# Georgia Tort Reform: SB 68 Hot Take(aways)

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Georgia Senate Bill 68 (a/k/a Georgia's Tort Reform Bill) officially passed the legislature and is now awaiting Governor Kemp's signature. He is expected to sign quickly. Below is a high-level synopsis of the bill and how it will impact your personal injury cases, as well as some practice tips for implementation in this new landscape.

- **Section 1: Anchoring**
  - Effective immediately upon Governor Kemp's signature (including pending cases).
  - **Addresses the ability of a plaintiff to "anchor" at trial by suggesting a specific number or value for the plaintiff's pain and suffering.**
  - Plaintiff's counsel cannot argue the worth or monetary value of noneconomic damages (i.e., pain and suffering), except as described below. This includes references to *any specific amount* **OR** *range of damages*.
  - Lawyers may argue the worth or monetary value of noneconomic damage *only* in closing, and the argument must be "*rationally related*" to the evidence.
    - Takeaway: Plaintiff's lawyers cannot use arbitrary and unrelated numerical values (i.e., one year of LeBron James's salary or the value of the Mona Lisa) to anchor pain and suffering awards.
  - Parties cannot argue the value of noneconomic damages in closing *unless* the party argued the *same* value in opening.
    - **Practice Tip:** note that this section applies to both plaintiff and defense lawyers. If the defendant wants to anchor in closing, they **must** anchor with the same number in opening.
  - If counsel violates this provision, the Court *shall* take remedial measure pursuant to O.C.G.A. 9-10-185. Upon objection, this section requires the court to rebuke the offending lawyer and provide jury instructions to disregard the improper testimony and/or argument. The court may also order a mistrial in its discretion.
    - **Practice Tip:** counsel *must* object to the improper anchoring evidence to trigger this section.

- During voir dire, counsel *may* ask prospective jurors if they could return a verdict with no damages and/or a verdict of some unspecified amount, provided that the question is supported by evidence.
    - **Practice Tip**: obviously, whether the question is "supported by evidence" is subjective and lawyers will want to use caution when asking these types of questions in voir dire.

- **Section 2: Motions to Dismiss and Accompanying Discovery Stay**
    - Effective immediately upon Governor Kemp's signature (including pending cases).
    - **Addresses discovery stays with the filing of a motion to dismiss and timing for an answer in the event a motion to dismiss or motion for more definite statement is filed.**
    - If a defendant files a motion to dismiss or a motion for more definite statement, the answer for that defendant is due:
        - 15 days after denial of the motion
        - 15 days after the more definite statement is served (in the event the court grants a motion for more definite statement).
    - Defendants *must* file the motion to dismiss *before* filing an answer.
    - Doing so will trigger a discovery stay for 90 days (or until a ruling on the motion). The statute *requires* the court to rule on the motion within the initial 90-day period.
        - If the court fails to rule within 90 days it *may* extend the stay *upon the motion of a party for good cause*.
        - The discovery period and any discovery deadlines will also be extended for the length of the stay.
        - **NOTE:** Filing an answer, will immediately terminate the discovery stay.
    - **Practice Tip**: motions to dismiss must be filed *before* the answer deadline and no answer should be filed in these cases pending a ruling on the motion. Prior to the expiration of the 90-day stay, counsel should seek an extension of the stay if the motion remains pending.
- **Section 3: Plaintiff's ability to voluntarily dismiss**
    - Effective immediately upon Governor Kemp's signature (including pending cases).
    - **Addresses when a plaintiff may voluntarily dismiss the suit without prejudice without seeking leave of court.**
    - A plaintiff may dismiss without permission of the court by
        - (1) filing a dismissal without prejudice prior to 60 days after the service of the answer; **OR**
        - (2) With the consent of all parties.
- **Section 4: Double recovery of attorneys' fees**
    - Effective immediately upon Governor Kemp's signature (including pending cases).
    - **This section eliminates the ability of plaintiff attorneys to recover the same attorneys' fees twice.**

        - Ex: pursuant to an Offer of Settlement under O.C.G.A. 9-11-68 *and* under O.C.G.A. 9-15-14 and/or O.C.G.A 13-6-11.
        - A contingent fee agreement between a plaintiff and their counsel is not admissible as evidence of the proof of the reasonableness of the fees alleged.

