

The Senate Judiciary Committee offered the following substitute to SB 3:

A BILL TO BE ENTITLED
AN ACT

To amend Titles 9, 24, 33, 43, and 51 of the Official Code of Georgia Annotated, relating respectively to civil practice; evidence; insurance; professions and businesses; and torts, so as to provide for substantive and comprehensive revision of provisions regarding civil practice, evidentiary matters, and liability in tort actions in general and actions related to health care in particular; to provide for legislative findings; to change provisions relating to venue in actions with joint defendants; to change provisions relating to affidavits accompanying charges of professional malpractice; to provide for defendants' access to plaintiffs' health information in medical malpractice cases; to provide for offers for judgment and the effect thereof; to provide new procedures for damages for frivolous claims and defenses; to provide that certain statements of apology or similar statements by health care providers shall not be admitted as evidence in civil actions; to change provisions relating to opinions of experts; to create provisions regarding expert opinions in certain malpractice civil actions; to change provisions relating to reporting of medical malpractice judgments and settlements; to provide for investigations and remedial actions with respect to physicians' fitness to practice under certain circumstances; to limit noneconomic damages in certain actions relating to emergency health care; to change provisions relating to agency liability of hospitals; to change provisions relating to apportionment of award according to degree of fault; to create provisions relating to apportioning damages in certain malpractice actions; to limit noneconomic damages in certain actions relating to health care; to provide for payment over time of certain future damages in certain actions; to provide for related matters; to provide for severability; to provide for an effective date and applicability; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

SECTION 1.

The General Assembly finds that there presently exists a crisis affecting the provision and quality of health care services in this state. Hospitals and other health care providers in this

1 state are having increasing difficulty in locating liability insurance and, when such hospitals
2 and providers are able to locate such insurance, the insurance is extremely costly. The result
3 of this crisis is the potential for a diminution of the availability of access to health care
4 services and a resulting adverse impact on the health and well-being of the citizens of this
5 state. The General Assembly further finds that certain civil justice and health care regulatory
6 reforms as provided in this Act will promote predictability and improvement in the provision
7 of quality health care services and the resolution of health care liability claims and will
8 thereby assist in promoting the provision of health care liability insurance by insurance
9 providers. The General Assembly further finds that certain needed reforms affect not only
10 health care liability claims but also other civil actions and accordingly provides such general
11 reforms in this Act.

12 SECTION 2.

13 Title 9 of the Official Code of Georgia Annotated, relating to civil practice, is amended by
14 striking Code Section 9-10-31, relating to actions against certain codefendants residing in
15 different counties, and inserting in lieu thereof the following:

16 "9-10-31.

17 (a) The General Assembly finds that Paragraph IV of Section II of Article VI of the
18 Georgia Constitution permits a trial and entry of judgment against a resident of Georgia in
19 a county other than the county of the defendant's residence only if the Georgia resident
20 defendant is a joint obligor, joint tort-feasor, joint promisor, copartner, or joint trespasser
21 and therefore this Code section shall apply to all pending actions filed on or after July 1,
22 1999.

23 (b) Joint or joint and several tort-feasors, obligors, or promisors, or joint contractors or
24 copartners, residing in different counties, may be subject to an action as such in the same
25 action in any county in which one or more of the defendants reside. If, however, the court
26 determines prior to the commencement of trial that: who are joint or joint and several
27 tort-feasors, obligors, or promisors, or joint contractors or copartners reside.

28 (1) The plaintiff has brought the action in bad faith against all defendants residing in the
29 county in which the action is brought; or

30 (2) As a matter of law, no defendant residing in the county in which the action is brought
31 is a proper party, the action shall be transferred to the county and court which the plaintiff
32 elects in which venue is proper. The burden of proof on the issue of venue shall be on the
33 party claiming improper venue by a preponderance of evidence.

34 (b)(c) If all defendants who reside in the county in which an action is pending are
35 discharged from liability before the commencement of trial or upon the return of a verdict
36 by the jury or the court hearing the case without a jury, a nonresident defendant may

1 require that the case be transferred to a county and court in which venue would otherwise
2 be proper. If venue would be proper in more than one county, the plaintiff may elect from
3 among the counties in which venue is proper trial court where the action has been pending
4 shall determine the county and the court in to which the action shall proceed be transferred.

5 (c) If all defendants who reside in the county in which the action is pending are discharged
6 from liability after the commencement of trial, the case may be transferred to a county and
7 court in which venue would otherwise lie only if all parties consent to such transfer.

8 (d) For purposes of this Code section, trial shall be deemed to have commenced upon the
9 jury being sworn or, in the instance of a trial without a jury, upon the first witness being
10 sworn.

11 (e)(d) Nothing in this Code section shall be deemed to alter or amend the pleading
12 requirements of Chapter 11 of this title relating to the filing of complaints or answers.

13 (f) This Code section shall apply to actions filed on or after July 1, 1999."

14 SECTION 3.

15 Title 9 of the Official Code of Georgia Annotated, relating to civil practice, is amended by
16 striking Code Section 9-11-9.1, relating to affidavits in professional malpractice cases, and
17 inserting in its place a new Code section to read as follows:

18 "9-11-9.1.

