

This paper was prepared by a Warshauer Law Group attorney, for an audience of lawyers, as part of a Continuing Legal Education program or for publication in a professional journal. If presented as part of a Continuing Legal Education program, the presentation included a speech and possibly a PowerPoint or Keynote presentation. An audio or video recording of the speech might be available from the sponsor of the program. This paper does not constitute legal advice; and readers are cautioned that because the law is continuously evolving that all or portions of this paper might not be correct at the time you read it.

A Primer On Medical Malpractice Law

Lyle Griffin Warshauer
James M. Poe

I. INTRODUCTION

A cause of action for medical malpractice, or any form of professional negligence, is a claim which brings into question the professional care or skill employed by a given professional.¹ The action is based upon fault; therefore, strict liability principles do not apply.² Nor is *res ipsa loquitur* applicable in malpractice actions in Georgia.³ As in any negligence action, the plaintiff must establish duty, breach, proximate cause and damages.⁴ What differentiates a claim for professional malpractice from any other tort primarily concerns the procedural hurdles necessary to bring a claim and the need for specific expert testimony in order to successfully prosecute or defend the claim.

Georgia law requires that any person who performs skilled services, such as medical services, exercise that degree of care, skill and ability which is ordinarily exercised under similar conditions and like circumstances by others employed in the

¹ The Code provides for a specific definition of “medical malpractice” actions, but not malpractice in general. O.C.G.A. §§ 9-3-70; 9-11-8. Examples of claims against medical professionals which are not considered malpractice include a claim that a surgeon committed a battery, *Newton v. Porter*, 424 S.E.2d 323 (1992); and where a mental health counselor committed an intentional tort by subjecting his client to perverted behavior. *Rowebuck v. Smith*, 418 S.E.2d 165 (1992).

² *Jackson v. Miller*, 176 G. App. 220, 335 S.E.2d 438 (1985) (theory of strict liability was not applicable to wrongful death action brought against physician arising out of medical malpractice).

³ *Cherokee County Hosp. Authority v. Beaver*, 179 Ga. App. 200, 345 S.E.2d 904 (1986). Note that at least one jurisdiction has held that *Res Ipsa Loquitur*, as expressed in Restatement (Second) of Torts, § 328 D, may be applicable to allow an inference as to whether a defendant is the responsible cause of the injury. See, e.g., *Jones v. Harrisburg Polyclinic Hospital*, 437 A.2d 1134 (Pa. 1981).

⁴ *Anthony v. Chambliss*, 231 Ga. App. 657, 500 S.E.2d 402 (1998).

same or similar professions.⁵ The standard of care is not what one individual's doctor thought was advisable and what he or she would have done under the circumstances; the standard is what a "reasonable" medical professional would do under similar circumstances.⁶

Although rebuttable, in Georgia there is a presumption that professional services are provided with the requisite degree of care, skill and diligence generally required by the profession.⁷ Thus, the plaintiff is usually required to present expert testimony to overcome the presumption⁸ and once the plaintiff produces sufficient evidence of negligence, the burden then shifts to the defendant to respond with similar expert testimony. Recently, plaintiffs challenged the jury charge on the presumption of due care, arguing that it essentially created a higher burden for plaintiffs in medical malpractice actions than in other negligence cases. The Court of Appeals rejected the argument, however, finding that the standard was still a preponderance of the evidence and the jury instruction was held constitutional.⁹

II. ELEMENTS OF A CAUSE OF ACTION

As noted above, the elements of a cause of action for medical malpractice are those found in any negligence action. The duty exists through the doctor-patient

⁵ *Hailey v. Blalock*, 209 Ga. App. 345, 433 S.E.2d 337 (1993). *See, e.g.*, O.C.G.A. § 51-1-27 (physicians); O.C.G.A. § 43-9-16(g) (chiropractors).

⁶ *Shea v. Phillips*, 213 Ga. 269, 98 S.E.2d 552 (1957); *McNabb v. Landis*, 223 Ga. App. 894, 896, 479 S.E.2d 194 (1996); *see also Johnson v. Rberdale Anesthesia*, 275 Ga. 240, 563 S.E.2d 431 (2002).

⁷ *Hailey v. Blalock*, 209 Ga. App. 345, 433 S.E.2d 337 (1993).

⁸ An expert witness must establish not only a deviation from acceptable standards of care, but also that the negligence was a proximate cause of the injury. *See, e.g., Parrott v. Chatham County Hosp. Auth.*, 145 Ga. App. 113, 243 S.E.2d 269 (1978).

⁹ *Beach v. Lipham*, 276 Ga. App. 302, 578 SE2d 402 (2003).

relationship or other situation where the defendant professional, including a corporation or group providing medical care, owes a duty to perform skilled services with that degree of care and skill ordinarily exercised by persons in the profession. The plaintiff must first establish, through expert testimony, the standards of practice and the degree of skill and care ordinarily employed by others in the same profession.¹⁰ The standard of care must be proved by an expert in professional negligence cases because the jury cannot rationally apply negligence principles to professional conduct without evidence of what the competent professional would have done under similar circumstances. However, in rare cases involving “clear and palpable” evidence of negligence, no expert testimony is required.¹¹ Additionally, while expert testimony is necessary in cases in which the medical professional’s care and skill is criticized, expert testimony is not necessary even against a professional if the cause of action is based on “ordinary negligence.”¹² For example, in *Clark v. Prison Health Services, Inc.*,¹³ the court held that an action which alleged that a prison nurse negligently failed to deliver a mental health evaluation for the deceased prisoner to a booking officer stated a claim for ordinary negligence, not medical malpractice. Unfortunately, it is not always clear what constitutes ordinary negligence in

¹⁰ *Shack v. Moorhead*, 152 Ga. App. 68, 262 S.E.2d 186 (1979)(expert testimony required except in rare instances.)

¹¹ *Sood v. Smeigh*, 259 Ga. App. 490, 578 SE2d 158 (2003) (expert affidavit requirement did not apply to case alleging doctor assembled prosthetic knee backwards in patient’s total knee replacement).

¹² *Self v. Executive Committee of Georgia Baptist Convention*, 245 Ga. 548, 266 S.E.2d 168 (1980) (plaintiff slipped and fell in hospital bathroom while a patient; claim alleged the fall was the result of the hospital’s negligence in failing to properly repair a leaking bathroom fixture). Where the alleged negligence does not involve the exercise of professional judgment and skill, the cause of action is in simple negligence so that no expert testimony is necessary to bring the claim. *Hodo v. General Hospital of Humana, Inc.*, 211 Ga. App. 6, 438 S.E.2d 378 (1993).

¹³ 257 Ga. App. 787, 575 s.E.2d 342 (2002).

this context of a professional's conduct.¹⁴ The best approach is always to present expert testimony when a medical professional, individual or organization, is the defendant.

The plaintiff is then required to produce expert testimony establishing that the defendant's conduct deviated from the accepted standard of care.¹⁵ The plaintiff must also establish that the defendant's negligence was the proximate cause of the plaintiff's injuries. Causation in a malpractice action requires more certainty than providing evidence that the plaintiff "might have" or "could have" obtained a more favorable result had the defendant not breached the standard of care.¹⁶ While some courts have held that expert testimony is not required to establish causation,¹⁷ the Court of Appeals recently confirmed that establishing causation similarly requires proof.¹⁸ Finally, the plaintiff must prove damages.

¹⁴ For example, in *Robinson v. Medical Center of Central Georgia*, 456 S.E.2d 378, 380 (Ga. App. 1995) the plaintiff blamed his fall from his hospital bed on the nurses' failure to raise the side rails on the bed. The Court of Appeals held that the allegation concerned nursing judgment, to be exercised in accordance with a written "fall risk protocol" so that expert testimony was required. *But see Smith v. North Fulton Medical Ctr.*, 200 Ga. App. 464, 408 S.E.2d 468 (1991) (holding trial court erred in dismissing complaint for failure to provide expert affidavit in case alleging plaintiff fell due to improperly positioned bed rails); *Flowers v. Memorial Med. Ctr.*, 198 Ga. App. 651, 402 S.E.2d 541 (1991) (plaintiff alleged nurses failed to hold her up during exam, causing her to fall and break her hip. Held that because the claim could be construed both as professional negligence *or* ordinary negligence, suit should not have been dismissed for failure to provide expert affidavit).

¹⁵ *Cherokee County Hosp. Auth. v. Beaver*, 179 Ga. App. 200, 345 S.E.2d 904 (1986). Expert testimony is not required to establish a breach of the standard of care where the results of the defendant's conduct are so pronounced, and so clear and palpable as to be within the common knowledge of laymen. *See, e.g., Packer v. Gill*, 193 Ga. App. 388, 388 S.E.2d 338 (1989).

¹⁶ *See, e.g., Abdul-Majed v. Emory University Hospital*, 225 Ga. App. 608, 484 S.E.2d 257 (1997) ("Certainty is not required, but the plaintiff must show a probability rather than merely a possibility that the alleged negligence caused the injury or death."). The expert need not use any specific language such as "within a reasonable degree of medical certainty," as many believe. *Lee v. Satilla Health Services*, 220 Ga. App. 885, 887, 470 S.E.2d 461 (1996).

