

THE FACTS ABOUT TORT “REFORM”

AND

WHY REASONABLE REFORM DIED
IN THE 2004 SESSION OF
THE GEORGIA GENERAL ASSEMBLY

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TORT REFORM KILLED IN 2004 SESSION – NOT BY NEGLIGENCE BUT BY INTENTIONAL ACTS

Personal politics and monopolistic greed scuttled efforts to pass meaningful tort reform during the 2004 Session of the Georgia General Assembly. The political organizations that clamored the loudest for tort reform this session – the hospital association, the chamber of commerce, the medical association and MAG Mutual Insurance Company – went home the last night of the session with nothing to show for their efforts and more than a bit of explaining to do to their members. Here is what happened.

A Good Bill Passed by the House

For two years now, doctors and hospitals have bemoaned rising malpractice insurance premiums. Responding to these complaints, the House of Representatives passed HB 1028, a bill creating a state authority to provide medical malpractice insurance to smaller hospitals and the doctors who practice there. While the bill would have directly helped rural hospitals and physicians, it also would have created competition for malpractice insurers, particularly for MAG Mutual Ins. Co. MAG Mutual is the monopolistic insurance company that insures over 70% of the physicians in Georgia and pays the medical industry's political organization, MAG, more than \$600,000 per year as an "endorsement" fee. Once MAG Mutual realized the real import of HB 1028 – the fact that it would have created a competitor – the insurance company and its political machinery went to work to kill HB 1028 by session's end.

House Bill Hijacked in the Senate

In the last several weeks of the 2004 session, the proponents of draconian tort reform were desperate to find a "vehicle" to move their unreasonable measures to the floor of the Senate. Led by MAG's Sen./Dr. Don Thomas, and in collaboration with MAG Mutual and the medical community's political organizations, the Senate Health Committee seized upon HB 1028 and took out the provisions to provide malpractice insurance alternatives to doctors. The Committee then substituted the House bill with numerous, draconian, insurance-friendly 'tort reform' provisions.

Once the bill got to the Senate floor, MAG's Dr. Thomas, Dr. Tom Price, and Sen. Renee Unterman (whose husband is a doctor) attempted to amend HB1028 even further to cap the amount of damages that a jury could award to a victim of malpractice. But, that effort was repelled by the majority of the Senate and the "caps" amendment failed on a bipartisan vote of 24-31. HB 1028 eventually passed the Senate and each chamber then appointed members to a conference committee to try to work through the differences in the bill.

Extremists Refuse to Compromise

At every meeting of the HB 1028 Conference Committee, the House conferees submitted proposals to improve the civil justice system, including enhancements

to the penalties that could be imposed for bringing so-called “frivolous lawsuits.” House conferees also sought reforms that would halt predatory insurance practices that result in higher premiums and fewer options for doctors and hospitals looking for malpractice coverage.

Unfortunately, Dr. Price and his fellow Senate conferees, Sen. Mitch Seabaugh (R-Sharpsburg) and Sen. Preston Smith (R-Rome), insisted that caps on damages be put in the bill, even though the entire Senate had rejected caps. The Senate conferees also refused to accept any of the meaningful limits to ‘frivolous litigation,’ apparently opposing the fact that penalties also could have been imposed against defendants for their frivolous conduct in fighting legitimate lawsuits. But, the Senate conferees’ greatest opposition to HB1028 was to the part of the bill that would have created competition for MAG Mutual Insurance Company. This opposition continued throughout the final hours of the session.

The Senate Fired Its Own Conference Committee

Finally, in the last hour of the 2004 session, outraged by the ‘all or nothing’ approach employed by their conferees on the tort reform bill, several Senate Republicans made an extraordinary motion to fire the Senate conferees. In a dramatic showdown vote in that last hour on the last night of the session, Republican and Democratic senators joined together to fire Senators Price, Seabaugh, and Smith for trying to kill tort reform. The vote was 29-21. For the first time in recent memory, a chamber of the General Assembly fired its own conferees. Yet, even after this bi-partisan attempt to save meaningful reform, the Senate leadership then refused to appoint new conferees, thus killing tort reform – and MAG Mutual’s potential competition.

