

This paper was prepared by a Warshauer Law Group attorney, for an audience of lawyers, as part of a 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.

BASICS OF PROFESSIONAL NEGLIGENCE

By: Lyle Griffin Warshauer

I. INTRODUCTION

The “basics” of professional negligence is a very broad topic. The categories discussed herein could very well be, and often are, the topic of entire papers or even seminars. Thus, the goal of this paper is merely to touch upon the most important aspects of handling a professional negligence case. Because the vast majority of applicable law applies to medical or legal malpractice, reference is primarily to cases involving medical or legal professionals. However, the principles that apply to the prosecution or defense of a medical negligence case are to a large degree applicable to any cause of action for professional negligence.

A cause of action for professional negligence is any 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. 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.

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.

² *Bieling v. Battle*, 209 Ga. App. 874, 434 S.E.2d 719 (1993); *Jackson v. Miller*, 176 G. App. 220, 335 S.E.2d 438 (1985).

³ *Cherokee County Hosp. Authority v. Beaver*, 179 Ga. App. 200, 345 S.E.2d 904 (1986).

Georgia law requires that any person who performs skilled services, such as medical, legal, engineering, architectural or other professional skills exercise that degree of care, skill and ability which is ordinarily exercised under similar conditions and like circumstances by others employed in the same or similar professions.⁴ 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.⁵ Thus, the plaintiff is usually required to present expert testimony to overcome the presumption⁶ and once the plaintiff produces sufficient evidence of negligence, the burden then shifts to the defendant to respond with similar expert testimony.

II. ELEMENTS OF A CAUSE OF ACTION

As noted above, the elements of a cause of action for professional negligence are those found in any negligence action. The duty exists through the doctor-patient relationship, attorney-client relationship or other situation where the defendant professional owes a duty to perform skilled services, pursuant to a contract made with the client, 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.⁷ 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

⁴ *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).

⁵ *Hailey v. Blalock*, 209 Ga. App. 345, 433 S.E.2d 337 (1993).

⁶ 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).

⁷ *Kneip v. Southern Engineering Co.*, 260 Ga. 409, 395 S.E.2d 809 (1990); *Housing Authority of Savanna v. Greene*, 259 Ga. 435, 383 S.E.2d 867 (1989).

under similar circumstances.”⁸ However, in rare cases involving “clear and palpable” evidence of negligence, no expert testimony is required.⁹

The plaintiff is then required to produce expert testimony establishing that the defendant’s conduct deviated from the accepted standard of care.¹⁰ 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; however, it is debatable whether expert testimony is also required to establish causation.¹¹ Finally, the plaintiff must prove damages.

III. ELEMENTS OF THE DEFENSE

The defendant has the usual defenses available in a professional 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 will affect his right to recover as in other

⁸ *Built Rite of Augusta v. Gardner*, 221 Ga. App. 817, 472 S.E.2d 709 (1996) In *Built Rite*, the plaintiffs sued for negligence and breach of warranty for installing a polyurethane foam roof on their house. The court found clear and palpable evidence of negligence through the manufacturer’s specifications, from which the jury could conclude that the defendant departed from the appropriate standard of care in the application of the roofing material.

⁹ *Self v. Executive Committee of Georgia Baptist Convention*, 245 Ga. 548, 266 S.E.2d 168 (1980); *Gibson v. Talley*, 162 Ga. App. 303, 291 S.E.2d 72 (1982) (failure to file complaint within statute of limitations is clear and palpable negligence). Nor is expert testimony necessary if the professional negligence is “blatant” or “obvious.” *Packer v. Gill*, 193 Ga. App. 388, 385 S.E.2d 338 (1989).

¹⁰ *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).

¹¹ *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).

negligence suits.¹² A release executed by the plaintiff or on his behalf will operate as a defense to an action against the defendant.¹³

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 it must be pled in the answer or it is waived.¹⁴ If the defense *is* raised, the proper pleading to challenge the sufficiency of the affidavit is a motion to dismiss for failure to state a claim, not a motion for summary judgment. If granted, a dismissal for failure to comply with § 9-11-9.1 is a dismissal on the merits.

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.¹⁵

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,¹⁶ admission and discharge of mental health patients,¹⁷ disclosure of medical records¹⁸

¹² *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).