- **Section 5: Admissibility of seatbelt nonuse**
    - Effective immediately upon Governor Kemp's signature (including pending cases).
    - **A plaintiff's failure to use a seatbelt is admissible as evidence of negligence, comparative negligent, causation, assumption of the risk, apportionment of fault, and/or any other purpose.**
- **Section 6: Negligent security provisions**
    - Applies to "causes of action" which "accrue" ***after*** Governor Kemp's signature.
        - Generally, a cause of action accrues when all elements of the cause of action occurred (i.e., in a negligence tort claim- after the tort/breach + damages). This means this provision and the phantom damages provision will only apply to accidents which occur *after* enactment of the bill.
    - This section completely overhauls the circumstances under which a plaintiff can bring a claim for negligent security. There are now many requirements, subparts, and subparts to the subparts which will almost certainly be the subject of extensive litigation. However, circumstances under which an owner/occupier can be liable for criminal acts of a third-party on its premises are substantially narrower.
    - O.C.G.A. 51-3-51: Liability to *invitees*:
        - An invitee is a person who is on the property for a purpose that is beneficial to the owner/occupier (i.e. a customer).
        - **Five Requirements**:
            - **FIRST:** Criminal/wrongful conduct was reasonably foreseeable; **AND**
            - **SECOND:** The injury sustained was a reasonably foreseeable consequence of the criminal/wrongful conduct; **AND**
            - **THIRD:** The criminal/wrongful conduct was a reasonably foreseeable consequence of exploiting a specific physical condition of the premises known to the owner/occupier, which created a reasonably foreseeable risk of criminal/wrongful activity that was substantially greater than the general risk of wrongful conduct in the vicinity of the premises; **AND**
            - **FOURTH:** The owner/occupier failed to exercise ordinary care to remedy or mitigate the specific and known physical condition and to otherwise keep the premises safe from criminal/wrongful conduct; **AND**
            - **FIFTH:** The failure of the owner/occupier was the proximate cause of the injury to the invitee

- **FIRST REQUIREMENT-FORESEEABILITY:** The third-party's conduct was reasonably foreseeable because:
    - The owner/occupier had "*particularized warning of imminent danger*" by a third person
        - "*particularized warning of imminent wrongful conduct*" means information *actually known* to the owner/occupier **and** *deemed credible* by the owner/occupier which caused the owner/occupier to "*consciously understand*" the third party was likely to "*imminently*" engage in "*wrongful conduct*" on the premises that posed a "*clear danger*" to the safety of persons.
            - The "information" must be *specific* as to the identity of the third person, the nature and character of the conduct, the degree of danger, **and** the location/time/circumstances of the conduct.
        - "*wrongful conduct*" means any violation of law punishable as a misdemeanor or felony **OR** any other conduct that amounts to an intentional, willful, or wanton tort.
        - "*third party*" means any person other than an owner/occupier **or** a security contractor **or** a person under the direction, control, or supervision of an owner/occupier or security contractor.
    - **AND** the owner/occupier *reasonably should have known* that a third person was *reasonably likely* to engage in wrongful conduct on the premises, based on:
        - *Actual knowledge of* prior occurrences of *substantially similar prior wrongful conduct* on the premises; **OR**
            - *Substantially similar prior wrongful conduct* means conduct sufficiently similar in nature and character, degree of dangerousness, proximity, time, location, and circumstances which would lead a reasonable owner/occupier to determine wrongful conduct was reasonably likely to occur on the premises, to understand the risk to persons, **AND** to understand that specific known physical condition created a risk greater that the general risk in the vicinity of the premises.
        - *Actual knowledge* of prior occurrences of substantially similar wrongful conduct on an adjoining property or within 500 yards of the property; **OR**
        - **Practice Tip**: in both instances the requirement of actual knowledge of "substantially similar" conduct should mean that knowledge of property damage-only crimes like car break-ins or

theft, would not create evidence that a violent crime was reasonably foreseeable. Of note, "actual knowledge" means that the owner/occupier must actually know about the prior crimes for those crimes to serve as evidence of foreseeability.

