constitutionality of New OCGA § 24-9-67.1

As noted earlier (text at n.3, *supra*), "[a] constitutional question will not be decided unless it is essential to the resolution of the case". Were the Court of the opinion that all of the

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<sup>6</sup>Devore v. Liberty Mut. Ins. Co., 257 Ga. App. 7, 9 (570 SE2d 87) (2002) (citations omitted; emphasis added).

<sup>7</sup>Together with new OCGA § 24-9-67, these two new statutes replacing existing OCGA § 24-9-67.

<sup>8</sup>Plaintiff's contention (second brief opposing the motions, filed on May 13, 2005, pp. 26-28) that enactment of this new rule of evidence violates the constitutional prohibition against, among other things, legislators exercising the functions of the judiciary (Art. I, Sec. II, Par. III) is addressed in Sections II.C. and D. below.

<sup>9</sup>Browning v. Maytag Corp., 261 Ga. 20, 22 (401 SE2d 725) (1991), relied upon by Plaintiff (first brief opposing the motions, filed on May 9, 2005, p. 20), is not to the contrary, as there "to apply [the new statute] retroactively to defeat [the plaintiffs'] substantive right to bring their cause of action would be unconstitutional."

motions should be denied in toto because the expert testimony in question is admissible under either new OCGA § 24-9-67.1 or replaced OCGA § 24-9-67 (see n.7, *supra*), it would not decide any further constitutional questions, as that would not be essential to the resolution of the motions. The Court's opinion, however, is that, if the new section is constitutional, it requires the granting of two of the motions in toto and one in part, so the Court must proceed to decide some<sup>10</sup> of Plaintiff's constitutional attacks on the new act. In so doing, the Court will be mindful of the rule that "the constitutionality of a statute is presumed, and . . . all doubts must be resolved in favor of its validity."<sup>11</sup>

A. Georgia Constitution Art. III, Sec. V, Par. III

The cited provision prohibits the passage of a bill that, among other things, "refers to more than one subject matter."

Whether an act violates [this] rule depends on whether all of the bill's provisions seek to accomplish a single objective. The Constitution looks to unity of purpose. As used in the Constitution, the term subject matter is to be given a broad and extended meaning so as to allow the legislature authority to include in one Act all matters having a logical or natural connection. To constitute plurality of subject matter, an Act must embrace two or more dissimilar and discordant subjects that by no fair intendment can be considered as having

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<sup>10</sup>Section 14 of the new act states that a judgment that some portion of the new act is unconstitutional does not impair the vitality of the rest of the act; and, as will be discussed below, some of Plaintiff's attacks are on portions of the act not involved in the decision of the motions.

<sup>11</sup>Albany Surgical, P. C. v. Ga. Dep't of Cmty. Health, 278 Ga. 366, 368 (2) (602 SE2d 648) (2004) (citation omitted).

any logical connection with or relation to each other. All that our Constitution requires is that the Act embrace only one general subject. . . .

The general purpose of the challenged act [enacting, inter alia, OCGA § 9-11-9.1] is to reform tort liability of both medical providers and other professionals. . . . All three provisions are logically related to the general subject of professional liability and do not embrace discordant subjects. Therefore, the act is constitutional under the multiple subject matter provision.<sup>12</sup>

Under this standard, the new act does not refer to more than one subject matter.

B. Georgia Constitution Art. I, Sec. I, Par. I

The cited provision states that "[n]o person shall be deprived of . . . property except by due process of law."<sup>13</sup> Plaintiff contends (first brief opposing the motions, p. 18) that subsection (f) of new OCGA § 24-9-67.1 offends this provision because it is vague. Even assuming this to be true, however, it has no impact on the decision of the motions, as the statement of legislative intent in subsection (f) is irrelevant to the questions of interpretation of subsection (c) of new OCGA § 24-9-67.1 that are addressed below. Accordingly, in view of the severability clause mentioned in n. 10, *supra*, there is no need to address further this claimed constitutional infirmity of subsection (f).

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<sup>12</sup>Lutz v. Foran, 262 Ga. 819, 823-24 (3) (b) (427 SE2d 248) (1993) (punctuation, brackets and citations omitted).

<sup>13</sup>Plaintiff does not claim that new OCGA § 24-9-67.1 violates the due process clause of the 14<sup>th</sup> amendment to the U.S. Constitution.

C. Georgia Constitution Art. I, Sec. II, Par. III

The cited provision prohibits, among other things, legislators from exercising the functions of the judiciary. Plaintiff contends that subsection (f) of new OCGA § 24-9-67.1 "seeks to invade the statutory construction role of the courts" (second opposing brief, p. 28 - see also p. 29).<sup>14</sup> As under the previous heading, however, even assuming this to be true, it has no impact on the decision of the motions. Accordingly, there is similarly no need to address further this claimed constitutional infirmity of subsection (f).

D. Georgia Constitution Art. VI, Sec. I, Par. IX

The cited provision states that "[a]ll rules of evidence shall be as prescribed by law."

[T]he effect of this paragraph [new in the 1983 Constitution] is to elevate to constitutional status the long-recognized principle that the legislature has power to establish rules of evidence *where not in conflict with the constitution or rights guaranteed by it*.<sup>15</sup>

Calhoun v. State Highway Dep't,<sup>16</sup> relied upon by Plaintiff (second opposing brief, pp. 27-28), antedated the existence of the constitutional provision just quoted. Even so, however, that Court

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<sup>14</sup>She also contends that it abdicates legislative responsibility (*id.*, pp. 29-30) and delegates legislative powers without sufficient direction (*id.*, p. 30).

<sup>15</sup>Bell, *supra* (n.3), 278 Ga. at 846 (2) (punctuation and citation omitted; emphasis added).

<sup>16</sup>223 Ga. 65 (2) (153 SE2d 418) (1967).

found that the newly enacted rule of evidence struck down in that case was in conflict with the constitution (and rights guaranteed by it).<sup>17</sup> Likewise, Plaintiff must show that new OCGA § 24-9-67.1 is "in conflict with the constitution or rights guaranteed by it."<sup>18</sup>

1. Georgia Constitution Art. I, Sec. I, Par. II<sup>19</sup>

The cited provision states, in part, that "[n]o person shall be denied the equal protection of the laws." Plaintiff contends (first brief opposing the motions, pp. 14-16) that new OCGA § 24-9-67.1 denies equal protection. In Bell, *supra* (n.3), however, the Court wrote:

[The defendant] is affected by OCGA § 24-3-18<sup>20</sup> only to the extent that he is a party to a civil action involving an injury that [the plaintiff wife] allegedly sustained as the result of his negligence. *The statute does not discriminate against him in that capacity,*

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<sup>17</sup>*I.e.*, the requirement that when private property is taken for public road or street purposes, "just and adequate compensation shall . . . be paid" (now Ga. Const. 1983, Art. I, Sec. III, Par. I(b)).

<sup>18</sup>Bell, *supra* (n.3), 278 Ga. at 846 (2) (punctuation and citation omitted).