¹⁷ *Horney v. Lawrence*, 189 Ga. App. 376, 375 S.E.2d 629 (1988) (expert testimony not required); *McClure v. Clayton County Hospital Auth.*, 176 Ga. App. 414, 336 S.E.2d 268 (1985) (expert testimony required). *See also Sinkfield v. Oh*, 1997 Ga. App. LEXIS 1492 (12/5/97) (while toxicologist was not competent to testify regarding physician's violation of standard of care, he was competent expert on issue of causation of decedent's death).

¹⁸ *Thompson v. Zwiren*, 254 Ga. App. 204, 561 S.E.2d 493 (2002).

III. ELEMENTS OF THE DEFENSE

The defendant has the usual defenses available in a medical malpractice suit with some additional defenses unique to the tort. The typical defenses of statutes of limitations and repose apply in the professional negligence context and will be discussed in greater detail below. Additionally, the plaintiff's contributory negligence can affect his right to recover as in other negligence suits.¹⁹ In a recent case handled by our office, *Amu et al. vs. Barnes*, Ct. of Appeals A07A0811, decided July 2, 2007, the Court of Appeals held that the failure to seek routine, preventative care was not contributory negligence and could not constitute an intervening proximate cause of injury. The Court held that a patient's own actions constitute intervening cause only where the patient consciously ignores a problem and allows it to worsen. *Amu*, supra at p15; *Eldred v. Blue Cross & Blue Shield of Ga*, 274 GaApp 798, 619 SE2d 331 (2005). A release executed by the plaintiff or on his behalf will operate as a defense to an action against the defendant.²⁰

Those defenses that are unique to professional negligence cases mimic the peculiar requirements imposed upon the plaintiff in bringing the cause of action. For example, in virtually every answer to a malpractice suit, the defendant will assert the failure to comply with the requirements of O.C.G.A. § 9-11-9.1. This defense is asserted almost as a matter of course even if there does not appear to be a deficiency simply because defendants believe the defense must be pled in the answer or it will be waived.²¹

¹⁹ *Anglin v. Grisamore*, 192 Ga. App. 704, 386 S.E.2d 52 (1989) (comparative negligence charge properly given where the patient fails to follow physician's instructions following treatment and suffers harm as a result).

²⁰ *Posey v. Medical Center-West, Inc.*, 257 Ga. 55, 254 S.E.2d 417 (1987).

²¹ Prior to the revision of O.C.G.A. § 9-11-9.1 in 1997, there was some ambiguity concerning a defendant's burden in making a motion to dismiss when it is not clear the affidavit is valid; however, we take the position that this was corrected by revision, and only where a specific defect exists is it appropriate to move to dismiss.

Under the 2007 amendment to O.C.G.A. § 9-11-9.1(e) the way to challenge an affidavit is to file a Motion to Dismiss alleging the defect with particularity. The Motion to Dismiss must be filed prior to the close of discovery.

Just as a plaintiff may assert that a physician is liable to him for performing a procedure without the requisite informed consent, a physician may defend on the basis of a written consent.²²

There are numerous immunities which apply in certain circumstances in medical malpractice actions. The number and extent of available statutory immunities is beyond the scope of this paper; however, they include, among other things, immunity for charitable activities,²³ admission and discharge of mental health patients,²⁴ disclosure of medical records²⁵ and treatment of minors without parental consent.²⁶ Additionally, the Code specifically provides immunity to anyone who renders emergency care in good faith and without charge at the scene of an emergency or accident.²⁷ The Supreme Court has held, however, that governmental immunity available in medical malpractice actions is limited. In *Keenan v. Plouffe*,²⁸ the Court considered whether a state-employed doctor who allegedly negligently performed surgery on a private pay patient is immune from suit under the State Tort Claims Act and held that the defendant physician was not

²² *Hutcheson v. McGoogan*, 162 Ga. App. 657, 292 S.E.2d 527 (1982) (a written consent which covers the procedure complained of is a defense to a battery allegation); *Hooker v. Headley*, 192 Ga. App. 629, 385 S.E.2d 732 (1989) (a physician will not be held responsible to a patient who elects to undergo a high risk procedure despite being informed of such risks).

²³ O.C.G.A. § 51-1-29.1. This immunity extends only to the charitable entity, however. Physicians employed by charitable hospitals are not afforded the same immunity. *Cutts v. Fulton Dekalb Hosp. Auth.*, 192 Ga. App. 517, 385 S.E.2d 436 (1989).

²⁴ O.C.G.A. § 37-3-4.

²⁵ See O.C.G.A. §§ 24-9-40, 24-9-44, 31-33-2 and 33-31-5.

²⁶ O.C.G.A. § 15-11-117.

²⁷ O.C.G.A. § 51-1-29. The Code is very general and would extend protection to licensed health care professionals; however, this would not be an available defense to a professional who had a prior duty to treat the patient. *Claxton v. Kelly*, 183 Ga. App. 45, 357 S.E.2d 865 (1987).

²⁸ 267 Ga. 791, 482 S.E.2d 253 (1997).

immune because the plaintiff sought to hold him liable only for the exercise of his medical (as opposed to governmental) discretion in treating the patient. In other words, his treatment decisions were his alone and not controlled by policies of the Board of Regents. The Court found that the purpose of the immunity statute would not be furthered by extending immunity to that situation.

While certainly a concern when determining whether to take a medical malpractice case, immunity issues have not really been a significant impediment in the past.

IV. TIME LIMITATIONS

An action for medical malpractice in Georgia must be brought within two years after the date on which the negligent act or omission occurred.²⁹ While there are some exceptions that can extend the limitation period, the statute also provides for a five-year statute of ultimate repose.³⁰ The statute of repose must of course be considered when deciding whether to file suit; however, it also is important to recognize that the repose period will similarly serve to bar a suit that has been dismissed and refiled pursuant to O.C.G.A. § 9-2-61 more than five years after the date of the negligent treatment.³¹

A. Misdiagnosis

In the context of medical negligence suits involving misdiagnosis, the question of when the cause of action accrues can be confusing. After considering this issue in

²⁹ O.C.G.A. § 9-3-71(a). The two-year statute of limitation is applicable whether the action for medical malpractice is brought in tort or in contract. *See St. Joseph's Hospital, Inc. v. Mattair*, 239 Ga. 674, 238 S.E.2d 366 (1977). Please keep in mind, however, that certain causes of action asserted against a Health Maintenance Organization, such as one based in contract, will have a different, usually longer, statutes of limitation, that may or may not fall within the "medical malpractice" category such that two years is the operative number. As with any cause of action, the practitioner will have to consider each of the claims asserted to assure that the statute of limitations applicable to each has been considered.

³⁰ O.C.G.A. § 9-3-71(b).

³¹ *Wright v. Robinson*, 262 Ga. 844, 426 S.E.2d 870 (1993); *Hanflik v. Ratchford*, 848 F. Supp. 1539 (N.D. Ga. 1994).

numerous cases, the courts have concluded that a cause of action accrues when physical symptoms of the injury manifest themselves to the plaintiff, whether or not the condition has been diagnosed or the plaintiff has knowledge of the medical cause of the physical symptoms.³² However, a defendant claiming the statute of limitations as a defense in failure to diagnose cases must show that the symptoms experienced by the plaintiff early on were actually the result of the negligence complained of.³³ Several cases illustrate how this physical manifestation of injury principle has been applied in favor of both parties.

In *Staples v. Bhatti*,³⁴ the plaintiff underwent a mammogram at the defendant's request in 1989, which revealed the presence of breast cancer. According to the plaintiff, the defendant doctor failed to advise her of the test results. In 1992, almost three years later, the plaintiff experienced pain in her breast and felt a lump. A second mammogram confirmed a cancerous tumor at the location of the previous test site. The plaintiff filed a medical negligence action against Bhatti approximately a year after the diagnosis was made - almost four years after receiving treatment from Dr. Bhatti. The trial court granted the defendant's motion for summary judgment on the ground that the action was barred by the two-year statute of limitations in O.C.G.A. § 9-3-71.

The Court of Appeals reversed finding that “the focus of OCGA § 9-3-71(a) is not the date of the negligent act but the ‘consequence of the defendant’s acts on the plaintiff.’”³⁵ Because the plaintiff’s expert opined that the “injury occasioned by the

³² *Oxley v. Kilpatrick*, 225 Ga. App. 838, 486 S.E.2d 44 (1997); *Henry v. Medical Center, Inc.*, 216 Ga. App. 893, 456 S.E.2d 216 (1995); *Bryant v. Crider*, 209 Ga. App. 623 (1993).

³³ *Scraven v. Drs. Gruskin & Lucas, P.C.*, 227 Ga. App. 756, 758, 490 S.E.2d 422 (1997) *See also Walker v. Melton*, 227 Ga. App. 149, 489 S.E.2d 63 (1997).

