REPRESENTING THE PLAINTIFF:

SETTLEMENT OR TRIAL

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I. INTRODUCTION

The plaintiff's lawyer who accepts a medical malpractice case should develop from the beginning an approach to assure that the plaintiff's cause will be faithfully and diligently prosecuted. Developing an approach to assess, prepare and successfully resolve a medical malpractice case is essential in effectively representing injured victims. When all is said and done, obtaining adequate compensation for the victims we represent, is the difference between justice and injustice for our clients.

Some compare medical malpractice litigation to walking through a mine field. One procedural or tactical error, and you can literally "blow up" your client's case. In such cases, usually involving catastrophic injuries, the stakes are high and the responsibilities as counsel are serious. Don't ever forget it is the client's case, and in no uncertain terms you are "playing" for keeps; the outcome of the case will affect the rest of your client's life.

Insurers who insure doctors, in our experience, are generally less willing to settle professional negligence cases than are insurers in other areas. In medical cases it is imperative that thorough discovery be conducted and all available evidence uncovered. In deciding whether to accept the case initially and ultimately whether to settle or try the case, the practitioner must take a serious and objective look at all aspects of the case. The decision of whether to settle or try

your client's medical malpractice case involves many considerations. Plaintiff's counsel must thoroughly and honestly examine each factor or consideration.

II. SOME OF THE CONSIDERATIONS INVOLVED INCLUDE:

A. Clients' background, family, expectations, amount and immediacy.

B. Seriousness of injury.

C. Evidence of liability and causation. (How strong is your proof of liability; how strong is the defense's evidence?)

D. "Smoking gun" evidence. (Is there evidence that makes the doctor's conduct gross or which places the doctor in an unusually bad light.)

E. Jury appeal -- "boring" or is there shocking, aggravated conduct by the defendant(s).

F. Local bias or prejudice.

G. Venue for trial.

H. How high can the verdict be?

I. Is it a case where punitive damages are authorized?

J. Antagonistic judge.

K. Cost of litigation.

L. Demeanor and credibility (will the plaintiff make a credible witness; will the jury like the plaintiff, which is imperative in order to obtain adequate compensation).

M. Defendant's demeanor and credibility.

N. Quantifying tragic, but economically immeasurable, harm, i.e., the death of a child.

III. ANALYZE THE PROBLEM AREAS OF YOUR CASE

A. Identify the problem situations or case weaknesses. Don't ignore problems. They'll kill you at trial if you do!

B. Explore strategies to minimize harm in these areas.

C. In deciding whether to try your case or settle the case consider whether there are ways to turn problems or weaknesses to your client's advantage or to avoid them having a detrimental effect on the outcome.

IV. A FEW FACTORS THAT CAN SUBSTANTIALLY INCREASE THE VALUE OF A MEDICAL MALPRACTICE CASE INTO ONES THAT SHOULD BE TRIED.

A. Lost or altered medical records.

Lost or altered medical records usually looks bad to a jury. Intentionally destroyed records without a satisfactory explanation, at the least gives rise to inferences that the evidence would have been favorable to the opposing party, and may under certain circumstances, give rise to an irrebuttable presumption of malpractice. If a defendant altered records, once they are discovered, consider taking a video tape deposition and using clips of the deposition in a video settlement "brochure;" display both the altered and unaltered documents if a copy of the former can be

found or generated; or otherwise highlight this problem of the defendants.

B. Policies and Procedures.

Obtain hospital policies and procedures, as well as reports and recommendations from the Joint Commission on the Accreditation of Hospitals. Determine whether the hospital failed to follow its own policies. If so, this could be an important factor in your assessment as to trial or settlement.

C. Has there been prior disciplinary actions or sanctions against the doctor and if so are there ways to get such evidence admitted during the trial of the case? A doctor's drug or alcohol abuse generally around the time of treating a patient can be admitted for punitive damages as showing a wholesale indifference to his/her patient's well-being.

V. SETTLEMENT TECHNIQUES

If you conclude after thorough analysis that settlement of your client's cause should be pursued, how do you force the doctor defendant to the settlement table? The doctor and its insurer will not come to the conclusion that they will voluntarily pay adequate consideration just because it is the right thing to do. Cases are settled by such defendants out of fear. If you want to achieve a fair settlement for your client, you must give the defendants and their insurers something to fear.

Settlement brochures can be effective. If done correctly they convince the opponent of counsel's preparation and readiness for trial. It is imperative that the demand package provide information that will get the defendant's/insurer's attention; **they must be given something to fear.** Put together settlement brochures that demonstrate the evidence that will be produced at trial that will make the jury want to award adequate compensation. Additionally, present information that will demonstrate how the defendant will be destroyed at trial. Special techniques such as video settlement brochures can be effective.