19 (a) In any action for damages alleging professional malpractice against a professional
20 licensed by the State of Georgia and listed in subsection (f)(d) of this Code section or
21 against any licensed health care facility alleged to be liable based upon the action or
22 inaction of a health care professional licensed by the State of Georgia and listed in
23 subsection (f)(d) of this Code section, the plaintiff shall be required to file with the
24 complaint an affidavit of an expert competent to testify, which affidavit shall set forth
25 specifically at least one negligent act or omission claimed to exist and the factual basis for
26 each such claim.

27 (b) The contemporaneous filing requirement of subsection (a) of this Code section shall
28 not apply to any case in which the period of limitation will expire or there is a good faith
29 basis to believe it will expire on any claim stated in the complaint within ten days of the
30 date of filing and, because of such time constraints, the plaintiff has alleged that an
31 affidavit of an expert could not be prepared. In such cases, the plaintiff shall have 45 days
32 after the filing of the complaint to supplement the pleadings with the affidavit. The trial
33 court may, on motion, after hearing and for good cause extend such time as it shall
34 determine justice requires. If an affidavit is not filed within the period specified in this
35 subsection or as extended by the trial court and the defendant against whom an affidavit
36 should have been filed alleges, by motion to dismiss filed contemporaneously with its

1 initial responsive pleading that the plaintiff has failed to file the requisite affidavit, the
2 complaint is subject to dismissal for failure to state a claim.

3 (c) This Code section shall not be construed to extend any applicable period of limitation,
4 except that if the affidavit is filed within the period specified in this Code section, the filing
5 of the affidavit after the expiration of the statute of limitations shall be considered timely
6 and shall provide no basis for a statute of limitations defense.

7 (d)(b) If a plaintiff files an affidavit which is allegedly defective, and the defendant to
8 whom it pertains alleges, with specificity, by motion to dismiss filed contemporaneously
9 with its initial responsive pleading on or before the close of discovery, that said affidavit
10 is defective, the plaintiff's complaint is subject to dismissal for failure to state a claim,
11 except that the plaintiff may cure the alleged defect by amendment pursuant to Code
12 Section 9-11-15 within 30 days of service of the motion alleging that the affidavit is
13 defective. The trial court may, in the exercise of its discretion, extend the time for filing
14 said amendment or response to the motion, or both, as it shall determine justice requires.

15 (e)(c) If a plaintiff fails to file an affidavit as required by this Code section and the
16 defendant raises the failure to file such an affidavit by motion to dismiss filed
17 contemporaneously with its initial responsive pleading, such complaint shall not be subject
18 to the renewal provisions of Code Section 9-2-61 after the expiration of the applicable
19 period of limitation, unless a court determines that the plaintiff had the requisite affidavit
20 within the time required by this Code section and the failure to file the affidavit was the
21 result of a mistake.

22 (f)(d) The professions to which this Code section applies are:

- 23 (1) Architects;
- 24 (2) Attorneys at law;
- 25 (3) Certified public accountants;
- 26 (4) Chiropractors;
- 27 (5) Clinical social workers;
- 28 (6) Dentists;
- 29 (7) Dietitians;
- 30 (8) Land surveyors;
- 31 (9) Medical doctors;
- 32 (10) Marriage and family therapists;
- 33 (11) Nurses;
- 34 (12) Occupational therapists;
- 35 (13) Optometrists;
- 36 (14) Osteopathic physicians;
- 37 (15) Pharmacists;

- 1 (16) Physical therapists;
- 2 (17) Physicians' assistants;
- 3 (18) Professional counselors;
- 4 (19) Professional engineers;
- 5 (20) Podiatrists;
- 6 (21) Psychologists;
- 7 (22) Radiological technicians;
- 8 (23) Respiratory therapists; or
- 9 (24) Veterinarians."

10 SECTION 4.

11 Title 9 of the Official Code of Georgia Annotated, relating to civil practice, is amended by
12 inserting a new Code Section 9-11-9.2 to read as follows:

13 "9-11-9.2.

14 (a) In any action for damages alleging medical malpractice against a professional licensed
15 by the State of Georgia and listed in subsection (d) of Code Section 9-11-9.1, against a
16 professional corporation or other legal entity that provides health care services through a
17 professional licensed by the State of Georgia and listed in subsection (d) of Code Section
18 9-11-9.1, or against any licensed health care facility alleged to be liable based upon the
19 action or inaction of a health care professional licensed by the State of Georgia and listed
20 in subsection (d) of Code Section 9-11-9.1, contemporaneously with the filing of the
21 complaint, the plaintiff shall be required to file a medical authorization form. Failure to
22 provide this authorization shall subject the complaint to dismissal.

23 (b) The authorization shall provide that the attorney representing the defendant is
24 authorized to obtain and disclose protected health information contained in medical records
25 to facilitate the investigation, evaluation, and defense of the claims and allegations set forth
26 in the complaint which pertain to the plaintiff or, where applicable, the plaintiff's decedent
27 whose treatment is at issue in the complaint. This authorization includes the defendant's
28 attorney's right to discuss the care and treatment of the plaintiff or, where applicable, the
29 plaintiff's decedent with all of the plaintiff's or decedent's treating physicians.