¹³ *Posey v. Medical Center-West, Inc.*, 257 Ga. 55, 254 S.E.2d 417 (1987).

¹⁴ O.C.G.A. § 9-11-9.1(e), (f); *Colston v. Fred's Pest Control*, 210 Ga. App. 362, 436 S.E.2d 23 (1993).

¹⁵ *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).

¹⁶ 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).

¹⁷ O.C.G.A. § 37-3-4.

¹⁸ *See* O.C.G.A. §§ 24-9-40, 24-9-44, 31-33-2 and 33-31-5.

and treatment of minors without parental consent.¹⁹ 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.²⁰

IV. TIME LIMITATIONS

A. Medical Malpractice

An action for medical malpractice must be brought within two years after the date on which the negligent act or omission occurred.²¹ While there are some exceptions that can extend the limitation period, the statute also provides for a five year statute of ultimate repose.²² 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.²³

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 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.²⁴ Several cases illustrate how this principle has been applied in favor of both parties.

¹⁹ O.C.G.A. § 15-11-117.

²⁰ 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).

²¹ O.C.G.A. § 9-3-71(a).

²² O.C.G.A. § 9-3-71(b).

²³ *Wright v. Robinson*, 262 Ga. 844, 426 S.E.2d 870 (1993); *Hanflik v. Ratchford*, 848 F. Supp. 1539 (N.D. Ga. 1994).

²⁴ *Henry v. Medical Center, Inc.*, 216 Ga. App. 893, 456 S.E.2d 216 (1995); *Bryant v. Crider*, 209 Ga. App. 623 (1993).

In *Staples v. Bhatti*,²⁵ 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.’”²⁶ Because the plaintiff’s expert opined that the “injury occasioned by the 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,”²⁷ 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.”²⁸

The rule was applied in part to the detriment of the plaintiff in *Vitner v. Miller*,²⁹ 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

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

²⁶ 220 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)).

²⁷ 220 Ga. App. at 405.

²⁸ *Id.* at 406.

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

manifested itself to plaintiff by March 14.”³⁰ 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.”³¹

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 is made.³² For example, in *Crawford v. Spencer*,³³ 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.³⁴ 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.”³⁵

³⁰ 208 Ga. App. 306, 307.

³¹ *Id.*

³² 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).

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

³⁴ 217 Ga. App. 446, 448.

³⁵ *Id.*

1. Continuing Tort and Continuing Treatment Theories

Crawford v. Spencer is also important to note for the Court's rejection of 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 found that the application of such theories would serve to "thwart the intent of the legislature."

2. 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 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.³⁶

The court has declined to extend the "foreign objection exception" allowed in medical malpractice cases to other areas of malpractice.³⁷

3. 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 fraud on the part of the defendant health care provider.³⁸ The patient must present evidence of fraud or misrepresentation in order to toll the statute of limitations.³⁹

³⁶ *Karafotias v. Coyne*, 184 Ga. App. 355, 361 S.E.2d 514 (9187).

³⁷ *See Consolidated Management Services, Inc. v. Halligan*, 186 Ga. App. 621, 368 S.E.2d 148, *aff'd* 258 Ga. 471, 369 S.E.2d 745 (1988).

³⁸ 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

In *Beck v. Dennis*,⁴⁰ 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 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."⁴¹

4. 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.⁴² 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.

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.

fraud. *Wolf v. Virusky*, 306 F. Supp. 519 (S.D. Ga. 1969), *rev'd on other grounds*, 470 F.2d 831 (5th Cir. 1972).

³⁹ *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).

⁴⁰ 215 Ga. App. 728, 452 S.E.2d 205 (1994).

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

⁴² O.C.G.A. § 9-3-90.

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.⁴³

5. Loss of Consortium

Although the statute of limitations for loss of consortium is four years,⁴⁴ 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.⁴⁵

B. Legal Malpractice

In Georgia, the following rule applies to legal malpractice cases:

“‘[A] cause of action for legal malpractice, alleging *negligence or unskillfulness*, sounds in *contract* (agency) and, in the case of an oral agreement, is subject to the four-year statute of limitations in OCGA § 9-3-25. Such a cause of action (can) *also* sound in tort and, thus, be subject to the one-year and/or two-year limitation of OCGA § 9-3-33. Thus, a plaintiff who alleges legal malpractice has two years to bring an action for tort, and four years to bring an action for breach of contract.’ (Citations and punctuation omitted.) *Ballard v. Frey*, 179 Ga. App. 455, 459 (3) (346 S.E.2d 893) (1986).”⁴⁶

In the typical legal malpractice action, the plaintiff alleges *negligence and unskillfulness*, which, according to the above rule, is a cause of action for breach of contract. The plaintiff may also specifically allege breach of contract. The question becomes, to what extent the claims also

⁴³ *Legum v. Crouch*, 208 Ga. App. 185, 430 S.E.2d 360 (1993), discussed *infra*, note ____

⁴⁴ O.C.G.A. § 9-3-33.