Some lawyers worry about "showing your cards" in a good, solid settlement brochure. That is a legitimate concern, but on balance it usually is of benefit to your client. Of course, if settlement is impossible or extremely unlikely, nothing is achieved by educating the other side. But that's the exceptional case. If you have a good case, a thorough, impressive settlement brochure often (though surely not always), will convince the other side that they've got a real problem, and settlement is the best route.

One approach that certain lawyers have used successfully in demand packages is to include an example of what plaintiff's closing argument might look like at trial. That has a way of bringing home the power of your case. In a catastrophically injured child case the following part of a closing argument was submitted as a part of the demand package. This argument

demonstrated how the damages to this child would be quantified as well as how the defendants would be destroyed. This approach proved to be quite effective in that particular case. The argument went like this, and it came after a detailed discussion of the defendants' liability:

> Ladies and gentlemen of the jury, Jimmy's life is in your hands. Jimmy was born a wonderful little boy to two wonderful parents. But, today, seeing for your own eyes and having heard from the doctors, he is no longer the kind of happy, loving child he should be.
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> Instead, Jimmy is a young boy who will never know the joys and pleasures of childhood. He won't know the simple pleasures of sports and other games. He will never slide into home base. He will never carry a football across a goal line. He may never even be able to understand those games so that he could have the vicarious joy of sharing his friends' triumphs.
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> Jimmy's childhood will be a childhood lost to frustration, an endless host of sad events that we all pray other children will never suffer.
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> Jimmy's tragic childhood will only be the beginning of his life of suffering. As he gets older, he will realize someday that he is very different than others, that he cannot do what the rest of us can do. Jimmy will realize someday that he will never be like his father. He will never even drive a car.
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> Someone will have to tell him someday -- probably his mother and father -- that he will never get married, and he will never have the greatest joy there is -- the joy of seeing his own children come into the world and grow up.
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> Instead of experiencing these joys of life, Jimmy will suffer a very different fate. He will become tormented at some point in his life by one question -- WHY? Why did it happen to ME? Why shouldn't I be running and laughing like everyone else? When he learns that these doctors did this to him -- and understands to the extent that he can that his life could have been completely normal, that he could have done all those things -- he will be tortured by confusion and anger. Will he cry night after night, week after week, and month after month? Or will he withdraw further and

further from the world and into himself, where he has no friends and no companions?

We can't say today just what will happen to Jimmy 15 or 20 years from now, but we can be sure that it will be a terrible day when Jimmy finally learns. If it is mom and dad that have to tell him, as strong as they may be, they will be tortured themselves. They'll be sobbing when they get the words out and realize once again, "it didn't have to happen." Jimmy will never understand that.

But for all the loss that Jimmy will suffer when he finally learns that his condition was caused by the total neglect of the defendants to properly do a simple test, it will pale by comparison to a worse affliction the defendants have put upon him -- they have made Jimmy a prisoner for the rest of his life. Jimmy will never be free. He will never be independent, hold a job, live by himself, go out with his friends. To just survive in this world, he will require constant care every day for the rest of his life.

While not a prisoner in a cell like a common criminal, Jimmy will be just as much a prisoner of his own inability to be self-sufficient. Think for a minute what it is like to be so incapacitated that you are completely dependent upon the whims of others for every single thing you will do for the rest of your life -- what you eat, where you go, what you do, where you live, who you see, and every other thing that people do that makes us people and gives us life. Jimmy will be totally dependent on others for all of this.

When Jimmy realizes this, it will be terrifying. Because of Jimmy's disease, he is not only mentally retarded, he suffers serious personality disorders. He will never interact with people easily and naturally. He will always be easily frustrated and often angry, all because of his untreated disease.

Ladies and gentlemen, it is your duty in this case to put Jimmy in as close a position as you can to where he would have been were it not for the negligence of the defendants. Jimmy will never be well, he will never know life in the beautiful terms that we know it. He will never be the boy or man he would have been, if the defendants had not done what they did in this case. No matter how much Jimmy, or his mother and father, wish that they could change Jimmy, it will never happen.

Jimmy will never be free from the prison that the defendants put him in, but your verdict can begin to provide him at least some freedom. Although it will never be the kind of freedom that we think of, you can provide him with the freedom to know that he will have the money in five years, ten years and fifty years, that will allow him to control his own life to the extent that he can. For Jimmy to have even this freedom -- the freedom to obtain the bare and necessary health care and kind of professional care and assistance that a person as handicapped as Jimmy needs, will require a large sum of money -- according to the evidence, nearly $10,000,000.00. The court will charge you that this is an item of damages that you are authorized to award in this case.