30 (c) The authorization shall provide for the release of all protected health information
31 except information that is considered privileged and shall authorize the release of such
32 information by any physician or health care facility by which health care records of the
33 plaintiff or the plaintiff's decedent would be maintained."

SECTION 5.

Title 9 of the Official Code of Georgia Annotated, relating to civil practice, is amended by inserting in place of Code Section 9-11-68, which is reserved, a new Code Section 9-11-68 to read as follows:

"9-11-68.

(a) At any time more than 30 days after the service of a summons and complaint on a party but not less than 30 days (or 20 days if it is a counteroffer) before trial, either party may serve upon the other party, but shall not file with the court, a written offer, denominated as an offer under this Code section, to settle a claim for the money, property, or relief specified in the offer and to enter into an agreement dismissing the claim or to allow judgment to be entered accordingly. Any offer under this Code section must:

- (1) Be in writing and state that it is being made pursuant to this Code section;
- (2) Identify the party or parties making the proposal and the party or parties to whom the proposal is being made;
- (3) Identify generally the claim or claims the proposal is attempting to resolve;
- (4) State with particularity any relevant conditions;
- (5) State the total amount of the proposal and state with particularity all nonmonetary terms of the proposal;
- (6) State with particularity the amount proposed to settle a claim for punitive damages, if any;
- (7) State whether the proposal includes attorney's fees or other expenses and whether attorney's fees or other expenses are part of the legal claim; and
- (8) Include a certificate of service in the form required by Code Section 9-11-5.

(b) When the complaint sets forth a claim for money, if the offeree rejects or does not accept the offer and the judgment finally obtained by the offeree was not at least 25 percent more favorable than the last offer, the offeree shall pay the offeror's reasonable attorney's fees and costs incurred after the rejection of the last offer. When the complaint sets forth a claim for property or other nonmonetary relief, if the offeree rejects or does not accept the offer and the judgment finally obtained by the offeree is not more favorable than the last offer, the offeree shall pay the offeror's reasonable attorney's fees and costs incurred after rejection of the last offer.

(c) Any offer made under this Code section shall remain open for 30 days unless sooner withdrawn by a writing served on the offeree prior to acceptance by the offeree, but an offeror shall not be entitled to attorney's fees and costs under subsection (b) of this Code section to the extent an offer is not open for at least 30 days (unless it is rejected during that 30 day period). A counteroffer shall be deemed a rejection but may serve as an offer under this Code section if it is specifically denominated as an offer under this Code section.

Acceptance or rejection of the offer by the offeree must be in writing and served upon the offeror. An offer that is neither withdrawn nor accepted within 30 days shall be deemed rejected. The fact that an offer is made but not accepted does not preclude a subsequent offer. Evidence of an offer is not admissible except in proceedings to enforce a settlement or to determine reasonable attorney's fees and costs under this Code section.

(d) Upon motion made within 30 days of the entry of the judgment or after voluntary or involuntary dismissal, the court shall determine the following:

(1) If the offer of judgment was 25 percent more favorable than the monetary award or the offer of nonmonetary relief or property was more favorable than the final relief, the court shall award reasonable attorney's fees and costs and the court shall set off such reasonable attorney's fees and costs against any award; and

(2) If a party is entitled to costs and fees pursuant to the provisions of this Code section, the court may determine that an offer was not made in good faith in an order setting forth the basis for such a determination. In such case, the court may disallow an award of attorney's fees and costs.

(e) Upon motion by the prevailing party at the time that the verdict or judgment is rendered, the moving party may request that the finder of fact determine whether the opposing party presented a frivolous claim or defense. In such event, the court shall hold a separate bifurcated hearing at which the finder of fact shall make a determination of whether such frivolous claims or defenses were asserted and to award damages, if any, against the party presenting such frivolous claims or defenses. Under this subsection:

(1) Frivolous claims shall include, but are not limited to, the following:

(A) A claim, defense, or other position that lacks substantial justification or that is not made in good faith or that is made with malice or a wrongful purpose, as those terms are defined in Code Section 51-7-80;

(B) A claim, defense, or other position with respect to which there existed such a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept the asserted claim, defense, or other position; and

(C) A claim, defense, or other position that was interposed for delay or harassment;

(2) Damages awarded may include reasonable and necessary attorney's fees and expenses of litigation; and

(3) A party may elect to pursue either the procedure specified in this subsection or the procedure specified in Code Section 9-15-14, but not both."

SECTION 6.

Title 24 of the Official Code of Georgia Annotated, relating to evidence, is amended by inserting after 24-3-37 a new Code Section 24-3-37.1 to read as follows:

1 "24-3-37.1.

2 (a) The General Assembly finds that conduct, statements, or activity constituting voluntary
3 offers of assistance or expressions of benevolence, regret, mistake, error, sympathy, or
4 apology between or among parties or potential parties to a civil action should be
5 encouraged and should not be considered an admission of liability. The General Assembly
6 further finds that such conduct, statements, or activity should be particularly encouraged
7 between health care providers and patients experiencing an unanticipated outcome resulting
8 from their medical care. Regulatory and accreditation agencies are in some instances
9 requiring health care providers to discuss the outcomes of their medical care and treatment
10 with their patients, including unanticipated outcomes, and studies have shown such
11 discussions foster improved communications and respect between provider and patient,
12 promote quicker recovery by the patient, and reduce the incidence of claims and lawsuits
13 arising out of such unanticipated outcomes. The General Assembly therefore concludes
14 certain steps should be taken to promote such conduct, statements, or activity by limiting
15 their admissibility in civil actions.

