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DAILY REPORT

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DAILY REPORT BUSINESSMATTERS

A housing recovery would give Fed chief Ben Bernanke a freer rein to ultimately raise the interest rate for overnight loans from near zero. **Page 6.**

6 A DIFFERENT STIMULUS
Ann Woolner: There is demand for lawyers willing to stand up for Moody's and Standard & Poor's.

ANTI-LYING LAW
Read about the 11th Circuit's ruling on a Florida law at DailyReportOnline.com.

YOUNG NOMINEE
Read about Obama's choice for the 9th Circuit at DailyReportOnline.com.

1B OPINIONS
Read summaries of recent opinions from Georgia's high court and Court of Appeals.

ewsreel

ıhmias chides bar, ıwyer for sanction

Georgia Supreme Court tice David E. Nahmias has ped a former Greenberg urig associate and the State of Georgia for recommend- that the associate receive a t sanction after he admitted "half-million-dollar fraud.")n Monday, the high court cted a voluntary petition filed ex-Greenberg bankruptcy l foreclosure associate hael J.C. Shaw. Shaw had uested a six-to-12-months oactive suspension after nitting that he performed examinations, skip traces other investigative services er two fake identities, billing firm for them, and collect- approximately $493,000 ween 2003 and 2009.

Shaw "is fortunate not to be arcerated in a state or fed- prison," wrote Nahmias in a currence, joined by Presid- Justice George Carley.

Nahmias said he found it ubling" that Shaw and, "even se, the State Bar apparently eve that such a short 'break' ı practicing law is appropri- discipline for his extended, nsive, and serious miscon- t, notwithstanding the fac- he presents in mitigation."

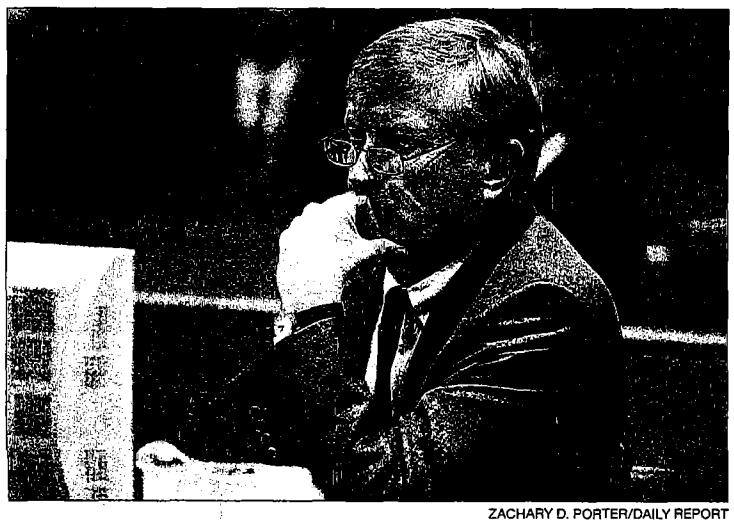
hose mitigating factors, ording to the court record, ude difficulties in Shaw's sonal life and his restitution 526,922 to his former firm.

haw's attorney, Johannes Lingma, said his client is norseful," adding that his cli- nas not been charged with me and plans to work with Bar to resolve the issue.

aula J. Frederick, the Bar's eral counsel, said, "I guess ask for an increased level scipline."

Greenberg spokeswoman, e-mail, said that when the earned of Shaw's actions, it inated Shaw and reported ctions to the bar.

—Janet L. Conley



ZACHARY D. PORTER/DAILY REPORT

Wade Copeland, who won a decision for ER doctors, said the high court's stance is "encouraging" for the defense of damage caps in med-mal cases.

Court upholds ER standard

CARLEY LEADS 4-3 majority; he also writes for 5-2 court backing offer-of-settlement rule

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THE SUPREME COURT of Georgia on Monday dealt a two-pronged blow to plaintiff's lawyers, rejecting challenges to two parts of the 2005 tort reform package.