<sup>19</sup>See also U.S. Const. amend. XIV, § 1: ". . . No State shall . . . deny . . . equal protection of the laws."

<sup>20</sup>Subsection (a) of this statute provides that

Upon the trial of any civil case involving injury or disease, any medical report . . . which has been signed . . . by an examining or treating . . . doctor . . . shall be admissible and received in evidence . . . the same as if that person were present at trial . . .

since it gives him the same right as any other similarly situated party to rely upon the hearsay exception created thereby. Thus, if [the defendant] wished to introduce medical reports authored by [the plaintiff wife's] examining or treating physicians to rebut her claim that the collision was the proximate cause of her medical condition, he could do so without having to call the doctors themselves as defense witnesses. . . . The person who is asserting the equal protection claim has the burden to establish that he is similarly situated to members of the class who are treated differently from him. If the person asserting the violation cannot make the foregoing showing, there is no need to continue with an equal protection analysis. Because [the defendant] is treated no differently than any other party in a civil action involving injury or disease, he does not have a viable challenge to OCGA § 24-3-18 on equal protection grounds.<sup>21</sup>

2. Georgia Constitution Art. I, Sec. I, Pars. I and XII

The cited provisions state, respectively, that no person shall be deprived of "property except by due process of law"<sup>22</sup> and "the right to prosecute . . . , either in person or by an attorney, that person's own cause in any of the courts of this state." Plaintiff contends (first brief opposing the motions, p. 17) that exclusion of the testimony of her current experts pursuant to new OCGA § 24-9-67.1 will foreclose her opportunity to present her claim. The Court, however, is not persuaded on this point, as, to the extent that such testimony is excluded by this Order, Plaintiff will have ample opportunity to replace it with expert testi-

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<sup>21</sup>278 Ga. at 846-47 (punctuation and citations omitted; emphasis added).

<sup>22</sup>Plaintiff does not claim that new OCGA § 24-9-67.1 violates the due process clause of the 14<sup>th</sup> amendment to the U.S. Constitution.

mony that is admissible under the new section.

III. The Merits of the Motions

New OCGA § 24-9-67.1(c) provides that

. . . [T]he opinions of an expert . . . shall be admissible only if, at the time the act or omission is alleged to have occurred, such expert:

\* \* \*

(2) . . . had actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given as the result of having been regularly engaged in:

(A) The active practice of such area of specialty of his or her profession for at least three of the last five years, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in . . . diagnosing the condition . . . which is alleged to have been [diagnosed]<sup>23</sup> negligently . . . .

\* \* \*

(D) Notwithstanding any other provision of this Code section, an expert who is a physician and, as a result of having, during at least three of the last five years immediately preceding the time the act or omission is alleged to have occurred, supervised . . . nurses . . . or medical support staff, has knowledge of the standard of care of that health care provider under the circumstances at issue shall be competent to testify as to the standard of that health care provider. . . .

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<sup>23</sup>See OCGA § 1-3-1(a):

. . . [In interpreting statutes, a] transposition of words and clauses may be resorted to when a sentence or clause is without meaning as it stands.

In interpreting the foregoing language, this Court must "look diligently for the intention of the General Assembly, keeping in view at all times the old law, the evil, and the remedy."<sup>24</sup> Here, the "old law" is OCGA § 24-9-67:

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.

And the "evil" is stated in Section 1 of the new act:

. . . The General Assembly . . . finds that certain civil justice . . . reforms as provided in this Act will promote predictability and improvement in . . . the resolution of health care liability claims and will thereby assist in promoting the provision of health care liability insurance . . . .<sup>25</sup>

Moreover, in determining the intention of the General Assembly,

[W]e look first to the words of the statute to determine what the intent was, and if those words be plain and unambiguous and the intent may be clearly gathered therefrom, we need look no further in determining what that intent was. In fact, where the language of an Act is plain and unequivocal, judicial construction is not only unnecessary but is forbidden.<sup>26</sup>

A. Defendant Lewis' Motion

Defendant Lewis, the first doctor to see Plaintiff's decedent

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<sup>24</sup>*Id.*

<sup>25</sup>Quotation of this finding should not be understood as indicating agreement with it - nor should this footnote be understood as indicating disagreement - either, of course, being beyond the role of this Court.

<sup>26</sup>Whirl v. Safeco Ins. Co., 241 Ga. App. 654, 655 (527 SE2d 262) (1999) (punctuation and citations omitted).

(on March 12 and 19, 1997),<sup>27</sup> is an internist,<sup>28</sup> and both of Plaintiff's current expert witnesses<sup>29</sup> are board certified in this "area of specialty" (OCGA § 24-9-67.1(c)(2)(A)),<sup>30</sup> although both are pulmonary specialists.<sup>31</sup> Dr. Witorsch has been in practice since 1969,<sup>32</sup> and Dr. Wright since at least 1984.<sup>33</sup> Accordingly, as of March 12-19, 1997, both of these experts had "actual professional knowledge and experience in [internal medicine] as the result of having been regularly engaged in . . . [t]he active practice of [internal medicine] for at least three of the . . . five years [preceding March 12-19, 1997], with sufficient frequency to establish an appropriate level of knowledge . . . in . . . diagnosing the condition . . . which is alleged to have been [diagnosed] neg-

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<sup>27</sup>The parties have stipulated that Defendant Lewis was an employee of Defendant DeKalb in March of 1997. Amended Consolidated Pre-Trial Order, ¶ 13.

<sup>28</sup>Lewis deposition, p. 16, ll. 3-6.

<sup>29</sup>The Amended Consolidated Pre-Trial Order also lists (¶ 19(b)(25)) a Dr. Cooperman as one of Plaintiff's may-call witnesses. The file contains a copy of a notice that Defendants will take Dr. Cooperman's deposition on "Tuesday, May 17, 2006 [sic]," but Dr. Cooperman is mentioned only in Defendant Kim's motion.

<sup>30</sup>Exhibit to Dr. Witorsch's deposition, p. 1; Exh. 1 to Dr. Wright's deposition, p. 2.

<sup>31</sup>Dr. Witorsch testified in his deposition that he practices in "[i]nternal medicine and pulmonary diseases" (p. 7, l. 18). Dr. Wright similarly testified that he practices "[p]ulmonary critical care/internal medicine" (p. 8, l. 17).

<sup>32</sup>Deposition exhibit, p. 1.

<sup>33</sup>Deposition Exh. 1, p. 3.

ligently" (OCGA § 24-9-67.1(c)(2)).<sup>34</sup> The result of this finding is, of course, that the opinions of these experts are admissible against Defendant Lewis.

B. Defendant DeKalb's Motion

1. Dr. Martin

The second doctor to see Plaintiff's decedent (on March 22, 1997), non-party Dr. Martin, who has also been stipulated to have been an employee of Defendant DeKalb in March of 1997,<sup>35</sup> practices emergency medicine.<sup>36</sup>

a. Admissibility of Dr. Wright's Opinions

Dr. Wright testified in his deposition that

Q . . . You don't hold yourself out as a specialist in emergency medicine, though; is that fair to say?