The court will also charge you that it is your duty to award a sum that in your enlightened conscience is sufficient to compensate Jimmy for all the suffering he has endured and will have to endure throughout his life. It must be sufficient as well to compensate Jimmy for all the pleasures and the joys he will never experience. The evidence in this case establishes that the defendants are responsible for Jimmy's condition and we submit that Jimmy should be compensated for having his childhood taken from him, for having been made a prisoner, and for being deprived of the basic dignity of ever being self-sufficient. Jimmy has been and will be forever deprived of the basic joys of life, the chance of ever raising a family, the joys of hearing his own sons' and daughters' first words. He will never bounce them on his knees, hug them, or hear the words, "Daddy, I love you."

Now, ladies and gentlemen, you will realize very quickly, if you haven't already, that the total sum of money that is appropriate to compensate Jimmy in this case for the wrong done to him is a large amount. But it is a small amount when we look at what Jimmy will face from this day forward. It is a small amount when we consider the future cost of medical treatment for Jimmy and the cost of having his basic needs attended to on a daily basis. Your duty is to award those damages authorized and required by the law and the evidence, no matter how great they may be.

During voir dire, each of you stated on your oath that there was no sum, even if it be as large as $20,000,000.00 that you would consider too great as proper compensation simply because it was a large amount of money.

Now, there is something else I would like for you to think about and it is this. If you hear anyone during the deliberations saying, "That's too much money," just remember how we got here and how simple it would have been for the defendants to have done the right thing back on February 10, 1993. Then, none of us would have been here. Is it too great a sum of money? The defendants admit that they knew that PKU was a crippling disease and they knew full well that a mistake at the lab and a missed PKU reading could destroy a child's life.

Did that make any difference to the defendants? No, not at all. They ignored procedures that were established a quarter of a century ago when Dr. Guthrie's test was instituted. Had they followed the simplest procedures, we would not be here today.

You heard Dr. Levy testify -- and the defendants don't dispute that he is one of the foremost experts in this area in the country. He charitably characterized the defendants' operation as "a disaster waiting to happen. If it hadn't been Jimmy it would have been someone else."

Indeed, I remember reading with interest back last year, when I received the answer of the defendants in this case, that the members of the board of the Department of Human Resources, which has jurisdiction over the lab, stated, and I quote, "Defendants specifically deny that defendant board members had any responsibility for oversight of the DHR laboratory procedures, or that any official action of the board of the Department of Human Resources is involved in this matter." Ladies and gentlemen, it is exactly that attitude, which defendants have admitted in their very pleading, that is why we are here today. And, it is exactly that attitude that warrants full and total compensation and punitive damages, be awarded to Jimmy.

Ladies and gentlemen, we have asked in this case for an award of no less than $15,000,000.00. The "hard economic" numbers at the very least show damages of nearly $10,000,000.00. When you ask yourselves what might be the additional compensation that is appropriate for Jimmy's life suffering and the loss of the joy of life, please remember that we are today talking about a youngster with a life expectancy of 80 years. He will be suffering from irreversible brain damages, put upon him by the defendants, long after we are all gone.

> I would suggest that the value of the life which has been taken from Jimmy would surely be at least as great as the simple economic cost of maintaining him, and the loss of income he will suffer. Life, of course, is far more precious than a job or a house. A proper award for Jimmy's pain and suffering would have to exceed all of his combined material losses, or you would really be saying that his life has no greater meaning than that. None of us believe that. An award of at least $15,000,000.00 is clearly called for in this case.
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> Finally, we submit that you should award punitive damages in an amount based upon your enlightened consciences to deter the defendants, to stop them from engaging in such conduct as has been proven here. The defendants acted with conscious indifference to their consequences; they knew the terrible and horrible results that would follow due to their running this lab the way that they did. Their conduct was reckless and willful and in addition to the $15,000,000.00 in compensatory damages, substantial punitive damages should and must be awarded.

VI. CONCLUSION

Maximizing settlement and recovery should be on the lawyer's mind from the moment that the case is accepted. Thorough case investigation, discovery and preparation is the key to obtaining such results, as in any case. But in medical malpractice cases, those basic rules are even more true. You can obtain a good settlement only if the defendants know you are ready, willing, and able to try a good, solid case.

BRINGING CLAIMS AND LITIGATING UNDER THE GEORGIA TORT CLAIMS ACT

I. Introduction

The Tort Claims Act was passed in the 1992 Session of the General Assembly. The Act provides a remedy for certain claims accruing after July 1, 1992. O.C.G.A. § 50-21-27(c). Additionally, the entire Act -- including the caps it imposes on damages -- was made retroactive to sweep back in time and cover accrued claims that occurred anytime after January 1, 1991. O.C.G.A. § 50-21-27(a).