³⁴ 220 Ga. App. 404, 469 S.E.2d 490 (1996).

³⁵ 220 Ga. App. 404, 405 (quoting *Jones v. Lamon*, 206 Ga. App. 842, 845 (426 S.E.2d 657 (1992)); *Vitner v. Miller*, 208 Ga. App. 306 (430 S.E.2d 671 (1993)).

Bhatti's alleged failure to inform the Staples of her mammogram results occurred when the small cancer present in 1989 was allowed to grow in mass and to spread to Staples' lymph node,"³⁶ the action was not time barred. The court focused on the fact that the plaintiff remained symptom-free for a period of time before experiencing the pain that led her to obtain the proper diagnosis. The plaintiff filed suit within two years of the time the injury became apparent to her, "well within the two-year limitation period for medical negligence actions."³⁷

The rule was applied in part to the detriment of the plaintiff in *Vitner v. Miller*,³⁸ where the plaintiff filed suit on March 18, 1991 alleging negligence in the performance of two abortions. The court held the action was untimely as to the first abortion performed on March 11, 1989 because "any injury which resulted from the first abortion occurred and physically manifested itself to plaintiff by March 14."³⁹ But the complaint was timely as to the second abortion performed on March 15, 1989 because the plaintiff's injury from that procedure "manifested itself on March 20, 1989, when plaintiff began to bleed and experience pain after the second abortion."⁴⁰

Based on this "physical manifestation of injury" requirement, it is very important to question the client about what he or she was experiencing physically during the course of treatment when considering whether to accept a medical negligence case in which the alleged negligent care occurred more than two years beforehand. Even if the plaintiff continues to treat with the physician, the statute may begin to run long before a diagnosis

³⁶ 220 Ga. App. at 405.

³⁷ *Id.* at 406.

³⁸ 208 Ga. App. 306, 430 S.E.2d 671 (1993).

³⁹ 208 Ga. App. 306, 307.

⁴⁰ *Id.*

is made.⁴¹ For example, in *Crawford v. Spencer*,⁴² the plaintiff alleged that the defendant was negligent in continuing to prescribe Feldene to treat her arthritis because the drug is contraindicated for patients with peptic ulcers. The plaintiff first began taking the drug in May, 1990. The defendant became aware of the plaintiff's ulcer in January, 1991. The plaintiff continued to complain to the defendant about stomach pain until July, 1991 when he consulted with another physician who advised that he cease taking the Feldene immediately. Suit was filed in July, 1993.

The trial court granted summary judgment and the Court of Appeals affirmed on the ground that the evidence established that the plaintiff's "injury occurred and had physically manifested itself to him" prior to the time when he became aware of the medical cause of his pain.⁴³ Significantly, the *Crawford* opinion establishes that even a subjective belief that the plaintiff's symptoms are "due to some other cause unrelated to the alleged negligence does not change the point at which the injury occurred."⁴⁴

Subsequent cases have continued to erode the plaintiff's ability to file in misdiagnosis cases. In *Kane v. Shoup*⁴⁵ the court held that the patient's cause of action against an orthodontist and clinic, alleging misdiagnosis and mistreatment in connection with patient's treatment for overbite, accrued at time of alleged misdiagnosis, not when oral surgeon gave opinion that surgery might be required to correct overbite. This was despite repeated assurances by the doctor that nothing was wrong.

⁴¹ See, e.g., *Henry v. Medical Center, Inc.*, 216 Ga. App. 893, 456 S.E.2d 216 (1995) (holding that the statute begins to run when there is a physical manifestation of an injury, not knowledge of the cause or a specific diagnosis).

⁴² 217 Ga. App. 446, 457 S.E.2d 711 (1995).

⁴³ 217 Ga. App. 446, 448.

⁴⁴ *Id.*

⁴⁵ 260 Ga. App. 723, 580 SE2d 555 (2003) cert denied.

In *Williams v. Young*,⁴⁶ the Court of Appeals attempted to cure what it perceived as a wrong in the law in Georgia regarding the limitation period in misdiagnosis cases. The rule is that the injury 'occurs' when its symptoms manifest themselves to the patient applies even if the patient is not aware of either the cause of the pain or of the connection between the symptoms and the negligent act or omission, which does not seem fair. To alleviate the "harsh result" this rule can create, the majority in *Williams* adopted the "continuous treatment" doctrine. The Supreme Court, however, reversed the Court of Appeals' decision, holding that the continuous treatment doctrine is more appropriately incorporated into a statute of limitation that commences upon occurrence of the negligent act.⁴⁷ In the *Amu v Barnes* case we handled, which was just decided by the Court of Appeals on July 2, 2007, Dr. Amu argued that the statute of limitation had passed and our claim should have been time barred. Our client, Wilbert Barnes, had gone to Dr. Amu in January 2000 with a complaint of 2 weeks of rectal bleeding. Dr. Amu had told him the bleeding was most likely hemorrhoids and would stop shortly. It did. Mr. Barnes remained asymptomatic until the spring of 2004 when he began having vague abdominal symptoms. They progressed and in July they were determined to be from stage IV colon cancer.

The general rule in misdiagnosis cases is that the 2 year period of limitations begins running immediately from the misdiagnosis even when the injured person does not know the ongoing pain/problem is coming from misdiagnosis. *Williams v Young*, 258 GaApp 821, 823-24, 575 SE2d 648 (2002)

Over the years the Court has had one exception to this general rule of 2 years from the date of misdiagnosis. When the misdiagnosis results in a subsequent injury that

⁴⁶ 247 Ga. App. 337, 543 S.E.2d 737 (2000).

is difficult or impossible to date precisely, the statute of limitations runs from the date that symptoms attributable to the misdiagnosis are manifested to the patient. This has become known as the “subsequent injury” or “new injury” exception.

In his appeal in *Barnes* Dr. Amu asked the Court to disavow this rule because it is a “discovery” rule in conflict with O.C.G.A. § 9-3-71(a). The Court determined this was not a “discovery” rule, but was simply a reconciliation of the “date of injury” language with the difficulty or impossibility of determining precisely when a new injury arose. *Barnes*, supra at p13. Thus, Georgia's current medical malpractice statute of limitation begins to run upon occurrence or discovery of the injury. The trigger is the appearance of symptoms even if the plaintiff is totally unaware of any causal relationship between his or her medical care and those symptoms.⁴⁸

B. Continuing Tort and Continuing Treatment Theories

Even before *Young v. Williams*, Georgia courts had rejected the “continuing tort” and “continuous treatment” theories. These theories attempt to toll the statute of limitations during the period in which the plaintiff continues to treat with the defendant, making the operative date the last date of treatment. Noting the legislative intent in amending the statute of limitations in 1985 to limit perpetual liability for alleged negligent acts by health care professionals, the Court in *Crawford v. Spencer* found that the application of such theories would serve to “thwart the intent of the legislature.”⁴⁹ The court similarly declined to adopt a “continuing treatment” theory, which it found

⁴⁷ 274 Ga. 845, 847, 560 S.E.2d 690 (2002).

⁴⁸ *Luem v. Johnson*, 258 Ga. App. 530, 574 S.E.2d 835 (2002)

⁴⁹ 217 Ga. App. 446, 449, 457 S.E.2d 711 (1995).

would “expand substantially the period of limitation in medical malpractice cases of this nature.”⁵⁰

The Supreme Court has consistently confirmed the non-viability of the continuing treatment theory. For example, in *Waters v. Rosenbloom*⁵¹ the defendant prescribed Valium and Librium over many years, which the plaintiff alleged caused problems with her husband’s diabetes resulting in renal failure and his ultimate death. The plaintiff attempted to use the continuing tort theory in an effort to avoid the statute of repose by stating that the statute did not begin to run until the date the last prescription was written. The Court did not agree. “Even assuming, arguendo, that the alleged negligent acts constitute a continuing tort and the continuing tort theory should be applied to toll the running of the statute of repose,” the Court noted that under this theory, a cause of action accrues when a plaintiff discovers, or should discover, both the injury and the cause.⁵² Because the plaintiff knew for many years that Valium was affecting her husband’s mental state and had the same suspicions when he started to take Librium, she was barred from asserting that the doctor’s continuing treatment extended the statute of limitations.

Finally, in *Young v. Williams*, the Supreme Court held that the legislatively-prescribed statute of limitation did not provide for the commencement of the period of limitation upon the termination of the health-care provider’s treatment of the patient, and the judicial branch was not empowered to engraft such a provision on to what the legislature had enacted.⁵³ Thus, the Court of Appeals’ adoption of the continuous treatment doctrine was error. In his concurrence, Justice Carley was careful to point out that the continuous treatment doctrine does have “much to commend;” however, the

⁵⁰ *Id.* (citing *Vitner v. Miller*, 208 Ga. App. 306 (1993). See also *Ford v. Dove*, 218 Ga. App. 828 (1995).

⁵¹ 268 Ga. 482, 490 S.E.2d 73 (1997).

⁵² 268 Ga. at 483.