The court split 4-3 to uphold a rule that demanded evidence of "gross negligence" on the part of emergency room doctors in order to sustain a medical malpractice claim. The court also divided 5-2 to uphold a fee shifting rule that is supposed to deter the filing of

*See **ER**, page **4***

Court rejects bid to narrow scope of sex offender list

HUNSTEIN DISSENTS, says law that includes non-sexual offenders in sex registry is 'constitutionally over-inclusive'

GREG LAND | gland@alm.com

THE GEORGIA Supreme Court on Monday refused to narrow the scope of Georgia's sex offender registry, turning aside an effort by a man convicted of robbing a 17-year-old girl to keep from having to register as a sex offender even though his crime did not involve any sexual misconduct.

In a 5-2 ruling authored by Justice Harold D. Melton, the court said that having to register is not a punitive requirement but serves a valid regulatory goal designed to inform the public "for purposes of protecting children from those who would harm them."

In a dissent joined by Justice Robert Benham, Chief Justice Carol W. Hunstein wrote that the law defining a criminal offense against a minor is "constitutionally over-inclusive" and that existing laws against kidnapping and false imprisonment are sufficient.

The case involves an appeal by Jake Rainer, who was 18

*See **List**, page **10***

▸ LAWYER DISCIPLINE

The Supreme Court of Georgia on Monday issued discipline decisions regarding the following lawyers:

- **Michael J. C. Shaw** petition for voluntary discipline rejected
- **Derrick A. Pope** voluntary petition rejected
- **Craig Steven Mathis** reprimanded
- **Ike A. Hudson** petition for reinstatement accepted
- **Thomas P. Burke** disbarred

—**See page 9** to see the full decisions of the Supreme Court.

KING & SPALDING IN 2009

Revenue
$677.3 million
(up 3.9 percent from $652 million in 2008)

Revenue per lawyer
$851,000
(up 5.1 percent from $810,000 in 2008)

Profits per equity partner
$1.4 million
(up 16.8 percent from $1.2 million in 2008)

K&S attributes revenue, profit jump to more demand

ROBERT HAYS SAID FIRM increased revenue, profit and revenue per lawyer, despite recession

MEREDITH HOBBS | mhobbs@alm.com

UNLIKE MOST Am Law 100 firms, King & Spalding made a lot of money last year.

King & Spalding reported a 4 percent increase in revenue, a 5 percent increase in revenue per lawyer and a jump in profit per partner of a whopping 17 percent—to $1.4 million.

The firm's chairman, Robert D. Hays,

*See **King & Spalding**, page **8***

Court upholds ER standard and offer of settlement rule

ER, from page 1

frivolous suits and encourage settlements.

The state high court did not issue a ruling Monday in the most closely watched case over the legislation—a challenge to the caps on noneconomic damages in medical malpractice cases. That case is expected to be decided by the end of this month.

There is some overlap between the arguments raised by plaintiffs challenging the provisions upheld Monday and the arguments made against the damages gap. Still, lawyers on both sides of the medical-malpractice debate were hesitant to predict what Monday's decisions mean for the caps' fate.

"Certainly those arguments that are the same I feel less confident about," said Bondurant, Mixson & Elmore partner Michael B. Terry, who made Supreme Court arguments for the plaintiffs in their challenges to both the ER rule and the damages caps. But he said the analysis is different in each case. "There's nothing in this opinion that forecloses us prevailing on those challenges," he said.

Carlock, Copeland & Stair partner Wade K. Copeland, who along with Hall Booth Smith & Slover partner Roger Sumrall made the winning argument on the ER standards case and whose firm is on the defense side of the caps matter, also was cautious on what the decision in his case means for the caps. "They argued a lot of the same issues, so I think it's encouraging for the defense," he said, "but I certainly don't want to speculate on it."

The Georgia Chamber of Commerce released a statement by its president and CEO, George Israel, praising the court's work in both cases. And the Medical Association of Georgia's general counsel, Donald J. Palmisano Jr., called both the decision on the ER rule and the caps case "vitally important."

One thing that's clear—and perhaps portends badly for those fighting the damages caps—is that a majority of the justices on the state's highest court now have shown at least some disinclination to second guess the Legislature on the rules governing tort cases.