The Tort Claims Act purports to abrogate the right of injured victims to bring actions against responsible state employees for their negligence or their violation of ministerial duties. The Act also limited a plaintiff's right to an action against the State Department by whom the responsible state employee is employed except and to the extent that an action is provided for under the provisions of the Tort Claims Act. Under the law which existed prior to the passage of the 1991 constitutional amendment and the Tort Claims Act, a plaintiff could sue both the negligent state employees and the department by whom they were employed. See Martin v. Georgia Department of Public Safety, 257 Ga. 300 (1987). The Act provides:

> This Article constitutes the exclusive remedy for any tort committed by a state officer or employee. A state officer or employee who commits a tort while acting within the scope of his or her official duties or employment is not subject to lawsuit or liability therefor. O.C.G.,A. § 50-21-25(a) (emphasis added).

II. The Georgia Tort Claims Act Provides A Limited Waiver of Sovereign Immunity And Prescribes Certain Torts for Which the State Is Not Liable

An understanding of the language of the Act is a must for lawyers who seek to represent injured victims under the Act. The Act contains a limited waiver of sovereign immunity and sets forth certain types of torts or losses of which the State and its departments are not liable.

O.C.G.A § 50-21-23 is entitled "Limited waiver of sovereign immunity." O.C.G.A. § 50-21-23 provides:

> (a) The state waives its sovereign immunity for the torts of state officers and employees while acting within the scope of their official duties or employment and shall be liable for such torts in the same manner as a private individual or entity would be liable under like circumstances; provided, however, that the state's sovereign immunity is waived subject to all exceptions and limitations set forth in this article. The state shall have no liability for losses resulting from conduct on the part of state officers or employees which was not within the scope of their official duties or employment.
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> (b) The state waives its sovereign immunity only to the extent and in the manner provided in this article and only with respect to actions brought in the courts of the State of Georgia. The state does not waive any immunity with respect to actions brought in the courts of the United States.

O.C.G.A. § 50-21-24 contains a list of losses for which the state is not liable and this list is entitled "Exceptions to State Liability." This provision of the Act provides that the state shall have no liability for losses resulting from 12 separate categories of occurrences. Among the exceptions to state liability are losses resulting from assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, or interference with contractual rights. See O.C.G.A. § 50-21-24(7).

Several recent cases have interpreted the state's exception to liability for losses resulting from assault and battery. In Department of Human Resources v. Hutchinson, 217 Ga.App. 70, 456 S.E.2d 642 (1995), the Court of Appeals held that the state is not liable for claims where the underlying loss arises from assault and battery. Likewise, in the recent case of Sherin v. Department of Human Resources, Case No. A97A1091 (11/4/97), the Court of Appeals held ". . . plaintiffs' claims are precluded by Department of Human Resources v. Hutchinson, 217 Ga.App. 70, 456 S.E.2d 642 (1995), because they arise from an assault and battery . . . and immunity for this act has not been waived."

The specific provisions of O.C.G.A. § 50-21-24 excluding the state's liability for certain torts must be examined in detail.

Some of the exceptions to state liability include losses resulting from an act or omission by a state officer or employee exercising due care in the carrying out a statute, regulation or rule [O.C.G.A. § 50-21-24(1)], the performance or failure to perform a discretionary function or duty by a state officer or employee whether or not the discretion involved is abused [O.C.G.A. § 50-21-24(2)], losses resulting from inspection powers or functions [O.C.G.A. § 50-21-24(8)], and losses resulting from licensing powers or functions [O.C.G.A. § 50-21-24(9)].

In Christensen, et al. v. State of Georgia, et al., 219 Ga.App. 10 (1995) the Court of Appeals construed the state's exceptions to liability under Sections 50-21-24 (7) and (2) of the Georgia Tort Claims Act. The Court of Appeals stated:

> O.C.G.A. § 50-21-24(7) provides: "The state shall have no liability for losses resulting from . . . [a]ssault [or] battery . . . ." Plaintiffs argue that the assault and battery exception applies only where a state employee commits the assault or battery. But we rejected this construction of O.C.G.A. § 50-21-24 (7) in Ga. Dept. of Human Resources v. Hutchinson, 217 Ga.App. 70 (456 S.E.2d 642 (1995), where a victim of a shooting by a juvenile who had been placed in the victim's home by the state, attempted to hold DHR responsible for her injuries. Hutchinson made plain that this immunity provision does not require that the state employee be the person committing the assault or battery. Id. at 71-73 (1). Likewise, O.C.G.A. § 50-21-24 (2) provides: "The state shall have no liability for losses resulting from . . . [t]he exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of a state officer or employee, whether or not

> the discretion involved is abused." Even assuming that GMHI had wrongfully denied Zachary emergency medical or psychiatric treatment as plaintiffs allege, such conduct would be insulated by this section of Georgia Tort Claims Act. A hospital employee's decision in connection with admission or discharge of a patient is a discretionary act cloaked with immunity. See, Roberts v. Grigsby, 177 Ga.App. 377, 379 (2) (339 S.E.2d 633) (1985). Christensen, 219 Ga.App. at 13.

