

Georgia Tort Reform

Introduction

In recent years, Georgia has earned the unenviable designation of a “judicial hellhole.” That label resulted from the combination of appellate court decisions and a dramatic rise in nuclear verdicts. Those dynamics have made assessing risk and defending personal injury claims increasingly difficult.

Governor Kemp made “tort reform” a centerpiece of his 2025 legislative package to rebalance the scales. He introduced two bills: SB 68, which amends various existing statutes and creates some new statutes that govern the litigation and trial of personal injury claims, and SB 69, which deals with litigation financing agreements.

Our law firm’s governmental relations team, Freeman Mathis Decisions, played an important role in advocating on behalf of our clients for passage of this much needed reform legislation. Working with other advocacy groups, the Governor’s office and legislative leadership, Freeman Mathis Decisions, led by Earl Erhart and Trey Paris, worked tirelessly to insure that balance was restored to administration of fair justice for all litigants.

The final version of SB 68 passed the House on March 20, 2025, and the Senate on March 21, 2025. The final version of SB 69 passed the Senate on March 28, 2025, and the House on March 31, 2025. Governor Kemp is expected to sign both bills very soon.

SB 68 contains nine sections. Section 1 restricts using “anchoring” to establish a plaintiff’s damages for pain and suffering. Section 2 alters the procedural rules when a defendant files a Rule 12 motion, eliminating the need to simultaneously file an answer and extending the automatic stay of discovery. Section 3 establishes a shorter period when a plaintiff may voluntarily dismiss their lawsuit without the court’s permission or defendant’s consent. Section 4 bars the double recovery of attorney fees and prohibits plaintiffs from introducing their contingency fee agreement at trial to prove the reasonableness of those fees. Section 5 allows a defendant to introduce evidence that a plaintiff was not wearing a seatbelt during a motor vehicle accident. Section 6 creates new detailed standards governing negligent security cases. Section 7 permits defendants to counter a plaintiff’s claim to “phantom damages,” allowing them to show the jury the difference between the “list price” for medical services and the amount actually paid. Section 8 requires the issues of liability and damages to be bifurcated in most trials. Section 9 outlines the effective dates for each new provision. Each section is discussed in more detail below.

SB 69, also known as the Georgia Courts Access and Consumer Protection Act, contains two substantive sections. Section 2 adds a series of new statutes that regulate litigation financing companies. Section 3 allows discovery of litigation financing agreements. These provisions are likewise discussed in more detail below.

Senate Bill 68

Section 1 – Anchoring

Anchoring is a cognitive bias by which the first piece of information a person hears on a topic creates a reference point – the anchor – and causes a person’s subsequent decisions on that topic to be made relative to that reference point, even if that information is irrelevant or incorrect. Anchoring artificially drives up the value of a claim and prejudices the defendant, especially if it is unsubstantiated. Currently, anchoring may be done at any point during a case.

SB 68 revises the Georgia statute governing a plaintiff’s ability to argue pain and suffering damages to a jury. It prohibits anchoring with respect to the worth or monetary value of non-economic damages before closing arguments. However, an attorney may ask prospective jurors during voir dire whether they could return a verdict that does not award any damages or a verdict that awards damages exceeding some unspecified amount.

Section 2 – Motions to Dismiss and Stay of Discovery

Unlike Rule 12 of the federal rules, Georgia law currently requires a defendant to file an answer even if it files a Rule 12 motion to dismiss. The new statute removes that requirement and, like the federal rule, only requires an answer after the denial of the motion to dismiss.

SB 68 also changes the parameters of the automatic discovery stay triggered by a motion to dismiss. Currently, that stay remains in place for 90 days or until the court rules on the motion. But it automatically lifts after 90 days if the court has not yet ruled. The revised statute removes the 90-day limit. The stay remains in place until the court rules on the motion or terminates the stay.

The revised statute will save defendants time and expense by eliminating the need to prepare an answer if filing a motion to dismiss and ensuring that discovery will not begin until the motion is decided.