"Anyone who thinks the court is not deferring to the Legislature has their answer," said Atlanta lawyer J. Marcus "Marc" Howard, who co-chairs the amicus committee of the Georgia Trial Lawyers Association. As for what the decision on caps will be, Howard said, "we'll just have to wait and see."

Majority: Promoting affordable insurance is legitimate

The ER standard case was brought by Carol Gliemmo, who suffered a stroke after a 2007 trip to Columbus' St. Francis Hospital. ER doctor Mark D. Cousineau allegedly misdiagnosed her with a headache caused by stress and high blood pressure and did not perform a CT scan that would have detected a brain aneurysm. Gliemmo's attorneys argued these alleged mistakes constituted gross negligence but also challenged the constitutionality of the ER statute on a number of grounds.

Muscogee County State Court Judge Andrew Prather II rejected the challenge but allowed an appeal to the high court, which granted the interlocutory application. The court directed the parties to focus on the question of whether the statute violated the provision of the state Constitution that prohibits the enactment of a "special law" when there's already an existing "general law."

Presiding Justice George H. Carley wrote for the majority that the ER rule isn't a "special law" because it doesn't affect only a limited activity in a specific industry during a limited time frame. Instead, he said, the rule "operates uniformly upon all health care liability claims arising from emergency medical care."

The court also rejected the plaintiffs' equal protection challenge to the ER rule.

Carley said the rule did not deprive the plaintiffs of a fundamental right, such as a right to trial by jury. Nor does the rule harm a suspect class, such as a racial minority. So, Carley concluded, the law needed only to bear a reasonable relationship to a legitimate state purpose.

"Promoting affordable liability insurance for health care providers and hospitals, and thereby promoting the availability of quality health care services, are certainly legitimate legislative purposes," wrote Carley. "Furthermore, it is entirely logical to assume that emergency medical care provided in hospital emergency rooms is different from medical care provided in other settings, and that establishing a standard of care and a burden of proof that reduces the potential liability of the providers of such care will help achieve those legitimate legislative goals."

The rule "may be imperfect," he said, but the plaintiffs' argument essentially comes down to the assertion that the rule is bad policy, an argument he said should be directed to the Legislature and the governor. Carley was joined by Justices P. Harris Hines, Harold D. Melton and David E. Nahmias.

Justice Robert Benham, joined by Chief Justice Carol W. Hunstein and Justice Hugh P. Thompson, wrote in dissent that it was not sufficiently reasonable to treat ER doctors differently.

"The General Assembly found that all health-care providers, not merely those who treat patients after they arrive in hospital emergency rooms or obstetrical units, are incurring difficulty in locating affordable liability insurance," wrote Benham. "Similarly, all health-care providers of emergency medical care, regardless of the location at which such care is provided, are incurring difficulty in locating affordable liability insurance.

"The General Assembly's effort to assist health-care providers is arbitrary in that an emergency medical technician treating a patient who suffered a heart attack in an ambulance on the way to the emergency room does not receive the benefits of the statute simply because the patient has not yet arrived at the emergency room," he added. "The classification is unreasonable in that a physician who treats a patient for an emergency medical condition in an emergency room receives the statute's additional protection while a physician who treats the same condition in his office or on a house call does not."

Copeland, who won the case for the ER doctor, said his side had been confident about the outcome based on the questions posed at oral argument. "We're faced with a tremendous shortage of doctors over the next few years," added Copeland, "and we need to be doing whatever we can to encourage people to go into medicine."

Terry, the plaintiffs' appellate lawyer, said Monday's decision ignored several of the court's own precedents. He said his clients are considering filing a motion for reconsid-

eration.

The ER case decided Monday was *Gliemmo v. Cousineau*, No. S09A1807.

Interesting but 'irrelevant' debate?

Monday's other tort reform decision addressed the provision known as offer of judgment, also called offer of settlement. Under that rule, a party can be ordered to pay the other side's attorney fees if it rejects a settlement offer but doesn't fare much better than the offer when the case is decided in court.

The challenge to the offer of judgment provision came from the plaintiffs in a defamation case. Duluth beauty salon owner Cheryl Baptiste sued former Atlanta Falcon Chuck Smith and WQXI 790 AM, alleging Smith made negative comments about the salon during a WQXI radio broadcast.