⁴⁵ *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.

⁴⁶ *Coleman v. Hicks*, 209 Ga. App. 467, 468, 433 S.E.2d 621 (1993).

sound in “tort.” It appears from a review of the case law that what is meant by a tort in this context is one where the person alleges an injury to the person, as opposed to simply a property or monetary loss. For example, in *Ballard v. Frey*, the Court of Appeals made the following comparison: “Unlike the plaintiff in *Hamilton*, appellant in the instant case does not seek tort damages for any ‘injuries to the person’ within the ambit of OCGA § 9-3-33. He seeks only those damages alleged to be the result of appellee’s negligent breach of his contract of employment.”⁴⁷ Thus, the court found that it was error for the malpractice claim to be dismissed based on the two year statute of limitations.

In contrast, in *Hamilton v. Powell, Goldstein, Frazer & Murphy*⁴⁸ the plaintiff sought damages for “alleged injury to his reputation, for mental and physical strain, for humiliation, for decreased capacity to earn money,” among other things. The plaintiff claimed that these damages resulted from the alleged negligence and breach of duty by the defendant attorneys, rather than from any source independent of the attorneys’ actual representation. The court found that the plaintiff set forth a cause of action sounding in tort as well as in contract. “Accordingly, [plaintiff] had one year within which to bring his action for damage to his reputation, two years to bring an action for tort, and four years to bring an action for breach of contract.”⁴⁹

It appears that cases where the plaintiff claims injury resulting from the representation, as opposed to claiming damages originally sought in the underlying suit, are treated differently and are not subject to the four year period.⁵⁰ However, numerous cases interpreting the statute of limitations in legal malpractice cases have held without question that the four year period

⁴⁷ 179 Ga. App. 455, 459, 346 S.E.2d 893 (1986).

⁴⁸ 167 Ga. App. 411, 306 S.E.2d 340 (1983).

⁴⁹ 167 Ga. App. at 414 (citing O.C.G.A. §§ 9-3-25 and 9-3-33).

⁵⁰ See, e.g., *Cheeley v. Henderson*, 197 Ga. App. 543, 546-547, 398 S.E.2d 787 (1990), *rev’d on other grounds*, 261 Ga. 498, 405 S.E.2d 865 (1991) (summary judgment on plaintiff’s tort claims was appropriate where plaintiff sought to recover “general damages for mental anguish and damage to his business and credit reputation” resulting from the alleged errors committed by the defendants).

applies.⁵¹ It is only where the plaintiff clearly seeks to recover for injuries to the person *arising out of the alleged negligent representation*, that the court applies the shorter two year statute set forth in O.C.G.A. § 9-3-33.

In the context of legal malpractice, fraud on the part of the defendant will serve to toll the statute just as it does in medical negligence suits in the event the plaintiff sets forth facts sufficient to support an allegation of fraudulent concealment.⁵²

V. EXPERT TESTIMONY

Unless the case involves “simple negligence”⁵³ as opposed to the violation of a professional standard of care, expert testimony is required in any case against a professional.⁵⁴ In fact, in order to bring any claim for professional negligence in 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.⁵⁵ This requirement applies to any action for damages alleging professional negligence;⁵⁶ thus, obtaining an expert opinion is absolutely essential before filing a claim for malpractice.

⁵¹ See, e.g., *Master Mortgage v. Byers*, 130 Ga. App. 97, 98 (1973); *McClain v. Johnson*, 160 Ga. App. 548 (1981); *Frates v. Sutherland, Asbill & Brennan*, 164 Ga. App. 243, 246 (1982); *Peppers v. Siefferman*, 166 Ga. App. 389 (1983).

⁵² *Frates v. Sutherland*, 164 Ga. App. 243, 296 S.E.2d 788 (1982).

