

Georgia Supreme Court Upholds ED Liability Law

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In a split 4-3 ruling on March 15th, the Georgia Supreme Court upheld a controversial provision of the state's tort reform law that makes it extremely difficult for patients to recover damages in cases involving emergency department (ED) care. The ruling affirmed a state trial court decision that upheld the constitutionality of the statute in the context of a malpractice lawsuit (*Gliemmo v. Cousineau*) brought by Carol and Robert Gliemmo against St. Francis Hospital ED physician Mark Cousineau and his employer, Emergency Medical Specialists of Columbus PC.

Carol Gliemmo went to the hospital in 2007 complaining of serious pain behind her eyes and a "snapping in her head." She said she was diagnosed with high blood pressure, and the ED doctor sent her away with a prescription but failed to diagnose a brain hemorrhage that left her paralyzed. The Gliemmos alleged that the doctor was negligent. The defendants sought to have the suit dismissed under the 2005 tort reform law that requires "clear and convincing evidence that the physician or health care provider's action showed gross negligence."

Plaintiffs argued that the law creates what is tantamount to an insurmountable legal threshold for patients injured by malpractice in hospital EDs. But attorneys for hospitals and insurers contended that the statute takes into account what happens in EDs, where doctors are often faced with life-or-death decisions without knowing their patients' medical histories.

In rejecting the Gliemmos' claim, the majority compared the ED law to one already held to be constitutional, the **Hospital Care for Pregnant Women Act**. That law requires certain hospitals to care for pregnant women in labor and prohibits lawsuits except when the person providing treatment "has been grossly negligent." Relying on that precedent, the four justices decided the law that Gliemmos challenged also was not an unconstitutional special law. Writing for the majority, Justice George Carley said the Legislature had a legitimate reason to promote affordable malpractice insurance for hospitals and health care providers and that it is "entirely logical" to assume that ED care is different than care provided in other hospital settings. In dissent, Justice Robert Benham called the ED provision "unreasonable and arbitrary" and said it leaves ED patients with "a lower standard of care and a higher burden of proof."

Separately, the Supreme Court upheld another key provision of Georgia's 2005 **Tort Reform Act** in a case involving a former player for the Atlanta Falcons. This provision encourages settlements in all civil tort lawsuits and penalizes litigants who do not accept good-faith financial offers to close a case. Also, by the end of the month, the state Supreme Court is expected to decide the constitutionality of the cornerstone of Georgia's tort reform law – the \$350,000 cap on jury awards in medical malpractice cases.

Editor's Note: The Georgia Supreme Court has since ruled, in a unanimous decision, that the existing caps on noneconomic damages in medical malpractice actions infringe on the right to a jury trial granted under the Georgia Constitution. The Court's decision is to be applied retroactively to the inception of the caps in 2005. More information about this unfortunate decision is available online at <http://www.medscape.com/viewarticle/718938>. In light of the similar decision in Illinois (see below), a disturbing trend is developing which threatens to set back progress made towards tort reform in several other states.

Illinois Supreme Court Strikes Down Malpractice Caps

In February 2010, the Illinois Supreme Court struck down a five-year-old state law that capped medical malpractice noneconomic damages awards at \$1 million for hospitals and \$500,000 for physicians. The Court ruled that the law violated the separation of powers provision in the state constitution, marking the third time since 1976 that the Illinois high court has struck down malpractice damages caps.

The ruling stems from *Lebron v. Gottlieb Memorial Hospital*, a 2006 lawsuit filed by the family of a girl who suffered severe brain damage during her caesarean birth. The suit, which was a test case for several lawsuits challenging the constitutionality of the 2005 law, partially affirms a 2007 ruling in Cook County Circuit Court. In writing for the majority, Chief Justice Thomas Fitzgerald stated, "The crux of our analysis is whether the statute unduly infringes upon the inherent power of the judiciary. Here, the legislature's attempt to limit...damages in medical malpractice actions runs afoul of the separation of powers clause." The case was sent back to the circuit court for further proceedings.

The state's physician and hospital groups criticized the ruling, characterizing it as rejection of and ignoring the wishes/will of Illinois citizens, while trial lawyers and labor groups saw the ruling as a victory for victims of medical errors. The 2005 law did not cap economic damages or other compensation for victims, such as lost wages, potential future earnings and medical expenses.

U.S. Supreme Court Invites Solicitor General's View on Decision to Extend EMTALA Reach

This case involves claims brought by the estate of a woman whose spouse murdered her after he was discharged from Providence Hospital in Michigan, following a psychotic episode. For the facts in this case, see the *Common Sense* article titled "Estate of Murdered Woman Allowed to Pursue EMTALA Claims," accessed at: <http://www.aaem.org/commonsense/commonsense0709.pdf>.

On January 25, 2010, the U.S. Supreme Court issued an interim order inviting the U.S. solicitor general to file a brief about whether the high court should review the U.S. Court of Appeals for the Sixth Circuit decision in *Moses (Providence Hospital and Medical Centers Inc. v. Moses, U.S., No. 09-438, interim order 1/25/10)*. In particular, the court seeks an opinion as to whether:

- EMTALA's requirement for screening and stabilization should be expanded to apply to hospital inpatients; and
- A CMS regulation clarifying that EMTALA is inapplicable to hospital inpatients is valid and applies retroactively.

