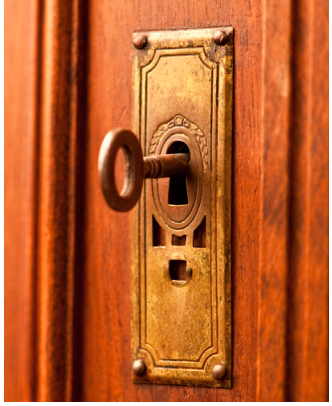
Swift Currie
ATTORNEYS AT LAW

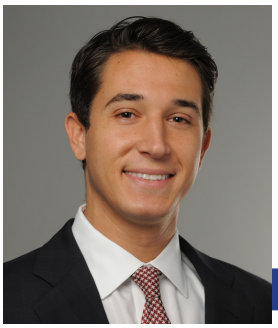


The Tort Report

An Update on Liability Issues

Spring 2016

Timeless Values. Progressive Solutions.



Georgia Courts Provide Clarity on Wrongful Detainment Torts

By: Jared A. Cohen

Historically, Georgia law recognized four independent torts arising out of the wrongful detainment of an individual: false imprisonment, false arrest, malicious arrest and malicious prosecution. However, two recent cases confirmed the landmark 2008 decision by the Georgia Court of Appeals that merged the torts of false arrest and malicious arrest. *Ferrell v. Mikula*, 295 Ga. App. 326 (2008); *Stephens v. Zimmerman*, 333 Ga. App. 586 (2015); *Lattimore v. PetSmart, Inc.*, 2015 WL 1020127 (M.D. Ga. 2015). These cases clearly define the elements of each of Georgia's wrongful detainment torts.

Prior to these decisions, the tort of false arrest required detention absent process of law (i.e., absent a warrant), whereas the tort of malicious arrest required the inappropriate initiation of criminal proceedings. Confusion between these two torts arose due to the placement of the statute describing malicious arrest under the Article of false arrest. Because of this confusion, the Georgia Court of Appeals held in *Ferrell* that it would simply refer to any actions under O.C.G.A. § 51–7–1 as false/malicious arrest.

A 2015 Federal case out of the Middle District of Georgia analyzed the holding of *Ferrell* and held that there now exist only three torts relating to wrongful detainment: (1) false imprisonment - involving unlawful detention without judicial process; (2) false/malicious arrest - involving detention under the process of law; and (3) malicious prosecution, detention with judicial process followed by prosecution. *Lattimore*, 2015 WL 1020127, at *2.

Likewise, in *Stephens*, the Georgia Court of Appeals provided further clarity as to what proof is required in order to recover under the tort of false/malicious arrest. When an arrest is made pursuant to a warrant, the detainee's remedy hinges on whether he or she was subsequently prosecuted for the criminal act leading to the arrest. If the warrant is dismissed or otherwise not pursued after the arrest, the remedy is malicious arrest (or false arrest), but if the case persists through prosecution, an action for malicious prosecution is the exclusive remedy, and an action for malicious arrest is not available. *Stephens*, 333 Ga. App. at 590.

This means under Georgia law there are essentially three mutually exclusive wrongful detainment torts, each with specific requirements. False imprisonment requires unlawful detention without a warrant or judicial process, and false/malicious arrest requires inappropriate detention under process of law. Therefore, in any set of circumstances, only one of these two actions will lie. Likewise, a claim for malicious prosecution requires detention with judicial process, but unlike a claim for false/malicious arrest, it also must involve a subsequent prosecution. As was made clear in *Stephens*, the distinction is important because "[m]alicious prosecution and malicious arrest are mutually exclusive; if one right of action exists, the other does not." *Stephens,* 333 Ga. App. at 589. ■

Follow the Rules: Recent Changes to the Federal Rules of Civil Procedure

By: Allison Ng

The Federal Rules of Civil Procedure ("FRCP") govern civil procedure in Federal Courts. On December 1,

2015, amendments to several rules went into effect, with the most significant changes relating to early case management and discovery.

Most of the amendments to the FRCP seek to reduce unnecessary delays and to pressure all parties to evaluate the strength of their cases at the outset. To accomplish this goal, amendments have been made to reduce the amount of time allotted to complete certain tasks. First, plaintiffs now have 90 days to serve a defendant instead of 120 days. If a defendant is not served within 90 days after the Complaint's filing date, the court must dismiss the action without prejudice. Fed. R. Civ. P. 4(m). Similar amendments were made to Rule 16 – the Court now has 90 days to issue a scheduling order after any defendant has been served or 60 days after any defendant has made an appearance. Fed. R. Civ. P. 16(b)(2).

The amendment to Rule 26(b)(1), which relates to discovery, changes the standard for determining whether particular information or materials are discoverable. Prior to the amendment, a party could seek "discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Rule 26(b)(1) now allows a party to "obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable." Fed. R. Civ. P. 26(b)(1) (emphasis added).