Court was compelled to follow the doctrine of stare decisis and existing law did not provide for such a doctrine.⁵⁴ He did note, however, that the Court's decision was not necessarily the end of the plaintiff's case. On remand, the Court of Appeals was still compelled to consider when the statute of limitations began to run on the claim.

The issue of the Statute of Limitations in cases of continued treatment after initial negligent misdiagnosis continues to arise. In *Canas v. Al-Jabi*, 282 GaApp 764, 783 (1)(b), 639 SE2d 494 (2006), Cert Granted, ___ GA ___ (case no. S07C0587, decided Feb. 26, 2007) the Court of Appeals held that if a patient continues in treatment after an additional misdiagnosis, and if the doctor stands by the misdiagnosis in a later appointment even after the patient presents the doctor with a significant change in manifestations of his condition, then the injury from the new negligent act cannot be deemed to have occurred any earlier than the date of the new misdiagnosis. *Id* at 785(1)(b).

The *Canas* decision from the Supreme Court's grant of certiorari is expected at any time. Hopefully it will shed new light on this difficult subspecies of case and perhaps give some relief to those victims of malpractice who have been too trusting to promptly suspect they have been the victims of malpractice..

C. **Foreign Object Exception**

An exception to the two-year statute of limitations applies in the case of a foreign object left in the body. O.C.G.A. § 9-3-72 provides that such an action must be brought within one year of discovery of the wrongful act, assuming that the discovery occurs more than two years after the date of treatment. Otherwise, the limitation period is the usual two year period. In other words, the statute does not serve to *shorten* the limitation

⁵³ 274 Ga. 845, 848, 560 S.E.2d 690 (2002).

period when the discovery of the object occurs less than two years after the date of treatment. The additional one-year period is absolute; there is no further tolling due to a claim of fraudulent concealment. The application of O.C.G.A. § 9-3-72 tolls the statute of limitations until the patient knows or should know that a foreign object has been left inside his body.⁵⁵

D. Tolling the Statute of Limitations Due to Fraud

Additionally, both the statute of limitations *and the statute of repose* will be extended in the event of proven fraud⁵⁶ on the part of the defendant health care provider.⁵⁷ The patient must present evidence of fraud or misrepresentation in order to toll the statute of limitations.⁵⁸

In *Beck v. Dennis*,⁵⁹ the defendant performed nasal surgery on the plaintiff in 1983. The defendant failed to remove the packing from plaintiff's nose during the procedure and failed to notify plaintiff or any of her subsequent treating physicians of this fact. It was eventually discovered and removed by another physician in 1990. The trial court granted the defendant's motion for summary judgment based on the statute of repose but the Court of Appeals reversed because of the defendant's alleged fraud in

⁵⁴ 274 Ga. at 848.

⁵⁵ *Childers v. Tauber*, 148 Ga. App. 157 (1978). Fraudulent concealment of the presence of a foreign object in ones body is not a cause of action subject to the one-year statute of limitations provided in O.C.G.A. § 9-3-72; the one year statute is tolled until the patient knows of the presence of the object. *Karafotias v. Coyne*, 184 Ga. App. 335 (1987).

⁵⁶ Generally, fraud having the effect of tolling the statute of limitations is a proper question for a jury to decide. *Johnson v. Gamwell*, 165 Ga. App. 425 (1983).

⁵⁷ O.C.G.A. § 9-3-96. The fraud must be such that it deterred the plaintiff from bringing the action. The statute of limitations begins to run from the point at which the plaintiff discovers the fraud. *Wolf v. Virusky*, 306 F. Supp. 519 (S.D. Ga. 1969), *rev'd on other grounds*, 470 F.2d 831 (5th Cir. 1972).

⁵⁸ *Zechman v. Thigpen*, 210 Ga. App. 726, 437 S.E.2d 475 (1993) (statute of repose not tolled where no evidence of fraudulent concealment by defendant); *Rowell v. McCue*, 188 Ga. App. 528, 373 S.E.2d 243 (1988).

concealing the negligent act. “The statute of repose should not be applied to relieve a defendant of liability for injuries caused by negligence concealed by the defendant fraud, lest it provide an incentive for a doctor to conceal his negligence with the assurance that in five years he will be insulated from liability.”⁶⁰

*Oxley v. Kilpatrick*⁶¹ is an interesting case in which the Court of Appeals considered what a plaintiff must do to discover the alleged fraud. In *Oxley*, the plaintiff’s son, Ben, suffered from cerebral palsy as a result of oxygen deprivation as a result of fetal distress. Ben was born in 1987, but was not diagnosed for eighteen months. Mrs. Oxley continued to remain under the care of Dr. Kilpatrick, who advised her that Ben’s condition was due to a genetic condition and cautioned her not to have another child. After becoming pregnant in 1993, Mrs. Oxley’s new obstetrician reviewed the medical records from her first delivery and informed her that Ben’s condition was caused by oxygen deprivation from fetal distress and could have been prevented if he had been delivered earlier. She later delivered a healthy girl in 1994. Suit was filed in 1996.

In response to the plaintiff’s assertion that she had been prevented from discovering the true cause of Ben’s injuries due to the defendant’s comments, the defense pointed to the fact that she had consulted a number of physicians about Ben’s condition and maintained that based on *Bryant v. Crider*⁶² her claims were barred. In *Bryant*, the court held that ““once a plaintiff seeks the diagnosis of care of another doctor, she is no longer deterred from learning the true facts by any conduct of a defendant.”” The court,

⁵⁹ 215 Ga. App. 728, 452 S.E.2d 205 (1994), *rev’d on other grounds*, *Abend v. Klautdt*, 243 Ga. App. 271, 531 S.E.2d 722 (2000).

⁶⁰ 215 Ga. App. at 729 (citing *Hill v. Fordham*, 186 Ga. App. 354, 367 (1988)).

⁶¹ 225 Ga. App. 838, 486 S.E.2d 44 (1997) *rev’d on other grounds*, 269 Ga. 82, 495 S.E.2d 391 (1998).

⁶² 209 Ga. App. 623, 434 S.E.2d 161 (1993).

however, relied upon *Bynum v. Gregory*,⁶³ holding that a jury could find that as long as Mrs. Oxley remained under Dr. Kilpatrick's care, she could reasonably rely on his representations concerning the cause of her son's condition and had no duty to investigate or confirm the truth of those representations.⁶⁴

Most recently, the Supreme Court has made clear that for equitable estoppel to prevent the assertion of the statute of repose, only intentional fraud of the physician preventing the plaintiff from discovering the injury will give rise to the applicability of such doctrines.⁶⁵

E. Other Tolling Provisions

There are several other provisions in the Code which toll the statute of limitations in medical malpractice actions and these should be carefully reviewed before filing suit. For example, O.C.G.A. § 9-3-73(a) states that the "disabilities and exceptions prescribed in Article 5 in limiting actions on contracts, shall be allowed and held applicable to actions, whether in tort or contract, for medical malpractice." Ordinarily a minor would not have to bring an action until two years after reaching the age of majority.⁶⁶ However, Section 9-3-73 (b) goes on to set forth a unique limitation period for medical malpractice actions on behalf of minors. Minors who have reached age five have the usual two years to bring a cause of action; a minor who has not reached age five has until his seventh birthday.

⁶³ 215 Ga. App. 431, 450 S.E.2d 840 (1994).

⁶⁴ 225 Ga. App. 838, 840-841. The Court of Appeals also ruled that Dr. Kilpatrick's misrepresentations regarding the cause of the cerebral palsy would toll the statute of limitation as to Dr. Rossi, an on-call physician who was involved in the plaintiff's care during labor. However, the Supreme Court reversed this portion of the suit, dismissing Dr. Rossi, on the ground that the on call arrangement between Dr. Kilpatrick and Dr. Rossi did not constitute a "joint venture" such that representations made by Dr. Kilpatrick could be attributed to Dr. Rossi in order to toll the statute of limitations for the plaintiff's claims against him as well. 269 Ga. 82, 495 S.E.2d 391 (1998).

⁶⁵ *Miller v. Vitner*, 249 Ga. App. 17, 546 S.E.2d 917 (2001).

O.C.G.A. § 9-3-97.1 provides for a special tolling provision if the injured party or his attorney has made a request for medical records assuming certain requirements are met.

O.C.G.A. § 9-3-92 provides for the tolling of the statute of limitations in wrongful death actions during the period in which the estate is unrepresented, provided that the time does not exceed five years. This provision has been applied in the context of medical malpractice in an unusual circumstance to bar the plaintiff's claims.⁶⁷

F. Loss of Consortium

Although the statute of limitations for loss of consortium is four years,⁶⁸ when the underlying action is based upon injury to the spouse due to medical malpractice, the two-year statute of limitations applies to the consortium claim as well.⁶⁹

V. EXPERT TESTIMONY

Unless the case involves "simple negligence"⁷⁰ as opposed to the violation of a professional standard of care, expert testimony is required in any case against a professional.⁷¹ In fact, in order to bring any claim for professional negligence in

⁶⁶ O.C.G.A. § 9-3-90.