Baptiste did not respond to an official offer of settlement of $5,000 and then lost the case on summary judgment, prompting Smith and WQXI to seek attorney fees. But Fulton Superior Court Judge Michael D. Johnson denied the motion for fees on the ground that the offer of judgment statute is unconstitutional because it hinders access to courts.

The high court's treatment of the case showed not only that the court was split over the state Constitution's treatment of access to courts but also that the court's newest justice, Nahmias, thinks that the value of court precedent is diminished in the context of constitutional interpretation.

Writing again for the majority, Carley wrote that the part of the state Constitution that says "[n]o person shall be deprived of the right to prosecute or defend, either in person or by an attorney, that person's own cause in any of the courts of this state," was not intended to provide a right of access to the courts generally but to provide only a right of choice between self-representation and representation by a lawyer. As he is want to do, Carley cited the importance of stare decisis, saying to interpret the constitutional provision differently would ignore a key 1984 decision of the court.

Hines, Melton, Thompson joined Carley, with Nahmias agreeing to most of his opinion.

Hunstein and Benham again dissented, with Hunstein writing for the pair. She said that the majority's interpretation of the constitutional provision relied on an account of the 1877 state constitutional convention, quoted in the 1984 court decision, that was unofficial and inaccurate. Noting that she had borrowed an original edition of the account from Georgia State University's law library, Hunstein derided the book written by Samuel W. Small as the account of a journalist reporting for the *Atlanta Constitution*.

"If all we require now is that a source look accurate and be cited by authorities other than courts," wrote Hunstein, "then we might as well just start relying on Wikipedia entries."

Hunstein concluded that although the question of whether the offer of judgment provision violated the right to access to the courts is a close question, the existence of such a right is not.

In a special concurrence, Nahmias said he found the debate between Carley and Hunstein about Small's account of the constitutional convention "interesting, but largely irrelevant." Quoting Chief Justice John Roberts Jr.'s recent concurring opinion in the much-discussed U.S. Supreme Court campaign finance decision, Nahmias said he didn't join the section of Carley's opinion discussing stare decisis because he thought that principle, while always important, is less compelling when the issue is one of constitutional interpretation.

"That is because it is much harder for the democratic process to correct or alter our interpretation of the Constitution than our interpretation of a statute or regulation," wrote Nahmias, whom Roberts once successfully recruited to Hogan & Hartson in Washington.

Nonetheless, Nahmias said prior court decisions were right to find that the constitutional provision at issue was meant to protect the right to self-representation. Arguments that the Legislature has limited court access in an arbitrary or discriminatory way should be raised as due process or equal protection challenges, said Nahmias.

"[Th]e entire existence of our court system and all of the constitutional provisions related thereto are premised on the understanding that citizens will have access to take their cases to court," wrote Nahmias. "But that hardly supports the claim that the 'right to the courts' provision provides an express or 'unfettered' right of access to the courts, as appellees argue. Nor does it mean, as the dissent would have it, that this Court has license to roam through and approve or disapprove, using entirely undefined standards, the myriad of restrictions and limitations that the legislature and our case law have placed upon who can go to court, when they can go to court, what it costs to file a case or pleadings, what causes of action may be brought, what evidence is allowed or prohibited in support of those claims, the standards and burden of proof for such claims, etc."

Mark G. Trigg of the Atlanta office of Greenberg Traurig, who made the winning argument in defense of the fee-shifting provision, said he thought the decision would spell increased usage of the offer of judgment tool. "I think once word spreads that this now has been upheld by the Supreme Court, I would expect it to be used much more frequently by both plaintiffs and defendants," said Trigg. He also said Nahmias' opinion should be "required reading" for all constitutional law students.

Atlanta lawyer Regina S. Molden, who had challenged the provision along with law partner Oni D. Holley, said Hunstein and Benham got the case right. "Obviously we challenged the statute because we felt strongly about our position," said Molden.

The offer-of-judgment case was *Smith v. Baptiste*, No. S09A1543.