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DAILY REPORT
BUSINESS MATTERS

Fed chief Ben Bernanke, at a weekend symposium, warned political leaders not to go light on financial reforms in the presence of recovery. **Page 6.**

REPORT

A SMART READ FOR SMART READERS

Newsreel

Justice's ethics office urges investigation of detainee abuse by CIA

• The U.S. Justice Department's ethics office has recommended that prosecutors investigate several cases of alleged abuse of suspected terrorists by the Central Intelligence Agency, a government official said.

The department's Office of Professional Responsibility recommended that Attorney General Eric Holder override a Bush administration decision to close the cases, said the official who spoke on condition of anonymity. If Holder agrees, it could subject CIA employees and outside contractors to prosecution for interrogation techniques of detainees after the Sept. 11, 2001, attacks.

President Barack Obama will leave it to the Justice Department to decide whether to pursue prosecutions related to abuse of detainees. White House spokesman Bill Burton said.

Obama "thinks we should be looking forward, not backward," Burton said at a briefing. "The decisions on who should be investigated and who is prosecuted" will be up to Holder. "The decision is in his hands."

Burton confirmed a report in the *Washington Post* that the president approved creating a special team of interrogators to question so-called high-value terror suspects.

Also, the Justice Department planned to release Monday thousands of pages of details on prisoner abuse that were included in a 2004 report by the CIA's inspector general. The report is a less-censored version of a previously released account of the interrogations.

The *New York Times* earlier reported that the ethics unit had recommended reopening almost a dozen prisoner abuse cases.

—Bloomberg News



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10 GOLFS GREATS John Carroll talks to golf writer Hogan and Bobby Jones.

8 BACK IN BUSINESS Lawyer involved in DOJ political hiring investigation gets D.C. law license.

SENATORS CLEARED For more on Ga. senators who resolved their taxes, visit DailyReportOnline.com.

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

Two cases address limits of doctor liability

AN ISSUE OF IMMUNITY for state doctors will have to wait a little longer for Supreme Court review



ZACHARY D. PORTER/DAILY REPORT
Annarita Busbee said she's surprised the couple won't appeal the ruling in favor of her client, the doctor.

BY ALYSSON M. PALMER

DESPITE OFFERS of help from plaintiffs' lawyers, a south Georgia couple has decided not to ask the state Supreme Court to review a recent lower court ruling that granted immunity from a wrongful death suit to a doctor at the Medical College of Georgia in Augusta.

The plaintiffs' bar and defense lawyers had noticed the July 8 decision by a panel of the Court of Appeals of Georgia because it said the doctor was shielded by governmental immunity, in part because the patient was covered by Medicaid.

A 1997 ruling by the state Supreme Court had denied immunity under the Georgia Tort Claims Act to a state-employed doctor. But before last month's ruling, the state appellate courts had not

See *Immunity*, page 4

LAWYERS CRAFT backup challenge to ER statute for high court

BY GREG LAND

A FULTON COUNTY JUDGE'S order dismissing a medical malpractice suit last week will be appealed to the state Supreme Court, but the plaintiff's lawyers are hoping that a case already before the justices will accomplish what they asked the trial court to do: declare Georgia's "emergency room statute" unconstitutional.

"Procedurally, we're positioned exactly where we wanted to be," said Watkins, Loure-Roll & Chance partner Stephen R. Chance on the heels of Fulton County Superior Court Judge Craig L. Schwall's Aug. 18 ruling, which upheld the portion of Georgia's 2005 tort reform package that bars malpractice suits against emergency medical career providers unless the plaintiff can prove "gross negligence."

Schwall's three-page order turning aside the constitutional challenges to the statute noted that the lawyers for the executor of the estate of Winfred Burt, 70, who died of an undiagnosed hernia after being referred to the emergency room at Emory Eastside Medical Center in 2005, have "not produced evidence that the Defendants were grossly negligent, as required" by the law.

That omission, said Chance, is a strategic move designed to essentially line up another shot for

See *ER*, page 5



FILE PHOTO
Fulton Superior Court Judge Craig Schwall upheld a key part of the 2005 tort reform law.

Gitmo detainee wins on habeas

JUDGE RULES U.S. can't hold Sutherland client, but hard part is getting him released

BY MEREDITH HOBBS

A FEDERAL JUDGE HAS ruled that the government has no basis to hold Muhammad al-Adahi, a Guantanamo detainee represented by Atlanta lawyers.

In her 42-page declassified opinion, released Friday, U.S. District Court Judge Gladys Kessler shed rare light on the evidence used to hold al-Adahi at the U.S. naval base in Cuba as a suspected al-Qaida fighter since late 2001.

It's the first habeas corpus victory for the Sutherland lawyers who brought suit for al-Adahi in 2005, along with four other Guantanamo detainees.

John A. Chandler, formerly of Sutherland and now at King & Spalding, represented al-Adahi at his federal hearing in late June, while Kristen B. Wilhelm, a partner at Sutherland, questioned al-Adahi live from Guantanamo via a videolink.