⁶⁷ *Legum v. Crouch*, 208 Ga. App. 185, 430 S.E.2d 360 (1993) (because of the tolling period allotted during the period before the administrator is appointed, the statute of limitations was not actually set to expire within 10 days as alleged; thus, plaintiff could not utilize the 45 day extension period in O.C.G.A. § 9-11-9.1(b)). This problem was cured with the amendment to the affidavit statute when the language was changed to include additional time when one reasonably believes the statute is going to expire.

⁶⁸ O.C.G.A. § 9-3-33.

⁶⁹ *Hamby v. Neurological Associates, P.C.*, 243 Ga. 698, 256 S.E.2d 378 (1979). It should be noted, however, that if the action is based, instead, upon battery, the usual four year statute for the loss of consortium claim applies.

⁷⁰ Because the requirement for expert testimony in professional negligence cases is so important, one should carefully consider whether a belief that a case involves only simple negligence is valid. The following are examples of instances in which the courts have determined that only simple negligence was involved: *Roebuck v. Smith*, 204 Ga. App. 20, 418 S.E.2d 165 (1992) (plaintiff alleged the defendant subjected him to "perverted psychotherapy"); *General Hospitals of Humana, Inc. v. Bentley*, 184 Ga. App. 489, 361 S.E.2d 718 (1987) (elderly woman's death as a result of a fall in a nursing home was within the common knowledge of jury).

⁷¹ *Storrs v. Wills*, 170 Ga. App. 179, 316 S.E.2d 758 (1984).

Georgia, the plaintiff must include with the complaint an affidavit of an expert competent to testify in the field setting forth at least one negligent act or omission on the part of the defendant and the factual basis for same.⁷² This requirement applies to any action for damages alleging professional negligence;⁷³ thus, obtaining an expert opinion is absolutely essential before filing a claim for malpractice.

At the outset, the facts of the case should be analyzed carefully by an expert before a determination to accept the case is even made. Although the expert who provides the affidavit to satisfy the pleading requirement need not necessarily be the testifying expert at trial, his or her opinions become part of the heart of the claim and will likely be subject to strict scrutiny during the course of litigation. It makes sense to choose an expert for this purpose as carefully as any other. Certainly, there are cost benefits to having one expert to provide the affidavit as well as to testify at trial.

As noted above, expert testimony is required on the applicable standard of care, the alleged deviation from that standard, causation, and even damages. The substance of the expert's standard of care testimony recently came under attack in a terrible case for plaintiffs, *Johnson v. Riverdale Anesthesia*.⁷⁴ In *Johnson*, the decedent suffered a severe adverse reaction to anesthesia she received during surgery, causing her oxygen supply to be interrupted, resulting in her death. At trial, Johnson alleged that Anesthesia Associates had committed malpractice by failing to "pre-oxygenate" Mrs. Johnson. Pre-oxygenation is a procedure where, before surgery, a patient is given a measure of pure oxygen, providing her with a reserve to draw from, should her oxygen supply be interrupted

⁷² O.C.G.A. § 9-11-9.1.

⁷³ See, e.g., *Kneip v. Southern Engineering Co.*, 260 Ga. 409, 395 S.E.2d 809 (1990) (engineer); *Housing Authority of Savannah v. Greene*, 259 Ga. 435, 383 S.E.2d 867 (1989) (architect); *Seely v. Lloyd H. Johnson Construction Co.*, 220 Ga. App. 719, 723, 470 S.E.2d 283 (1996) (plumbing company).

⁷⁴ 275 Ga. 240, 563 S.E.2d 431 (2002).

during surgery. The trial court granted Anesthesia Associates' Motion in Limine to prevent Johnson from cross-examining the defendants' medical expert, Dr. Caplan, about whether he, personally, would have pre-oxygenated Mrs. Johnson.

After the jury found in favor of Anesthesia Associates, Johnson appealed, claiming the trial court erred by preventing Johnson from cross-examining Dr. Caplan as to whether he would have elected to pre-oxygenate Mrs. Johnson. The Court of Appeals affirmed,⁷⁵ and this Supreme Court granted certiorari. The high court concluded where expert testimony is presented either to support or rebut a claim that the applicable standard of care was breached, questions aimed at determining how the expert would have personally elected to treat the patient are irrelevant. Notably, this was found to be the rule whether the questioning comes on direct or cross-examination. Most surprising, however, was the Court's view that the rule applied even when the evidence was being offered for impeachment purposes, as in that case, since "is axiomatic that a witness may not be impeached with irrelevant facts or evidence and cross-examination should be confined to matters that are relevant to the case."⁷⁶ This result seems entirely unfair. That an expert can testify that the standard of care was not breached by the defendant, when he, himself, would not have done what the defendant did, is crazy. Justice Carley, for what its worth, filed a dissent in *Johnson*, indicating that the Court's ruling, at least with respect to the impeachment part, violated clear precedent.⁷⁷

In S.B. 3 the legislature adopted O.C.G.A. § 24-9-67.1 which modified the evidence code and stated that it was, "the intent of the legislature that in civil cases the courts of the State of Georgia not be viewed as open to expert testimony that would not

⁷⁵ 249 Ga. App. 152, 547 S.E.2d 342 (2001).

⁷⁶ 275 Ga. at 242.

⁷⁷ *Id.*

be admissible in other states. Therefore, in interpreting and applying this code section, the Courts of this state may draw from the opinions of the United States Supreme Court in *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 509 US 579 (1993); *General Electric Co. v Joiner*, 522 US 136 (1997); *Kumho Tire Co., LTD. v Carmichael*, 526 US 137 (1999) and other cases in federal courts applying the standards announced by the United States Supreme Court in these cases.”

This adoption of *Daubert* should require reversal of *Johnson* since under *Daubert* the expert must demonstrate that his methodology and opinion in the litigation is consistent with his methodology in general practice. To date, there has been no ruling on this issue from our appellate courts. In our only experience with a trial court the judge declined to depart from the *Johnson* decision despite the enactment of this code section.

A. Where to Find An Expert

There are numerous services that provide expert review for a fee. They can often be found through promotional materials that are routinely sent out to personal injury law firms. The benefit of using a service to have the case reviewed and to retain an expert is that the service will likely have the resources to access experts from across the country. It is often beneficial to use experts who are not part of the local community. In fact, in some specialties, such as orthopedics or obstetrics, it is almost impossible to get a local physician to testify against a colleague in the community.

Additionally, the use of a service saves time. But often it is the time spent in locating an expert that provides invaluable tools for the attorney handling the case. Unless the attorney is also a neurosurgeon, pharmacist, midwife or whatever medical profession happens to be involved in the claim, it is unlikely that she is going to be familiar with the standard of care applicable to the situation at issue. Therefore, researching the issues first hand not only provides a source for retaining an expert, but it

familiarizes the practitioner with the standard to be applied to the case. Once an expert becomes involved in the case he too will appreciate the attorney's knowledge of the subject and it will be much easier for the two to work together to advocate the client's position. A frequent complaint from experts who are involved in litigation is that they are expected to educate the lawyer. While the expert is an expert for a reason and should know more than you about the technical issues, it is imperative that you do your own research first.

If you just don't know where to start, but you don't want to use a service, simply asking other lawyers who have handled similar cases is a good source for names. Similarly, organizations such as the Association of Trial Lawyers of America and the Georgia Trial Lawyers Association for plaintiffs' lawyers, and the Defense Research Institute for defense lawyers typically have databases containing information about experts in various fields. Not only is this a good resource to obtain information about potential experts to use in your case, it is also a useful mechanism for learning about other experts who are involved in the case and who have been retained on behalf of the opposing party. It is most helpful to review prior testimony of the expert in preparation for cross-examination of the witness. These services can provide information on how to obtain transcripts of prior testimony. Keep in mind that you can find information from these organizations and others on the internet.

Another invaluable source, at least for plaintiff's lawyers, is subsequent treating physicians.⁷⁸ While treating physicians often do not wish to become involved in litigation, and may be reluctant to provide supporting "expert testimony," they have an insight into the patient's care that may be helpful in revealing negligence. Often clients

⁷⁸ In reality, the treating physicians are much more valuable to the defense, as the defendants and their lawyers have significantly better access to them.

discover that they have a potential claim when a subsequent treating physician suggests it. In such a case, the physician may at a minimum be willing to suggest the names of others who could be experts.

University settings are also good sources for experts. Simply contact that appropriate department and find out if any of the professors do consulting or litigation work. Often, universities have a protocol for their faculty physicians who do consulting work. This can be a financially lucrative arrangement for the university as well as the physician.

B. Who Can Be An Expert Witness?

Expert witnesses are those persons who possess the requisite knowledge and training and experience to render opinions regarding negligence and causation.