- Actual knowledge of prior wrongful conduct by the third-party who caused the injury (i.e. the criminal assailant) AND clear and convincing evidence the owner/occupier knew or should have known the third party would be on the property.

- O.C.G.A. 51-3-52: Liability to Licensees:

  - **FIVE REQUIREMENTS (all must be met)**:
    - **FIRST:** Wrongful conduct by a third person was reasonably foreseeable because the owner/occupier had particularized warning of imminent wrongful conduct by a third person; **AND**
    - **SECOND:** The injury was a reasonably foreseeable consequence of such wrongful conduct; **AND**
    - **THIRD:** The wrongful conduct was a reasonably foreseeable consequence of the third person exploiting a specific physical condition of the premises, known to the owner/occupier, which creates a reasonably foreseeable risk of wrongful conduct that was substantially grater that the general risk in the vicinity of the premises; **AND**
    - **FOURTH:** The owner or occupier **willfully and wantonly** failed to exercise **any** care to remedy or mitigate the known physical condition; **AND**
      - **Practice Tip:** the standard for an *invitee* is a failure to exercise *reasonable care*, so this represents a heightened evidentiary requirement for licensees.
    - **FIFTH:** The failure of the owner/occupier to exercise **any** care was the proximate cause of the injury

- These provisions represent the sole and exclusive remedy for negligent security claims (claims which sound in tort *or* nuisance) against owners/occupiers*,* **EXCEPT**:
  - Causes of action brought pursuant to O.C.G.A. 51-1-56 (civil recovery for victims of human trafficking) or O.C.G.A. 16-5-46 (trafficking of persons for labor or sexual servitude; **OR**
  - Claims or remedies for breach of contract.

- **There is no liability for negligent security when**:
  - The injured party was a *trespasser*;
  - The injury giving rise to the negligent security claim did not occur on the premises;

- The wrongful conduct did not occur on the premises **or** in a location where the owner/occupier had legal authority to exclude the third party wrongdoer;
- The third party responsible for the wrongful conduct was on the premises as a tenant or guest of a tenant **if** the owner/occupier had commenced eviction proceedings against the tenant at the time of the wrongful conduct;
- The injured party was an invitee/licensee:
  - Who came onto the property for the purpose of committing a felony or to commit a misdemeanor crime involving theft (as defined in O.C.G.A. 16-8-1—16-8-106); **OR**
  - Was actively engaged in the commission of a felony or committing a misdemeanor crime involving theft (as described above).
- The injury was sustained in a single family residence;
- The owner/occupier made *any reasonable effort* to provide information to law enforcement of a particularized warning of imminent wrongful conduct by a third party. Calling 9-1-1 or otherwise making a report **shall** be deemed reasonable.

- Owners/occupiers not required to exercise extraordinary care to keep persons safe from wrongful conduct and **shall not** be required to assume the responsibilities and obligations of government for law enforcement and public safety.
- In determining whether the owner/occupier exercised reasonable care, the trier of fact **shall** consider the security measures employed by the owner/occupier at the time of the injury, the need for additional security measures, the practicality of additional measures, whether additional measures would have prevented the injury, and the respective responsibilities of owners/occupiers versus the government and/or law enforcement.
- **Apportionment in negligent security claims**:
  - Trier of fact **shall reasonably apportion** fault to:
    - The owner/occupier;
    - The third person(s) whose wrongful conduct caused the injury and forms the basis of the negligent security claim;
    - Any other person to whom fault otherwise should be apportioned under the apportionment statute (O.C.G.A. 51-12-33).
  - No party shall offer evidence or make any argument in the hearing of any juror regarding:
    - Any criminal penalty for the third-party wrongful conduct which gives rise to the negligent security claim; **OR**
    - The financial resources of any party or nonparty; **OR**
    - The effect of an apportionment of fault upon any award of damages to the plaintiff; **AND**
  - If the jury fails to apportion a "*reasonable degree*" of fault to the third party who committed the wrongful conduct, the trial court **shall** set aside the verdict **and order a re-trial** of liability and damages.

