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# CURRENT ISSUES IN MEDICAL MALPRACTICE

Judge William F. Lee, Jr.  
Coweta Judicial Circuit

Atty. William U. Norwood, III  
Pope, McGlamry, Kilpatrick, Morrison and Norwood, L.L.P.

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### I. TIPS FOR JUDGES

#### A. 3 Goals

- 1) Fair trial for both parties
- 2) Jury understands case and its responsibility
- 3) No reversal

#### B. Case Management

- 1) Discovery schedule
- 2) How discovery disputes will be handled
- 3) Pre-trial conference date
- 4) Trial Date/Special setting

#### C. Pre-Trial Conference

- 1) Conduct separately
- 2) Disclose relationships with doctor/patient
- 3) Evidentiary problems
- 4) Date for pre-trial order
- 5) Date for pre-evidence Charge Requests
- 6) Be thorough

#### D. Trial

- 1) Voir Dire (Uniform Rule 10.1)
  - a) Consider Court asking questions beyond mere qualifying questions
  - b) Consider questionnaire
- 2) Jury Selection all morning
- 3) Convenience of witnesses
- 4) Convenience of Jurors
- 5) Argue and charge on successive days

## II. LEGAL PRINCIPLES

### A. Affidavit O.C.G.A. § 9-11-9.1

### B. “Action for Malpractice” defined. O.C.G.A. §§ 9-3-70; 9-11-8(a)

### C. Standard of Care – Defined

In Georgia, a person professing to practice medicine for compensation must bring to the exercise of his profession a reasonable degree of care and skill. Any injury resulting from a lack of such care and skill is a tort for which recovery may be had.

O.C.G.A. 51-1-27

### D. Standard of Care – Applied

The standard of care, when applied to any particular case, must be such degree of care and skill as, under similar conditions and like surrounding circumstances, is ordinary employed by the medical profession generally.

Hayes v. Brown, 108 Ga. App.360

1. Error to charge that Defendant may be liable for failure to exercise required care or required skill.

Brown v. Macheers, 249 Ga. App. 418, 422 (2001)

2. Doctors are held to a higher standard than ordinary negligence; they must exercise the degree of care generally employed by their profession.

Beach v. Lipham, 276 Ga. 302

3. The standard of care is that prevailing in the general medical community as opposed to what a particular doctor would do. Slack v. Moorhead, 152 Ga. App. 68. Mere difference in views between physicians as to techniques is not alone sufficient to present issue of violation of Standard of Care.

Hardy v. Tanner Medical Center, 231 Ga. App. 254 (1998)

4. Informed Consent.

O.C.G.A. § 31-9-6(d)

### E. Voire dire

1. No party to any case has a right to have any particular person on its jury.

Hill v. Hosp. Auth. Of Clarke County, 137 Ga. App. 633, 636

2. The fact that a doctor-patient relationship exists between a juror and a defendant does not in itself justify dismissing the juror.  
Cohen v. Baxter, 267 G.a 422
3. It is error for a judge to try to rehabilitate a biased juror whose verdict in the case may be affected by a personal interest.  
Walls v. Kim, 250 Ga. App. 259
  - a. Jury questions
    - i. Are you able to consider this case solely on its merits without any bias or prior inclination?
    - ii. Do you have an opinion that any party in this case ought to prevail?
    - iii. Do you have any desire that any party succeeds in this lawsuit?
    - iv. Are you inclined to favor any particular side in this case?
    - v. Do you have any personal interest in the result of this case?
    - vi. Can you decide this case solely on the evidence and the law?

#### **F. Pre-evidence Charges**

1. No requirement that entire jury instruction come after argument.
2. O.C.G.A. § 9-10-5 permits written charge be given to jury.
3. Recent complaints that charge at conclusion is harmful.
4. Consider Pre-evidence charge covering all basics so jury can evaluate evidence as received rather than through a “retrospectroscope”.
5. Pre-evidence Charge topics:
  - a) Object of all legal investigations is discovery of truth.  
O.C.G.A. § 24-1-2
  - b) Direct and circumstantial evidence.

- c) Credibility of witnesses.
- d) Expert witnesses.
- e) Burden of Proof: Preponderance of evidence defined.
- f) Physician, skill required of O.C.G.A. 51-1-27. Pattern Instructions 30 pp. 315-316.
- g) Not necessary that Plaintiff present evidence that physician “was guilty of malpractice”. It is sufficient that jury be given standard by testimony of physicians and evidence of violation of that standard.  
Andrews v. Smith, 112 Ga. App. 144, 147
- h) Happening of untoward or bad result or outcome is not proof of violation of Standard of Care. Hayes v. Brown, 108 Ga. App. 360, Andrews v. Smith, id.
- i) Verdict cannot be based on conjecture speculation or suspicion Stapleton v. Id., 87 Ga. App. 417
- j) Mere difference in views between physicians as to judgment exercised, where it is shown that each preference is an acceptable method can not prove violation of Standard of Care. Hayes v. Brown, 108 Ga. App. 360

#### **G. Jury Charges**

1. Presumption – There is a rebuttable presumption of law that the doctor performed the medical services in an ordinarily skillful manner and it is not error to charge on this presumption.  
Beach v. Lipham, 276 Ga. 302
2. Proximate cause – Proof of proximate cause is “within a reasonable degree of medical certainty” not “a reasonable probability.” Suggested charge  
Zwiren v. Thompson, 276 Ga. 498
3. Hindsight – Hindsight charge is authorized where the evidence raises an issue as to whether the negligence claim is based on later acquired knowledge or information not known or reasonably available to the defendant physician at the time the medical care was rendered.  
Bethea v. Coralli, 248 Ga. App. 853, 855(2)

Mercker v. Abend, 260 Ga. 836, 839

4. Imputed liability – Apparent or ostensible agent. Richmond County Hosp. Auth. V. Brown, 257 Ga. 507. Borrowed servant. Blessing v. Doctors Hosp., 184 Ga. App. 737; Kaplan v. Gibson, 192 Ga. App. 466. Joint Venture. Schrader v. Kohout, 239 Ga. App. 134 (en banc)

#### H. Evidence

1. Settlement with a co-defendant is not admissible. The fact of settlement is excluded and the amount of the settlement is set off from the jury's award.  
Allison v. Patel, 211 Ga. App. 376
2. Since they have competing interests, co-defendants can cross-examine each other's witnesses.  
Thomas v. Newnan Hosp., 185 Ga. App. 764(3)