See also Miller v. Department of Public Safety, 221 Ga.App. 280, 281 (1996), holding that "[P]ursuant to the 1991 amendment, the General Assembly enacted the Georgia Tort Claims Act . . . providing for a limited waiver of sovereign immunity accorded to the State and its departments and agencies." "Under the provisions of the Tort Claims Act, the waiver of sovereign immunity accorded DPS as a department or agency of the State does not extend to 'losses resulting from . . . [a]ssault [or] battery.' O.C.G.A. § 59-21-24(7)." Id.

In yet another case, Mattox v. Bailey, 221 Ga.App. 546 (1996), Judge Pope, writing for the Court, observed "[t]he Act 'provides for a waiver of the state's sovereign immunity for torts of state officers and employees while acting within the scope of their official duties or employment, *unless the alleged tortious act falls within one of the exceptions set forth in O.C.G.A. § 50-21-24.*'"

III. **What Entities or Persons Are Covered by the Tort Claims Act**

Construction and interpretation of the State Tort Claims Act by the courts is still in its infancy. However, there have been several important decisions over the past several years dealing with entities or persons covered under the Act, the caps on damages provisions, and the notice of claim requirements.

O.C.G.A. § 50-21-22 contains certain definitions that are very important to an interpretation and construction of the act. Subparagraph (5) of this definitional section defines "state" as ". . . the State of Georgia and any of its offices, agencies, authorities, departments, commissions, boards, divisions, instrumentalities and institutions, but does not include counties, municipalities, school districts, other units of local government, hospital authorities, or housing and other local authorities." The following decisions answer some important questions regarding the entities covered by the Act:

(1) Hospital authorities and certain other authorities are expressly excluded from coverage under the Georgia Tort Claims Act (it does not apply to them), however, the Georgia Ports Authority is a state agency covered under the Act. Miller v. Georgia Ports Authority, 217 Ga. App. 876, 877 (1995);

(2) "The Georgia Tort Claims Act, O.C.G.A. § 50-21-22 to 50-21-37 was . . . enacted to waive the sovereign immunity of the state for the torts of its officers and employees but expressly excludes counties from the ambit of this waiver." Gilbert v. Richardson, 264 Ga. 744, 747 (1994);

(3) Under O.C.G.A. § 50-21-22(7) a corporation cannot be a "state officer or employee," and [the Georgia Higher Education Assistance Corporation] is not one of the covered state government entities referred to in O.C.G.A. § 50-21-22(5). Garrett v. Georgia Higher Education Assistance Corporation, 217 Ga. App. 415 (1995).

Subparagraph (7) of O.C.G.A. § 50-21-22 provides that "'state officer or employee' means officer or employee of the state, elected or appointed officials, law enforcement officers, and persons acting on behalf or in service of the state in any official capacity, whether with or without compensation, but the term does not include an independent contractor doing business with the state . . . ." This section provides that the term "state officer or employee" includes persons who are members of a board, commission committee task force or other similar body established to perform

specific tasks including advisory functions, with or without compensation, for the state or state governmental entity, or natural persons who is a volunteer participating as a volunteer, with or without compensation, in a structured volunteer program organized, controlled and directed by a state governmental entity for the purposes of carrying out the functions of the state entity.

Subpart paragraph (7) states that "an employee shall also include foster parents and foster children. This subparagraph provides that the term "[state officer or employee]" shall not include a corporation whether for profit or not for profit, or any private firm, business proprietorship, company, trust, partnership, association, or other such private entity. Therefore, it appears clear that the term "state officer or employee" only includes natural persons.

In a 6-1 decision in the case of Keenan v. Plouffe, 260 Ga. 791 (1997), the Supreme Court decided that a state employed physician alleged to have negligently performed surgery on a private patient is not immune from suit under the State Tort Claims Act. Construing the provisions of O.C.G.A. § 50-21-25, the Supreme Court stated this ". . . section provides that a state employee is immune from suit for torts committed 'while acting within the scope of his or her official duties or employment.' . . .Thus, the

decisive question in this case is whether Dr. Plouffe was acting within the scope of his official state duties while treating [the patient]." The Court concluded that Dr. Plouffe was not acting in the course of his official duties as a state employee in his treatment of the patient and was therefore not entitled to sovereign immunity.