16 (b) As used in this Code section, the term:

17 (1) 'Health care provider' means any person licensed under Chapter 9, 10A, 11, 11A, 26,
18 28, 30, 33, 34, 35, 39, or 44 of Title 43 or any hospital, nursing home, home health
19 agency, institution, or medical facility licensed or defined under Chapter 7 of Title 31.
20 The term shall also include any corporation, professional corporation, partnership, limited
21 liability company, limited liability partnership, authority, or other entity comprised of
22 such health care providers.

23 (2) 'Unanticipated outcome' means the outcome of a medical treatment or procedure,
24 whether or not resulting from an intentional act, that differs from an expected or intended
25 result of such medical treatment or procedure.

26 (c) In any claim or civil action brought by or on behalf of a patient allegedly experiencing
27 an unanticipated outcome of medical care, any and all statements, affirmations, gestures,
28 activities or conduct expressing benevolence, regret, apology, sympathy, commiseration,
29 condolence, compassion, mistake, error, or a general sense of benevolence which are made
30 by a health care provider or an employee or agent of a health care provider to the patient,
31 a relative of the patient, or a representative of the patient and which relate to the
32 unanticipated outcome shall be inadmissible as evidence and shall not constitute an
33 admission of liability or an admission against interest."

SECTION 7.

Title 24 of the Official Code of Georgia Annotated, relating to evidence, is amended by striking Code Section 24-9-67, relating to expert opinion evidence, and inserting in its place a new Code section to read as follows:

"24-9-67.

(a) 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. The opinion of a witness qualified as an expert under subsection (b) of this Code section may be given on the facts as proved by other witnesses. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing or trial. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

(b) If scientific, technical, or other specialized knowledge will assist the trier of fact in any cause of action to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if:

(1) The testimony is based upon sufficient facts or data which are or will be admitted into evidence at the hearing or trial;

(2) The testimony is the product of reliable principles and methods; and

(3) The witness has applied the principles and methods reliably to the facts of the case.

(c) Notwithstanding the provisions of subsection (b) of this Code section and any other provision of law which might be construed to the contrary, in professional malpractice actions, the opinions of an expert, who is otherwise qualified as to the acceptable standard of conduct of the professional whose conduct is at issue, shall be admissible only if, at the time the act or omission is alleged to have occurred, such expert:

(1) Was licensed by an appropriate regulatory agency to practice his or her profession in the state in which such expert was practicing or teaching in the profession at such time;

and

(2) In the case of a medical malpractice action, had actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given as the result of having been regularly engaged in:

- 1 (A) The active practice of such area of specialty of his or her profession for at least
2 three of the last five years, with sufficient frequency to establish an appropriate level
3 of knowledge, as determined by the judge, in performing the procedure, diagnosing the
4 condition or rendering the treatment which is alleged to have been performed or
5 rendered negligently by the defendant whose conduct is at issue; or
- 6 (B) The teaching of his or her profession for at least three of the last five years as an
7 employed member of the faculty of an educational institution accredited in the teaching
8 of such profession, with sufficient frequency to establish an appropriate level of
9 knowledge as determined by the judge in teaching others how to perform the procedure,
10 diagnose the condition, or render the treatment which is alleged to have been performed
11 or rendered negligently by the defendant whose conduct is at issue; and
- 12 (C) Except as provided in subparagraph (D) of this paragraph:
- 13 (i) Is a member of the same profession;
- 14 (ii) Is a medical doctor testifying as to the standard of care of a defendant who is a
15 doctor of osteopathy; or
- 16 (iii) Is a doctor of osteopathy testifying as to the standard of care of a defendant who
17 is a medical doctor; and
- 18 (D) Notwithstanding any other provision of this Code section, an expert who is a
19 physician and, as a result of having, during at least three of the last five years
20 immediately preceding the time the act or omission is alleged to have occurred,
21 supervised, taught, or instructed nurses, nurse practitioners, certified registered nursing
22 anesthetists, nurse midwives, physician assistants, physical therapists, occupational
23 therapists, or medical support staff, has knowledge of that standard of care of that
24 health care provider under the circumstances at issue shall be competent to testify as to
25 the standard of that health care provider. However, a nurse, nurse practitioner, certified
26 registered nurse anesthetist, nurse midwife, physician assistant, physical therapist,
27 occupational therapist, or medical support staff shall not be competent to testify as to
28 the standard of care of a physician.
- 29 (d)(1) If a witness is testifying as an expert in a civil action, then upon motion of a party,
30 the court must hold a pretrial hearing to determine whether the witness qualifies as an
31 expert and whether the expert's testimony satisfies the requirements of subsections (a)
32 and (b) of this Code section. The court shall allow sufficient time for a hearing and shall
33 rule on the qualifications of the witness to testify as an expert and whether or not the
34 testimony satisfies the requirements of subsections (a) and (b) of this Code section. Such
35 hearing and ruling shall be completed no later than the final pretrial conference
36 contemplated under Code Section 9-11-16.

