Tort Reform 2011

- **Medical Malpractice Changes** (SB 33; S.L. 2011-400)

  - **Enhanced Special Pleading Requirement (Rule 9(j))**

    Rule 9(j) of the Rules of Civil Procedure now requires medical malpractice complaints to allege that the relevant reviewing expert has also reviewed the pertinent medical records available to the plaintiff after reasonable inquiry. (Previously only required an allegation that reviewing expert had reviewed the "medical care.") Effective October 1, 2011 and applies to causes of action *commenced* on or after that date.

    Text changes:

    (j) Medical malpractice. – Any complaint alleging medical malpractice by a health care provider ~~as defined in~~ pursuant to ~~G.S. 90-21.11~~G.S. 90-21.11(2)a. in failing to comply with the applicable standard of care under G.S. 90-21.12 shall be dismissed unless:

    (1) The pleading specifically asserts that the medical care ~~has~~ and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care;

    (2) The pleading specifically asserts that the medical care ~~has~~ and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person that the complainant will seek to have qualified as an expert witness by motion under Rule 702(e) of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care, and the motion is filed with the complaint; or

    (3) The pleading alleges facts establishing negligence under the existing common-law doctrine of res ipsa loquitur.

  - **Enhanced Findings for Breach of Standard of Health Care (G.S. 90-21.12(a))**

    G.S. 90-21.12 previously based liability in medical malpractice actions on a jury finding that the health care provider breached the "standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities." The amendment now adds the further requirement that the breach occur "under the same or similar circumstances." Effective October 1, 2011 and applies to causes of action *arising* on or after that date.

Text changes:

"§ 90-21.12. Standard of health care.

(a) Except as provided in subsection (b) of this section, in~~In~~ any medical malpractice action as defined in G.S. 90-21.11(2)(a), ~~action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical, dental, or other health care,~~ the defendant health care provider shall not be liable for the payment of damages unless the trier of ~~the facts~~fact ~~is satisfied~~finds by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time of the alleged act giving rise to the cause of action; or in the case of a medical malpractice action as defined in G.S. 90-21.11(2)(b), the defendant health care provider shall not be liable for the payment of damages unless the trier of fact finds by the greater weight of the evidence that the action or inaction of such health care provider was not in accordance with the standards of practice among similar health care providers situated in the same or similar communities under the same or similar circumstances at the time of the alleged act giving rise to the cause of action.

- **Heightened Burden of Proof in Emergency Cases (G.S. 90-21.12(b))**

The new legislation also heightens the evidentiary standard for proving breach of standard of care in emergency treatment. In emergency cases, the jury must find breach by clear and convincing evidence rather than a mere preponderance of the evidence. Effective October 1, 2011 and applies to causes of action *arising* on or after that date.

New text:

(b) In any medical malpractice action arising out of the furnishing or the failure to furnish professional services in the treatment of an emergency medical condition, as the term "emergency medical condition" is defined in 42 U.S.C. 1395dd(e)(1)(A), the claimant must prove a violation of the standards of practice set forth in subsection (a) of this section by clear and convincing evidence.

[*Note: 42 U.S.C. 1395dd(e)(1)(A) defines "emergency medical condition" as "(A) a medical 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—(i) placing the health of the individual (or, with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy, (ii) serious impairment of bodily functions, or (iii) serious dysfunction of any bodily organ or part.]*

- **Limits to Liability for Noneconomic Damages (G.S. 90-21.19, 90-21.19B)**

Limits awards of noneconomic damages in medical malpractice actions to $500,000.

- **"Noneconomic damages" are damages to compensate for pain, suffering, emotional distress, loss of consortium, inconvenience, and any other nonpecuniary compensatory damage. (Does not include punitive damages.) The court shall instruct jury as to definition.**
- **$500,000 is the limit of the total noneconomic damages award against all defendants in the action.**
- **$500,000 is the limit of noneconomic damages against any defendant for all claims brought by the parties arising out of the same professional services.**
- **Noneconomic damages are not limited where trier of fact finds that the plaintiff suffered disfigurement, loss of use of part of body, or permanent injury or death; *and* defendant's causal acts were committed in reckless disregard of rights of others, grossly negligent, fraudulent, intentional, or malicious.**
- **Verdict sheet shall separately indicate noneconomic damage amount. Jury shall not be instructed as to statutory limit.**
- **Effective October 1, 2011 and applies to causes of action *commenced* on or after that date.**

New Text (abridged):

§ 90-21.19. Liability limit for noneconomic damages.