⁵³ 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: *Creel v. Cotton States Mutual Ins. Co.*, 260 Ga. 499, 397 S.E.2d 294 (1990) (failing to transmit correct information to insurance company); *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).

⁵⁴ *Storrs v. Wills*, 170 Ga. App. 179, 316 S.E.2d 758 (1984).

⁵⁵ O.C.G.A. § 9-11-9.1.

⁵⁶ 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).

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.

A. Where to Find An Expert

There are numerous services that provide expert review for a fee. You have probably been inundated with promotional materials from these agencies as they seem to be proliferating recently. 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, accountant or whatever 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.

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. The defendant in a malpractice action may be an expert on his own behalf.⁵⁷ It is within the trial judge's discretion whether to accept the qualifications of the expert witness and the appellate courts construe the qualifications of the expert most strongly on behalf of the expert.⁵⁸ At a minimum, however, in order for the witness to be accepted, he must establish that he has knowledge of the standard of care applicable to the case in order to be competent to testify.⁵⁹ The point of the expert's testimony is to establish that the standard of care has either been breached or met in the case. Thus, the expert may give his opinion as to whether the procedure was performed in a skillful manner; however, it is not necessary for the expert to state that the care rendered was or was not actually guilty of malpractice.

⁵⁷ *Landers v. Georgia Baptist Medical Center*, 175 Ga. App. 500, 333 S.E.2d 884 (1985).

⁵⁸ Generally, the party offering the testimony need only show that the witness has special knowledge of the subject through training and experience. *Queen v. McDaniel*, 178 Ga. App. 504, 343 S.E.2d 783 (1986).

⁵⁹ *Chandler v. Koenig*, 203 Ga. App. 684, 417 S.E.2d 715 (1992).

The standard for accepting expert testimony also touches upon the substance of the expert's opinions. This is a hot topic in cases involving less conventional scientific evidence in light of the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals*.⁶⁰ However, in at least one recent Georgia opinion, the court has held that the "gate keeping" requirements of *Daubert* do not apply to Georgia cases. In *Orkin Exterminating Company, Inc. v. McIntosh*,⁶¹ the plaintiffs brought suit against Orkin alleging it misapplied pesticides to their home causing injury. In considering the defendant's objection to the plaintiffs' expert medical testimony, the court noted that *Daubert* dealt with Federal Rule of Evidence 702, which has not been adopted in Georgia. The rule in Georgia, codified in O.C.G.A. § 24-9-67, provides: "The opinions of experts on any question of science, skill, trade or like questions shall always be admissible; and such opinions may be given on the facts as proved by other witnesses." Thus, "[p]rovided an expert witness is properly qualified in the field in which he offers testimony, . . . and the facts relied upon are within the bounds of the evidence, whether there is sufficient knowledge upon which to base an opinion or whether it is based upon hearsay goes to the weight and credibility of testimony, not its admissibility."⁶²

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

O.C.G.A. Section 9-11-9.1 provides that in any action for damages alleging professional malpractice,⁶³ 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

⁶⁰ 509 U.S. 579, 113 S. Ct. 2786 (1993).

⁶¹ 215 Ga. App. 587, 452 S.E.2d 159 (1994).

⁶² 215 Ga. App. 587, 592-593 (citations omitted).

⁶³ An affidavit is required only where the complaint calls into question professional standards of care applicable to the profession. For example, where the complaint raises questions relating to the existence of a legal services contract, no affidavit is necessary. *Peacock v. Beall*, 223 Ga. App. 465, 477 S.E.2d 883 (1996). See also *SK Hand Tool, Corp. v. Lowman*, 223 Ga. App. 712, 479 S.E.2d 103 (1996).

statute has been extended to encompass a wide variety of professions.⁶⁴ 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;⁶⁵ yet it is still not clearly defined. Because the filing of the affidavit is such a crucial prerequisite to the maintenance of a professional negligence 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 authorized by O.C.G.A. § 9-11-27(a) is not available to obtain facts with which to prepare an affidavit.⁶⁶

1. When is An Affidavit Required?

An affidavit is required in any case where a profession listed in or incorporated by O.C.G.A. §§ 14-7-2(2), 14-10-2(2) and 43-1-24 is involved. Although not exhaustive, a good rule of thumb is to consider any profession regulated and licensed by state examining boards to be included among those requiring supporting expert testimony.⁶⁷ Therefore, the statute does not apply to professional liability suits against teachers “because, although the legislature has recognized that teaching is a profession, . . . teachers are certified, not licensed, and not specifically listed among the professions in § 14-7-2(2).”⁶⁸

⁶⁴ See *Gillis v. Goodgame*, 262 Ga. 117, 414 S.E.2d 197 (1992).