Section 3 – Voluntary Dismissals

Plaintiffs too often misused Georgia’s voluntary dismissal rules. The renewal statute (which allows a plaintiff to refile a case within six months of a voluntary dismissal without prejudice even if the statute of limitations has expired) provided them an escape hatch. Faced with a deadline they have not met, a dispositive motion they cannot defeat because they have failed to produce evidence sufficient to satisfy the elements of their claim, or trial, they could voluntarily—and unilaterally—dismiss up to the time the first witness was sworn at trial. They could then refile the case within six months and begin the process anew. The current framework drove up the cost of defending cases by giving plaintiffs a second bite at the apple. The revised rule prohibits that gamesmanship.

Section 3 – Voluntary Dismissals *Continued*

The new law limits a plaintiff's ability to voluntarily dismiss a case without the court's permission and the defendant's consent. Instead of being able to do so at any time before the first witness is sworn at trial, the law now imposes a deadline of 60 days after the defendant files an answer.

Section 4 – Double Recovery of Attorney Fees

SB 68 adds a new statute (O.C.G.A. § 9-15-16) enacted in the wake of the Supreme Court of Georgia's decision in *Junior v. Graham*, 313 Ga. 420 (2022), which allows a plaintiff to recover attorney fees under both O.C.G.A. § 13-6-11 and O.C.G.A. § 9-11-68. The statute precludes a party from recovering the same attorney fees more than once in the same case unless one of the authorizing statutes specifically allows the recovery of duplicate attorney fees. It also bars the admission of a contingency fee agreement into evidence at trial to prove the reasonableness of attorney fees.

The prohibition against the double-recovery of attorney fees is a commonsense fix to existing law. But the new rule barring the admission of contingency fee agreements to show the reasonableness of attorney fees may have a more significant impact. Plaintiffs' attorneys routinely introduced their contingency fee agreements into evidence to support their fee request under O.C.G.A. § 13-6-11 and other similar statutes. They would then argue that the fee (often 40% of the total recovery) was reasonable regardless of their time working on the case. Especially in cases involving high verdicts, this led to fee awards that were disproportionate to the work attorneys did on the case. Eliminating the fee agreement from the equation should, on average, reduce the value of attorney fee awards.

Section 5 – Evidence of Seat Belt Non-Use

Evidence that a plaintiff was not wearing a seatbelt is relevant to their relative fault in causing or contributing to their injuries incurred in a motor vehicle accident. But since 1988, Georgia law has barred that evidence from trial. SB 68 changes that. Now, evidence that a plaintiff was not belted is admissible, subject to Rule 403's balancing test. Going forward, defendants can use this evidence to build a case that at least some fault should be apportioned to the plaintiff, reducing the amount of any judgment in their favor.

Section 6 – Negligent Security Claims

SB 68's most sweeping changes involve Georgia's negligent security law. The revisions come after the Supreme Court's decision in *Georgia CVS Pharmacy, LLC v. Carmichael*, 316 Ga. 718 (2023), which adopted a "totality of the circumstances" standard for negligent security claims. The new law prescribes more concrete standards.

Liability for injuries to invitees and licensees will still be predicated on the crime being reasonably foreseeable, but the standard for proving reasonable foreseeability is higher than the totality of the circumstances. Beyond that, the statute provides different standards for invitees and licensees.

An invitee must prove five elements:

1. The crime committed against the plaintiff by a third person was reasonably foreseeable in one of the following two ways:
 - a. Because the owner/occupier had particularized warning of imminent criminal conduct by the third person; or
 - b. Because the owner/occupier had constructive knowledge that the third person was reasonably likely to commit the crime based on:
 - i. Evidence of prior substantially similar crimes on the premises of which the owner/occupier had actual knowledge;
 - ii. Evidence of prior substantially similar crimes on adjoining property, or otherwise occurring within 500 yards of the premises, of which the owner/occupier had actual knowledge; or
 - iii. Evidence of prior substantially similar crimes committed by the third person of which the owner/occupier had actual knowledge, but only if the owner/occupier had actual or constructive knowledge, based on clear and convincing evidence, that the third person was or would be on the premises;
2. The plaintiff's injury was a reasonably foreseeable consequence of the crime;
3. The crime was a reasonably foreseeable consequence of the third person's exploitation of a specific physical condition of the premises that was known to the owner/occupier and that created a reasonably foreseeable risk of crime on the premises that was substantially greater than the general risk of crime in the vicinity of the premises;
4. The owner/occupier failed to exercise ordinary care to remedy or mitigate the specific and known physical condition of the premises and to otherwise keep the premises safe from third-person crime; and
5. The failure of the owner/occupier to exercise such ordinary care was a proximate cause of the plaintiff's injuries.

