34th Annual Medical Malpractice CLE
Case Law Update
(October 2017-October 2018)

Kristin Pierson, Esq.
Bendin Sumrall & Ladner, LLC

	2015-2016	2016-2017	*2017-2018*
Total # Cases	17	23	*33*
Topics			
Appeal Process			
Arbitration Agreement			
Damages (Wrongful Death vs. Personal Injury)			
Discovery (Subpoena for Medical Rates Charged, Litigation Investment Company, Peer Review Organization, Treating Physician Financial Interest, Attorney Work Product)			
EMTALA Claim			
Experts (§ 9-11-9.1 Affidavits, 30(b)(6) Witness, Rule 702 Qualifications, *Daubert*)			
Gross Negligence/§ 51-1-29.5			
Incompetent Party-Proper Plaintiff			
Open Records Act Request			
Physician-Patient Relationship			
Proximate Cause (Intervening Act, Expert Testimony)			
Simple vs. Professional Negligence			
Statute of Limitations (Minor Exception, Fraud, Misdiagnosis, Relation Back/Amendments)			
Trial (Jury Award, Jury Instruction, Non-Party Apportionment, Assumption of Risk Defense)			

Case *Trial*	Facts	Legal Principles	Conclusions
<u>BERRYHILL V. DALY</u> **2018 GA. APP. LEXIS 526** **(SEPTEMBER 26, 2018)**	• Cardiologist instructed Patient not to engage in strenuous activity following surgery on Patient's blocked artery; 5 days after surgery, Patient fainted and fell from deer stand while hunting • Patient appealed denial of Motion for New Trial after jury verdict in favor of Cardiologist, arguing that Trial Court should not have given Assumption of the Risk jury instruction	♦ **Defendant asserting Assumption of the Risk defense must establish that Plaintiff: (1) had actual knowledge of the danger; (2) understood and appreciated risks associated with that danger; and (3) voluntarily exposed himself to risks** ♦ **Charge is appropriate where there is evidence Plaintiff had subjective knowledge of specific, particular risk of harm associated with activity or condition that proximately caused injury, yet proceeded anyway** ♦ **Knowledge requirement does not refer to Plaintiff's comprehension of general, non-specific risks that might be associated with such conditions or activities** ******************************** ♦ **Avoidance Doctrine: Plaintiff must use ordinary care to avoid consequences of Defendant's negligence when it is apparent or when in exercise of ordinary care it should become apparent**	♣ Cardiologist advised Patient not to engage in strenuous activity. However, this does *not* establish Patient knew he risked losing consciousness if he chose to disregard instructions. Nor is there evidence Patient knew dizziness or loss of consciousness were possible side effects of medication. Thus, there is no evidence establishing 1st element for instruction on Assumption of the Risk. Error could have confused jury into believing *any risk* assumed by Patient could have formed basis for no liability; new trial ordered ******************************** ♣ Cardiologist advised Patient not to engage in strenuous activity for week following surgery. Patient decided not to seek further clarification or guidance on this limitation before climbing into deer stand just few days later. Thus, it was jury question whether, in exercising ordinary care for his own safety, Patient could have avoided consequences of Cardiologist's alleged negligence

Case *Trial*	Facts	Legal Principles	Conclusions
<u>SOUTHWESTERN EMERGENCY PHYSICIANS v. QUINNEY</u> **2018 GA. APP. LEXIS 538** **(SEPTEMBER 28, 2018)**	• Following implantation of spinal cord stimulator, Patient experienced leg numbness/ severe back pain and was transferred to ED • ED Physician examined Patient, did general but not complete neuro exam, and ordered CT Spine; Physician was unaware Patient could not lie on his back • CT interpreted by non-party Radiologist as showing no abscess or abnormal fluid collection • ED Physician transferred Patient to Neurosurgeon, where Patient was found to be irreversibly paralyzed from spinal cord compression due to expanding spinal canal hematoma • Court of Appeals ruled in 2013 that Gross Negligence standard applied but there was fact question as to whether Physician was grossly negligent • Jury rendered $4.5 million verdict for Patient, apportioning 34% to ED Physician	♦ **Evidence of similar acts or omissions is not admissible because issue to be tried is only negligence or non-negligence of defendant *at time of alleged negligent act*, which must be determined by circumstances surrounding *that act* and not by reputation of alleged tortfeasor** ******************************** ♦ **Showing of gross negligence necessarily equates to showing breach of duty of even slight care; accordingly, under plain language of § 51-1-29.5, emergency medical provider's legal duty has indeed been effectively modified to that of only slight care** ******************************** ♦ **Fault of a non-party cannot be considered for purposes of apportioning damages without some competent evidence that non-party *in fact* contributed to alleged injury or damage**	♣ Patient's Attorney's question of Defense Expert that "You've reviewed a case that involved Dr. Gutierrez's old emergency practice group here in town before?"—although arguably improper—did not explicitly impute any prior negligence to Physician or indicate that he had previously been sued. Within context of nearly weeklong trial, references were insufficient to fatally infect verdict and require mistrial ******************************** ♣ Court rejected Physician's argument that because § 51-12-33(c) [Apportionment Statute] requires only finding of "fault" of non-party generally, Jury does not need to find non-parties *grossly* negligent to apportion them fault. Trial Court did not err in instructing Jury that gross negligence standard of care applied in apportioning fault to non-parties ******************************** ♣ There was *no evidence* that non-party Hospital was responsible for delay transferring Patient. Physician contends evidence absolving him necessarily implicates Hospital as administrative entity, but speculation is not evidence