Keenan v. Plouffe arose from a situation where the physician, Plouffe, performed a laser laparoscopy/hysterectomy on a patient at the Medical College of Georgia. At the time of the surgery, Plouffe was a member of the faculty of the Medical College. The patient suffered significant and permanent brain damage as a result of the surgery. The suit was brought against Dr. Plouffe and the manufacturer of a laser device known as an Argon Beam Coagulator. The suit alleged, among other things, that Dr. Plouffe was not certified to use this particular type of laser and that he had used it in a negligent manner during the surgery thereby injuring the plaintiff.

Dr. Plouffe moved for summary judgment asserting that he was acting as a state employee at the time of the surgery and that he was immune from suit under O.C.G.A. § 50-21-25. The trial court agreed with Dr. Plouffe, finding that he was teaching a resident doctor at the time of the patient's surgery and ruled that as a

matter of law, he was entitled to immunity. In reversing, Justice Sears, writing for the Supreme Court, observed:

> . . . Although it could be argued that Dr. Plouffe was in the broadest sense acting within the scope of his employment because he had an obligation as a professor of the Medical College to treat patients, he had distinct obligations to [the patient] that were independent of his official state duties, and the duties he is alleged to have violated in this case relate solely to those independent obligations. Here, [the patient] was a private-pay patient who employed Dr. Plouffe as her medical doctor. She was billed directly for his services by the PPG [the Physicians Practice Group which exists as a cooperative organization under the policies of the Medical College of Georgia and the Board of Regents], and Dr. Plouffe stated that the diagnosis and treatment of [the patient], including the use of the Argon Beam Coagulator during the surgery, were left to his sole medical discretion, and were not controlled by the government. Therefore, significantly, the duties alleged to have been violated in this case relate strictly to the medical care provided [the patient] and do not call into play what might be termed 'governmental considerations,' such as the allocations of state resources for various types of medical care. 267 Ga. at 793.

The Supreme Court concluded that based upon the nature of the doctor's relationship with his patient in this case, as well as the fact that the allegations of negligence related solely to the doctor's independent medical judgment in treating the patient, that he was not acting within the scope of his official state duties in treating the patient. The Court construed the legislative intent of the Act bolstered the conclusion that the General Assembly did not intend for the language of § 50-21-25 ". . . to provide

immunity to physicians under circumstances like those existing in this case." 267 Ga. at 795.

"Protecting doctors against the exercise of their medical discretion (as opposed to the exercise of governmental discretion) in treating a private patient does not further the purposes of official immunity." 267 Ga. at 796. "Further, liability insurance is readily available for medical doctors who treat private-pay patients. . . . because the purpose of official immunity is not furthered by construing the phrase 'official duties' to encompass the exercise of medical discretion with regard to private-pay patients, we decline to construe that phrase to provide protection in this case." Id. However, after making these important observations about the scope of sovereign immunity, the Court in footnote 17 indicated that it was not considering or ruling upon whether immunity is appropriate for state employed physicians who are required to treat particular patients:

> Because this case involves the exercise of a medical discretion on a private-pay patient that was not controlled by the government employer or by statute, we do not consider whether immunity is appropriate for state-employed physicians who are required to treat particular patients, or who are alleged to have violated governmental, as opposed to medical, responsibilities, or whose medical discretion is controlled or impacted by governmental standards or constraints. 267 at 796, footnote 17.

The Supreme Court has also held that the 1991 amendment to the State Constitution and the 1992 enactment of the Tort Claims Act did not negate the long-standing principle of law that sovereign immunity does not protect or shield state departments or employees from injunctive relief. In IBM Corp. v. Evans, 265 Ga. 215 (1995), Justice Fletcher writing for the majority stated:

> This Court has long recognized an exception to sovereign immunity where a party seeks injunctive relief against the State or a public official acting outside the scope of lawful authority. . . . 'If the actions of [public corporations, boards or commissions] are illegal or contrary to law, the Courts will intervene in order to prevent [an action] illegal or contrary to the law.' . . . To avoid the harsh results sovereign immunity would impose, the Court has often employed the legal fiction that such a suit is not a suit against the state, but against an errant official, even though the purpose of the suit is to control state action through state employees.

In a pending case we are handling, the State of Georgia filed a motion to dismiss the complaint of a physician claiming that he was immune from a liability under the State Tort Claims Act since he was a house staff member or resident of the Medical College of Georgia, even though the allegations of negligence against this physician arose during the time that he was working in the emergency room at University Hospital in Augusta, Georgia. The State contends in that case that the Medical College of Georgia and University Health Services, Inc. d/b/a University Hospital [a

private corporation that leased University Hospital from the Richmond County Hospital Authority] entered into a cooperative agreement whereby medical residents worked at University Hospital as part of their medical education.