A Well, no. There's overlap. I hold myself out to be as expert in the management of critically ill patients, as ER doctors are, because I am boarded in critical-care medicine. That's our overlap.

Q Okay.

A I -- where I don't have their training and would not even want to or I'd be remiss trying to treat a child . . . for . . . an abdominal condition, but a

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<sup>34</sup>The Court notes that Defendants contend only that Plaintiff's current experts do not have "knowledge and experience in the area of practice or specialty in which the opinion is to be given as the result of having been regularly engaged in the active practice of such area of specialty" and do not raise issues as to the requirements of "at least three of the last five years" or "sufficient frequency."

<sup>35</sup>Amended Consolidated Pre-Trial Order, ¶ 13.

<sup>36</sup>Deposition of Dr. Martin, p. 6, ll. 2-3.

critically ill person in the ER, I'm as well-trained and as comfortable as they are.<sup>37</sup>

Accordingly, as of March 12-19, 1997, Dr. Wright had "actual professional knowledge and experience in [emergency medicine] as the result of having been regularly engaged in . . . [t]he active practice of [emergency medicine]" (OCGA § 24-9-67.1(c)(2)),<sup>38</sup> with the result that Dr. Wright's opinions are admissible against Defendant DeKalb insofar as Plaintiff seeks to hold it liable on the basis of Dr. Martin's acts or omissions.

b. Admissibility of Dr. Witorsch's Opinions

Dr. Witorsch's deposition contains no testimony similar to that of Dr. Wright as just discussed. Accordingly, as of March 22, 1997, Dr. Witorsch did *not* have "actual professional knowledge and experience in [emergency medicine] as the result of having been regularly engaged in . . . [t]he active practice of [emergency medicine]" (OCGA § 24-9-67.1(c)(2)),<sup>39</sup> with the result that his opinions are *inadmissible* against Defendant DeKalb insofar as Plaintiff seeks to hold it liable on the basis of Dr. Martin's acts or omissions.

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<sup>37</sup>Deposition of Dr. Wright, p. 262, ll. 5-16. Earlier (p. 133, ll. 6-8), Dr. Wright did answer "[n]o" to the very similar question "[y]ou don't hold yourself out as an emergency department physician, do you?," but the quotation in the main text is clearly a more refined statement of Dr. Wright's "professional knowledge and experience in [emergency medicine]" (OCGA § 24-9-67.1(c)(2)).

<sup>38</sup>See n. 34, *supra*.

<sup>39</sup>See n. 34, *supra*.

## 2. The Nurses

Defendant DeKalb is also alleged to be liable on the basis of the acts or omissions on March 22-23, 1997, of nurses employed by it.<sup>40</sup> Both of Plaintiff's current experts have "knowledge of the standard of care of nurses under the circumstances at issue" "as a result of having, during at least three of the last five years immediately preceding [March 22-23, 1997] supervised . . . nurses . . . or medical support staff" (OCGA § 24-9-67.1(c)(2)(D)),<sup>41</sup> and thus they are "competent to testify as to the standard [of care] of [nurses]" (*id.*).

### C. Defendant Rampell's Motion

The third doctor to see Plaintiff's decedent (on March 22-23, 1997), Defendant Rampell, is board certified in general neurology.<sup>42</sup> Accordingly, there being no evidence that, as of March 22-23, 1997, either of Plaintiff's current experts had "actual professional knowledge and experience in [general neurology] as the result of having been regularly engaged in . . . [t]he active

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<sup>40</sup>Amended Consolidated Pre-Trial Order, p. 8, 3<sup>rd</sup> full paragraph; *id.*, ¶ 13 (stipulation that the nurses were employees of Defendant DeKalb).

<sup>41</sup>Witorsch deposition, p. 8, ll. 12-18 (clinical practice); Wright deposition, p. 8, l. 17 (critical care). The Court notes that Defendants contend only that Plaintiff's current experts do not have "knowledge of the standard of care of [nurses] under the circumstances at issue" and do not raise an issue whether they supervised nurses during at least three of the five years preceding March 22-23, 1997.

<sup>42</sup>Rampell deposition, p. 7, ll. 11-13.

practice of [general neurology]" (OCGA § 24-9-67.1(c)(2)),<sup>43</sup> their opinions are inadmissible against Defendant Rampell.

D. Defendant Kim's Motion

The final doctor to see Plaintiff's decedent (on March 22-23, 1997), Defendant Kim, is an ophthalmologist.<sup>44</sup> Accordingly, there being no evidence that, as of March 22-23, 1997, either of Plaintiff's current experts had "actual professional knowledge and experience in [ophthalmology] as the result of having been regularly engaged in . . . [t]he active practice of [ophthalmology]" (OCGA § 24-9-67.1(c)(2)),<sup>45</sup> their opinions are inadmissible against Defendant Kim.<sup>46</sup>

CONCLUSION

ACCORDINGLY, Defendant Lewis' motion, so much of Defendant DeKalb's motion as relates to Dr. Wright's opinions as to Dr. Martin and so much of Defendant DeKalb's motion as relates its nurses are hereby DENIED, and Defendants Rampell's and Kim's motions and

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<sup>43</sup>See n. 34, *supra*.

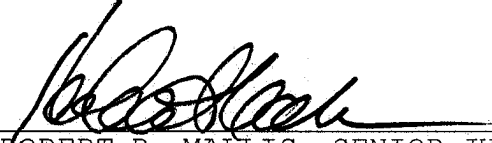
<sup>44</sup>Kim deposition, p. 18, l. 24 to p. 19, l. 7.

<sup>45</sup>See n. 34, *supra*.

<sup>46</sup>As noted earlier, Defendant Kim's motion states that "Plaintiff has also indicated she may call Dr. Michael Cooperman as a medical expert and that Dr. Cooperman is an internist." The court has before it, however, neither evidence nor a stipulation that Dr. Cooperman is an internist, so it is presently unable to rule as to the admissibility of his opinions. Similarly, the Court presently has nothing before it that would enable it to rule as to his competency to testify under OCGA § 24-9-67.1(c)(2)(D).

so much of Defendant DeKalb's motion as relates to Dr. Witorsch's opinions as to Dr. Martin are hereby GRANTED.

SO ORDERED, this 26<sup>th</sup> day of May, 2005.