"Lawyers are the only ones who have interacted with these men," said Wilhelm of her client's live video appearance at his hearing. "This whole experience has been outside the public eye. We wanted him to be able to testify to the public at large."

The government mistakenly failed to tape al-Adahi's video testimony, but a transcript has

See *Detainee*, page 9

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Lawyers craft backup challenge to ER statute for high court

ER, from page 1

A Supreme Court challenge. A case raising similar objections arising from a Columbus suit is scheduled for oral arguments in October; the Fulton case is set to serve as a back-up challenge in case the justices don't rule on the constitutionality of the law.

But in the Columbus case, involving a woman who suffered a stroke when an ER doctor allegedly misdiagnosed her with a headache and did not perform a CT scan that would have detected a brain aneurysm, attorneys for plaintiffs Carol and Robert Gliemmo argued gross negligence, as well as constitutional questions.

If the high court doesn't address the constitutional questions when it decides the Gliemmo case, said Chance, he hopes the Burt case will force the issue.

"This way, the Supreme Court can't sidestep the case," said Chance, who represents Burt executor Judith Watkins along with



ZACHARY D. PORTER/DAILY REPORT
Plaintiff's attorney Stephen Chance says the emergency room statute is unconstitutional.

firm partners Lance D. Lourie and Robert D. Roll.

The plaintiff's attorneys have attacked the statute as violating the Georgia Constitution's ban on "special laws" because it carves out a subset of patients who are exposed to a lower standard of care than individuals who are not treated in ER rooms.

They also argue that the law violates constitutional guarantees of equal protection.

"The 'gross negligence' standard applied to emergency room care treats similarly situated people in radically dissimilar ways, and creates a new and artificial distinction between plaintiffs in emergency medical malpractice cases and all other plaintiffs who have suffered injury as a result of medical negligence," says one of the plaintiff's supporting briefs in the case.

That distinction violates the "rational basis" test that must be applied for laws to pass constitutional muster, the plaintiffs say; that test requires that laws be "reasonable and not arbitrary, and rest upon some ground of difference having a fair and rational relationship to the legislation's objective."

"In order to find a health care provider working in the emergency room under the new 'gross negligence' standard ... a jury must essentially find that the provider abandoned all education, experience and skill and then failed to comply with the standard of care applicable to an inattentive lay person," says the filing. "This discriminates against people who receive their care through emergency departments, and there is no rational basis for doing so."

The third branch of attack argues the law is unconstitutionally vague, according to

plaintiff's filings, as it only requires "slight diligence" of emergency medical providers, as opposed to the "reasonable care and skill" required of doctors in other circumstances. Georgia law describes "slight diligence" as "that degree of care which every man of common sense, however inattentive he may be, exercises under the same or similar circumstances ... The absence of such care is termed gross negligence." O.C.G.A. 51-1-14.

The ER statute provides no guidance to doctors, judges or juries as to what actually constitutes "gross negligence," the filing says.

The statute is "unconstitutionally vague if persons of common intelligence must guess whether medical professionals with that degree of care that every man of common sense, however inattentive he may be exercises under the same or similar circumstances," it says. "Plaintiffs submit that persons of common intelligence, i.e., jurors, will be thoroughly confused when charged with the task of weighing competing expert testimony about what an inattentive common man would have done under the circumstances. This is absurd."

Chance points to his own experience to portray what he sees as the inherent unfairness of the law. A father of three, he said his wife was admitted directly to a hospital room to deliver their first child, but her doctor instructed them to present to an ER for the next two.

There were never any complications and his wife was shortly transported to a maternity ward, he said, "but it's constitutionally unfair for people to have different rights depending on which door of the hospital they walk into."

Not at all, counters Huff, Powell & Bailey partner R. Page Powell Jr., one of eight attorneys defending the four doctors and other corporate entities named as defendants in the case.

"Their point is that the plaintiff was referred to the emergency room. What if the referring physician had sent them directly to the hospital's front desk, and everything else was the same?"

It's a valid argument, said Powell, "but the flip side is that the Legislature recognized that emergency medicine is different from any other type. [ER staff] don't know the patient, they don't have the patients' records and background. And they're working in an extremely high-volume, high-pressure atmosphere: They may have a heart attack in one room, a gunshot in the other. ... It's like practicing medicine without a net."

Given the current economic climate, he said, ER operations are under even more pressure as uninsured patients show up for primary care at emergency rooms.

"Before tort reform," said Powell, "it was very frequent that patients would have had outcomes and sue, not because the physician was practicing bad medicine, but because he's practicing under very difficult circumstances."

When they were crafting the tort reform package, said Powell, lawmakers were trying to ensure that emergency room doctors didn't decide to seek another specialty or leave Georgia altogether.

"If's our position that the Legislature, not the courts, gets to make these judgments," said Powell.

The case is *Watkins v. Aneguni*, No. 2008-CV-160682. ☎

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