Practically, the change to this Rule suggests that even if there is relevant evidence, the cost or access to the evidence may render the evidence outside of the scope of permissible discovery. While this is a new amendment to the written text of Rule 26, proportionality is not a new concept. Various courts have previously considered proportionality to determine cost/fee-shifting and other issues. By making proportionality considerations an explicit component within the scope of discovery, the parties can no longer request everything under the sun. The hope is that this will reduce excessive and unnecessary discovery. Proportionality considerations are not one size fits all. What may be the proper scope of discovery in one case may not be the proper scope in another case. Until courts start making rulings on the new amendments, the practical impact of these amendments remains unclear.

Rule 34 was also amended to combat discovery issues related to objections, document production, and timing for said production. Many district court judges in Georgia have standing orders that prohibit general and vague objections. The recent amendment to Rule 34 and the Advisory Committee's comment make clear that general and vague objections will not be allowed. Rule 34 now requires the objecting party to lodge specific objections and an explanation for why an objection applies. For example, if a responding party objects to a discovery request that it is "overbroad and unduly burdensome," that party must also state *how* the request is overbroad and unduly burdensome. The responding party must only object to the portion of the request that is overbroad and provide a response for any portion of the request not deemed overbroad. The new amendment also requires the responding party to state whether any documents are being withheld on the basis of the objection. However, the rule does not require the responding party to provide a log of every document that is withheld.

These changes are meant to benefit both sides. Boilerplate objections are no longer allowed and these amendments are meant to dispel the frequent confusion of whether documents are being withheld. Practically this means that both plaintiffs and defendants will have a greater burden at the onset of their case to determine what discovery requests are proper and what documents are discoverable. ■

Jury to Determine Whether to Apply "ER Statute"

By: Zach M. Matthews

Georgia law provides for a special, higher burden of proof in situations where medical providers are required to provide "emergency medical care." This law, codified at O.C.G.A. § 51-1-29.5 and referred to as the "ER Statute," recognizes that in an emergency situation, medical professionals do not always have the luxury of time to analyze a patient's condition with the same degree of attention applicable to routine medical care. Instead, they must use their best judgment and act quickly to save a life or prevent an otherwise harmful outcome. Inevitably, various medical malpractice claims arise out of these "emergency circumstances," where the end result is the apparent increased harm to a patient, or even a patient's death. Under the ER Statute as codified, a patient who received emergency treatment in a hospital emergency department, and who subsequently sues his or her medical providers for malpractice arising from such treatment, must show "by clear and convincing evidence," rather than the usual preponderance of the evidence,

Georgia Courts Continue to Answer Questions and Provide Guidance in Applying the Apportionment Statute

By: Alicia A. Timm

Georgia's "apportionment statute" passed in 2005, O.C.G.A. § 51-12-33, requires a trier of fact to assess the percentages of fault "of all persons or entities who contributed to the alleged injury or damages, regardless of whether the person or entity was, or could have been, named as a party to the suit." The motivation behind the statute was to award damages against defendants only for their own portion of liability.

Since its passage, Georgia Courts have issued a number of opinions regarding the scope and intent of the statute. One consistently litigated issue is when a trier of fact can allocate fault to a non-party who may have contributed to the alleged injury or damages. In addressing this issue, the Georgia Supreme Court had to decide whether the legislature intended for the trier of fact to consider **all** potential persons or entities who may have had some fault in causing the alleged injury, irrespective of other law that may provide immunity to the non-party or an affirmative defense that may otherwise prevent a finding of liability for the non-party. *See Zaldivar v.* Prickett, 297 Ga. 589 (2015); *Walker v. Tensor Machinery Ltd.*, 779 S.E. 651 (2015).

In *Zaldivar v. Prickett*, the Georgia Supreme Court finally answered the question of whether statutory immunity pursuant to the Worker's Compensation Act, or any other doctrine or statute, will prevent a trier of fact from apportioning fault to an immune employer under the apportionment statute. In so doing, the Court expounded upon its prior decisions as to why "fault" and "liability" are two separate concepts under the law. The Supreme Court acknowledged that to prove fault, one must prove the essential elements of tort liability, but explained a person or entity could still be at "fault" for a plaintiff's alleged injury even if it could not be liable to the plaintiff in tort. The Supreme Court relied on the provision in the apportionment statute that provides the trier of fact must consider the fault of a non-party who settled with the plaintiff, despite the fact the settlement agreement extinguishes any potential liability of the settling non-party. While the settling non-party no longer has legal liability to the plaintiff, the settling non-party's actions still may have caused harm to the plaintiff (assuming evidence shows the settling non-party committed a tort against the plaintiff), and therefore the settling non-party bears some "fault" for the alleged injuries or damages.

Similarly, a non-party's affirmative defense or immunity which may cut off liability for the tort does not prevent apportionment of fault. The Supreme Court held affirmative defenses (even statutory immunity) will not prevent apportionment to a bad actor. "What happened, happened, and affirmative defenses and immunities do not change what happened, only what the consequences will be." *Zaldivar*, 297 Ga. at 598. The Court found the legislature intended the trier of fact consider every other "tortfeasor whose commission of a tort against the plaintiff was a proximate cause of his injury, regardless of whether such tortfeasor would have actual liability in tort to the plaintiff." *Id.* at 600. Following its decision in *Zaldivar*, the Supreme Court applied the same reasoning to address a certified question from the District Court for the Northern District of Georgia. In answering the certified question, the Supreme Court held a plaintiff's employer could be named on the verdict form if there was evidence it breached its duty and caused damages to the plaintiff-employee. *See Walker v. Tensor Machinery Ltd.*, 298 Ga. 297 (2015); *see also Six Flags Over Georgia II L.P. v. Martin*, 335 Ga. App. 350 (2015).