In order to provide some perspective on how these issues are arising, a copy of the brief filed by the State in the case of Mays v. The Kroger Company; University Health Services, Inc., et al. is attached and included herewith under Tab 1. A copy of the responsive brief opposing the motion to dismiss the physician is attached under Tab 2. The trial court denied the State's motion to dismiss. The trial court found that the State Tort Claims Act did not apply to this employee as he was not acting within the scope of his official duties at the time. Hopefully, the briefs on this issue will be of some help if you have these or similar issues to arise as you litigate under the Tort Claims Act.

IV. Prior to Filing Suit, You *Must* Timely File A Notice of Claim; the Notice of Claim *Must* Be Given in Writing Within 12 Months of the Date of Loss

O.C.G.A. § 50-21-26 sets forth the requirements regarding the Notice of Claim which must be served upon the State as a prerequisite to bringing an action under the Tort Claims Act. O.C.G.A. § 50-21-26(a)(1) provides that anyone having a tort claim

against the State pursuant to the Act must give notice of the claim in writing within 12 months of the date the loss was discovered or should have been discovered. O.C.G.A. § 50-21-26(a)(2) provides that the notice of a claim must be given in writing and ". . . shall be mailed by certified mail, return receipt requested, or delivered personally to and a receipt obtained from the Risk Management Division of the Department of Administrative Services." This section also requires that in addition to serving the notice upon the Risk Management Division of the Department of Administrative Services, a copy shall be delivered personally to or mailed by First Class Mail to the State Government entity whose acts or omissions or whose employee's acts or omissions are asserted as the basis of the claim. This provision also gives each state government entity the power and right to designate an office or officer within that entity to whom the Notice of Claim is to be delivered or mailed.

The Notice of Claim provisions of the Act are very important. A failure to strictly comply with the Notice of Claim provisions can be fatal. The Act specifically sets forth what is required to be included in the Notice of Claim. The items or matters that must be set forth in the Notice of Claim are set forth in O.C.G.A. § 50-21-26(a)(5). This provision provides:

A Notice of Claim under this code section shall state, to the extent of the claimant's knowledge and belief and as may be practical under the circumstances, the following:

(A) the name of the state government entity, the acts or omissions of which are asserted as the basis of the claims;

(B) the time of the transaction or occurrence out of which the loss arose;

(C) the place of the transaction or occurrence;

(D) the nature of the loss suffered;

(E) the amount of the loss claimed; and

(F) the acts or omissions which caused the loss.

In serving Notices of Claims under the Tort Claims Act, it is the practice in our office to serve the Notice both by certified mail/return receipt requested and in person. We serve both the Risk Management Division of the Department of Administrative Services and the State Department whose acts or omissions gave rise to the claim, separately, by certified mail/return receipt requested and by hand delivery. O.C.G.A. § 50-21-26(a)(2) provides that when the Notice is delivered personally, a receipt must be obtained from the Risk Management Division of the Department of Administrative Services. When we serve the Risk Management Division of the Department of Administrative Services and State Departments personally with our Notices of Claim in the past, the persons to whom we have delivered these Notices often refuses to

sign the receipt acknowledging delivery. Therefore, after we serve the Notices personally, we write a separate letter confirming that the Notice of Claim was delivered at a certain time, on a certain date and naming the person to whom it was delivered, and that we provided a receipt acknowledging delivery which this person refused to sign. If the Notices are timely served both personally and by certified mail/return receipt requested to both the Department of Administrative Services and to each state governmental entity involved, then the plaintiff will have sufficient proof that the Notice was timely served.

In cases where we have separate claims by the estate for pain and suffering and a claim by the next of kin for wrongful death arising out of the same occurrence, we generally file separate claims, one on behalf of the estate for the pain and suffering and other claims belonging to the estate and another Notice of Claim for the wrongful death claim. We do this because in these cases we take the position that the cap on damages of $1 million set forth in O.C.G.A. § 50-21-29(b) applies separately to the personal representative's wrongful death claim and the administratrix's claims arising from the occurrence. The Supreme Court in the case of Georgia Department of Human Resources v. Phillips, 268 Ga. 316 (1997) agreed and held that the personal representative and

administratrix are "two distinct legal persons" and that the maximum amount of damages that could be assessed against the Department of Human Resources is $2 million. In that case, the Court stated:

> Notably, two separate notices of claim were filed in this case, each asking for damages in the amount of $1 million. Because suit in this case was filed on behalf of two distinct legal persons, the pretrial order supports a damages award of $2 million . . . . 268 Ga. at 320, footnote 18.

V. Other Requirements of the Act with Respect to Commencement of A Lawsuit and the Filing of the Complaint

1. O.C.G.A. § 50-21-26(b) mandates that the lawsuit or civil action may not filed or commenced following the presentation of the Notice of Claim until either the Department of Administrative Services has denied the claim or more than 90 days have expired after presenting and serving the Notice of Claim without action by the Department of Administrative Services.