The Only Winner Was MAG Mutual

The sad truth is that the big losers resulting from all of this misconduct during the 2004 session are the small, financially struggling hospitals of this state, the doctors who practice there and the people of Georgia, who have been misled again. They lost because of those extremist senators and interest groups that wanted to – and continue to plot to – stifle competition and preserve one insurance company’s monopoly.

As the 2004 elections and the 2005 session approach, the real question regarding tort reform is: When are the doctors and hospitals of this state going to quit believing the misinformation and half-truths their political organizations are telling them? And when will legislators – veterans and new legislators alike – look beyond the rhetoric, forget the bumper-sticker solutions of capping victims’ rights, and pass reasonable reforms that will actually help those physicians and hospitals who are struggling to deal with unwarranted premium increases?

WHY CAPPING DAMAGES IS WRONG

1. CAPS WOULD HURT GEORGIA'S MOST VULNERABLE CITIZENS

- A cap on non-economic damages would disproportionately harm stay-at-home moms, senior citizens and others who have no income to lose. They would be prohibited any recovery beyond the cap except for their medical expenses.
- Caps would have little, if any, effect on cases involving minor injuries, but would cause incredible harm to people seriously injured by negligence.
- Another state's Supreme Court held "it is simply unfair and unreasonable to impose the burden of supporting the medical care industry solely upon those persons who are most severely injured and therefore most in need of compensation."¹

2. GEORGIA JURIES HAVE SHOWN COMMON SENSE

A study of Georgia's tort system by the University of Georgia² found the following:

- **"Juries, the target of much criticism by proponents of tort reform, appear to produce rational and predictable results."**
- **"Defendants prevail more often in legally and factually more complex cases, such as medical malpractice and products liability. Modest compensatory damage awards are very much the norm and high awards are consistently linked to more severe injuries. Indeed, several studies suggest that juries under-compensate for the most severe injuries."**
- **"Collectively, this growing body of research indicates that the tort system in operation is much different from the one portrayed in the popular and political rhetoric of tort reform. There is no evidence of an explosion in tort filings, and there are few signs of runaway juries."**

3. CAPS DIVERT ATTENTION FROM THE REAL PROBLEMS

- According to John Henry, then CEO of Emory Hospitals, including Emory University Hospital and Crawford Long Hospital **"There does not seem to be any direct relationship between claims and premium increases; it seems more related to Sept. 11 and the need for insurance companies to generate profits for shareholders."**³
- The *Wall Street Journal* reported "[s]ome doctors are beginning to acknowledge that **the conventional focus on jury awards deflects attention from the insurance industry's behavior.** The American College of Obstetricians and Gynecologists, for the first time is conceding that **carrier's business practices have contributed to the current problem...**"⁴

4. TRIAL BY JURY IS A CONSTITUTIONAL RIGHT

- The Seventh Amendment to the **U.S. Constitution guarantees trial by jury** in civil cases.
- The Georgia Constitution, Art. I, § 1, Para. IX provides **"The right to trial by jury shall remain inviolate..."**

¹ *Brannigan v. Usitalo*, 587 A.2d 1232, 1236 (N.H. 1991).

² *Another Brick in the Wall: An Empirical Look at Tort Litigation In Georgia*, 34 Ga. L. Rev 1049 (2000).

³ *Atlanta Business Chronicle*, March 28, 2002, p.36A.

⁴ *Wall Street Journal*, (June 24, 2002).