(a) Except as otherwise provided in subsection (b) of this section, in any medical malpractice action in which the plaintiff is entitled to an award of noneconomic damages, the total amount of noneconomic damages for which judgment is entered against all defendants shall not exceed five hundred thousand dollars ($500,000). Judgment shall not be entered against any defendant for noneconomic damages in excess of five hundred thousand dollars ($500,000) for all claims brought by all parties arising out of the same professional services. … In the event that any verdict or award of noneconomic damages stated pursuant to G.S. 90-21.19B exceeds these limits, the court shall modify the judgment as necessary to conform to the requirements of this subsection.

(b) Notwithstanding subsection (a) of this section, there shall be no limit on the amount of noneconomic damages for which judgment may be entered against a defendant if the trier of fact finds both of the following:

(1) The plaintiff suffered disfigurement, loss of use of part of the body, permanent injury or death.

(2) The defendant's acts or failures, which are the proximate cause of the plaintiff's injuries, were committed in reckless disregard of the rights of others, grossly negligent, fraudulent, intentional or with malice.

(c) The following definitions apply in this section: …

(2) Noneconomic damages. – Damages to compensate for pain, suffering, emotional distress, loss of consortium, inconvenience, and any other nonpecuniary compensatory damage. "Noneconomic damages" does not include punitive damages as defined in G.S. 1D-5.

(3) Same professional services. – The transactions, occurrences, or series of transactions or occurrences alleged to have caused injury to the health care provider's patient.

(d) Any award of damages in a medical malpractice action shall be stated in accordance with G.S. 90-21.19B. If a jury is determining the facts, the court shall not instruct the jury with respect to the limit of noneconomic damages under subsection (a) of this section, and neither the attorney for any party nor a witness shall inform the jury or potential members of the jury panel of that limit."

§ 90-21.19B. Verdicts and awards of damages in medical malpractice actions; form.

In any malpractice action, any verdict or award of damages, if supported by the evidence, shall indicate specifically what amount, if any, is awarded for noneconomic damages. If applicable, the court shall instruct the jury on the definition of noneconomic damages under G.S. 90-21.19(b).

- **Bifurcation of Tort Trials (Rule 42)**

Rule 42(b) of the Rules of Civil Procedure is amended to require the trial court, upon motion of a party, to bifurcate the liability and damages phases of the trial of a tort action (not just a medical malpractice action) where the plaintiff seeks damages in excess of $150,000. The court may order a single trial "for good cause shown." The same jury must hear both phases. Effective October 1, 2011 and applies to causes of action *commenced* on or after that date.

Text changes:

Rule 42
….
(b) Separate trials. –
(1) The court may in furtherance of convenience or to avoid prejudice and shall for considerations of venue upon timely motion order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.

(2) Upon motion of any party in an action that includes a claim commenced under Article 1G of Chapter 90 of the General Statutes involving a managed care entity as defined in G.S. 90-21.50, the court shall order separate discovery and a separate trial of any claim, cross-claim, counterclaim, or third-party claim against a physician or other medical provider.

(3) Upon motion of any party in an action in tort wherein the plaintiff seeks damages exceeding one hundred fifty thousand dollars ($150,000), the court shall order separate trials for the issue of liability and the issue of damages, unless the court for good cause shown orders a single trial. Evidence relating solely to compensatory damages shall not be admissible until the trier of fact has determined that the defendant is liable. The same trier of fact that tries the issues relating to liability shall try the issues relating to damages.

- **General Liability Reform: Evidence of Medical Expenses; Evidentiary Standard for Experts (*Daubert*); Attorney Fees in Small-Verdict Cases; and Liability to Trespassers (HB 542; SL 2011-283)**

  - **Evidence of Medical Expenses (Evidence Rule 414; G.S. 8-58.1)**

    Enacts a new rule of evidence and similar conforming statutory changes limiting the amount of past medical expenses a plaintiff can introduce into evidence to prove damages. The plaintiff may only introduce evidence of amounts actually paid or required to be paid to satisfy the bills (rather than the amounts originally billed by the provider, which are typically substantially higher than the actual amount required to satisfy the bill). Effective October 1, 2011 and applies to actions *arising* on or after that date (see S.L. 2011-317 for change in effective date).