  
ROBERT P. MALLIS, SENIOR JUDGE  
BY DESIGNATION

c: David F. Walbert, Esquire  
Thomas D. Trask, Esquire  
Charles A. Mathis, Jr., Esquire  
Sheryl Barnes, Esquire  
Timothy H. Bendin, Esquire  
Russell B. Davis, Esquire  
D. Gary Lovell, Jr., Esquire  
Renee Y. Little, Esquire  
Jonathan C. Peters, Esquire  
Jonathan Hawkins, Esquire

~~FILED IN THIS OFFICE  
THIS DAY OF 20  
Clerk, State Court, DeKalb County~~

FILED IN THIS OFFICE  
THIS 26<sup>th</sup> DAY OF May 2005

IN THE STATE COURT OF DEKALB COUNTY

STATE OF GEORGIA

HARRIETTE D. WIGGINS, as )  
Widow and Personal Representative of )  
Raymond C. Wiggins, and HARRIETTE D. )  
WIGGINS, as Executrix of the )  
Estate of Raymond C. Wiggins, )  
Plaintiff, )  
v. )  
DEKALB MEDICAL CENTER, INC., )  
CHAPEL HILL MEDICAL & )  
PROFESSIONAL CENTER, INC., )  
ANDRE LEWIS, M.D., HOWARD )  
STIRNE, M.D., NANCY RAMPELL, )  
M.D. and DANIEL KIM, M.D., )  
Defendants. )

CIVIL ACTION

FILE NO. 99A54244-4

**BRIEF IN SUPPORT OF DEFENDANT NANCY RAMPELL, M.D.'S MOTION TO EXCLUDE EXPERT TESTIMONY OF ROBERT WRIGHT, M.D. AND PHILIP WITORSCH, M.D. or IN THE ALTERNATIVE, MOTION TO DISMISS**

COME NOW Defendant, Nancy Rampell, M.D, in the above-titled action (hereinafter "Defendant"), by and through her undersigned counsel of record, and submits this her brief in support of her Motion to Exclude the Expert Testimony of Robert Wright, M.D., ("Dr. Wright") and Philip Witorsch, M.D. ("Dr. Witorsch"), or in the Alternative, Motion to Dismiss, and show as follows:

**I. FACTUAL BACKGROUND**

This is a medical malpractice case. The Plaintiff alleges that Dr. Nancy Rampell, the Defendant (hereinafter "Dr. Rampell"), whose specialty in medicine is Neurology, was negligent in her care and treatment of the Plaintiff, Raymond C. Wiggins (hereinafter "Mr. Wiggins"), and that Dr. Rampell failed to identify and treat Plaintiff's pulmonary embolism. (See Plaintiff's complaint at ¶¶ 31, 33).

Plaintiff has designated Dr. Robert Wright to serve as their expert witness. Dr. Wright's deposition was taken on December 28, 2004 and February 25, 2005. Dr. Wright is a pulmonary and critical care physician. In his depositions, Dr. Wright alleged that Dr. Rampell violated the standard of care in her management and treatment of Raymond Wiggins. (Deposition of Dr. Robert Wright, Volume I, pp. 33-36, attached hereto as Exhibit A). Specifically, Dr. Wright alleged that Dr. Rampell breached the standard of care in failing to recognize that the abnormal chest x-ray, low pulse oximetry readings and medical history were suspicious for pulmonary embolus. (Exhibit A, pp. 33-36).

Plaintiff earlier designated Dr. Witorsch as their expert witness. Subsequent to this identification, Dr. Witorsch was deposed on July 10, 2003. Dr. Witorsch is not Board Certified in Neurology, but rather is Board Certified in Internal Medicine with a subspecialty in pulmonary medicine. In his deposition, Dr. Witorsch opined that Dr. Rampell breached the standard of care in not accurately diagnosing Mr. Wiggins' condition based on the symptoms and the chest x-ray. According to Dr. Witorsch, the standard of care required Dr. Rampell to request an internal medicine or pulmonary

consult to rule of pulmonary emboli. (Deposition of Dr. Philip Witorsch, pp. 169-170, attached hereto as Exhibit B).

Under the newly enacted O.C.G.A. § 24-9-67.1, however, both Dr. Wright and Dr. Wright lack the necessary expertise to render expert opinion and be critical of Dr. Rampell. Specifically, neither physician actively practiced neurology for three of the last five years, which is required by the statute. Therefore, Dr. Rampell respectfully requests that the Court issue an order excluding their expert testimony of Dr. Robert Wright and Dr. Philip Witorsch.

## **II. ARGUMENT AND CITATION OF AUTHORITY**

### **A. Applicable Law**

On February 16, 2005, the Georgia Tort Reform Act was enacted, which provides, in pertinent part:

in professional malpractice actions, the opinions of an expert, who is otherwise qualified as to the acceptable standard of conduct of the professional whose conduct is at issue, shall be admissible only if, at the time the act or omission is alleged to have occurred, such expert:

- (1) Was licensed by an appropriate regulatory agency to practice his or her profession in the state in which such expert was practicing or teaching in the profession at such time; and
- (2) In the case of a medical malpractice action, had actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given as the result of having been regularly engaged in:
  - (A) The active practice of such area of specialty of his or her profession for at least three of the last five years, with sufficient

frequency to establish an appropriate level of knowledge, as determined by the judge, in performing the procedure, diagnosing the condition, or rendering the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue...

O.C.G.A. § 24-9-67.1.

**B. Dr. Wright and Dr. Witorsch's Testimony Must Be Excluded Because They Are Unable to Satisfy the Expert Requirements Set Forth By O.C.G.A. § 24-9-67.1.**

Neither Dr. Wright nor Dr. Witorsch is qualified to testify as an expert against Dr. Rampell because they lack the necessary experience in neurology. The statute specifies that, for a doctor to testify as an expert witness, he must have been actively practicing in the area/specialty of medicine that he intends to testify about for at least three of the last five years. (See O.C.G.A. § 24-9-67.1(2)(A)). Dr. Wright is a pulmonology and critical care physician, as well as an internal medicine physician by training. (Deposition of Dr. Robert Wright, Volume I, p. 8, line 17, attached hereto as Exhibit A). He practices pulmonary medicine in Santa Barbara, California. (Id. at p. 6, lines 5). On the other hand, Dr. Rampell is a Board Certified Neurologist. (Deposition of Dr. Rampell, p. 7, lines 9, attached hereto as Exhibit C).

Unlike Dr. Rampell, Dr. Wright has never practiced as a neurologist, let alone done so for three of the past five years which is required by the statute. There is no doubt, then, that Dr. Wright, as a pulmonary physician is not qualified under the Statute to offer any expert testimony regarding Dr. Rampell's care and treatment of Mr. Wiggins, particularly as such concerns her alleged failure to recognize signs and symptoms

associated with what he identified as a pulmonary, rather than neurological, condition. Accordingly, Dr. Wright's testimony should be excluded from this case and he should not be allowed to testify as Plaintiff's expert.

Similarly, Dr. Witorsch is Board Certified in Internal Medicine with a subspecialty in pulmonary medicine. (Deposition of Dr. Philip Witorsch, p. 7, line 18, attached hereto as Exhibit B). Dr. Witorsch has never practiced as a neurologist. Like Dr. Wright, Dr. Witorsch, is not qualified under the Statute to offer any expert testimony regarding Dr. Rampell's care and treatment of Mr. Wiggins; particularly as such concerns her alleged failure to recognize signs and symptoms associated with what he also identified as a pulmonary, rather than neurological, condition. Thus, to the extent that Plaintiff attempts to use the testimony of Dr. Witorsch as an expert concerning Dr. Rampell's care and treatment of Mr. Wiggins, Dr. Witorsch's testimony should be excluded from this case and he should not be allowed to testify as Plaintiff's expert.