(2) If a witness is testifying as an expert in a criminal action, then upon motion of a party, the court may hold a hearing to determine the issues specified in paragraph (1) of this subsection at the time the witness is called to testify, outside the presence of the jury, if any.

(e) An affiant must meet the requirements of this Code section in order to be deemed qualified to testify as an expert by means of the affidavit required under Code Section 9-11-9.1

(f) It is the intent of the legislature that the courts of the State of Georgia not be viewed as open to expert evidence that would not 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 U.S. 579 (1993); General Electric Co. v. Joiner, 522 U.S. 136 (1997); Kumho Tire Co. Ltd. v. Carmichael, 526 U.S. 137 (1999); and other cases in federal courts applying the standards announced by the United States Supreme Court in these cases."

SECTION 8.

Title 33 of the Official Code of Georgia Annotated, relating to insurance, is amended by striking subsection (b) of Code Section 33-3-27, relating to reports of medical malpractice judgments and settlements, and inserting in its place a new subsection (b) to read as follows:

"(b) Every insurer providing medical malpractice insurance coverage in this state shall notify in writing the Composite State Board of Medical Examiners when it pays a judgment in excess of \$10,000.00 or enters into an agreement to pay an amount in excess of \$10,000.00 to settle a medical malpractice claim against a person authorized by law to practice medicine in this state; such. Such judgments or agreements shall be reported to the board regardless of the dollar amount if the records of the insurer establish that there have been two or more previous judgments against or settlements with a licensed physician which relate to the practice of medicine. Such notice shall be sent within 30 days after the judgment has been paid or the agreement has been entered into by the parties involved in the claim."

SECTION 9.

Title 43 of the Official Code of Georgia Annotated, relating to professions and businesses, is amended by striking subsection (i) of Code Section 43-34-37, relating to disciplinary actions involving physicians, and inserting in its place new subsections (i) and (j) to read as follows:

"(i) The board shall investigate a licensee's or permit holder's fitness to practice medicine if the board has received ~~regarding that licensee~~ a notification, pursuant to Code Section

33-3-27, regarding that licensee or permit holder of a medical malpractice judgment or settlement in excess of \$100,000.00 or a notification pursuant to Code Section 33-3-27 that there have been two or more previous judgments against or settlements with the licensee or permit holder relating to the practice of medicine involving an action for medical malpractice. Every licensee or permit holder shall notify the board of any settlement or judgment involving the licensee or permit holder and relating to the practice of medicine in excess of \$20,000.00 involving an action for medical malpractice.

(j) The board shall conduct an assessment of a licensee's fitness to practice medicine if it has disciplined the licensee three times in the last ten years as a result of an action for medical malpractice. The assessment shall include an examination of the licensee's entire history with respect to the practice of medicine and a one day on-site visit to the licensee's current practice location. The assessment shall be completed within six months of the third disciplinary action. As a result of its findings the board may take any action it deems necessary to reduce medical errors and promote patient safety, including revocation, suspension, or limiting the licensee's license or requiring additional clinical training, additional continuing medical education, proctoring, or referral to appropriate rehabilitation facilities. As used in this subsection, the term 'action for medical malpractice' shall have the same meaning as provided in Code Section 9-3-70. The board shall implement this subsection upon the effective date of a specific appropriation of funds for purposes of this subsection as expressed in a line item making specific reference to the full funding of this subsection in an appropriations Act enacted by the General Assembly."

SECTION 10.

Title 51 of the Official Code of Georgia Annotated, relating to torts, is amended by adding a new Code section immediately following Code Section 51-1-29.4, to be designated Code Section 51-1-29.5 to read as follows:

"51-1-29.5.

(a) As used in this Code section, the term:

(1) 'Dedicated emergency department' means any department or facility of the hospital located on the main hospital campus that meets one of the following requirements:

(A) It is held out to the public, by name, posted signs, advertising, or other means, as a place that provides care for emergency medical conditions on an urgent basis without requiring a previously scheduled appointment; or

(B) During the calendar year immediately preceding the calendar year in which a determination under this Code section is being made, based upon a representative sample of patient visits that occurred during that calendar year, it provided at least

1 one-third of all of its outpatient visits for the treatment of emergency medical
2 conditions on an urgent basis without requiring a previously scheduled appointment.

3 (2) 'Emergency medical condition' means:

4 (A) A medical condition manifesting itself by acute symptoms of sufficient severity,
5 including severe pain, such that the absence of immediate medical attention could
6 reasonably be expected to result in:

- 7 (i) Placing the health of the individual, or, with respect to a pregnant woman, the
8 health of the woman or her unborn child, in serious jeopardy;
9 (ii) Serious impairment to bodily functions; or
10 (iii) Serious dysfunction of any bodily organ or part; or

11 (B) With respect to a pregnant woman who is having contractions:

- 12 (i) That there is inadequate time to effect a safe transfer to another hospital before
13 delivery; or
14 (ii) That transfer may pose a threat to the health or safety of the woman or the unborn
15 child.