The factual scenario of a potentially at-fault employer who is otherwise protected by statutory immunity is not unusual, especially in product liability and construction injury cases. Accordingly, the ability of a defendant to allocate fault to an at-fault employer under the apportionment statute has the potential to significantly impact Georgia tort law moving forward. ■

that the provider's actions showed "gross negligence," rather than the usual ordinary negligence, or there can be no recovery. This higher standard of care recognizes the special situation posed by emergency medicine.

A significant case with respect to the ER statute was recently decided by the Georgia Supreme Court in *Nguyen v. Southwest Emergency Physicians, P.C.*, 298 Ga. 75 (2015). In *Nguyen*, the parents of a six-month-old infant girl took their child to the hospital for a "bump on the head" they said was the size of an "apple," that she sustained after falling off a bed. Plaintiffs alleged that the ER personnel released the infant without appropriately diagnosing her subdural hematoma and skull fracture, allegedly resulting in her brain damage several days later.

At the emergency room, a paramedic tasked with triaging patients diagnosed the infant girl as having a non-emergency condition. As a result, the infant girl was placed in the "fast-track" "non-emergency" area of the emergency department. In that area the child was seen by a physician's assistant, who noted that she was interacting normally and did not seem to be in pain other than in the area of the local contusion. He diagnosed her with a bruise and discharged her with instructions to return to the ER if her symptoms worsened. The child was subsequently diagnosed with a severe brain injury which has resulted in various physical and mental deficiencies in her development.

The Nguyen family sued the hospital, as well as the various provider groups involved in care for their daughter, and subsequently argued in a motion for partial summary judgment that the ER Statute should not apply because the child had been assessed as a non-emergency patient. The trial court agreed, holding that the providers who treated the child did not believe they were providing emergency care and therefore, the ER Statute (as well as its higher "gross negligence" burden of proof) could not apply. The Georgia Court of Appeals reversed, holding instead that the application of O.C.G.A. § 51-1-29.5 to these facts posed a jury question and was not proper for summary adjudication. The Nguyens appealed, and the Georgia Supreme Court granted certiorari.

The Supreme Court held the purpose of the ER Statute was to limit emergency medical providers' liability exposure by imposing a higher standard of proof. As a result, the test is not simply whether care is or is not provided in an emergency room, or even what state of mind the medical professional might have had at the time care was provided, but rather, whether the condition presented by the patient actually proves to be an emergency situation. The Supreme Court held that this "objective" test of "bona fide emergency services" will apply "even if the result of those services is that the patient is diagnosed as not needing (or no longer needing) emergency treatment."

Applying this "objective test" to the facts, the Supreme Court noted the Nguyen child had reportedly fallen from a bed and struck her head, thereby suffering an injury for which the parents sought emergency room treatment, and therefore, at least objectively, the services provided were potentially "bona fide emergency services" as defined under the ER Statute. Accordingly, the Supreme Court affirmed the Court of Appeals in reversing the award of partial summary judgment, sending the case back to the trial court with instructions for the jury to determine whether the ER statute should apply.

The Supreme Court's ruling seemingly places the decision of which *legal* standard to apply in a medical malpractice case into the hands of the jury, rather than the hands of the trial court. In a factually close case, a jury (whose members may be impacted by countless other factors, including sympathy and personal opinion of fault) is to determine whether "bona fide emergency services" were or were not rendered, and thus, issue a verdict based on the standard of their choosing. The effect of this decision is difficult to predict, but the potential exists for this aspect of the Tort Reform Act of 2005 to be weakened. ■

Events

WC WEBINAR:
The Law, The Job, The Deal – A Discussion of Recent Legislative Changes in Georgia, Utilizing the Light Duty Job Offer Process, and the Best Practices for Claim Settlement
May 4, 2016
1:00 - 2:00 pm EST

Many Swift Currie programs offer CE hours for insurance adjusters. To confirm the number of hours offered, for more information on these programs, or to RSVP, visit www.swiftcurrie.com/events.

Email List

If you would like to sign up for the E-Newsletter version of The Tort Report, visit our website at www.swiftcurrie.com and click on the "Contact Us" link at the top of the page. Or you may send an e-mail to info@swiftcurrie.com with "Tort Report" in the subject line. In the e-mail, please include your name, title, company name, mailing address, phone and fax.

Be sure to follow us on Twitter (@SwiftCurrie) and "Like" us on Facebook for additional information on events, legal updates and more!

The Tort Report is edited by Joe Angersola, Myrece Johnson and Drew Timmons. If you have any comments or suggestions for our next newsletter, please email joseph.angersola@swiftcurrie.com, myrece.johnson@swiftcurrie.com or drew.timmons@swiftcurrie.com.