In S.B. 3 the legislature removed O.C.G.A. § 24-9-67 on expert opinion evidence and substituted O.C.G.A. § 24-9-67.1. This portion of the bill attempted to limit those who could testify as expert witnesses. Subsection (c) applied to professional malpractice actions and added the requirements that the professional be licensed in the state where he or she was practicing at the time of the occurrence, and have actual knowledge and experience in the area of practice or specialty in which the opinion is given as a result of either practicing in the specialty for 3 of the last 5 years to have an appropriate level of knowledge or alternatively by teaching for 3 of the last 5 years as an employed member of the faculty of an education institution accredited in the teaching of such profession. The determination of the expert's qualification to testify is to be made by the judge, and on appeal the issue is whether the judge abused his or her discretion. The revision further provides that the expert has to be a member of the same profession. O.C.G.A. § 24-9-67.1(c)

Defense lawyers immediately argued this meant a witness had to be from the same specialty or subspecialty before their testimony could be admissible. Four cases have addressed this issue. The most recent decision is *MCG Health, Inc. v. Barton*, 2007 WL 1518345, 07 FCDR 1618, ___ SE2d ___ (decided 5/25/07). This case involved the loss of an injured testicle. The issue was whether the defendant hospital and urologist had negligently failed to timely evaluate and treat a testicular torsion. Plaintiff's expert was an emergency room physician. The defendant urologists wanted this witness excluded since he was not a urologist. The Court of Appeals ruled that the witness had the requisite knowledge and experience in the area of concern, which was the question of what constituted timely investigation and intervention, and upheld the trial court's decision to allow the witness to testify.

Another 2007 decision addressing this same statute is *Mays v. Ellis*, 283 GaApp 195, 641 SE2d 201 (2007) cert denied. In *Mays* an obstetrician/gynecologist was sued for misdiagnosis and unnecessary surgery. The defendant had concluded the patient had either appendicitis or an ovarian torsion and had proceeded to surgery. Surgery established that neither condition was present, and that the patient actually had pancreatitis. The defendant had never considered that possibility. The defendant contended that since plaintiff's expert witness was a gastroenterologist, the expert was not qualified to testify against an obstetrician/gynecologist. Citing the *Cotton*⁷⁹ decision the court directly rejected the claim that an expert witness had to practice the same subspecialty as the defendant. The Court held the issue in each case is whether the proposed expert witness has the actual professional knowledge and experience in the area of practice in which the opinion is being given. The Court found that since the issue in

⁷⁹ *Cotton v. Phillips*, 280 GaApp 280, 633 SE2d 655 (2006)

Mays was proper diagnosis and treatment of abdominal complaints, the gastroenterologist had the appropriate knowledge and should be allowed to testify.

In September 2006 the Court decided *Abramson v. Williams*, 281 GaApp 617, 636 SE2d 765 (2006) cert denied. In the *Abramson* case a neurologist had been sued for negligently failing to diagnose a broken hip during a neurological consultation with the patient. The plaintiffs had filed suit and had submitted an affidavit from an orthopedic surgeon which offered the opinion that the defendant neurologist had failed to timely recognize and diagnose the broken hip and that failure was a deviation from the standards of the medical profession under like or similar condition and circumstances. The defendant neurologist filed a motion claiming that the affidavit from the orthopedic surgeon failed to meet the requirements of O.C.G.A. § 24-9-67.1. The trial court had rejected the defendant's motion and found that the affidavit from the orthopedic surgeon showed that he had the requisite knowledge and experience to give his opinion on the alleged failure to diagnose.

In *Abramson* our Court of Appeals observed that in *Cotton v. Phillips*, 280 Ga.App. 280, 633 S.E.2d 655 (2006), it had just ruled on a substantially similar contention. In *Cotton* the Court of Appeals held that the trial court had not erred in admitting testimony by a vascular surgeon that an orthopedic doctor's failure to assess vascular issues in a case failed to meet the standard of care. The trial court in *Cotton* had noted that the legislature had specifically allowed for an overlap in specialties so long as the opinion of the expert witness pertained to his specialty.

The Court of Appeals stated in *Cotton* that the legislature intended to follow federal practice on the issue as developed in *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed.2d 469 (1993) and its progeny. “[U]nder *Daubert*, disputes as to an expert's credentials are properly explored through cross-

examination at trial and go to the weight and credibility of the testimony, not its admissibility.” *Cotton* at 659. Our Court of Appeals noted that it had held that the trial court in the *Cotton* case had not abused its discretion when it admitted the testimony of the vascular surgeon concerning the performance of its orthopedist.

The *Abramson* opinion acknowledged that in ruling on a motion to dismiss it was looking at the proper construction of O.C.G.A. § 24-9-67.1, rather than the trial court’s discretionary decision on whether or not to admit evidence, but noted that even under the required de novo review, the statutory “area of practice or specialty in which the opinion is to be given” is dictated not by the apparent expertise of the treating physician but rather by the allegations of the complaint concerning the plaintiff’s injuries. The *Abramson* opinion specifically noted that, “The statute contemplates that “the expert may very well have a different area of practice than the defendant doctor.” It is thus the expert’s qualifications, and not the defendant doctor’s area of practice, that control the admissibility of the expert’s testimony.”

The *Abramson* opinion concluded that on the question of the proper means of proceeding with the diagnosis of the plaintiff’s broken hip, the orthopedic surgeon had the requisite knowledge and experience in making that diagnosis to render an expert opinion in the case. Accordingly the *Abramson* opinion affirmed the trial court’s denial of the defendant’s Motion to Dismiss the complaint. These cases make it clear that so far this code section will be broadly construed to permit testimony from outside the Defendant’s specialty or board if the requisite qualifications are otherwise met.

As noted earlier, in O.C.G.A. § 24-9-67.1(f) the legislature stated its intent to adopt the *Daubert* standard. At this time there are no appellate decisions on the precise effect of this statement of legislative intent on determination of how expert testimony must read to be admissible.

C. **The Expert Affidavit Requirement of O.C.G.A. § 9-11-9.1**

O.C.G.A. § 9-11-9.1 provides that in any action for damages alleging professional malpractice, the plaintiff must file with the complaint an affidavit of an expert competent to testify, which sets forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim. This provision was initially intended to reduce the number of frivolous lawsuits against medical professionals. However, since its adoption in 1987, the statute has been extended to encompass a wide variety of professions.⁸⁰ To whom the statute applies and what constitutes compliance with O.C.G.A. § 9-11-9.1 has been the subject of *numerous* appellate court decisions,⁸¹ yet, even despite subsequent revisions to the statute,⁸² it is still not clearly defined. Due to the proliferation of litigation over the application of the statute, and the “judicial preoccupation” with the statute, it has been referred to as “the state’s most notorious procedural statute.”⁸³ Because the filing of the affidavit is such a crucial prerequisite to the maintenance of a medical malpractice action, some extra attention to the decisions interpreting the statute is warranted. Interestingly, the vast majority of cases recently decided have concerned alleged procedural or technical violations of the statute as opposed to the sufficiency of the opinions actually rendered in the affidavit.

Initially, it should be noted that the affidavit must be based on facts known at the time of filing - usually gleaned from a review of records. The pre-suit discovery

⁸⁰ See *Gillis v. Goodgame*, 262 Ga. 117, 414 S.E.2d 197 (1992).

⁸¹ At the time of drafting this paper, there were 278 cases in which § 9-11-9.1 was addressed (not including any federal court cases); less than half of these cases actually involve the application of the statute and whether the plaintiff’s complaint was subject to dismissal for some alleged defect in the affidavit.

⁸² The statute was revised effective July 1, 1997.

⁸³ Robert D. Brussack, *Georgia’s Professional Affidavit Requirement*, 31 Ga. L. Rev. 1031 (1997).

authorized by O.C.G.A. § 9-11-27(a) is not available to obtain facts with which to prepare an affidavit.⁸⁴

1. *When is An Affidavit Required?*

An affidavit is going to be required in essentially any case where the complaint concerns care rendered by a medical professional. There are some exceptions, as noted above, in situations where the conduct is not deemed to invoke the defendant's professional judgment in such a way that another professional need establish the standard of care and a violation of that standard. For example, in *Sood v. Smeigh*,⁸⁵ the plaintiff alleged that the defendant surgeon was negligent in placing a knee prosthesis in backwards as part of a total knee replacement procedure. The Court of Appeals held that the expert affidavit requirement did not apply to that scenario.

In the 1997 amendment to the statute, the legislature provided a list of twenty-four professionals for whom the statute applies, including chiropractors, dentists, dietitians, medical doctors, nurses, occupational therapists, optometrists, osteopathic physicians, pharmacists, physical therapists, physicians' assistants, podiatrists, psychologists, radiological technicians, respiratory therapists and veterinarians.⁸⁶ Additionally, the statute now specifically refers to "any licensed health care facility alleged to be liable based upon the action or inaction of a health care professional. . ."⁸⁷ Thus, if negligence

⁸⁴ *St. Joseph's Hosp. v. Black*, 225 Ga. App. 139, 483 S.E.2d 290 ("The purpose of [OCGA @ 9-11-27 (a)] is to provide for perpetuation of testimony in situations where, for one reason or another, testimony might be lost to a prospective litigant unless steps are taken immediately to preserve and protect such testimony. [OCGA @ 9-11-27 (a)] does not provide a substitute for discovery or a method to determine whether a cause of action exists. This code section cannot be used for the purpose of ascertaining facts to be used in drafting a complaint." (quoting *Worley v. Worley*, 161 Ga. App. 44, 45 (288 S.E.2d 854)).