Section 6 – Negligent Security Claims *Continued*

A licensee must prove the following:

1. The crime committed against the plaintiff by a third person was reasonably foreseeable because the owner/occupier had particularized warning of imminent criminal conduct by the third person.
2. The plaintiff's injury was a reasonably foreseeable consequence of the crime;
3. The crime was a reasonably foreseeable consequence of the third person's exploitation of a specific physical condition of the premises that was known to the owner/occupier and that created a reasonably foreseeable risk of crime on the premises that was substantially greater than the general risk of crime in the vicinity of the premises;
4. The owner/occupier willfully and wantonly failed to exercise any care to remedy or mitigate the specific and known physical condition of the premises and to otherwise keep the premises safe from third-person crime; and
5. The failure of the owner/occupier to exercise any care was a proximate cause of the plaintiff's injuries.

The new statute removes liability to trespassers. It also eliminates liability for other defined types of negligent security claims:

- Those arising from an injury sustained by a person who was not on the premises of the owner/occupier;
- Those arising from a crime committed by a third person if the crime occurred (1) off the premises of the owner/occupier, and (2) in a place from which the owner/occupier did not have the legal right and authority to exclude the third-person;
- Those arising from a crime committed by a third person if (1) the third person was on the premises as a tenant or as a guest of a tenant, and (2) the owner/occupier had already commenced eviction proceedings against the tenant when the crime occurred;
- Those arising from an injury sustained by an invitee or a licensee if he (1) entered the premises for the purpose of committing a crime, or (2) was engaged in the commission of a crime at the time of the injury other than human trafficking;
- Those arising from any injury sustained on property used as a single-family residence; or
- Those based on particularized warning of imminent criminal conduct by a third person if the owner/occupier made a reasonable effort to provide such information to law enforcement personnel, provided that calling 911 or otherwise reporting such information to law enforcement personnel shall be deemed a reasonable effort.

Section 6 – Negligent Security Claims *Continued*

The new standard for negligent security claims does not apply to claims for human trafficking, which includes trafficking a person for labor servitude or sexual servitude.

The statute also addressed the apportionment of fault in negligent security cases. It requires a retrial of both liability and damages if the jury does not apportion a reasonable degree of fault to third persons (i.e., the criminal(s)). In the retrial, there would be a rebuttable presumption that the percentage of fault apportioned to the third person is unreasonable if the total percentage of fault apportioned to them is less than the total percentage of fault apportioned to all defendants and non-parties who did not participate in the crime.

Finally, the new law imposes the same standards for liability to a security contractor as an owner/occupier.

Defending a negligent security claim in Georgia post-Carmichael was wrought with uncertainty and risk. The court's "totality of the circumstances" test lacked definition and made summary judgment for defendants exceedingly difficult. The new law goes a long way to fixing those problems. It provides much more detailed standards plaintiffs must satisfy. Defendants facing a negligent security claim will now be better equipped to analyze risk and develop the case for summary judgment.

Section 7 – Phantom Damages

Phantom damages are the difference between a hospital's "list price" for a particular service and the amount it accepts as full payment for that service. For example, a hospital's "list price" for an appendectomy may be \$10,000, but if the patient has health insurance with a company that has contracted with the hospital to pay only \$7,000 for that procedure, the difference of \$3,000 is called phantom damages because neither the patient nor his insurer was ever required to pay \$10,000.

The problem with phantom damages under current law is that the patient is allowed to tell the jury that his bill for the appendectomy was \$10,000 instead of \$7,000. This is contrary to the purpose of special damages, which is to reimburse a plaintiff only for the expenses incurred because of the defendant's negligence.

