

**Constitutional Challenges to § 6-5-551 of
Alabama's Medical Malpractice Statute:
The Plaintiff's Perspective**

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I. Introduction.

A plaintiff's attorney in a medical malpractice action against a nursing home faces several obstacles that must be overcome in the prosecution of the case on behalf of the client. These obstacles were established by certain "tort reform" legislation which placed significant limitations on the substantive and procedural rights of plaintiffs who pursue nursing home malpractice cases. This legislation consists of the Alabama Medical Liability Act, Ala. Code §§ 6-5-480 through 6-5-488 (1975) and the Alabama Medical Liability Act of 1987, Ala. Code §§ 6-5-543 through 6-5-552 (1975). Further, the "Alabama Medical Liability Act of 1996" amended §§ 6-5-548 and 6-5-549 regarding expert witnesses and jury instructions relating to the burden of proof. The most recent "tort reform" legislation amended § 6-5-551 of the Alabama Medical Liability Act to draw claims based upon breaches of the standard of care in the "hiring, training, supervision, retention and termination" of employees into the "medical malpractice web." These statutory provisions will be collectively referred to hereinafter as "the Act".

These legislative enactments have tilted the playing field in favor of defendant health care providers in the areas of procedure, evidence, venue, the statute of limitations and damages. As these enactments have severely limited plaintiffs' rights in the prosecution of these actions, various constitutional issues have arisen

concerning their validity. This paper, while mentioning challenges to various other provisions of the Act, will focus on current constitutional issues concerning § 6-5-551 of the Act.

II. Defendants' Use of § 6-5-551.

In order to fully understand the constitutional issues arising from the mandates of § 6-5-551, one must first look at the limitations it places on a plaintiff's rights to bring and prosecute a medical malpractice action. Alabama Code § 6-5-551 sets out several pleading and discovery guidelines which are unique to medical malpractice claims. This statutory provision states that the Act "shall govern the parameters of discovery and all aspects of the action." The defendants in nursing home cases typically use this provision for two purposes: 1) to limit plaintiffs' claims, and 2) as a shield from discovery requests.

First, defendants try to limit the scope of plaintiffs' claims based upon the portion of § 6-5-551 which provides that the complaint shall contain a "detailed specification and factual description of **each act and omission** alleged by the plaintiff to render the health care provider liable to plaintiff". (emphasis added). This issue is typically injected by the defendants via an A.R.Civ.P. 12(b)(6) motion to dismiss for failure to make specific allegations in the complaint. On its face, there is nothing constitutionally offending about this requirement. However, as discussed below, constitutional concerns arise when a plaintiff pleads specific acts and omissions, and defendants seek to exclude such acts on the basis that they are "*other act or omission*" evidence.

Second, defendants use § 6-5-551 to shield themselves from discovery of evidence of what they allege is “other acts and omissions”. This argument is based upon the statement in 6-5-551 which provides that a party “shall be prohibited from conducting discovery with regard to any other act or omission or from introducing in evidence at trial evidence of any other act or omission.” This type of evidence would be discoverable and admissible, subject to basic materiality and relevancy guidelines, in the same action against a defendant who is not a “health care provider.” The clear intent of this provision is to prevent the plaintiff from “prying” into matters other than those acts or omissions which have been *alleged in the complaint* to have caused the plaintiff’s harm. However, especially in the context of negligent hiring, training and supervision claims, defendants frequently seek to avoid discovery and introduction of evidence which is clearly relevant and material to the claims alleged by the plaintiff. These applications of § 6-5-551 give rise to constitutional concerns in medical malpractice cases.

III. Equal Protection.

Equal protection challenges arise from disparate treatment of “classes” of people. Any equal protection challenge should be examined in light of both the state and federal constitutional provisions. The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution guarantees individuals equal protection under our laws. Sections 1, 6, and 22 of Article I, Constitution of Alabama 1901, combine to guarantee the citizens of Alabama equal protection under the laws of our state. See *Moore v. Mobile Infirmary Association*, 592 So.2d 156 (Ala.1991); but See *Ex*

parte Melof, 735 So.2d 1172 (Ala. 1999)(for the proposition that those provisions do not provide equal protection guarantees).

The Alabama Constitution allows the legislature to classify citizens in order to affect some “public interest”, only insofar as the resultant burden on individual rights or liberties does not outweigh the benefits effected by the statute. Whether the classifications created under the challenged statute represent a reasonable exercise of legislative power depends on whether they are *reasonably related to the stated objective*, and on whether the benefit it seeks to bestow upon society outweighs the detriment to private rights occasioned by the statute. *Smith v. Schulte*, 671 So.2d 1334 (Ala.1995).