⁶⁵ At the time of drafting this paper, there were 183 cases construing § 9-11-9.1, 43 of which were decided since the beginning of 1996.

⁶⁶ *St. Joseph's Hosp. v. Black*, 1997 Ga. App. LEXIS 124 (February 4, 1997) (statute not allowed to ascertain facts to be used in preparing complaint).

⁶⁷ *Gillis v. Goodgame*, supra. Additionally, in *Harrell v. Lusk*, 263 Ga. 895, 897, 439 S.E.2d 896 (1994), the court augmented the list of professions set forth in *Gillis* with those persons holding professional licenses pursuant to Chapter 4 of Title 26. Thus, § 9-11-9.1 requirements must be met in a suit against a pharmacist.

⁶⁸ *Harrell v. Lusk*, 263 Ga. 895, 897 n.3, 439 S.E.2d 896 (1994). The court also refers to court reporters and fire fighters as professionals not falling within the ambit of § 9-11-9.1.

Certainly, any claim against a physician would be covered by the provision. What may not be so obvious is whether an affidavit is necessary for others involved in the patient's care. For example, if negligence 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.⁶⁹ 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.⁷⁰ A recent 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*,⁷¹ 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 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. However, no federal decision as of this writing has conclusively decided the issue. In *Brown v. Nichols*,⁷² 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

⁶⁹ *Candler Hosp., Inc. v. Carter*, 1997 Ga. App. LEXIS 97 (January 30, 1997).

⁷⁰ *Legum v. Crouch*, 208 Ga. App. 185, 430 S.E.2d 360 (1993).

⁷¹ 219 Ga. App. 744 (1996).

⁷² 8 F.3d 770 (11th Cir. 1993).

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. Certainly, this opinion does not establish that an affidavit is *not* required in federal actions and the best course of conduct is 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.⁷³ Subsection (b) of the statute does provide an exception to this rule, however, in the event the statute of limitation “will expire within ten days of the date of filing and, because of such time constraints, the plaintiff has alleged that an affidavit of an expert could not be prepared.” In such a case, the plaintiff has 45 days within which to supplement the pleadings with an affidavit. The most important thing to realize when utilizing § 9-11-9.1(b) is that the magic language contained in the statute must be used in the complaint. That is, the plaintiff must specifically allege in the complaint that the extension is necessary because “time constraints” prevented the affidavit from being prepared within the time required by law.⁷⁴ However, if the magic language is used, the plaintiff will automatically be entitled to the extension, even if it can be shown that the failure to obtain the affidavit was due to delay on the part of the attorney or some other preventable reason.⁷⁵

Obviously, the best approach is to get the affidavit as soon as practicable. While there may be legitimate occasions when the affidavit cannot be obtained in sufficient time to file with the complaint, the affidavit statute can be a trap for the unwary in more ways than one and it is always advisable to avoid any justification for attacking the affidavit. One particularly disheartening example occurred in *Legum v. Crouch*,⁷⁶ a wrongful death malpractice action. In

⁷³ O.C.G.A. § 9-11-9.1(a).

⁷⁴ *Keefe v. Northside Hospital, Inc.*, 219 Ga. App. 876, 467 S.E.2d 9 (1996).

⁷⁵ *See, e.g., Works v. Aupont*, 219 Ga. App. 577, 465 S.E.2d 717 (1995).

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

that case, 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 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. 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.

In the event the plaintiff does invoke § 9-11-9.1(b), the defendant's answer is not due until 30 days after the filing of the affidavit.⁷⁷ The defendant will not be penalized or subject to default judgment for failure to file within 45 days if it is later determined that no affidavit was necessary and one is not actually filed.⁷⁸

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,⁷⁹ it also held that unless the facsimile is properly notarized, it has "no force, no validity, [and] amounts to nothing."⁸⁰ An extreme example of the manner in which the affidavit can be attacked is the case of *Redman v. Shook*,⁸¹ in which the court held that regardless of the form of the affidavit, the oath must be given in person and that

⁷⁷ O.C.G.A. § 9-11-9.1(c).