**C. O.C.G.A. § 24-9-67.1 is Retroactive and Applicable to this Action.**

The Georgia Legislature enacted O.C.G.A. § 24-9-67.1 with the specific intent that it would apply retroactively, and therefore, to pending cases. Under governing law, the potential uncertainty as to the impact of a retroactive statute is not a sufficient reason for a court to fail to give a new statute its intended affect. Ballew v. Riggs, 244 Ga. 232, 259 S.E.2d 482 (1979). Retroactivity often serves legitimate purposes, whether to respond to emergencies, to correct mistakes, to prevent circumvention of a new statute in the interval

immediately preceding its passage, or simply to give comprehensive effect to a new law Congress considers salutary. Landgraf v. USI Film Products, 511 U.S. 244, 114 S.Ct. 1483 (1993).

In this case, O.C.G.A. § 24-9-67.1, by its plain language applies to this case as the Tort Reform Act expressly provides that this statute is applicable to all pending cases. The Georgia Legislature further provided that the intent of this Act is to improve the resolution of healthcare liability claims, among other things. Neither this statute nor its retroactive application violates constitutional law. At most, this statute modifies the scope of evidence which may be offered in a medical malpractice trial. It does not affect the manner or degree, or otherwise alter, any substantive rights conferred on the party desiring to submit evidentiary expert testimony by law, as it speaks to the evidentiary procedural power of the court in determining admissible evidence rather than the rights or obligations of the parties.

Moreover, the statute does not violate the uniformity provision of the Georgia Constitution. Art. III, Sec. VI, Par. IV(a), Ga.Const. of 1983.

Our State Constitution only requires a law to have uniform operation; and that means that it shall apply to all persons, matters, or things which it is intended to affect. If it operates alike on all it is intended to affect. If it operates alike on who come within the scope of its provisions, constitutional uniformity is secured. Uniformity does not mean universality. This constitutional provision is complied with when the law operates uniformly on all persons who are brought within the relations and circumstances provided by it.

State v. Martin, 266 Ga. 244, 466 S.E.2d 216 (1996) (quoting C&S National Bank v. Mann., 234 Ga. 884, 889, 218 S.E.2d 593 (1975).

In the instant case, O.C.G.A. § 24-9-67.1 applies to all persons who wish to present expert testimony in a medical malpractice action. It operates uniformly throughout the state upon the subjects with which it proposes to deal. Specifically, the statute is equally applicable to both plaintiffs and defendants who wish to provide expert testimony as to medical malpractice.

Accordingly, this Court should grant Dr. Rampell's motion to exclude the expert testimony of Dr. Wright and Dr. Witorsch as it is the intent of the Legislature that experts attesting to the standard of care in a medical malpractice case have actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given.

**D. If Defendant Rampell's Motion is Granted, Should Plaintiff Fail to Name an Alternative Expert Within Thirty Days of the Court's Determination That Dr. Wright and Dr. Witorsch Cannot Serve as Plaintiff's Expert, The Case Against Dr. Rampell Should Be Dismissed.**

Assuming arguendo that the Court finds the Plaintiff's experts to be unqualified to testify, and allows the Plaintiff leave to correct this defect of their case, Dr. Rampell respectfully request that the court order the defect to be cured within a reasonable amount of time so as to not further prejudice Defendant in delaying this case for an infinite amount of time.

Therefore, Defendant, Nancy Rampell, M.D. respectfully request that if the Court enter an order GRANTING their Motion to exclude Dr. Robert Wright and Dr. Philip Witorsch's testimony, that Plaintiff be ordered to officially designate another expert, and

that expert's opinions regarding Defendant's breach of the standard of care within thirty days of the entry of any order. In the event that a new and proper expert is not properly designated within forty-five days of the entry of an order, Defendant request that Plaintiff's case be dismissed with prejudice pursuant to O.C.G.A. §9-11-37.

### III. CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Honorable Court grant their Motion to Exclude the expert testimony of Plaintiff's expert, Robert Wright, M.D. and Philip Witorsch, M.D., and order that Plaintiff have not more than forty-five (45) days from the entry of that order to formally designate a new expert or this case shall be dismissed.

Respectfully submitted, this the \_\_\_\_\_ day of April, 2005.

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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of the within and foregoing upon all parties to this matter by depositing a true copy of same in the U. S. Mail, proper postage prepaid, addressed to opposing counsel as follows:

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**IN THE STATE COURT OF DEKALB COUNTY  
STATE OF GEORGIA**

HARRIETTE D. WIGGINS, as )  
Widow and Personal Representative of )  
Raymond C. Wiggins, and HARRIETTE D. )  
WIGGINS, as Executrix of the )  
Estate of Raymond C. Wiggins, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
DEKALB MEDICAL CENTER, INC., )  
CHAPEL HILL MEDICAL & )  
PROFESSIONAL CENTER, INC., )  
ANDRE LEWIS, M.D., HOWARD )  
STIRNE, M.D., NANCY RAMPELL, )  
M.D. and DANIEL KIM, M.D., )  
 )  
Defendants. )

CIVIL ACTION  
FILE NO. 99A54244-4

**SUPPLEMENTAL REPLY/BRIEF IN SUPPORT OF DEFENDANT NANCY  
RAMPELL'S, M.D.'S MOTION TO EXCLUDE EXPERTS**

COMES NOW Defendant Nancy Rampell, M.D. , by and through the undersigned counsel, and hereby submits this Reply Brief in Support of her Motion to Exclude the testimony of Dr. Witorsh, Dr. Wright and Dr. Cooperman, as "expert's" of Plaintiffs' in the above-listed matter and shows the Court as follows:

**ARGUMENT AND CITATION OF AUTHORITY**

**A. APPLICABLE LAW**

Plaintiff raises several constitutional challenges to the newly enacted O.C.G.A. § 24-9-67.1 in her Response to Defendants' Motion to Dismiss. O.C.G.A. § 1-3-1(a) requires that "[i]n all interpretations of statutes, the courts shall look diligently for the

intention of the General Assembly, keeping in view at all times the old law, the evil, and the remedy." "A statute is presumed to be valid and constitutional until the contrary appears." Williams v. Ragsdale, 205 Ga. 274, 277, 53 S.E.2d 339 (1949). In determining the constitutionality of the newly enacted provisions it is important to keep in mind that "[a]n act of the General Assembly carries a strong presumption of constitutionality, and therefore, should not be set aside unless it 'plainly and palpably' conflicts with a constitutional provision." City of Atlanta v. MARTA, 636 F.2d 1084 (5th Cir. 1981). "It is the duty of courts, to put such a construction upon statutes, if possible, as to uphold them and carry them into effect." Lamons v. Yarbrough, 206 Ga. 50, 55 S.E.2d 551 (1949). "That construction which will uphold a statute in whole and in every part is to be preferred." Exum v. City of Valdosta, 246 Ga. 169, 170(1), 269 S.E.2d 441 (1980).