The main task of the Office of the Solicitor General is to supervise and conduct government litigation in the U.S. Supreme Court. Nearly all such litigation is channeled through the Office of the Solicitor General. The Solicitor General determines the cases in which Supreme Court review will be sought by the government and the positions the government will take before the high court. Another responsibility of the Office is to review all cases in the lower courts that are decided adversely against the government in order to determine whether they should be appealed and, if so, what position should be taken. Moreover, the Solicitor General determines whether the government will participate as *amicus curiae*, or intervene, in cases in any appellate court.

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At present, only hospitals in the states in the sixth circuit (Michigan, Ohio, Tennessee and Kentucky) must comply with the court's decision in *Moses*. However, should the Supreme Court affirm the appellate court's opinion, the concept of stabilization prior to discharge will have to be further defined for hospitals across the nation.

Procedure Is Power

A U.S. District Court case in California involving an EMTALA liability claim alleging injury caused by inadequate screening was first reported in the August 2008, issue of *Common Sense*. (See "No EMTALA Liability for Inadequacy in Screening Leading to Injury" at <http://www.aaem.org/commonsense/commonsense0708.pdf>.) Plaintiff Donna Hoffman sued defendant Memorial Medical Center (MCC) after an ED physician, Dr. Kent Tonnemacher, failed to diagnose her bacterial infection (*Hoffman v. Tonnemacher*, E.D. Cal., No. 1:04-cv-5714, 4/10/08). Defendant filed a motion for partial summary judgment, which the district court denied. After further discovery, MCC moved again for summary judgment, which the district court granted in part and denied in part. Hoffman's surviving claim alleged that Dr. Tonnemacher's screening examination constituted disparate treatment in violation of EMTALA because it failed to comply with MCC's EMTALA policy.

At trial, MCC moved for judgment as a matter of law at the close of the evidence. The district court denied the motion. The jury deadlocked, and the district court declared a mistrial. Following the mistrial, MCC moved for modification of the pretrial order. The district court modified the order allowing the hospital to add a new expert witness and to file another summary judgment motion. This time the district court granted MCC's summary judgment motion on the ground that Hoffman "could not show a genuine issue of material fact with respect to causation." Hoffman then appealed to the United States Court of Appeals for the Ninth Circuit, challenging the propriety of allowing the successive summary judgment motion.

On January 21, 2010, the Ninth Circuit held that "the district court has discretion to entertain successive motions for summary judgment and that the district court did not abuse its discretion in this instance" (*Hoffman v. Tonnemacher*, 9th Cir., No. 08-16166, 01/21/10). This civil procedure ruling joined the Ninth Circuit with five other circuits, which in prior decisions clarified that consideration of successive summary judgment motions is within the district court's discretion.

The court noted that the "Federal Rule of Civil Procedure 56 does not limit the number of motions that may be filed. Indeed, the version of Rule 56 that was in effect when the district court modified the pretrial order stated that a motion for summary judgment could be filed 'at any time' after certain events." In addition, the Ninth Circuit previously had ruled such motions were permissible on the issue of qualified immunity and noted that summary judgment decisions are subject to reconsideration at any time.

The Ninth Circuit Court found the district court was within its discretion to hear the second motion mainly because activity between the first and second motions provided an expanded factual record. The court wrote: "We review for abuse of discretion a district court's decision to permit a successive summary judgment motion. In this case, the district court did not abuse its discretion by allowing Defendant to file another summary judgment motion after the mistrial. The deposition of an expert witness after the deadline for pretrial summary judgment motions, the testimony at trial, and the addition of a new expert witness after the mistrial expanded the factual record beyond what it had been at the time of the pretrial summary judgment motion."

The entire opinion can be viewed at <http://www.ca9.uscourts.gov/datastore/opinions/2010/01/21/08-16166.pdf>.

EMTALA case synopses prepared by Terri L. Nally, Principal, KAR Associates, Inc.

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Meanwhile, on May 1, the Texas Medical Association (TMA) House of Delegates passed a three-part resolution, "That the Texas Medical Association (1) recognize that, and shall ask the Texas Medical Board (TMB) to recognize that, the American Board of Medical Specialties (ABMS), American Osteopathic Association Bureau of Osteopathic Specialists (AOABS), American Board of Oral Maxillofacial Surgery (ABOMS), and non-ABMS/AOABS/ABOMS boards with equivalent standards and training, are the standard in specialty board certification for the specialties they encompass; (2) evaluate TMB rules and practices regarding physicians' ability to advertise that they are "board certified" and report back to the 2011 TMA House of Delegates; and (3) actively oppose all efforts of any alternate certifying organizations in the State of Texas, or before the TMB, to recognize its members as "board certified" without the equivalent certification and training standards." The TMA House of Delegates should be applauded for taking a solid stance on this issue. Physicians living in Texas should contact the Texas Medical Association and encourage them to aggressively pursue the actions in this resolution. Physicians in other states should work with their own state medical associations to pass similar resolutions.

Texas residents may contact the Texas Medical Board (<http://www.tmb.state.tx.us/agency/contact.php>) directly to express

concern over changes to its board certification rules. There are likely to be significant efforts by the ABPS to lobby in favor of these changes. In addition, the ABPS has "a very aggressive and active governmental affairs program for 2010"¹ which underscores the importance of having members in every state keep a careful watch of his or her state medical board's activities for potential decisions that could damage the academic integrity of our specialty.

1. SoRelle, Ruth. "AAPS Ramping Up Campaign for Recognition." *Emergency Medicine News*. Lippincott Williams & Wilkins, March 2010. Accessed March 12, 2010. <http://journals.lww.com/em-news/Fulltext/2010/03000/AAPS_Ramping_Up_Campaign_for_Recognition.1.aspx>.

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