16 (3) 'Health care provider' means any person licensed under Chapter 9, 10A, 11, 11A, 26,
17 28, 30, 33, 34, 35, 39, or 44 of Title 43 who provides care or assistance to an individual
18 within the scope of such health care provider's licensure, either voluntarily or at the
19 request of a hospital, including but not limited to any health care provider who is 'on call'
20 to a hospital.

21 (4) 'Hospital' means a facility which has a valid permit or provisional permit issued by
22 the Department of Human Resources under Chapter 7 of Title 31 and which operates a
23 dedicated emergency department that provides care or assistance, including but not
24 limited to emergency care, to individuals seeking medical treatment. Such term shall also
25 include any employee of such hospital who provides care or assistance to such
26 individuals within the scope of his or her employment, whether or not such person is a
27 health care provider.

28 (b) The General Assembly makes the following findings: Georgia hospitals operating
29 dedicated emergency departments are required by both state and federal law to provide
30 examination and treatment to individuals who come to a dedicated emergency department,
31 without regard to the financial or insurance status of such individuals. Hospitals and other
32 health care providers have complied with these laws to their financial detriment and under
33 the well-founded apprehension of increased liability. Due in large part to fear of such
34 liability, hospitals are experiencing extreme difficulty attracting a sufficient number of
35 physicians and other health care professionals to maintain an effective team of
36 professionals, including on-call physicians, to provide needed care and assistance to
37 citizens of this state. As a result, many hospitals are being forced to close their emergency

1 departments or forgo other needed improvements in order to financially support such
2 emergency services and their attendant liability. The shortage of these emergency providers
3 poses a serious threat to the health, welfare, and safety of the citizens of Georgia.
4 Nevertheless, it is also recognized that patients who have been injured by negligence must
5 be afforded appropriate access to legal remedies for their injuries. The General Assembly
6 therefore concludes that certain steps must be taken to preserve Georgia citizens' access
7 to emergency care on the one hand, while on the other hand providing appropriate remedies
8 for patients who are negligently injured.

9 (c) Without waiving or affecting and cumulative of any existing immunity from any
10 source, unless it is established that injuries or death were caused by willful or wanton
11 misconduct, in deciding whether a hospital or health care provider that renders care or
12 assistance in or at the request of a hospital or a health care provider to an individual who
13 comes to a dedicated emergency department for treatment of a medical condition, whether
14 such care or assistance is rendered gratuitously or for a fee, shall be held liable for damages
15 to or for the benefit of any claimant arising out of any act or omission in rendering such
16 care or assistance, the finder of fact must determine whether the hospital or health care
17 provider met the applicable standard of care for treatment of such patients or conditions or
18 both in an emergency department setting under similar conditions and like surrounding
19 circumstances. In making such a determination, a jury shall be charged with the duty to
20 consider all relevant circumstances that the hospital or health care provider faced when
21 treating the patient or condition or both, including, but not limited to:

- 22 (1) Whether any emergency circumstances were involved with the patient's condition;
23 (2) Whether the hospital or health care provider had access to the patient's relevant
24 medical history;
25 (3) All relevant circumstances surrounding the operation of the facility;
26 (4) The number of patients seeking care;
27 (5) Whether there was a relevant preexisting relationship between the patient and
28 defendant hospital or health care provider; and
29 (6) All other circumstances affecting the hospital or health care provider's ability to
30 provide care under those circumstances at that time and place.

31 (d) Notwithstanding any other law to the contrary, a cause of action alleging a breach of
32 the applicable standard of care by a hospital or health care provider in the care and
33 treatment of an emergency medical condition must be proven by clear and convincing
34 evidence."

SECTION 11.

Title 51 of the Official Code of Georgia Annotated, relating to torts, is amended by adding immediately following Code Section 51-2-5, a new Code Section 51-2-5.1 to read as follows:

"51-2-5.1.

(a) As used in this Code section, the term:

(1) 'Health care professional' means a professional licensed as a chiropractor, clinical social worker, dentist, dietitian, medical doctor, marriage and family therapist, registered or licensed practical nurse, occupational therapist, optometrist, osteopathic physician, pharmacist, physical therapist, physician's assistant, professional counselor, podiatrist, psychologist, radiological technician, or respiratory therapist.

(2) 'Hospital' means a facility that has a valid permit or provisional permit issued by the Department of Human Resources under Chapter 7 of Title 31.

(b) Notwithstanding the provisions of Code Section 51-2-5, no hospital which complies with the notice provisions of either subsection (c) or subsection (d) of this Code section shall be liable in a tort action for the acts or omissions of a health care professional unless there exists an actual agency or employment relationship between the hospital and the health care professional.

(c) The hospital shall post a notice in the form and manner described herein. Such notice shall:

- (1) Be posted conspicuously in the hospital lobby or a public area of the hospital;
- (2) Contain print at least one inch high; and
- (3) Provide language substantially similar to the following:

'Some or all of the health care professionals performing services in this hospital are independent contractors and are not hospital agents or employees. Independent contractors are responsible for their own actions and the hospital shall not be liable for the acts or omissions of any such independent contractors.'

(d) The hospital shall have the patient or the patient's personal representative sign a written acknowledgment that contains language substantially similar to that set forth in paragraph (3) of subsection (c) of this Code section.