    New Text:

    Rule 414. Evidence of medical expenses.

    Evidence offered to prove past medical expenses shall be limited to evidence of the amounts actually paid to satisfy the bills that have been satisfied, regardless of the source of payment, and evidence of the amounts actually necessary to satisfy the bills that have been incurred but not yet satisfied. This rule does not impose upon any party an affirmative duty to seek a reduction in billed charges to which the party is not contractually entitled."

    "§ 8-58.1. Injured party as witness when medical charges at issue.

    (a) Whenever an issue of hospital, medical, dental, pharmaceutical, or funeral charges arises in any civil proceeding, the injured party or his guardian, administrator, or executor is competent to give evidence regarding the amount paid or required to be paid in full satisfaction of such charges, provided that records or copies of such charges

showing the amount paid or required to be paid in full satisfaction of such charges accompany such testimony.

(b) The testimony of ~~such~~ a person pursuant to subsection (a) of this section establishes a rebuttable presumption of the reasonableness of the amount paid or required to be paid in full satisfaction of the charges. However, in the event that the provider of hospital, medical, dental, pharmaceutical, or funeral services gives sworn testimony that the charge for that provider's service either was satisfied by payment of an amount less than the amount charged, or can be satisfied by payment of an amount less than the amount charged, then with respect to that provider's charge only, the presumption of the reasonableness of the amount charged is rebutted and a rebuttable presumption is established that the lesser satisfaction amount is the reasonable amount of the charges for the testifying provider's services. For the purposes of this subsection, the word "provider" shall include the agent or employee of a provider of hospital, medical, dental, pharmaceutical, or funeral services, or a person with responsibility to pay a provider of hospital, medical, dental, pharmaceutical, or funeral services on behalf of an injured party.

(c) The fact that a provider charged for services provided to the injured person establishes a permissive presumption that the services provided were reasonably necessary but no presumption is established that the services provided were necessary because of injuries caused by the acts or omissions of an alleged tortfeasor."

- **Revised Rule of Evidence Regarding Reliability of Expert Testimony (Rule 702(a))**

Revises G.S. 8C-702(a) (Rule of Evidence 702(a)) to add specific requirements that must be satisfied before an expert may provide opinion testimony at trial. These requirements tracks the language of the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) in that Court's interpretation of Federal Rule 702(a). These changes to the North Carolina rule appear to supplant the rule established in 2004 by the North Carolina Supreme Court in *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 597 S.E.2d 674 (2004), in which the court rejected the *Daubert* standard. Effective October 1, 2011, and applies to actions *arising* on or after that date (see S.L. 2011-317 for change in effective date).

Text Changes:

(a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:

(1) The testimony is based upon sufficient facts or data.

(2) The testimony is the product of reliable principles and methods.

(3) The witness has applied the principles and methods reliably to the facts of the case.

- **Changes to Statute Allowing Attorney Fees in Small Verdict Cases (G.S. 6-21.1)**

Significantly overhauls G.S. 6-21.1, which allows an award of attorney fees in certain cases resulting in a small damages verdicts. Among the changes are the following:

- **The requirement of "unwarranted refusal" to pay the claim now applies not just to insurance cases, but also to personal injury or property damage cases.**
- **The statute now applies to cases in which the damages award is $20,000 or less (was $10,000).**
- **The relevant figure now is "amount of damages recovered" rather than "judgment for recovery." This appears to mean that costs are no longer included in the calculation.**
- **The amount of damages recovered must exceed the highest offer defendant made no later than 90 days before trial.**
- **The court's award of fees may not exceed $10,000.**
- **Court is required to issue a written order with findings of fact detailing the basis for finding unwarranted refusal, setting forth highest offer made, and justifying the amount of fees awarded.**
- **Effective October 1, 2011, and applies to actions *arising* on or after that date (see S.L. 2011-317 for change in effective date).**

Text Changes:

§ 6-21.1. Allowance of counsel fees as part of costs in certain cases.