In the context of medical malpractice cases, § 6-5-551 creates separate classes of plaintiffs based on whether or not the claims of the plaintiff involve a “health care provider.” Further, the provision creates a favored class of tortfeasors – health care providers – and protects those who are the most egregious offenders by precluding the discovery and admission into evidence of “other acts and omissions.” Plaintiffs in medical malpractice actions are prohibited from discovering and introducing at trial evidence of “other acts or omissions”, whereas plaintiffs in similar actions involving non-medical personnel are free to discover and use this evidence. This limitation places the medical malpractice plaintiff at a distinct disadvantage in the development and establishment of the burden of proof in her case. This is complicated further by the fact that the medical malpractice plaintiff is held to the higher burden of proof of “substantial evidence.” If health care providers are worried about discovery “fishing

expeditions”, there are already numerous evidentiary guidelines to prevent this type of conduct.

The guarantee of equal protection prohibits “class legislation arbitrarily discriminatory against some and favoring others in like circumstances.” *Opinion of the Justices*, No.102, 41 So.2d 775, 777 (Ala.1949). In any equal protection analysis, the critical inquiry is whether there is some reasonable relation to the regulation and to the ends to be attained. See *Alabama State Federation of Labor v. McAdory*, 18 So.2d 810, 815 (1944). The “ends” sought by the “tort reformers” and stated by the Alabama Legislature are set out in § 6-5-540 of the Act as follows:

It is hereby declared by the Legislature of the State of Alabama that a crisis threatens the delivery of medical services to the people of Alabama and the health and safety of the citizens of this state are in jeopardy. In accordance with the previous declaration of the legislature contained in Act 513 of the Regular Session of the 1975 Alabama Legislature it is the declared intent of this legislature to insure that quality medical services continue to be available at reasonable costs to the citizens of the State of Alabama. This legislature finds and declares that the increasing threat of legal actions for alleged medical injury causes and contributes to an increase in health care costs and places a heavy burden upon those who can least afford such increases, and that the threat of such actions contributes to expensive medical procedures to be performed by physicians and other health care providers which otherwise would not be considered necessary, and that the spiraling costs and decreasing availability of essential medical services caused by the threat of such litigation constitutes a danger to the health and safety of the citizens of this state, and that this article should be given effect immediately to help control the spiraling cost of health care and to insure its continued availability. Additionally, the legislature finds that the increasing threat of legal actions for alleged medical injury has resulted in a limitation on the number of physicians providing specialized health care in this state. Because of the limited number of insurers offering professional liability coverage and because of the prejudice to the rights of the defendant health care provider through the interjection of evidence of insurance, the legislature finds that the interest of all citizens will best be served by prohibiting the introduction of evidence that a witness testifying at trial is insured by the same insurer as the defendant health care provider.

The stated purpose was driven by what the insurance industry and the medical community portrayed as an “insurance crisis”. These two special interest groups espoused a correlation between Alabama tort law and rising medical malpractice insurance premiums.

This alleged correlation has been proven to be a myth. The Alabama Supreme Court, in striking down statutory damage caps in the Act, found that any correlation was “at best, indirect and remote.” See *Smith v. Schulte*, 671 So.2d 1334 (Ala.1995); *Moore v. Mobile Infirmary Ass’n*, 592 So.2d 156 (Ala.1991). In the *Moore* case, the Court cites extensively to a United States General Accounting Office (GAO) report which found “no clear answer as to the cause of the increases in the cost of medical malpractice insurance.” The GAO report actually found that despite the fact that statutory reform had been in effect in some states for ten years, medical malpractice insurance costs almost doubled from 1983 to 1985. The GAO also noted that there was no consensus among the interest groups that any of the mid-70s reforms had a major effect. Apparently now there is a consensus, as a March 13, 2002 press release by the American Insurance Association proclaims that: ***“The insurance industry never promised that tort reform would achieve specific premium savings.”***

There is clearly no “reasonable relationship” to the stated ends sought by the Legislature in enacting the Act. Further, the “unstated” ends sought by the enactment – the favored protection of health care providers – is not a legitimate governmental interest, and as such deprives medical malpractice plaintiffs of the equal protection under the laws of this state and the U.S. Constitution.

IV. Trial by Jury.

In 1215 at Runnymede, King John sealed the Magna Carta, preserving two concepts of governance that protect individual liberty: *representative democracy and trial by jury*. The right to trial by jury is preserved in Article I, Section 11 of the Alabama Constitution (1901). The right that an individual, as a party to civil litigation, has to a trial by jury is protected by Section 11 from the legislative, executive and judicial branches of government. *Clark v. Container Corp. of America, Inc.*, 589 So.2d 184 (Ala.1991). The provisions of § 6-5-551 violate this individual right in regard to wrongful death claims and negligent hiring, training and supervision claims.