(e) The notice required in this Code section shall be sufficient if it meets the requirements of either subsection (c) or subsection (d) of this Code section even if the patient or the patient's personal representative did not see or read such notice for any reason, including but not limited to medical condition or language proficiency.

(f) Whether a health care professional is an actual agent, an employee, or an independent contractor shall be determined by the language of the contract between the health care professional and the hospital. In the absence of such a contract, or if the contract is unclear or ambiguous, a health care professional shall only be considered the hospital's employee

1 or actual agent if it can be shown by a preponderance of the evidence that the hospital
2 reserves the right to control the time, manner, or method in which the health care
3 professional performs the services for which licensed, as distinguished from the right to
4 merely require certain definite results.

5 (g) If the court finds that there is no contract or that the contract is unclear or ambiguous
6 as to the relationship between the hospital and health care professional, the court shall
7 apply the following:

8 (1) Factors that may be considered as evidence the hospital exercises a right of control
9 over the time, manner, or method of the health care professional's services include: the
10 parties believed they were creating an actual agency or employment relationship; the
11 health care professional receives substantially all the employee benefits received by
12 actual employees of the hospital; the hospital directs the details of the health care
13 professional's work step-by-step; the health care professional's services are terminable
14 at the will of the hospital without cause and without notice; the hospital withholds, or is
15 required to withhold, federal and state taxes from the remuneration paid to the health care
16 professional for services to the patients of the hospital; and factors not specifically
17 excluded in paragraph (2) of this subsection; and

18 (2) Factors that shall not be considered as evidence a hospital exercises a right of control
19 over the time, manner, or method of the health care professional's services include: a
20 requirement by the hospital that such health care professional treat all patients or that any
21 health care professional or group is obligated to staff a hospital department continuously
22 or from time to time; the hospital's payment to the health care professional on an hourly
23 basis; the provision of facilities or equipment by the hospital; the fact a health care
24 professional does not maintain a separate practice outside the hospital; the source of the
25 payment for the professional liability insurance premium for that health care professional;
26 the fact that the professional fees for services are billed by the hospital; or any
27 requirement by the hospital that such health care professional engage in conduct required
28 to satisfy any state or federal statute or regulation, any standard of care, any standard or
29 guideline set by an association of hospitals or health care professionals, or any
30 accreditation standard adopted by a national accreditation organization."

31 SECTION 12.

32 Title 51 of the Official Code of Georgia Annotated, relating to torts, is amended by striking
33 Code Section 51-12-31, relating to recovery against joint trespassers, and Code Section
34 51-12-33, relating to apportionment of damages, and inserting in their respective places new
35 Code sections to read as follows:

1 "51-12-31.

2 Except as provided in Code Section 51-12-33, where an action is brought jointly against
3 several ~~trespassers~~ persons, the plaintiff may recover damages for the greatest injury done
4 ~~an injury caused by any of the defendants against all of them only the defendant or~~
5 ~~defendants liable for the injury~~. In its verdict, the jury may specify the particular damages
6 to be recovered of each defendant. Judgment in such a case must be entered severally."

7 "51-12-33.

8 (a) ~~Where an action is brought against more than one person for injury to person or~~
9 ~~property and the plaintiff is himself to some degree responsible for the injury or damages~~
10 ~~claimed, the trier of fact, in its determination of the total amount of damages to be awarded,~~
11 ~~if any, may apportion its award of damages among the persons who are liable and whose~~
12 ~~degree of fault is greater than that of the injured party according to the degree of fault of~~
13 ~~each person. Damages, if apportioned by the trier of fact as provided in this Code section,~~
14 ~~shall be the liability of each person against whom they are awarded, shall not be a joint~~
15 ~~liability among the persons liable, and shall not be subject to any right of contribution.~~
16 Where an action is brought against one or more persons for injury to person or property and
17 the plaintiff is to some degree responsible for the injury or damages claimed, the trier of
18 fact, in its determination of the total amount of damages to be awarded, if any, shall
19 determine the percentage of fault of the plaintiff and the judge shall reduce the amount of
20 damages otherwise awarded to the plaintiff in proportion to his or her percentage of fault.

21 (b) Subsection (a) of this Code section shall not affect venue provisions regarding joint
22 actions. Where an action is brought against more than one person for injury to person or
23 property, the trier of fact, in its determination of the total amount of damages to be
24 awarded, if any, shall after a reduction of damages pursuant to subsection (a) of this Code
25 section, if any, apportion its award of damages among the persons who are liable according
26 to the percentage of fault of each person. Damages apportioned by the trier of fact as
27 provided in this Code section shall be the liability of each person against whom they are
28 awarded, shall not be a joint liability among the persons liable, and shall not be subject to
29 any right of contribution.

30 (c) This Code section shall apply only to causes of action arising on or after July 1, 1987.

31 (c) In assessing percentages of fault, the trier of fact shall consider the fault of all persons
32 or entities who contributed to the alleged injury or damages, regardless of whether the
33 person or entity was, or could have been, named as a party to the suit.

34 (d)(1) Negligence or fault of a nonparty shall be considered if the plaintiff entered into
35 a settlement agreement with the nonparty or if a defending party gives notice not later
36 than 120 days prior to the date of trial that a nonparty was wholly or partially at fault.