Case ***Miscellaneous: Physician-Patient Relationship/ EMTALA***	**Facts**	**Legal Principles**	**Conclusions**
<u>**PHAM V. BLACK**</u> **2018 GA. APP. LEXIS 567** **(OCTOBER 10, 2018)**	• Patient's Sister filed suit against Physicians and Hospital under EMTALA for failing to stabilize and transfer deceased Patient who arrived in ED complaining of a racing heart rate and who coded in interim • Trial Court granted one Physician-Hospitalist's MSJ for lack of physician-patient relationship • Trial Court granted all Physicians' MSJ on EMTALA claims	♦ **There can be no liability for malpractice in absence of physician-patient relationship** ♦ **Although doctor who has agreed to be on call makes himself available to be consulted regarding patient's condition, that fact alone does *not* indicate doctor has agreed to establish doctor-patient relationship with *any* patient who presents to hospital. Plaintiff has to show more than that doctor was on-call physician at time of patient's injury** ******************************** ♦ **EMTALA imposes certain requirements on hospitals with emergency departments. EMTALA only provides relief in personal injury action against participating hospital**	♣ Hospitalist was hospitalist-on-duty at time Patient was being treated in ED and was called for consultation, but never met Patient and did not participate in his diagnosis or treatment. Where Hospitalist's sole involvement with Patient was consulting with his treating doctors regarding whether he should be admitted and ultimately refusing to admit him, we do not find that Hospitalist and Patient had doctor-patient relationship ******************************** ♣ EMTALA only imposes legal duty upon hospitals, not individual doctors. Legal duty to perform medical screening, stabilize patient, and restrict transfers until patient is stabilized fell upon hospital by plain language of statute. Because EMTALA imposes no legal duty on individual doctors, Plaintiff cannot maintain cause of action against individual doctors

Case *Miscellaneous: Open Records Act Request*	Facts	Legal Principles	Conclusions
SMITH V. NORTHSIDE HOSPITAL **2018 GA. APP. LEXIS 590** **(OCTOBER 23, 2018)**	• Plaintiff-Attorney requested that Hospital provide financial statements and other documents related to its acquisition of physician practices pursuant to Open Records Act (ORA) • Hospital declined to comply with request, contending that it sought trade-secret information • Hospital argued it is entitled to discovery on Request because identity and purposes of Plaintiff-Attorney's client and whether client is competitor of Hospital who is pursuing this Request to gain economic value and for competitive purposes is potentially dispositive of whether records sought are trade secrets exempt from disclosure	♦ **Open Records Act (§ 50-18-71) treats *all* public records as subject to disclosure, *except* those which by order of court or by law are prohibited or specifically exempted from being open to inspection** ♦ **Actions for enforcement of ORA may be brought by *any* person, firm, corporation, or other entity** ♣ **Prohibiting inspection of records must be based on nature of information sought, not connections of person seeking information; intentions and motivations behind ORA request are irrelevant**	♣ Given broad discretion Trial Court has to control discovery matters; minimal probative value, if any, of identity and motives of Plaintiff-Attorney's clients; and Georgia's strong public policy in favor of open government, Trial Court did not abuse discretion in precluding Hospital from seeking discovery regarding identity and motives of client ♣ Regardless of whether Plaintiff-Attorney requested documents and initiated this action on behalf of Hospital's competitor or on his own behalf, Hospital is still required to prove documents requested qualify as trade secrets. Hospital has burden of presenting evidence to establish that documents are trade secrets and exempt from disclosure