CAPS ON DAMAGES DON'T HELP ANYONE BUT INSURANCE COMPANIES

- **Caps do not hold down insurance rates.** The Medical Liability Monitor, the leading trade publication in the malpractice insurance industry, listed in its October 2003 issue the average insurance rates charged in each state by the various insurance companies selling coverage in that state. A comparison of the average rates charged to various specialists in states WITH caps and states WITHOUT caps proves that caps do not result in premium reductions:
 - **Internists in states WITH CAPS were charged on average 14.7% HIGHER rates** than Internists in states WITHOUT CAPS.
 - **General Surgeons in states WITH CAPS were charged on average 22.9% HIGHER rates** than General Surgeons in states WITHOUT CAPS.
 - **OB/Gyn's in states WITH CAPS were charged on average 12.3% HIGHER rates** than OB/Gyn's in states WITHOUT CAPS.
- **Georgia premiums are well below the national median and far less than many states that have caps on damages.** According to the Medical Liability Monitor, the average insurance rate charged to Georgia physicians in 2003 was \$28,814, compared with the national median of \$33,433. Indeed, 33 states had HIGHER premiums than Georgia, including 19 states **WITH CAPS**.
- **National rankings show states WITH CAPS are not likely to have lower premiums.** A ranking of the premiums charged in all 50 states shows that 14 "cap states" have average rates that are above the national median and 14 cap states have average rates that are below the national median. 11 "non-cap" states' average rates are above the national median and 11 are below it. There simply is no correlation between caps on damages and lower insurance premiums.
- **Southeastern rankings are even more revealing.** Of the 13 Southern states, 7 have an average insurance rate that is at or above the national median and 6 (including Georgia) are below it. **5 of the 7 states above the national median have caps**, and **5 of the 6 below it do not have caps**. Indeed, the 5 Southern states with the lowest premiums DO NOT have caps. Consider these neighboring states that have enacted caps on damages:
 - **Florida** – With caps, it has the highest premiums in the nation at \$123,769, over four times what Georgia physicians pay.
 - **Louisiana** – With a \$500,000 overall cap on every item of damages except future medical expenses, its physicians pay \$43,864, over 50% more than what Georgia physicians pay.
 - **Virginia** – With a cap of \$1.6 million on **all** damages, including economic losses and future medical expenses, Virginia physicians still pay more than Georgia physicians.
- The evidence is clear. Enacting caps will not help Georgia's doctors and hospitals. **Capping damages is a placebo** rather than a cure for what ails our medical communities. And it's lethal medicine for victims of medical malpractice.

TRUE CONSERVATIVES ARE AGAINST CAPS

- Conservatives believe in less government but draconian tort reform amounts to arbitrary, **government-mandated limits** on individual rights and limits on the efficacy of the court system;
- Conservatives believe in more personal accountability, but unreasonable tort reform puts arbitrary **limits on how much a tortfeasor can be held accountable**;
- Conservatives believe in private regulation of conduct (which litigation promotes) but draconian tort reform will reduce the positive regulatory effect of litigation and will result in public demand for **greater governmental regulation** of our conduct;
- Conservatives believe that those who are responsible for something should pay for it, but **unreasonable forms of tort reform will require the taxpayer to pick up the tab for the victim** who cannot be sufficiently compensated for harm done to them by a wrongdoer;
- Caps on non-economic damages **disproportionately impact Stay-At-Home-Moms, Seniors, Children** and other non-wage earning or low-wage earning members of society who would have little or nothing to recover in economic damages;
- Caps on damages **violate the Constitutional Right to Trial by Jury** that is found in the 7th Amendment to the US Constitution and which, along with the right to vote, was one of the pillars of freedom upon which this Nation was founded;
- Self-identified **Georgia “Conservatives” favor limits on frivolous lawsuits rather than limits on damages by a 69%-29% margin.** [*Insider Advantage* poll of Georgia voters]

ARE PHYSICIANS LEAVING GEORGIA?

Draconian tort reform proponents claim that physicians are leaving the state in droves. It's been stated so often that many people simply accept such assertions as true. They are **FALSE**. **Georgia has seen a significant INCREASE in the number of physicians practicing here.** Physicians, other than those blinded by the political rhetoric of their political organizations, recognize that Georgia is a great place to practice medicine.