(a) In any personal injury or property damage suit, or suit against an insurance company under a policy issued by the defendant insurance company ~~and~~ in which the insured or beneficiary is the plaintiff, instituted in a court of record, upon ~~a finding~~findings by the court (i) that there was an unwarranted refusal by the defendant ~~insurance company~~ to negotiate or pay the claim which constitutes the basis of such suit, ~~instituted in a court of record, where~~ (ii) that the ~~judgment for recovery of~~amount of damages recovered is ~~ten thousand dollars ($10,000)~~twenty thousand dollars ($20,000) or less, and (iii) that the amount of damages recovered exceeded the highest offer made by the defendant no later than 90 days before the commencement of trial, the presiding judge may, in ~~his~~the judge's discretion, allow a reasonable ~~attorney fee~~ attorneys' fees to the duly licensed ~~attorney~~ attorneys representing the litigant obtaining a judgment for damages in said suit, said ~~attorney's fee~~ attorneys' fees to be taxed as a part of the court costs. The attorneys' fees so awarded shall not exceed ten thousand dollars ($10,000).

(b) When the presiding judge determines that an award of attorneys' fees is to be made under this statute, the judge shall issue a written order including findings of fact detailing the factual basis for the finding of an unwarranted refusal to negotiate or pay the claim, and setting forth the amount of the highest offer made 90 days or more before the commencement of trial, and the amount of damages recovered, as well as the factual basis and amount of any such attorneys' fees to be awarded.

- **Trespasser Responsibility Act (G.S. Chapter 38B)**

Essentially codifies existing law that those who possess land do not owe a duty of care to trespassers and are not liable for injury to trespassers. Exceptions are made for intentional harms, certain harms to trespassing children (under 14), and harm to trespassers in peril who are discovered by the possessor. Effective October 1, 2011 and applies to causes of action *arising* on or after that date (see S.L. 2011-317 for change in effective date).

New Text:

Chapter 38B.
Trespasser Responsibility.

§ 38B-1. Title.

This Chapter may be cited as the Trespasser Responsibility Act.

§ 38B-2. General rule.

A possessor of land, including an owner, lessee, or other occupant, does not owe a duty of care to a trespasser and is not subject to liability for any injury to a trespasser.

§ 38B-3. Exceptions.

Notwithstanding G.S. 38B-2, a possessor of land may be subject to liability for physical injury or death to a trespasser in the following situations:

(1) Intentional harms. – A possessor may be subject to liability if the trespasser's bodily injury or death resulted from the possessor's willful or wanton conduct, or was intentionally caused by the possessor, except that a possessor may use reasonable force to repel a trespasser who has entered the land or a building with the intent to commit a crime.

(2) Harms to trespassing children caused by artificial condition. – A possessor may be subject to liability for bodily injury or death to a child trespasser resulting from an artificial condition on the land if all of the following apply:

a. The possessor knew or had reason to know that children were likely to trespass at the location of the condition.

b. The condition is one the possessor knew or reasonably should have known involved an unreasonable risk of serious bodily injury or death to such children.

c. The injured child did not discover the condition or realize the risk involved in the condition or in coming within the area made dangerous by it.

d. The utility to the possessor of maintaining the condition and the burden of eliminating the danger were slight as compared with the risk to the child involved.

e. The possessor failed to exercise reasonable care to eliminate the danger or otherwise protect the injured child.

(3) Position of peril. – A possessor may be subject to liability for physical injury or death to a trespasser if the possessor discovered the trespasser in a position of peril or helplessness on the property and failed to exercise ordinary care not to injure the trespasser.

§ 38B-4. Definitions.

The following definitions shall apply in this Chapter:

(1) Child trespasser. – A trespasser who is less than 14 years of age or who has the level of mental development found in a person less than 14 years of age.
(2) Possessor. – A person in lawful possession of land, including an owner, lessee, or other occupant, or a person acting on behalf of such a lawful possessor of land.
(3) Trespasser. – A person who enters on the property of another without permission and without an invitation, express or implied.

-Ann M. Anderson
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