



Client Alert

Contact Attorney Regarding
This Matter:

Daniel M. Formby
404.873.8786 - direct
404.873.8787 - fax
daniel.formby@agg.com

GEORGIA COURT OF APPEALS DEFINES “GROSS NEGLIGENCE” STANDARD FOR EMERGENCY MEDICAL CARE

As a result of tort reform legislation enacted in 2005, Georgia law provides that in an action involving a health care liability claim arising out of emergency medical care in a hospital emergency department, no physician or health care provider shall be held liable “unless it is proven by clear and convincing evidence that the physician or health care provider’s actions showed gross negligence.” O.C.G.A. § 51-1-29.5. In order to substantiate a malpractice claim relating to emergency medical care under the statute, the degree of proof must be by “clear and convincing evidence,” and the degree of negligence established must be “gross negligence.”

In a medical malpractice action brought by an individual against an emergency department physician, the Georgia Court of Appeals recently set forth the definition of the statutory terms “clear and convincing evidence” and “gross negligence.” *Pottinger v. Smith*, 2008 WL 4072197 (Ga. Ct. App. Sept. 4, 2008).

The patient Smith was taken to the Floyd Medical Center emergency department after sustaining injuries in a motorcycle crash. The emergency department physician performed various tests for internal injury, including a cranial CT scan, spinal x-rays, and x-rays of the tibia and fibula in Smith’s left leg. The radiologist who read the x-rays found “a minimally displaced fracture of the left fibular head” and “no other fracture or subluxation.”

After discharge, Smith saw an orthopedic surgeon because of the continued severe pain in his leg. The orthopedic surgeon examined the x-rays taken at the emergency department and found not only the fibular fracture, but also an additional serious fracture that required surgery to correct.

In his malpractice action, Smith submitted the affidavit of a physician expert who determined that based on review of the certified medical records, the emergency department physician acted below the standard of care. Specifically, the expert stated that the emergency department physician misread the x-rays and failed to order a consult with an orthopedic surgeon. The physician responded that because the fracture found by the radiologist was not to a weight-bearing bone, no consult with an orthopedic surgeon was required in the emergency department. In her motion for summary judgment, the physician argued that Smith had not demonstrated by “clear and convincing evidence” that the physician’s level of care amounted to “gross negligence.”

Arnall Golden Gregory LLP
Attorneys at Law
171 17th Street NW
Suite 2100
Atlanta, GA 30363-1031
404.873.8500
www.agg.com

In reversing the trial court's denial of the motion for summary judgment, the Court of Appeals noted that gross negligence is the absence of even slight diligence, which is defined as "that degree of care which every man of common sense, however inattentive he may be, exercises under the same or similar circumstances." Expressed otherwise, gross negligence is "equivalent to [the] failure to exercise even a slight degree of care," or "lack of the diligence that even careless men are accustomed to exercise." With respect to the standard of proof, the Court of Appeals determined that the standard of "clear and convincing evidence" is "a more stringent standard than [a preponderance of evidence] and requires a greater quantum and a high quality of proof in plaintiff's favor."

In the view of the Court of Appeals, this was "a plain and indisputable case," lacking "clear and convincing evidence by which a jury could reasonably conclude that [the physician] failed to exercise even slight care and was therefore grossly negligent." The Court of Appeals' reasoning demonstrates the high standard of proof for establishing that a physician is "grossly negligent" in rendering emergency medical care. The Pottinger decision will be useful precedent for physicians and health care providers facing malpractice claims based upon the care provided in emergency medical departments.

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