⁸⁵ 259 Ga. App. 490, 578 SE2d 158 (2003).

⁸⁶ O.C.G.A. § 9-11-9.1(f).

⁸⁷ O.C.G.A. § 9-11-9.1(a).

is alleged against the hospital, in addition to the doctors, the affidavit or affidavits must specify a negligent act or omission by the agents or employees of the hospital.⁸⁸ It is important to watch for this, because usually the physicians are not employees of the hospital. Additionally, an affidavit is required for the hospital if the employees against whom allegations are made under a theory of respondeat superior are the type of professionals that otherwise would require an affidavit.⁸⁹

As noted above, if the defendant is included among those listed, even if it appears that the allegation involves an issue of ordinary negligence, an affidavit should be obtained. For example, the court recently held that an affidavit was required against the hospital where the plaintiff alleged that nurses allowed her to fall. The court found the claim to be an allegation that the nurses failed to exercise reasonable care in allowing her to fall or preventing her from falling, thus requiring expert testimony.⁹⁰

Another case suggests the importance of including an affidavit if any claims in the suit involve allegations that the standard of care has not been met. In *Georgia Physical Therapy, Inc. v. McCullough*,⁹¹ the plaintiff sued an athletic trainer and his employer claiming that the trainer negligently treated plaintiff's injury. The claims against the employer were upon a theory of respondeat superior as well as direct claims for negligent hiring, supervision and training of the athletic trainer. No affidavit was filed with the complaint. Not surprisingly, the trial court granted the trainer's motion to dismiss. It denied the employer's motion to dismiss; however, the Court of Appeals reversed and dismissed the claims against the employer as well. The opinion is important because not

⁸⁸ *Candler Hosp., Inc. v. Carter*, 1997 Ga. App. LEXIS 97 (January 30, 1997).

⁸⁹ *Georgia Physical Therapy, Inc. v. McCullough*, 219 Ga. App. 744, 466 S.E.2d 365 (1996).

⁹⁰ *Holloway v. Northside Hosp.*, 1998 Ga. App. LEXIS 147 (1/28/98).

only were the claims predicated on the professional negligence of the trainer dismissed as a result of the failure to file an affidavit, but so too were the claims that arguably did not involve professional negligence.

It is not clear whether an affidavit is required in an action filed in federal court. Since it is a procedural requirement, arguably the Georgia statute does not apply in federal suits. In *Brown v. Nichols*,⁹² the Eleventh Circuit reversed the trial court's dismissal of the action based on the failure to file an affidavit. The trial court held that under the *Erie* doctrine, O.C.G.A. § 9-11-9.1 applies to diversity actions. However, the Eleventh Circuit reversed, on the grounds that the plaintiff should not be penalized since the issue was unclear when the complaint was filed. The Court chose not to answer the question of whether the statute applies in federal court; instead, the Court expanded an existing state law exception as applied to the statute in federal court by holding that the plaintiff should be given a reasonable time to amend.

Since the *Brown* decision there has not been a ruling by the 11th Circuit but there has been a ruling on this issue by Judge Camp of the Northern District of Georgia. In the case of *Baird v. Cellis*, 41 F.Supp 2d 1358 (1999) Judge Camp ruled that the statute requiring an affidavit was a procedural rather than substantive law and ruled that it therefore would not be followed by the federal court. He went on to note that the statute was in direct conflict with Federal Rule of Civil Procedure 8(a) and therefore the court would not apply the Georgia rule to a medical malpractice claim in federal court.

While this opinion has stood for several years and has not been challenged, it is still only a District Court opinion. Since you must still have expert testimony to carry the

⁹¹ 219 Ga. App. 744 (1996). Because athletic trainers are not specifically included in the list in the revised statute, it is likely that this case would have a different result under the new law; however, it remains illustrative of the employee-employer trap in the medical negligence context.

⁹² 8 F.3d 770 (11th Cir. 1993).

burden of proof at trial anyway the best and safest course of conduct may still be simply to include an affidavit in *all* cases alleging professional negligence, regardless of the forum.

2. Time for Filing the Affidavit

The expert affidavit must be filed contemporaneously with the complaint.⁹³ S.B. 3 amended O.C.G.A. § 9-11-9.1 to remove the safety valve of subsection (b) which allowed a 45 day period for filing of an affidavit when the case was filed within 10 days of the statute of limitation and because of such time constraints an affidavit could not be obtained.

That intransigent “tort reform” position that the affidavit had to be filed with the complaint was modified by the legislature in 2007 to reinstate the 45 day provision so long as plaintiff’s counsel files an affidavit that plaintiff’s counsel and counsel’s firm had not been retained more than 90 days prior to expiration of the statute of limitation. The statute further provides that this extension is only available if **no** counsel of record was retained more than 90 days prior to the expiration of the statute of limitations. This requires close attention if a case is a referral case and care must be taken not to inadvertently fall into this problem by suddenly having the original counsel make an entry of appearance on the eve of trial.

The statute may be applied to all claims, if any of the claims is believed to expire. These revisions corrected a terrible result reached in *Legum v. Crouch*,⁹⁴ a wrongful death malpractice action in which the court held that the plaintiff could not invoke the 45 day grace period of § 9-11-9.1(b) because the estate remained unrepresented for a period of 83 days following the death, so that the complaint was not *actually* filed within 10

⁹³ O.C.G.A. § 9-11-9.1(a).

days of the statute of limitations. The defendant relied upon O.C.G.A. § 9-3-92, which tolls the statute of limitations until such time as the estate is represented, in its assertion that §9-11-9.1(b) did not apply. Thus, two statutes that were intended to protect the plaintiff were actually used to her detriment. This is probably one of the few examples of a defendant asserting that a plaintiff filed suit *too soon*, but it proved to be fatal to the plaintiff's case.

Certainly, there are times when the affidavit cannot be obtained in sufficient time. However, despite the revisions, it is still the best policy to get the affidavit ahead of time and submit it with the complaint, even in a diversity action in federal court. At a minimum, this provides the practitioner with peace of mind that the claim is appropriately supported and viable in that respect.

3. *Technical Requirements for Form of the Affidavit*

Rather than limiting litigation, the affidavit requirement has actually served to *create* litigation over some almost ridiculous issues. For example, the court recently decided several cases concerning the filing of a facsimile copy of the affidavit. While the court held that the filing of a facsimile copy was acceptable,⁹⁵ it also held that unless the facsimile is properly notarized, it has “no force, no validity, [and] amounts to nothing.”⁹⁶ An extreme example of the manner in which the affidavit can be attacked is the case of *Redman v. Shook*,⁹⁷ in which the court held that regardless of the form of the affidavit,

⁹⁴ 208 Ga. App. 185, 430 S.E.2d 360 (1993).

⁹⁵ *Sisk v. Patel*, 217 Ga. App. 156, 456 S.E.2d 718 (1995); *Roberts v. Faust*, 217 Ga. App. 787, 459 S.E.2d 448 (1995).

⁹⁶ *Allen v. Caldwell*, 221 Ga. App. 54, 470 S.E.2d 289 (1996) (quoting *Harvey v. Kidney Center of Central Georgia*, 213 Ga. App. 319, 320 (444 S.E.2d 590 (1994))).

⁹⁷ 218 Ga. App. 477, 462 S.E.2d 172 (1995).

the oath must be given in person and that where the oath was given over the phone the complaint could be dismissed if the validity of the affidavit is challenged.⁹⁸

As long as the affidavit adequately sets forth the factual basis for at least one negligent act or omission by the defendant, it is not necessary that the medical records from which the facts were gleaned be attached to the affidavit.⁹⁹ However, keep in mind that the requirements of the affidavit for initial pleading purposes differ from those at summary judgment stage. The medical records may likely be required as part of the record in that context.¹⁰⁰

4. Substantive Contents of the Affidavit

The substantive requirements of the affidavit statute have been more liberally construed than many of the technical aspects. Although an expert must be familiar with the standard of care applicable to the situation in order to testify, the court has held that the affiant need not specifically state in the affidavit that he is familiar with the standard of care required.¹⁰¹ Additionally, while the statute requires that the affidavit sets forth the factual basis for each claim, it is sufficient for the affiant to include in the affidavit a “synopsis of the salient facts” upon which the opinion is based.¹⁰²

If several individuals or entities are alleged to have been negligent, supporting expert testimony is necessary to establish claims against each. This may require more than one affidavit. For example, in an obstetrical negligence case you may have an

⁹⁸ See also *Schmidt v. Feldman*, 1998 Ga. App. LEXIS 201 (2/9/98) (case dismissed after expert admitted in deposition that he had signed affidavit in Michigan, although it was notarized by a Fayette County, Georgia notary.)