⁷⁸ *McGarr v. Gilmore*, 220 Ga. App. 286, 469 S.E.2d 720 (1996) (plaintiff was not entitled to default judgment based on defendant's failure to answer within 45 days where plaintiff determined that an affidavit was not necessary).

⁷⁹ *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).

⁸⁰ *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)).

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

where the oath was given over the phone the complaint could be dismissed if the validity of the affidavit is challenged.

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.⁸²

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.⁸³ 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.⁸⁴

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 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.⁸⁵

⁸² *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).

⁸³ *Crook v. Funk*, 214 Ga. App. 213, 447 S.E.2d 60 (1994).

⁸⁴ *Howard v. City of Columbus*, 219 Ga. App. 569, 466 S.E.2d 51 (1995).

⁸⁵ *Gadd v. Wilson & Co. Engineers & Architects*, 262 Ga. 234, 416 S.E.2d 285 (1992).

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.⁸⁶ It is important to establish a sufficient “overlap” between the two fields of medicine in order for the expert to be competent to testify.⁸⁷

5. Amending or Supplementing Affidavit

Section 9-11-9.1(e) states that if a plaintiff fails to file an affidavit with the complaint, it is subject to dismissal for failure to state a claim and cannot be cured by amendment unless the court determines that the plaintiff had the affidavit at the time of filing the complaint but failed to file it by mistake. If the affidavit is deemed technically deficient, it cannot be amended to cure the deficiency.⁸⁸ However, In *Hewett v. Kalish*, 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.⁸⁹ Recently, the court 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.⁹⁰ Finally, subsection (f) of the statute precludes the refiling of an action after the expiration of the statute of limitations pursuant to O.C.G.A. § 9-2-61 if the original action was dismissed for failure to comply with the affidavit statute. This does not preclude the refiling *within the statute of limitations* if the plaintiff voluntarily dismissed the original suit.⁹¹

VI. DAMAGES

⁸⁶ *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).

⁸⁷ *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).

⁸⁸ *Cheeley v. Henderson*, 261 Ga. 498, 405 S.E.2d 865 (1991).

⁸⁹ See *Hewett v. Kalish*, 264 Ga. 183, 442 S.E.2d 233 (1994).

⁹⁰ *Washington v. Georgia Baptist Med. Ctr.*, 223 Ga. App. 762, 763, 478 S.E.2d 892 (1996).

⁹¹ *Foskey v. Foster*, 199 Ga. App. 205, 404 S.E.2d 303 (1991).

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.⁹²

The Code specifically limits the prayer for relief in medical malpractice complaints to a simple demand for judgment “in excess of \$10,000.00.”⁹³ 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.⁹⁴

In *OB-GYN Associates of Albany v. Littleton*,⁹⁵ 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.⁹⁶

Punitive damages awards in malpractice actions are rather uncommon in professional negligence actions. 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.⁹⁷ The situation has to be particularly egregious,

⁹² *Kirby v. Chester*, 174 Ga. App. 881, 331 S.E.2d 915 (1985).

⁹³ O.C.G.A. § 9-11-8(a)(2)(B).

⁹⁴ O.C.G.A. § 9-11-8(a)(3).

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

⁹⁶ *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).

⁹⁷ O.C.G.A. § 51-12-5.1(b).

such as a surgeon operating on the wrong limb or an attorney sanctioning the forgery of a document, to allow the issue of punitive damages to go to the jury.⁹⁸

VII. SPECIAL CONSIDERATIONS

Malpractice actions, be they against medical professionals, lawyers or pest control applicators, 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 in the field at issue. Companies that insure doctors, lawyers and other professionals are retaining counsel who often handle nothing but malpractice cases involving the particular *specialty*. It is an extremely rare situation where a “general practitioner” will be employed to defend a case of this sort. 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. And they often *must* be tried. 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 malpractice action must think carefully about his or her ability to handle the case and take it to conclusion.

⁹⁸ *Hoffman v. Wells*, 260 Ga. 588, 397 S.E.2d 696 (1990); *Peters v. Hyatt Legal Services*, 211 Ga. App. 587, 440 S.E.2d 222 (1993).