ATLANTA BAR ASSOCIATION
LAWYERS WHO SERVE
Litigation Section

Medical Malpractice: Overview of the Emergency Room Statute

By David Turner
Partner, Schulten, Ward, Turner & Weiss, LLP

In 2005 the General Assembly passed O.C.G.A. § 51-1-29.5, the "ER Statute," which elevated the burden of proof to gross negligence, rather than ordinary negligence, proven by clear and convincing evidence, rather than the preponderance of the evidence, in medical malpractice cases against providers rendering "emergency medical care."

Gross negligence is the absence of even slight diligence, O.C.G.A. § 51-1-4, and liability can be decided adversely to the plaintiff on summary judgment notwithstanding testimony by plaintiff's expert that the provider was grossly negligent. *Pottinger v. Smith*, 293 Ga. App. 626, 628, 667 S.E.2d 659, 661 (2008).

Knowing the precise contours of the statute is, therefore, vital to analyzing the merits of cases where emergency medical care is at issue. While the statute imposes a monumental hurdle when applicable, whether the statute applies can be a disputed issue for jury resolution.

The statute applies in the context of "a health care liability claim arising out of the provision of emergency medical care in a hospital emergency department or obstetrical unit or in a surgical suite immediately following the evaluation or treatment of a patient in a hospital emergency department." O.C.G.A. § 51-1-29.5(c). When the statute applies, the court is required to instruct the jury on the issues enumerated in O.C.G.A. § 51-1-29.5(d).

It has been held that the department of the hospital to which the treating provider is assigned does not determine whether the statute applies; the key factor is the location where the care at issue occurs. *Nisbet v. Davis*, 327 Ga. App. 559, 568, 760 S.E.2d 179, 185 (2014) (statute applied to care provided by physician assigned to critical care department who provided care and treatment in the emergency room).

The mere fact that the care was rendered in an emergency room, however, is not dispositive; "the statute provides a definition of 'emergency medical care' that requires more than simply 'care provided in an emergency department.' " *Nguyen v. Southwestern Emergency Physicians*, P. C., 298 Ga. 75, 79, 779 S.E.2d 334 (2015).

The statute defines "emergency medical care" as "bona fide emergency services provided after the onset of a medical or traumatic condition manifesting itself by acute symptoms of sufficient severity, including severe pain, such that the absence of immediate medical attention could reasonably be expected to result in placing the patient's health in serious jeopardy, serious impairment to bodily functions, or serious dysfunction of any bodily organ or part. The term does not include medical care or treatment that occurs after the patient is stabilized and is capable of receiving medical treatment as a nonemergency patient or care that is unrelated to the original medical emergency." O.C.G.A. § 51-1-29.5 (a)(5).

In appropriate cases, it may be a jury question whether the patient was stable such that the ensuing treatment was subject to a standard of ordinary care rather than the ER Statute's gross negligence standard. *Howland v. Wadsworth*, 324 Ga. App. 175, 181, 749 S.E.2d 762 (2013); *Bonds v. Nesbitt*, 322 Ga. App. 852, 856, 747 S.E.2d 40, 45 (2013).

It may also be a jury question whether the patient received "emergency medical care." "[A] patient who seeks treatment in an emergency room while suffering from a serious but hidden medical condition and displaying no 'acute symptoms of sufficient severity' would not receive emergency medical care triggering O.C.G.A. § 51-1-29.5(c)." *Nguyen*, 298 Ga. at 82 (6-month-old with bump on her head presented to the ER and was given a non-emergency ranking by a paramedic, treated as a non-emergency patient then discharged but actually had a subdural hematoma and skull fracture which led a few days later to severe brain damage); *Everson v. Phoebe Sumter Med. Ctr., Inc.*, 341 Ga. App. 182, 182, 798 S.E.2d 667, 670 (2017) (27-year-old who complained of hallucinations and hearing voices was discharged by ER physician and died two days later after leaping from a moving car); *Hosp. Auth. v. Brinson*, 330 Ga. App. 212, 220–21, 767 S.E.2d 811, 817 (2014) (infant presented to the ER with some signs of an infection and received no emergency care but was diagnosed four days later with meningitis).

The heightened standards of proof and definitions set forth in the ER Statute may require the parties to walk a conceptual tightrope, with plaintiffs arguing that the patient's symptoms were serious enough that the medical providers were negligent in failing to recognize the need for more tests and treatment but not severe enough to constitute "emergency medical care," whereas defendants will argue that symptoms were severe enough to constitute "emergency medical care" but not so serious that a failure to treat was grossly negligent.

About the Author

David L. Turner is one of Atlanta's foremost litigators and legal advisors with 30 years of experience practicing law. David handles commercial litigation for corporate clients and serious personal injury cases for individuals and their families.

Mr. Turner can be reached at d.turner@swtwlaw.com or (404) 688-6803. More information about his practice can be found at www.swtwlaw.com