(2) The notice shall be given by filing a pleading in the action designating the nonparty and setting forth the nonparty's name and last known address, or the best identification of the nonparty which is possible under the circumstances, together with a brief statement of the basis for believing the nonparty to be at fault.

(e) Nothing in this Code section shall eliminate or diminish any defenses or immunities which currently exist, except as expressly stated in this Code section.

(f)(1) Assessments of percentages of fault of nonparties shall be used only in the determination of the percentage of fault of named parties.

(2) Where fault is assessed against nonparties pursuant to this Code section, findings of fault shall not subject any nonparty to liability in any action or be introduced as evidence of liability in any action.

(g) Notwithstanding the provisions of this Code section and any other provisions of law which might be construed to the contrary, the plaintiff shall not be entitled to receive any damages if the plaintiff is 50 percent or more responsible for the injury or damages claimed."

SECTION 13.

Title 51 of the Official Code of Georgia Annotated, relating to torts, is amended by adding a new Chapter 13 to read as follows:

"CHAPTER 13

51-13-1.

(a) As used in this Code section, the term:

(1) 'Claimant' means a person, including a decedent's estate, who seeks or has sought recovery of damages in a medical malpractice action. All persons claiming to have sustained damages as the result of the bodily injury or death of a single person are considered a single claimant.

(2) 'Health care provider' means any person licensed under Chapter 9, 10A, 11, 11A, 26, 28, 30, 33, 34, 35, 39, or 44 of Title 43. The term shall also include any corporation, professional corporation, partnership, limited liability company, limited liability partnership, authority, or other entity comprised of such health care providers.

(3) 'Medical facility' means any institution or medical facility licensed under Chapter 7 of Title 31 or any combination thereof under common ownership, operation, or control.

(4) 'Noneconomic damages' means damages for physical and emotional pain, discomfort, anxiety, hardship, distress, suffering, inconvenience, physical impairment, mental

anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium, injury to reputation, and all other nonpecuniary losses of any kind or nature. This term does not include past or future:

- (A) Medical expenses, including rehabilitation and therapy;
- (B) Wages or earnings capacity;
- (C) Income;
- (D) Funeral and burial expenses;
- (E) The value of services performed by the injured in the absence of the injury or death including those domestic and other necessary services performed without compensation; or
- (F) Other monetary expenses.

(b) In any verdict returned or judgment entered in a medical malpractice action, including an action for wrongful death, against one or more health care providers, the total amount recoverable by a claimant for noneconomic damages in such action shall be limited to an amount not to exceed \$250,000.00, regardless of the number of defendant health care providers against whom the claim is asserted or the number of separate causes of action on which the claim is based.

(c) In any verdict returned or judgment entered in a medical malpractice action, including an action for wrongful death, against a single medical facility, inclusive of all persons and entities for which vicarious liability theories may apply, the total amount recoverable by a claimant for noneconomic damages in such action shall be limited to an amount not to exceed \$250,000.00, regardless of the number of separate causes of action on which the claim is based.

(d) In any verdict returned or judgment entered in a medical malpractice action, including an action for wrongful death, against more than one medical facility, inclusive of all persons and entities for which vicarious liability theories may apply, the total amount recoverable by a claimant for noneconomic damages in such action shall be limited to an amount not to exceed \$250,000.00 from any single medical facility and \$500,000.00 from all medical facilities, regardless of the number of defendant medical facilities against whom the claim is asserted or the number of separate causes of action on which the claim is based.

(e) In applying subsections (b), (c), and (d) of this Code section, the aggregate amount of noneconomic damages recoverable under such subsections shall in no event exceed \$750,000.00.

(f) In any medical malpractice action, if an award of future damages equaling or exceeding \$250,000.00 is made against any party in the action, the trial court shall, upon the request of any party, issue an order providing that such damages be paid by periodic payments.

Such periodic payments shall be funded through an annuity policy with the premium for such annuity equal to the amount of the award for future damages."

SECTION 14.

4 In the event any section, subsection, sentence, clause, or phrase of this Act shall be declared
5 or adjudged invalid or unconstitutional, such adjudication shall in no manner affect the other
6 sections, subsections, sentences, clauses, or phrases of this Act, which shall remain of full
7 force and effect as if the section, subsection, sentence, clause, or phrase so declared or
8 adjudged invalid or unconstitutional were not originally a part hereof. The General
9 Assembly declares that it would have passed the remaining parts of this Act if it had known
10 that such part or parts hereof would be declared or adjudged invalid or unconstitutional.

SECTION 15.

- (a) This Act shall become effective upon its approval by the Governor or upon its becoming law without such approval.
 - (b) Code Sections 51-12-31 and 51-12-33, as amended by this Act, and Code Sections 51-1-29.5, 51-2-5.1, and 51-13-1, as enacted by this Act, shall apply only with respect to causes of action arising on or after the effective date of this Act, and any prior causes of action shall continue to be governed by prior law. It is the intention of the General Assembly that all other provisions of this Act shall apply to causes of action pending on its effective date, unless such application would be unconstitutional.

SECTION 16.

All laws and parts of laws in conflict with this Act are repealed.