⁹⁹ *Ulbrich v. Batts*, 206 Ga. App. 74, 424 S.E.2d 288 (1992); *Dozier v. Clayton County Hosp. Auth.*, 206 Ga. App. 62, 424 S.E.2d 632 (1992).

¹⁰⁰ See, e.g. *Williams v. Hajosy*, 210 Ga. App. 637, 436 S.E.2d 716 (1993) (granting summary judgment, holding that without medical records, there was no evidence that the defendant had done the things that in the affiant’s view constituted professional malpractice).

¹⁰¹ *Crook v. Funk*, 214 Ga. App. 213, 447 S.E.2d 60 (1994).

affidavit supporting allegations against a physician for failure to do a prompt cesarean section, one affidavit supporting claims that the nurses failed to properly inform the physician of the patient's status, and yet another affidavit supporting claims against the hospital for failure to have proper protocols in place. However, if the affidavit states that all the professionals involved were negligent in the same fashion, it is not necessary to set forth separate specific allegations of negligence for each.¹⁰³ It is important to name each individual defendant in the affidavit, even if the allegations against each are essentially the same.¹⁰⁴ The courts have been more lenient in allowing amendments to elaborate on the deviations from the standard of care, so long as each individual is included in the expert's statement.¹⁰⁵

Several cases have considered whether an expert from one school of medicine is competent to testify against a physician practicing in another field. Certainly, it is best to select a physician from the same school to testify. However, if the affiant states that he is familiar with the applicable standards of care and that there is no difference in the manner in which the two treat the condition at issue, this is usually sufficient.¹⁰⁶ Certainly the recent cases discussed above regarding whether an expert is qualified to offer the necessary opinion certainly establish that there is no mandatory requirement that the witness be from the same subspecialty group. It is however very clear that it will be

¹⁰² *Howard v. City of Columbus*, 219 Ga. App. 569, 466 S.E.2d 51 (1995).

¹⁰³ *Gadd v. Wilson & Co. Engineers & Architects*, 262 Ga. 234, 416 S.E.2d 285 (1992).

¹⁰⁴ You must identify the defendant as a negligent party; it is not sufficient to merely refer to the defendant in the case caption. *Goins v. Tucker*, 227 Ga. App. 524, 489 S.E.2d 857 (1997).

¹⁰⁵ *See, e.g., Porquez v. Washington*, 268 Ga. 649, 492 S.E.2d 665 (1997).

¹⁰⁶ *Stubbs v. Ray*, 218 Ga. App. 420, 461 S.E.2d 906 (1995) (general surgeon competent to testify against a radiologist who performed a surgical procedure); *Hicks v. Mauldin*, 190 Ga. App. 660, 379 S.E.2d 806 (1989) (osteopath allowed to testify against allopath).

crucial to establish a sufficient “overlap” between the two fields of medicine in order for the expert to be competent to testify.¹⁰⁷

5. Amending or Supplementing Affidavit

Section 9-11-9.1(e) as amended, states that if a plaintiff files an affidavit which is allegedly defective, and the defendant files a motion to dismiss contemporaneously with its answer, the complaint is subject to dismissal for failure to state a claim. However, the statute allows for amendment within 30 days of the filing of the motion to dismiss to cure the alleged defect.¹⁰⁸ The new provision is essentially a codification of *Hewett v. Kalish*, in which the court held that the plaintiff may present evidence outside of the affidavit on an expert’s competence to testify if the competency is challenged.¹⁰⁹ The Court of Appeals had already extended the *Hewett* decision by holding that an affidavit can be amended, as long as it was properly filed with the court originally, to respond to challenges to its sufficiency and the Supreme Court has since affirmed this right to amend.¹¹⁰

The statute provides only limited help when one fails to file an affidavit altogether. O.C.G.A. § 9-11-9.1(f) provides that a party may cure this defect by dismissing and refile only when the refile is prior to the expiration of the limitations period. If this arises after the limitations period has passed, the plaintiff may dismiss and refile only if the Court determines that the plaintiff had the required affidavit within the time period and the failure to file the affidavit was the result of mistake.

¹⁰⁷ *Bethea v. Smith*, 176 Ga. App. 467, 336 S.E.2d 295 (no evidence that the practices of orthopedists “overlapped” those of podiatrists); *Sanford v. Howard*, 161 Ga. App. 495, 288 S.E.2d 739 (1982) (orthopedic physician allowed to testify against podiatrist).

¹⁰⁸ This significantly altered the old rule which precluded amendment. *See, e.g., Cheeley v. Henderson*, 261 Ga. 498, 405 S.E.2d 865 (1991).

¹⁰⁹ *See Hewett v. Kalish*, 264 Ga. 183, 442 S.E.2d 233 (1994).

VI. DAMAGES

Damages are an essential element of professional malpractice actions, just as in any cause of action for negligence, and the types of damages allowed are those typically sought in any negligence suit. The plaintiff must demonstrate some degree of injury caused by the alleged error in order to sustain a cause of action. Nominal damages may be sufficient even if the plaintiff fails to establish special damages.¹¹¹

The Code specifically limits the prayer for relief in medical malpractice complaints to a simple demand for judgment “in excess of \$10,000.00.”¹¹² If the plaintiff is seeking less than \$10,000.00, which is rare if not unheard of in malpractice actions, the Code does allow a demand for a specific sum. If these provisions are violated, sanctions are authorized.¹¹³

In *OB-GYN Associates of Albany v. Littleton*,¹¹⁴ the Court addressed the extent to which damages for emotional distress are recoverable in a malpractice action. The plaintiff was not allowed to recover for the mental suffering associated with the wrongful death of her child; however, she could recover damages for the emotional distress occasioned by her own physical injury caused by the defendant’s negligence. In the legal malpractice context, the plaintiff may recover for emotional distress even absent physical injury if he demonstrates willful, wanton, voluntary or intentional misconduct, even without a showing of actual damages.¹¹⁵

¹¹⁰ *Washington v. Georgia Baptist Med. Ctr.*, 223 Ga. App. 762, 763, 478 S.E.2d 892 (1996), *aff’d*, *Porquez v. Washington*, 268 Ga. 649, 650, 492 S.E.2d 665 (1997).

¹¹¹ *Kirby v. Chester*, 174 Ga. App. 881, 331 S.E.2d 915 (1985).

¹¹² O.C.G.A. § 9-11-8(a)(2)(B).

¹¹³ O.C.G.A. § 9-11-8(a)(3).

¹¹⁴ 259 Ga. 663, 386 S.E.2d 146 (1989).

¹¹⁵ *Hamilton v. Powell, Goldstein, Frazer & Murphy*, 252 Ga. 149, 311 S.E.2d 818 (1984); *Whitehead v. Cuffie*, 185 Ga. App. 351, 364 S.E.2d 87 (1987).

Punitive damages awards in malpractice actions are exceedingly uncommon. However, they are authorized in a malpractice action sounding in tort where the defendant's conduct amounts to willful misconduct, malice, fraud, wantonness, oppression, or conscious indifference to the consequences.¹¹⁶ The situation has to be particularly egregious, such as a surgeon operating on the wrong limb to allow the issue of punitive damages to go to the jury.¹¹⁷

As part of "tort reform" the legislature enacted O.C.G.A. § 51-13-1 which defined non-economic damages and limited recovery for those claims to \$350,000.00 in actions against health care provider (subsection (b)), \$350,000.00 against any one medical facility (subsection (c)), \$700,000.00 from all medical facilities (subsection (d)) and \$1,050,000.00 in total against any combination of providers and facilities (subsection (e)).

VII. SPECIAL CONSIDERATIONS

Medical malpractice actions are typically some of the more difficult and expensive cases to handle. By their very nature they are extremely costly to pursue - just obtaining the requisite expert opinion with which to initiate suit can run into the thousands of dollars. Once filed, malpractice actions are vigorously defended by extremely competent attorneys who are well versed not only in the applicable legal issues, but often in the technicalities of the medicine involved as well. Companies that insure medical professionals are retaining counsel who often handle nothing but malpractice cases involving the particular *specialty* at issue. It is an extremely rare situation where a "general practitioner" will be employed to defend a case of this sort.

¹¹⁶ O.C.G.A. § 51-12-5.1(b).

For these reasons, and perhaps due to the feeling among jurors that professionals simply can do no wrong, malpractice actions more frequently than not result in defense verdicts. With the statistics favoring the defendant at trial, there is less incentive to settle. Additionally, many physicians in Georgia have malpractice policies that provide for settlement of claims only with the physician's approval. As a matter of principle, they are often reluctant to compromise. Given the extreme costs involved in prosecuting a malpractice action in light of the risks, a lawyer contemplating handling a medical malpractice action must think carefully about his or her ability to handle the case and take it to conclusion.¹¹⁸

¹¹⁷ *Hoffman v. Wells*, 260 Ga. 588, 397 S.E.2d 696 (1990).

¹¹⁸ Portions of this paper, specifically those addressing HMO Liability, first appeared in another article by the same author in the Spring Edition of The Verdict, entitled "Medical Malpractice in the Era of Managed Care."