The Alabama Supreme Court has already found the statutory damage cap on wrongful death claims set out in § 6-5-547 to violate the right to trial by jury. The Court stated that “in imposing, regardless of the facts of each case, an absolute limitation on the amount of damages a jury may assess”, there was a violation of the right to trial by jury. Alabama’s Wrongful Death Statute is unique in that it allows only the recovery of punitive damages. The judicial interpretations of our Wrongful Death Statute have developed this principle:

While human life is incapable of translation into a compensatory measurement, the amount of an award of punitive damages may be measured by the ***gravity of the wrong done, the punishment called for by the act of the wrongdoer, and the need to deter similar wrongs in order to preserve human life.***

See *Estes Health Care Centers, Inc. v. Bannerman*, 411 So.2d 109 (Ala.1982). In order to assess damages, a jury in a wrongful death action in Alabama must assess a defendant’s culpability. This procedure includes a plaintiff’s right under Section 11 of

the Alabama Constitution to have the damages assessed by the fact finder. See *Smith*, 671 So.2d at 1343; *Henderson v. Alabama Power*, 627 So.2d 878 (Ala.1993).

Section 6-5-551 takes away the jury's ability to sift through all the relevant evidence in the process of determining the damages to award in a wrongful death action. This provision precludes any evidence of defendant's knowledge of and failure to correct its conduct. Further, the discovery and evidentiary limitations of § 6-5-551 prevent a medical malpractice plaintiff from establishing the full amount of damages to which she is entitled. This, in turn, results in a "de facto" cap being on damages in medical malpractice actions which is a violation of Section 11 of the Alabama Constitution.

The pursuit of claims based upon breaches of the standard of care in the "hiring, training, supervision, retention and termination" of employees has drawn considerable attention in recent years. See *Ex parte McCollough*, 747 So.2d 887 (Ala.1999); *Ex parte Ridgeview*, 786 So.2d 1112 (Ala. 2000); *Ex parte Coosa Valley Health Care*, 789 So.2d 208 (Ala.2000). As previously mentioned, the most recent amendment to § 6-5-551 makes it clear that a claim against a health care provider alleging that it breached the standard of care in hiring, training, supervising, retaining, or terminating its employees is governed by the Act. *Ex parte Ridgeview* at 1116. The Ridgeview case went on to state that in an action against a health care provider based on the negligent hiring, training and supervision of employees, the plaintiff is entitled only to discovery concerning those acts or omissions "**detailed specifically and factually described in the complaint**" and "**alleged by the plaintiff to render the health care provider liable to the plaintiff.**"

In the writer's opinion, this statement, along with the mandates of the amended § 6-5-551, actually open the door for the plaintiff to discover and introduce into evidence any acts or omissions he specifically details and sets out in the complaint. For example, if plaintiff's counsel may allege that his client became dehydrated and malnourished while a resident at defendant nursing home because there was insufficient staff to feed and hydrate the client. In addition, plaintiff's counsel sets out specific details from Department of Public Health Surveys conducted at the defendant nursing home showing that the defendant nursing home was cited on three prior occasions for failure to ensure that residents received proper food and hydration. Further, plaintiff's counsel alleges that defendant nursing home was negligent in the training and supervision of its employees regarding the provision of food and water to residents *following* the citations by the surveyors. The alleged acts or omissions, alleged in the negligent hiring, training and supervision claim, become the actions or omissions of the facility following the surveys. This conduct becomes "THE" act complained of and is not an "OTHER" act or omission.

The relevant inquiry under Section 11 analysis is not whether the statute has entirely abrogated the right to empanel a jury; the relevant inquiry is whether the function of the jury has been impaired. *Moore* at 163. If the acts set out by the plaintiff are excluded, not only is the plaintiff prohibited from proving his negligent hiring, training and supervision claims, but the jury's role is completely abrogated. This exclusion prevents the jury from hearing evidence of "THE" acts or omissions which plaintiff must rely upon to prove his claim, and it therefore violates the plaintiff's right to trial by jury.

V. Conclusion.

The practical application of § 6-5-551 is to prevent the medical malpractice plaintiff from discovering and submitting evidence of “other acts and omission” of the defendant health provider in medical malpractice actions. While the provision of affordable, quality healthcare to the citizens of Alabama may be a legitimate governmental purpose; there is no rational relationship between the mandates of sec. 6-5-551 and this purpose. Further, in limiting the access of information available in medical malpractice actions, this section takes away the medical malpractice plaintiffs fundamental right to trial by jury by removing factual issues which are necessary to prove plaintiff’s claims from the province of the jury. These constitutional challenges are viable and should be pursued by plaintiffs’ attorneys in any actions in which defendant health care providers seek to invoke the protection of the Alabama Medical Liability Act.