**B. LAWS AFFECTING RULES OF EVIDENCE ARE TO BE APPLIED RETROACTIVELY BECAUSE THEY ARE PROCEDURAL IN NATURE**

O.C.G.A. § 24-9-67.1 specifically provides that it is to apply to causes of action pending on its effective date, which was February 15, 2005. This action was pending on February 15, 2005, so by the plain language of the statute it is to be applied to the case at hand.

Additionally, where a statute governs only procedural matters, it is to be given retroactive effect absent an expressed contrary intention. Minter v. Tyson Foods, Inc., 271 Ga. App. 185 (2004); Morgan Driveway, Inc. v. Canal Ins. Co., 266 Ga. App. 765, 769 (2004). "Substantive law is that law which creates rights, duties and obligations. Procedural law is that law which prescribes the methods of enforcement of rights, duties and obligations." Polito v. Holland, 258 Ga. 54, 55(2) (1988). "A law which

merely alters the procedure may, with perfect propriety, be made applicable to past as well as future transactions.... No person has a vested right in any course of procedure.” Glover v.Colbert, 210 Ga. App. 666, 668 (1993). See also Henderson v. Department of Transportation, 267 Ga. 90, 91 (1996) (holding that “[t]he constitutional prohibition against retroactivity... does not apply to procedural laws.”)

Questions of evidence are undeniably procedural and statutes that govern expert witness testimony do not affect the parties’ substantive rights. Harris v. Murray, 233 Ga.App. 661, 662, 504 S.E.2d 736 (1998). Where a statute governs only procedure of the courts, including the rules of evidence, it is to be given retroactive effect *absent an expressed contrary intention*. Harris v. Murray, 233 Ga.App. 661, 662, 504 S.E.2d 736 (1998). As such, statutes relating to rules of evidence may be applied retroactively to pending cases without infringing upon the parties’ constitutional rights. Id. Thus, the retroactive application of O.C.G.A. § 24-9-67.1 does not deprive the Plaintiff of any existing right and therefore does not infringe upon her constitutional rights in any way.

**C. THE GENERAL ASSEMBLY MAY PASS APPROPRIATE LEGISLATION CREATING RULES OF EVIDENCE**

The doctrine of separation of powers is an immutable constitutional principle which must be strictly enforced. McCutcheon v. Smith, 199 Ga. 685, 691(2), 35 S.E.2d 144 (1945). Under that doctrine, “[t]he authority of the courts extends only to construction of the provisions of whatever statute the General Assembly may choose to enact.” Etkind v. Suarez, 271 Ga. 352, 353, 519 S.E.2d 210 (1999). The courts role is to construe the legislation and fill in gaps by looking to common law principles and other

relevant statutes. Snapper Power Equipment Co. v. Crook, 206 Ga.App. 373, 375, 425 S.E.2d 393 (1992).

In enacting O.C.G.A. § 24-9-67.1, the General Assembly is performing its constitutionally established duty of legislating. Modern Homes Constr. Co. v. Burke, 219 Ga. 710 (1964). O.C.G.A. § 24-9-67.1 establishes the standards and requirements to determine the admissibility of expert witness testimony. The legislature may, by appropriate legislation, create rules of evidence. The legislature in fact created the very rules of evidence Plaintiff now argues it does not have the right to amend. Neidlinger v. State, 88 S.E. 687 (1916). To the contrary, the Federal and Georgia Constitution's explicitly grant the legislature the power to enact legislation such as O.C.G.A. § 24-9-67.1. Modern Homes Constr. Co. v. Burke, 219 Ga. 710 (1964).

**D. O.C.G.A. § 24-9-67.1 DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE**

Plaintiff has challenged the constitutionality of O.C.G.A. § 24-9-67.1 under the Equal Protection Clause. A statute attacked as unconstitutional is presumed by the judiciary to be constitutional State v. Brannan, 267 Ga. 315, 317 (1996) until it is established that the statute "manifestly infringes upon a constitutional provision or violates the rights of the people...." Miller v. State, 266 Ga. 850(1996). Love v. State 271 Ga. 398 (1999).

The Equal Protection Clauses of both the Federal and Georgia Constitutions require that similarly situated individuals be treated in a similar manner. City of Atlanta v. Watson, 267 Ga. 185, 187(1), 475 S.E.2d 896 (1996). Because no fundamental right or suspect class is involved, the disparate treatment between these litigants must meet

only the rational relationship test. See Wilson v. Zant, 249 Ga. 373, 384 -85, 290 S.E.2d 442 (1982). Under that test, statutory classifications are permitted when the classification is based on rational distinctions and bears a direct and real relationship to the legitimate object or purpose of the legislation. Home Materials, Inc. v. Home Owners Ins. Co., 250 Ga. 599, 600, 300 S.E.2d 139 (1983). Grissom v. Gleason, 262 Ga. 374, \*377 (1992). City of Atlanta v. Watson, 267 Ga. 185, 187 (1996).

This standard requires that classifications created by a state "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Allrid v. Emory University, 249 Ga. 35, 38 (1982). Additionally, the person who is asserting the equal protection claim has the burden to establish that " 'he is similarly situated to members of the class who are treated differently from him.' If the person asserting the violation cannot make the foregoing showing, "there is no need to continue with an equal protection analysis." Rodriguez v. State, 275 Ga. 283, 284-285(1) (2002). Because Plaintiff is treated differently than any other party in a civil action involving alleged medical malpractice causing injury or disease, she does not have a viable challenge on equal protection grounds. Bell v. Austin , 278 Ga. 844 (2005).

In a medical malpractice case relating to similar challenges to statutes tailored to medical malpractice cases, the Georgia Supreme Court outlined the level of scrutiny and burden of proof to be applied as follows: 'If the legislative purpose is legitimate and the classification drawn has some reasonable relation to furthering that

purpose, the classification passes muster.' " Doran v. Travelers Indemnity Co., 254 Ga. 93 (1965). Laws enacted by our legislature are presumed to be constitutional and the burden is on the party challenging the law to prove its invalidity. [Cit.] When classifications are challenged under the equal protection guarantees they will be upheld if there is any set of facts upon which they could be sustained. [Cit.] Smith v. Cobb County-Kennestone Hosp. Authority, 262 Ga. 566, 569-570, (Ga. 1992). The Court found "that the legislative intent of reduction of the period within which minors could bring suit (against health care providers) certainly would tend to achieve the stated legislative objectives, as, e.g., it would tend to prevent stale medical malpractice claims, and would also tend to lower insurance and medical costs by decreasing the period in which health care providers and their insurers would be exposed to suit". Smith v. Cobb County-Kennestone Hosp. Authority, 262 Ga. 566, \*571, (1992).