        - There **shall** be a rebuttable presumption that the apportionment of fault is **unreasonable** if the total percentage of fault apportioned to all third-party wrongdoers is **less than** the total percentage of fault apportioned to all owners/occupiers, security contractors, or other entities that did not commit the wrongful conduct.
    - Security Contractors
        - If a security contractor assumes a duty to invitees/licensees, the contractor may be liable for negligent security only in the same manner, same extent, and subject to the same limitations as the owner-occupier.
        - A security contractor cannot be held more liable than the owner/occupier.
- **Section 7: Phantom Damages Provision**
    - Applies to "causes of action" which "accrue" *after* Governor Kemp's signature.
    - **Addresses recovery of medical and healthcare expenses.**
    - Plaintiffs can only recover the reasonable value of medically necessary treatment. The value **shall** be determined by the trier of fact.
    - If a plaintiff has public or private health insurance (including workers' compensation), evidence of both the amounts *charged* and the amount *necessary to satisfy the charges* (i.e. negotiated contractual insurance rates or workers' compensation fee schedule rates) are admissible as relevant evidence of the reasonable value of the service.
        - The evidence is admissible regardless of whether the insurance has been used, is used, or will be used to satisfy the charges.
    - If a plaintiff treats under a letter of protection, lien, or any other arrangement whereby the provider is paid from the proceeds of the lawsuit, the following evidence is ***relevant and discoverable***:
        - The letter of protection;
        - An itemized list of the medical expenses which must be coded in accordance with generally accepted medical billing practices "to the extent applicable";
        - If the medical provider sells the accounts receivable to a third-party:
            - The name of the third-party;
            - The dollar amount the third-party paid to purchase the accounts receivable; **AND**
            - Whether the plaintiff was referred for treatment and who made the referral (i.e. the plaintiff's attorney).
        - The collateral source rule is essentially eliminated. However, the judge can issue jury instructions to clarify the role of any collateral source payments and/or to prevent jury confusion about the effect of collateral source payments on the plaintiff's recovery.
    - **Practice Tip:** Initial discovery to the plaintiff should include requests for this information. These topics should also be included in the plaintiff's deposition.
- **Section 8: Bifurcation**

- Effective immediately upon Governor Kemp's signature (including pending cases).
- **Addresses bifurcation of trials into liability and damages phases.**
- In any bodily injury or wrongful death case, either party may make a **written demand** for bifurcation **prior to the entry of the pre-trial order.**
    - Phase 1: Liability
        - In the first phase, the trier of fact will determine the fault of each defendant and allocate fault on the verdict form pursuant to O.C.G.A. 51-12-33 (the apportionment statute).
        - The evidence and arguments shall be limited to evidence of liability.
    - If the trier of fact finds that any defendant is at fault, the trial shall be immediately recommenced for a second phase with the same judge and jury.
    - Phase 2: Damages
        - In the second phase, the trier of fact shall determine all compensatory damages, if any. This would include special damages as well as pain and suffering.
    - If the trier of fact finds that compensatory damages are appropriate, the trial will be immediately recommended as necessary for further proceedings, including a punitive damages phase and/or proceedings to determine liability for attorneys' fees or expenses of litigation.
- If either party files a motion in opposition to bifurcation, the court may reject a request for bifurcation **if** the court determines that:
    - The plaintiff was injured by a sexual offense and would be likely to suffer serious psychological or emotional distress by testifying twice; **OR**
    - The amount in controversy is less than $150,000.00.
- **Practice Tip:** Consider seeking a stipulation that the total damages are less than $150,000.00 when considering whether to make a written demand for bifurcation.