



## Client Alert

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### **Georgia Supreme Court Strikes Down Noneconomic Damage Caps: Tort Reform Limits Held to Infringe Right to Jury Trial**

In the final installment of three recent decisions by the Georgia Supreme Court regarding the constitutionality of tort reform measures passed by the General Assembly in 2005, the state's high court struck down a cap on noneconomic damages (e.g., pain and suffering) in medical malpractice cases, declaring the cap to be a violation of the right to jury trial provided for by the Georgia Constitution.

The state's high court said the law limiting noneconomic damages in medical malpractice cases, codified at O.C.G.A. § 51-13-1, violates the constitutional right to a trial by jury guaranteed by the Georgia Constitution. The law limited the total recovery by a medical malpractice claimant for noneconomic damages to no more than \$350,000 against a medical provider.

The case, *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, NO. SO9A1432 (Ga. March 22, 2010), involved complications from a cosmetic facelift and laser surgery performed in 2006 by Harvey P. Cole, M.D., of Atlanta Oculoplastic Surgery on Betty Nestlehutt. A Fulton County jury determined that the surgery had led to Ms. Nestlehut's permanent disfigurement and awarded a verdict of \$1,265,000, comprised mostly of \$1,150,000 in noneconomic damages for Ms. Nestlehutt's pain and suffering. Ms. Nestlehut moved to have the damages cap, which would have reduced the jury's noneconomic damages award by \$800,000 to the statutory limit of \$350,000, declared unconstitutional. The trial court agreed, finding that caps violated the Georgia Constitution's right to a jury trial.

On appeal, the Georgia Supreme Court affirmed the trial court's decision. It first determined that the right to a jury trial under the Georgia Constitution was applicable only to those cases where there existed a right to a jury trial at the time of the adoption of the Georgia Constitution in 1798. Citing multiple historical sources and early colonial case law, the Court determined that medical negligence claims were encompassed within the right to jury trial as established in 1798. The Court further determined that, because the determination of damages has historically rested within the province of the jury, the common law right to a jury trial for claims of medical negligence by a health care provider possessed an "attendant right to the award of the full measure of damages, including noneconomic damages as determined by the jury." As such, because the noneconomic damages cap infringed upon the right to

have a jury determine the full measure of a claimant's damages, the Court found that O.C.G.A. § 51-12-1 violated the Georgia Constitution's right to a jury trial. The court concluded that because the general assembly could essentially reduce the caps to virtually any dollar value, including \$1, "the very existence of the caps, in any amount, is violative of the trial by jury."

The high court rejected the provider's arguments that because punitive damages limits have been upheld, so too should noneconomic damages caps. The Court distinguished punitive damages as not being "facts" determined by the jury. Therefore, limitations on punitive awards did not implicate the right to a jury trial. All seven justices unanimously agreed that the damages cap violated the Georgia Constitutional right to a jury trial, with the concurring opinions focusing solely on whether the Court's striking down of the caps provision should be applied retroactively and/or the legal basis for the retroactive application. Regarding the retroactivity of the decision, the Court noted that, while there are exceptions to the general rule that an unconstitutional statute is void from the date it was enacted if retroactive application brought "unjust results," O.C.G.A. § 51-13-1 did not qualify for such an exception. Thus, the Court's decision to strike down the caps applies retroactively.

The damages caps were intended to address the General Assembly's determination that a crisis existed in the medical liability insurance market, making it difficult for health care providers to buy affordable liability insurance. The damages caps, along with other provisions of the Tort Reform Act, were intended to promote predictability and improvement in the provision of quality healthcare services and the resolution of health-care liability claims.

The *Nestlehutt* decision comes on the heels of two recent decisions by the high court upholding key provisions of the Tort Reform Act. In *Gliemmo v. Cousineau*, NO. S09A1807 (Ga. March 15, 2010), the court upheld O.C.G.A. § 51-1-29.5(c), which requires a plaintiff who sues a hospital physician or healthcare provider regarding emergency medical care to prove "gross negligence" by "clear and convincing evidence." There, the Court found the emergency room provision to be a general law in operation throughout the state and not a "special law" in violation of the Georgia Constitution because it applies to all healthcare liability actions throughout the state arising from emergency care. In that case, the Court also rejected the plaintiffs' claims that a heightened burden of proof deprived them of a constitutional right, because the emergency room provision needed only to have a rational basis for its enactment to be constitutional, and the General Assembly could rationally find that increasing the standard of proof in emergency room liability cases would help promote health care quality and increase the availability of liability insurance for healthcare providers in Georgia.

In *Smith et.al. v. Baptiste et. al.*, No. S09A1543 (Ga. March 15, 2010), a defamation suit against former Atlanta Falcon defensive end Chuck Smith, the Georgia Supreme Court recently upheld Georgia's "offer of settlement" provision (codified at O.C.G.A. 9-11-68) of the Tort Reform Act. The offer of settlement rule provides that a defendant may collect attorney fees incurred after a rejected settlement offer, if the defendant wins the case or if the judgment is less than 75 percent of the settlement offer. Conversely, plaintiffs may collect

attorney fees incurred after a rejected settlement offer, if they win the case or the judgment is greater than 125 percent of the settlement offer. A 5-2 majority of the Court found that there was no general “right of access to the courts” under the Georgia Constitution, as the trial court had mistakenly determined. After a lengthy discussion of the proper records of Georgia’s constitutional convention of 1877, the majority said that provision simply addressed a right of choice between self-representation and representation by counsel, not a more general right of access to the courts. The Court also found the offer of settlement provisions were not an unconstitutional “special law,” but rather a general law, even though it only applied to tort claims and not contract disputes. The Court determined that as long as the law operated uniformly throughout the State, the General Assembly could exclude certain persons or activities from its application and still maintain the law’s constitutionality.

AGG will continue to update our clients with information on the Georgia Supreme Court’s latest decisions on tort reform in Georgia as well as possible legislative responses by the General Assembly to this developing legal landscape.

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