- **The number of physicians practicing in Georgia has INCREASED during the so-called crisis.** According to the Federation of State Medical Boards, 17,151 physicians practiced in Georgia in 2000. In 2003, that number had grown to 18,134, an increase of almost 1,000 physicians over three years.
- **The number of new medical licenses issued INCREASED by 36.3% during the so-called crisis.** The Georgia Composite Board of Medical Examiners issued 1,316 licenses in 2001 and 1,794 licenses in 2003, an increase of 478 licenses or 36.3%.
- **The number of OB/GYNs has INCREASED during the so-called crisis.** According to the American Medical Association, in 2000 there were 1,256 OB/GYNs in Georgia, and by 2002 that number had grown to 1,326 – a 5% increase in only two years. In recent years, according to the AMA, Georgia has attracted the **3rd highest** number of new OB/GYNs **among all 50 states** in the country.
- **The number of physicians in Georgia has GROWN by 38% over the past ten years.** According to the Composite State Board of Medical Examiners, Georgia had 13,157 physicians in 1994 and 18,134 in 2003 – an INCREASE of 4,977, or 38%. According to the national census, Georgia's population only grew by 26% from 1990 to 2000.
- **Nationwide, physicians recognize Georgia as a very attractive place to practice medicine.** Modern Physician, a physician practice magazine, ranked the top 75 places to practice medicine based on six factors, including malpractice premiums. **THE BEST city to practice medicine in the entire United States is Athens, Georgia.** The 11th best is **Atlanta**, and 63rd is **Savannah**. Yet, the doctors' political organizations would tell you that Georgia is one of the worst places to practice medicine.

Medicine's political organizations are either out of touch with reality or they are intentionally misleading the public and policymakers. First, the medical association of Georgia claims that Georgia is in a "crisis" and that things are so bad for practicing doctors in Georgia that they will all go out of business if they don't get what they want in the tort reform arena. This mantra is in lockstep with the orchestrated campaign of the AMA to scream "crisis" whenever they want something and aren't getting it. The fallacy of their declarations of a crisis is borne out in the Modern Physician survey of doctors across the country.

ALL 20 of the top 20 cities listed in Modern Physician's survey of the Top 75 cities in the nation for practicing medicine can be found in the AMA's so-called "crisis states." How can they be in crisis and be the best? The answer is clear: either the real life practicing physicians have it wrong or the politically motivated, politically calculating associations have it wrong. We trust our doctors – not their political organizations.

ELIMINATING JOINT AND SEVERAL LIABILITY IS BAD POLICY

- **What is joint and several liability?** Before any defendant can be held jointly and severally liable, the jury must determine that the defendants' conduct caused ALL of the plaintiff's injuries -- not 1%, not 25%, but ALL of the injuries.
 - ~ An example. A drunk driver runs a stop sign and causes what would have been a minor accident. But, a defect in the seat belt system of the victim's car caused a passenger to sustain permanent brain injuries. If either the drunk driver or the auto manufacturer had acted appropriately, the injuries would not have occurred. There is no way a jury can determine which defendant caused which injuries. Under joint and several liability, the plaintiff can collect the full amount from either defendant because either defendant could have prevented ALL the injuries. Any defendant who pays such a judgment can file an action against the other defendant for reimbursement.
- **The rule protects only innocent victims.** As a practical matter, Georgia has effectively eliminated joint and several liability in cases except where a plaintiff is completely innocent. Where a plaintiff is partially responsible for his or her injuries, a jury already may apportion damages between that plaintiff and the negligent defendants. And if a Plaintiff is 50% or more responsible for causing his or her injuries, then the plaintiff cannot recover anything.
- **Eliminating joint & several will punish innocent victims.** If two wrongdoers injure a victim but one wrongdoer is insolvent, eliminating joint and several liability will **cause the innocent victim to bear the burden of the wrongdoer's insolvency**. The victim suffers ALL the injuries. An innocent victim should not also share the burden of paying for the injuries when they were caused by someone else's negligence.
- **Eliminating joint & several will greatly expand litigation.** If a jury can apportion damages among parties in every case, defendants will have an incentive to add as many other defendants as possible, hoping that a jury will divide the responsibility for damages amongst others. If a jury is allowed to apportion damages among non-parties, as some proposals now suggest, the plaintiff will have the same incentive to add multiple non-parties to a case.
- **Defendants have recourse now.** Under current law, a defendant who thinks others should be responsible for part of the judgment can file a suit against anyone else it thinks should be responsible. This is the appropriate remedy for a negligent defendant – not short-changing an innocent plaintiff.
- **Eliminating joint & several will encourage collection of personal assets.** Under joint and several liability, if a doctor and a hospital are sued for malpractice and are found jointly and severally liable to the plaintiff for her claim, the plaintiff is free to satisfy her entire judgment against either defendant. Typically what happens under current law is that when the defendant physician's portion of the judgment exceeds the amount of malpractice insurance coverage the physician has, the plaintiff will seek and obtain the remainder of the defendant physician's share from the hospital defendant. However, if joint and several liability is eliminated, the plaintiff's lawyer will have to obtain ALL of the defendant physician's share of the judgment from that physician. If the physician's insurance coverage is insufficient to cover the physician's liability, then the plaintiff's lawyer will have to pursue the remaining "value" of the claim by seizing the personal assets of the physician, rather than satisfying that part of the judgment by obtaining it from the jointly responsible hospital defendant.