In the case at bar, medical malpractice plaintiffs are not a "suspect class" and the standards surrounding expert witness testimony is not a "fundamental right". Here, as in the Smith v. Cobb County case, supra, the General Assembly had a rational basis to create in O.C.G.A. § 24-9-67.1 a class of plaintiffs who bring medical malpractice lawsuits. Additionally, the classification created by the legislature bears an obvious and direct relation to the legitimate purpose of promoting quality healthcare in Georgia. Section 1 of Senate Bill 3 provides that there is a strong governmental interest in promoting quality healthcare in Georgia. There is also a strong governmental interest in promoting predictability and improving the provision of quality health care services. The establishment of the requirement that the expert in a medical malpractice lawsuit meet

certain standards will promote predictability in the civil litigation process. The increased predictability will serve to decrease the costs of medical malpractice litigation and in turn make medical malpractice insurance more affordable. This in turn will allow more quality physicians to keep their medical practices in Georgia, which will have a direct impact on the provision of quality health care services in Georgia. All of these issues have been determined by the Supreme Court of this state to be legitimate legislative actions.

**F. THE EXCLUSION OF PLAINTIFF'S EXPERTS' TESTIMONY UNDER O.C.G.A. § 24-9-67.1 DOES NOT VIOLATE PLAINTIFF'S DUE PROCESS RIGHTS**

Plaintiff's due process challenge is invalid on its face because Plaintiff is not being denied her day in Court without due process. To avoid dismissal of her case, Plaintiff must only comply with the procedural and evidentiary requirements of O.C.G.A. § 24-9-67.1. This Court has given Plaintiff ample time before trial to secure experts in order to do so.

Plaintiff points to the Orders entered in the cases of Mason v. Home Depot U.S.A., Inc. and Sparks v. Memorial Health as evidence of prior acceptance of due process challenges to O.C.G.A. § 24-9-67.1. However, both these cases are easily distinguishable from the case at hand. In this case, two of plaintiff's expert were identified and depose this year after the new statute went into effect. Additionally, Plaintiff has been additional time to secure competent experts.

**G. PLAINTIFF'S EXPERTS ARE NOT COMPETENT TO TESTIFY**

The fact remains that Dr. Witorsch, Dr. Wright and Dr. Cooperman are not competent to testify as an expert witness in this case. Georgia codified the requirements for expert witness competency in civil cases in general and medical malpractice cases in particular. O.C.G.A. § 24-9-67.1. Under O.C.G.A. § 24-9-67.1, in order to be deemed "competent to testify" on the standard of care against a physician, the affiant must testify that they are licensed to practice medicine and were licensed at the time of the alleged events, and that they had actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given. O.C.G.A. § 24-9-67.1. An expert has "actual professional knowledge" when they have *actively* practiced in the area of specialty for at least three (3) of the last five (5) years with sufficient frequency to establish an appropriate level of knowledge. *Id.* The competency standards apply to witnesses submitting an affidavit under Section 9-11-9.1 and also apply to pending cases. O.C.G.A. § 24-9-67.1 (3); Section 15 (b) of the Georgia Tort Reform Act.

**1. None of Plaintiff's Experts are Neurologists**

The second measure of "competency to testify" is that the purported expert must have *actual* knowledge of the specialty in which he is offering the opinion. O.C.G.A. §24-9-67.1(c)(2). This is evidenced by *active* practice or teaching experience in the same area as the defendant doctor in at least three (3) of the last five (5) years. *Id.* Under these standards, Plaintiff's "expert" pulmonologist and internal medicine doctors are incompetent to testify against neurologist Dr. Rampell. O.C.G.A. §§9-11-9.1 and 24-9-67.1(e).

Dr. Rampell is a board certified neurologist who was brought into this case by the ER doctor for a neurology consultation. She was not asked to do a consult for a pulmonary condition. Consequently, any expert of the Plaintiff must be a neurologist to testify against Dr. Rampell. See, O.C.G.A. §24-9-67(c)(2) and (e).

#### **H. PLAINTIFF CANNOT CHALLENGE THE EXPERT STATUTE AS "VAGUE"**

An attack on a statute as vague must be made by a party subject to the penalty of that statute, be it civil or criminal. Additionally, the application of due process with respect to vagueness and uncertainty is not applied as strictly to civil statutes as to those penal in nature. The rule is that a statute may be too vague and uncertain to be capable of enforcement as a penal statute and yet may be sufficiently certain to set forth a rule of civil conduct. Willis v. Jackson, 148 Ga. App. 432 (1978); In the civil context, to withstand an attack of vagueness or indefiniteness, a civil statute must provide fair notice to **those to whom the statute is directed** and its provisions must enable them to determine the legislative intent. *Anderson*, 273 Ga. at 114(1)(a). However, "mathematical certainty is not necessary in statutes," (citation and punctuation omitted) Dorsey v. State, 212 Ga. App. 830 (1994), and the "prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision." (Citation and punctuation omitted.) Wilson v. State, 245 Ga. 49 (1980). In this case, the Plaintiff does not have standing to challenge the expert statute as it does not seek to exact a civil penalty for some prohibited conduct by her. Additionally, the statute is very clear in its evidentiary minimums.

## **I. THE STATUTE DOES VIOLATE THE "DIFFERENT SUBJECT MATTER" RULES**

Plaintiff's present spurious arguments that the Statutes in question violate the Georgia constitutional prohibition against passage of a bill "which ... contains matter different from what is expressed in the title thereof." Ga. Const.1983, Art. III, Sec. V, Para. III. One of the purposes of the constitutional provision is to prevent "surprise legislation." Mead Corp. v. Collins, 258 Ga. 239 (1988). However, if "what follows after the enacting clause is definitely related to what is expressed in the title, has a natural connection, and relates to the main object of legislation and is not in conflict therewith, there is no infringement of the constitutional inhibition.... Any provision in the body which is germane to this general purpose as embraced in the title would not be violative of the constitutional provision.... It is well settled that provisions germane to the general subject-matter embraced in the title of the act and which are designed to carry into effect the purposes for which it was passed, may be constitutionally enacted therein, though not referred to in the title otherwise than by the use of the words "and for other purposes." Cross v. Stokes, 275 Ga. 872 (2002). The "different subject matter" law does not require that the material contained in the title of the Act be short and succinct, only that the enacting clause advise those reading the caption of the bill be advised of the contents of the bill. The enacting clause indicates that the bill deals with evidentiary matters, expert witness opinions, and for other purposes. Thus, there is no "surprise" in the bill.

## **CONCLUSION**

For the within and foregoing reasons, Dr. Rampell respectfully requests the Court grant her Motion and exclude the Plaintiff's current expert from testifying at trial.

This \_\_\_\_ day of May, 2005.