2. The complaint filed must include and have attached thereto a copy of the Notice of Claim presented to the Department of Administrative Services along with the certified mail receipt or receipt showing personal delivery as exhibits thereto. See O.C.G.A. § 50-21-26(a)(4).

3. In order to perfect service of process in any lawsuit brought under the Act, the plaintiff must both: "(1) cause process

to be served upon the chief executive officer of the state governmental entity involved at his or her usual office address; and (2) cause process to be served upon the director of the Risk Management Division of the Department of Administrative Services at his or her usual office address." O.C.G.A. § 50-21-35. It is also required under this section that a copy of the lawsuit showing the date of filing be mailed to the attorney general at his/her usual office address by certified mail/return receipt requested and attached to the lawsuit must be a certificate signed by counsel that this requirement has been complied with.

VI. Constitutional Considerations Under The Georgia Tort Claims Act

There are several constitutional questions under the Tort Claims Act that have not yet been addressed. Overall, the Act has been held constitutional. That is, the Act generally was passed as a legitimate exercise of the power bestowed upon the General Assembly by the 1991 constitutional amendment. In addition, that amendment has been upheld as valid, notwithstanding the substantial controversy surrounding the deceitful ballot language that was used to trick the voters into ratifying the amendment. Donaldson v. Department of Transportation, 262 Ga. 49 (1992); Burton v. Georgia, 953 Fed. 2d 1266 (11th Cir. 1992).

Other constitutional issues remain for decision. They are of two general kinds. First is the question of whether the cap and the immunity provisions can be applied retroactively to those claims that accrued prior to adoption of the act. A fundamental tenet of Georgia law is that substantive rights may not be abridged retroactively. Ga. Const. Art. I, Sec. I, Par. X. This issue was presented to the Georgia Supreme Court in the case of D.H.R. v. Phillips, supra, but the court declined to reach the question, holding instead that the issue had not been timely raised procedurally in that case. As time moves on, of course, the issue of retroactivity will become less and less important. For causes of action arising after the effective date of the act - which are nearly all of the cases now in the courts - the constitutionality of the GTCA's retroactivity provision will not be at issue.[1]

Regardless of retroactivity, there is the broader constitutional question that was not resolved in Riddle v. Ashe, 269 Ga. 65 (1998). While holding in that case that the Act was constitutional because it afforded remedies against state agencies where remedies were abrogated (by immunity) against individual employees, the Court did not reach the much more substantial

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[1] This view should be tempered by the fact that the GTCA contains broad tolling provisions so that actions may be filed, 6under proper circumstances, years after the original negligence.

constitutional question of whether the immunity granted employees is constitutional where *no remedy is provided by the GTCA*.

This constitutional issue starts with the language of the "tort claims amendment" itself. The 1991 constitutional amendment provides, in part:

> Except as specifically provided by the General Assembly in a State Tort Claims Act, all officers and employees of the state or its departments and agencies may be subject to suit and may be liable for injuries and damages caused by the negligent performance of, or negligent failure to perform, their ministerial functions....Ga. Const. Art. I, Sec. II, Par. IX.

The importance of this amendment is that it provides an affirmative right of action and remedy against officers and employees of the state who are negligent, *except insofar as a tort claims act is passed*. Given the affirmative establishment of this right of action, can a tort claims act immunize employees for their misconduct *where that misconduct does not have a corresponding remedy under the Tort Claims Act*? If the General Assembly could do that, why couldn't it pass a tort claims act that created a very narrow category of remedies (i.e., waivers of sovereign immunity), give blanket immunization to officers and employees of the state for all their conduct? That would not make sense, and it would not seem to be consistent with the constitutional provision. But where should this line be drawn, if it is not drawn to require that

employees be subject to suit *wherever* there is no corresponding remedy under the Tort Claims Act?

The same question comes up with regard to the caps under the Act. In cases where damages exceed the per-claim cap, the remedy provided by the Act is different than the rights affirmatively established by the constitutional provision. Can the caps be constitutionally applied in those circumstances?

In D.O.T. v. Phillips, supra, we filed a brief that addressed these issues as they arose under the facts of that case. The retroactivity issue was the principal one there, but as mentioned above, the Court did not reach it. Excerpts from that brief are included under Tab 3, should you have the opportunity and need to refer to it later.

VII. Recent Cases

There have been many recent cases that address issues under the Tort Claims Act, specifically, and official and sovereign immunity generally. Indeed, over forty cases have spoken in one degree or another to the GTCA in the last year and a half. Tab 4 includes a brief summary of what the courts have held in the more significant of these cases.

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