REASONABLE TORT REFORM

Our civil justice system could use some reform, but there is a big difference between meaningful reforms that will IMPROVE the system and draconian “reforms” that will destroy it. The reforms listed below would IMPROVE the system, not destroy it.

- **Strengthen frivolous litigation penalties – for both sides.** Last session, Republicans and Democrats supported the Frivolous Litigation Prevention Act, a tough bill that would have made a real difference. This bill would punish lawyers and parties who abuse the civil justice system, but would not eliminate valid claims. Among other things, this bill would: substantially expand the definition of punishable “frivolous” conduct on the part of lawyers and their firms; require lawyers to determine the validity of any lawsuit or defense before asserting it; require courts to impose attorney fees and other expenses for taking unreasonable positions or engaging in unjustified legal maneuvering; permit courts to punish litigants or lawyers with both monetary fines and by restricting their evidence or claims; and strengthen the hands of judges by allowing them to stop frivolous litigation at any time, even when a party does not request such action. These measures should be enacted.
- **Tighten requirements for experts who testify against physicians.** Last session, medical malpractice attorneys who represent plaintiffs and those who represent defendants spent weeks developing proposals that would tighten expert witness requirements AND apply those heightened requirements to the filing affidavit WITHOUT causing an avalanche of unnecessary motions. These compromise measures should be enacted.
- **Relieve hospitals from “apparent agency” claims.** Under current Georgia law, a hospital can be held liable for the acts of an independent contractor physician for simply not informing the patient that the doctor is not an employee. And, the law is very unclear about what a hospital must do to “inform” the patient. Bipartisan legislation would have immunized a hospital from apparent agency claims in the ER if the hospital posted a sign saying the doctor was an independent contractor and if the doctor had standard malpractice insurance. This, too, should be enacted.
- **Ensure juries recognize the unique circumstances facing ER doctors.** ER physicians called upon to treat patients in emergent circumstances may not have access to the patient’s prior medical history, may be seeing a patient for the first time, and may confront numerous other obstacles that other physicians do not face. Bipartisan legislation would have required juries to take these factors into account when considering a claim against an ER physician.

Unfortunately, ALL of these reforms were killed in the 2004 session by the Senate leadership and their hand-picked conference committee who took an all-or-nothing approach and insisted on damages caps and other draconian reforms. Due to the Senate conferees’ refusal to negotiate in good faith, the Senate voted 29-21 on the last night of the session to fire the leadership’s conferees. The Senate leadership then killed these reforms by refusing to appoint new conferees. Next session, legislators interested in improving the justice system, rather than dismantling it, should pass these reforms.

SUMMARY OF “FRIVOLOUS LITIGATION PREVENTION ACT”

The purpose of this bill is to change existing law by increasing the obligations of lawyers and parties to act in good faith, to impose harsher penalties for those who do not act in good faith, and to accelerate the time in which parties may request relief from the courts.