Respectfully submitted,

CARLOCK, COPELAND, SEMLER &  
STAIR, LLP

By: \_\_\_\_\_

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**IN THE STATE COURT OF DEKALB COUNTY  
STATE OF GEORGIA**

HARRIETTE D. WIGGINS, as )  
Widow and Personal Representative of )  
Raymond C. Wiggins, and HARRIETTE D. )  
WIGGINS, as Executrix of the )  
Estate of Raymond C. Wiggins, )

Plaintiff, )

v. )

DEKALB MEDICAL CENTER, INC., )  
CHAPEL HILL MEDICAL & )  
PROFESSIONAL CENTER, INC., )  
ANDRE LEWIS, M.D., HOWARD )  
STIRNE, M.D., NANCY RAMPELL, )  
M.D. and DANIEL KIM, M.D., )

Defendants. )

CIVIL ACTION

FILE NO. 99A54244-4

**SECOND SUPPLEMENTAL REPLY/BRIEF IN SUPPORT OF DEFENDANT  
NANCY RAMPELL'S, M.D.'S MOTION TO EXCLUDE EXPERTS**

COMES NOW Defendant Nancy Rampell, M.D., by and through the undersigned counsel, and hereby submits this Supplemental Reply Brief in Support of her Motion to Exclude the testimony of Dr. Witorsh, Dr. Wright and Dr. Cooperman, as "expert's" of Plaintiffs' in the above-listed matter and shows the Court as follows:

**ARGUMENT AND CITATION OF AUTHORITY**

**J. THE COURT SHOULD CONSTRUE THE STATUTE TO FOLLOW THE INTENT OF THE LEGISLATURE.**

Plaintiff, in the absence of any support, contends that O.C.G.A. § 24-9-67.1 as written is logically irrationally and inconvenient. Defendants deny that the statute is

irrational and certainly contend that such may be logically applied in a manner that is absent confusion and contradiction. In Telecom\* USA, Inc. v. Collins, 260 Ga. 362, 393 S.E.2d 235 (1990), the Supreme Court of Georgia recognized that the "golden rule" of statutory construction must be used to interpret and apply new statutes. The Collins Court stated that the literal meaning of the words of a statute must be followed unless the result is an "absurdity, contradiction or such an inconvenience" that it is clear that the legislature must have intended something else. Id. at 363-364. See also Mansfield v. Pannell, 261 Ga. 243, 404 S.E.2d 104 (1991). Even more important, the Court stated that

[w]hen literal reading of the statute produces such an absurdity, the appellate court must then seek to make sense out of the statute, while being faithful to the legislative intent. To divine the legislative intent, the court considers the purpose of the statute and its impact on the body of law as a whole. The court also considers the law as it existed before the statute was passed and identifies the mischief sought to be corrected.

Id. Use of that "golden rule" is called upon in this action.

Plaintiff's erroneously contend that the "area of practice of specialty" referenced in O.C.G.A. § 24-9-67.1(c)(2) is the diagnosis and treatment of pulmonary emboli. This proffered meaning is completely nonsensical as it would make the new statute void. To avoid the "absurdity" and "contradiction" discussed in Collins, which the Plaintiff's definition creates, the Court should apply the "golden rule" and interpret this language to meet the intent of the legislature, e.g., promoting predictability and improving the provision of health care services. At this time, it does not appear that all legislative commentary related to the new Tort Reform Bill is available to the public. Commentary from House Bill 1028, however, is available.

House Bill 1028 was a predecessor to the Tort Reform Bill. While the bill was not enacted due to the dissolution of the Conference Committee prior to full consideration by the General Assembly, it contains virtually identical language of O.C.G.A. 24-9-67.1(c)(2)(A). David Bookaher, Jon Gallant, Ramsey Knowles, A. Robin Teal, *Health, Tort and Civil Practice*, 21 Ga. St. U. L. Rev. 178, 181 (citing State of Georgia Final Composite Status Sheet, HB 1028, Apr. 7, 2004 (May 19, 2004)). Specifically, House Bill 1028 provides that the legislature sought to change the rules of admissibility for expert witnesses in medical malpractice cases by requiring experts attesting the standard of conduct of a health care provider whose conduct is at issue to have actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given." *Id.* at 184 (citing HB 1028 (SCS), 2004 Ga. Gen. Assem.). Commentary further states that "the bill sought to alter Georgia law by **restricting expert testimony at trial to those experts who share the same specialty as the doctor defendant.** This provision of the bill would have reduced the possibility that a podiatrist would testify to the standard of care for a neurologist." *Id.* at 200 (citing HB 1028 (SCS), 2004 Gen. Assem.) (*emphasis added*). Given that the same statutory language as to the requirements of experts was adopted in O.C.G.A. § 24-9-67.1(c)(2)(A), it is apparent that the legislative intent was indeed to restrict expert testimony at trial to those experts who share the same specialty as the doctor defendant. Thus, Plaintiff's flawed interpretation of "area of practice or specialty" would not satisfy the legislative intent of O.C.G.A. § 24-9-67.1(c)(2)(A). Accordingly, the construction which would most closely follow the legislative intent and still result in a constitutional statute would be to interpret "area of

practice or specialty" to only permit expert testimony at trial of those experts who share the same specialty as the doctor defendant.

As applied to O.C.G.A. § 24-9-67.1(c)(2)(A), the "golden rule" provides that Dr. Witorsch, Dr. Wright and Dr. Cooperman are not competent to testify as experts against Dr. Rampell. Specifically, neither has actual professional experience in the area of practice or specialty in which the opinion is to be given. Further, neither has actively practiced in the area or specialty for at least three (3) of the last five (5) years with sufficient frequency to establish an appropriate level of knowledge. Under the literal language of O.C.G.A. § 24-9-67.1(c)(2)(A), interpreted under the "golden rule," it is apparent that Plaintiff's expert pulmonologists and internist are not competent to offer expert testimony against neurologist Dr. Rampell.

Using these principles of construction, it is also clear that it would create an "absurdity" to interpret "area of practice or specialty" to refer only to the condition or illness that a medical malpractice plaintiff's expert wants to offer an opinion (as Plaintiff's contend) rather than the area of practice or specialty of the defendant doctor, as such would allow all plaintiffs to simply draft their complaints and tailor their expert's testimony to a illness, condition or procedure that permits them to limbo under the procedural radar that the legislature sought to create. Moreover, it would create a "contradiction" to interpret "area of practice or specialty" to refer on to the condition or illness that caused a medical malpractice plaintiff's injury or death because such would create redundancy, and we must assume by virtue of the retroactive enactment of the statute that the legislature did not intend for the new procedural statute to be simply

redundant. Nor could the legislature have intended that the new procedural statute be so open to manipulation that a Plaintiff could avoid its requirements through the use of crafty linguistics such that the new statute is meaningless. Accordingly, the only logical interpretation of the statute is one that permits expert testimony at trial of those experts who share the same specialty as the doctor defendant, which is evidenced by the active practice or teaching experience in the same area as the defendant doctor in at least three (3) of the last five (5) years.

**CONCLUSION**

For the within and foregoing reasons, Dr. Rampell respectfully requests the Court grant her Motion and exclude the Plaintiff's current expert from testifying at trial.

This \_\_\_\_ day of May, 2005.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of the within and foregoing upon all parties to this matter by depositing a true copy of same in the U. S. Mail, proper postage prepaid, addressed to opposing counsel as follows:

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