Among other things, this bill:

- Substantially expands the definitions of “frivolous” conduct on the part of lawyers and their firms;
- Requires lawyers to determine the validity of any lawsuit or defense before asserting it; and
- Allows a party to seek a dismissal of a frivolous lawsuit within 30 days of the date on which it is served;
- Requires courts to impose attorney fees and other expenses for frivolous claims and legal maneuvering;
- Allows courts to prevent litigants from introducing evidence or asserting claims as a punishment for frivolous conduct;
- Prohibits parties from “hiding the ball” by refusing to turn over documents or information in response to requests for information;
- Strengthens the hands of judges by allowing them to stop frivolous litigation at any time, even when a party does not request such action;
- Forces reluctant judges to impose penalties when there is a finding of frivolous claims or tactics.
- Adopts many of the harsh federal rules for preventing unnecessary disputes.

This bill does not eliminate claims for people who are truly injured. Instead, it punishes lawyers and parties who abuse the civil justice system – both those on the plaintiff’s side AND those on the side of the defendant or defendants.

If it is ‘frivolous lawsuits’ that are the problem and the target of tort reformers, instead of legitimate and serious claims, then the Frivolous Litigation Prevention Act should be the measure enacted by legislators – not caps on the amount of damages that the most severely injured or killed plaintiffs should be entitled to recover.

INSURANCE REFORM: PROPOSALS THAT WILL MAKE A DIFFERENCE

Despite all the talk about “tort reform,” **one type of reform has actually worked** to keep premiums under control in other states – **insurance reform**.

In 1975, California enacted one of the most restrictive caps in the nation, and insurance rates skyrocketed. In 1987, California passed a package of insurance reforms known as Proposition 103, and malpractice premiums have remained stable ever since. **To help Georgia’s doctors and hospitals, we should follow the example of California and other states and pass insurance reform. Georgia should:**

- **Create an insurance authority for smaller hospitals.** In the 2003-2004 session of the General Assembly, Rep. Alan Powell (D-Hartwell) proposed HB 1028, a bill that would create an authority to help purchase insurance for small hospitals and the doctors who practice there. Despite a lack of verdicts in rural areas, their small hospitals and medical communities have been hit particularly hard by premium increases. HB 1028 would have provided them the relief they need. It would have created competition for Georgia’s monopolistic carrier, MAG Mutual. It would have helped rural hospitals and rural physicians. In 2005, the legislature should reject the greed-based opposition to this bill and pass this bill.
- **Repeal the insurance industry’s Antitrust Exemption.** Insurance companies and major league baseball are the only two industries not governed by antitrust laws. Antitrust laws promote competition, and the insurance industry desperately needs competition. The Legislature can – and should – repeal this exemption.
- **Require Prior Approval for rate increases.** Currently, medical malpractice insurers file a rate increase with the Insurance Commissioner and charge the increased rate without waiting for approval. Requiring prior approval before a company could charge the increased rate would give the Insurance Commissioner greater control over rate increases and would give doctors and hospitals greater protection from unjustifiable rate hikes.
- **Public Hearings prior to rate increases of 10% or more.** When a malpractice carrier wants to stick Georgia doctors and hospitals with a big rate increase, the company should have to explain – **in public** – why the increase is warranted. This provision alone saved California doctors millions of dollars this year after a major carrier sought a significant rate hike and a consumer rights organization requested a public hearing on the proposed rate hike. Rather than face the public hearing, the carrier reduced its proposal for premium increases, thereby saving the doctors millions in premium dollars.
- **Disclosure of claims and other data.** Insurance companies are presently not forced to provide any meaningful data about their operations. Requiring them to provide claims-specific data relating to payouts, types of injuries paid for, number of claims paid, etc., would enable the Legislature to prevent arbitrary rate hikes and permit the Legislature to see proof – or lack thereof – of any claims problems the insurers allege, rather than having to take their word for it.
- **45-day notification before cancellation or rate increases.** Malpractice carriers often notify doctors or hospitals of huge increases shortly before a policy expires, leaving little or no time to shop for cheaper insurance. Coupled with exclusive brokerage agreements, which prevent doctors and hospitals from using the services of multiple brokers (again competition), these rate increase procedures tie the hands of purchasers of insurance. As such, these unfair practices should be prohibited – at least with respect to the sales of medical malpractice insurance.