SB 68 fixes the problem. A plaintiff may still introduce evidence of the healthcare provider's "list price" for medical treatment. But now, the defendant may introduce evidence of the amount the healthcare provider accepted in full satisfaction of its bills.

The new "phantom damages" provisions make the calculation of a plaintiff's compensatory damages fairer for defendants. The former rules allowed plaintiffs to inflate the costs of their medical expenses by relying on costs that no one—not the plaintiff nor their health insurer—ever paid. Defendants can now show a jury the difference between the billed amount and the amount actually paid for medical care. That may decrease the amount of medical expenses awarded in many cases.

Section 8 – Bifurcation of Trials

Experience teaches that a jury's desire to award an injured plaintiff some money often infects their determination of liability. Perhaps they cannot agree on whether the defendant is liable, so they compromise by finding for the plaintiff and awarding an amount they can agree upon. SB 68's new bifurcation requirements address that problem.

Now, all cases alleging bodily injury or wrongful death must be bifurcated into at least two phases upon the filing of a written demand before the entry of a pre-trial order. In the first phase, the jury will determine fault and apportionment of fault among the parties and any at-fault non-parties. If the jury determines that any defendant is at fault, the trial will recommence immediately with the same judge and jury. In the second phase, the jury would determine the amount of compensatory damages to be awarded to the plaintiff. If the jury awards compensatory damages to the plaintiff, the trial would recommence again for further proceedings, if any. Further proceedings could include whether punitive damages and/or attorney fees should be awarded.

The statute provides two potential exceptions to the bifurcation requirement. A trial court may reject a written demand for bifurcation and order a "concurrent" trial if, upon motion by the other party, it determines that (1) the plaintiff was injured by an alleged sexual assault offense and would be likely to suffer serious psychological or emotional distress as a result of having to testify in multiple phases of a bifurcated trial; or (2) the amount in controversy is less than \$150,000.

The new law disentangles a jury's liability determination and award of damages. We hope this leads to more defense verdicts or verdicts that apportion larger percentages of fault to plaintiffs or non-parties.

Section 9 – Applicability of SB 68

SB 68's provisions take effect at different times. Sections 6 (negligent security claims) and 7 (phantom damages) apply only to claims filed on or after the effective date, which is the date the bill was signed by Governor Kemp. Section 5 (evidence of seat belt non-use) also applies only to claims filed on or after the effective date, though this provision was included as an amendment to SB 69. All other sections apply to pending claims on the effective date unless such application is unconstitutional.

Senate Bill 69

Section 2 – Regulation of Litigation Financing Companies

This section adds a new chapter to Title 7 of the Official Code of Georgia Annotated that regulates litigation financing companies.

Any person or entity who engages in litigation financing must register as a litigation financier with the Georgia Department of Banking and Finance. Any person who is affiliated with any foreign government or foreign non-government person or entity that is designated by the U.S. Secretary of Commerce as a foreign adversary is not permitted to engage in litigation financing in Georgia.

There are many designated prohibitions on what litigation financiers may do. A partial list includes (1) controlling decisions about litigation or settlement, (2) paying commissions or fees in exchange for a referral of a consumer, (3) accepting commissions or fees for providing goods or rendering services to a consumer, (4) contracting for, receiving, or recovering more than the plaintiff recovers after deducting for attorney fees and expenses, and (5) offering or providing legal advice to a consumer.

A litigation financier that provides \$25,000 or more in funding may be jointly and severally liable for any award or order imposing costs or sanctions for frivolous litigation. Also, a litigation financier shall indemnify a plaintiff and his or her attorney for costs, fees, damages, or sanctions that may be imposed against them unless such costs, fees, damages, or sanctions resulted from intentional misconduct of the plaintiff or his or her attorney.

All litigation financing agreements must include certain disclosures, including (1) the consumer's right to cancel the agreement, (2) the limitation on the maximum amount the litigation financier may receive, (3) the litigation financier's inability to control the litigation or to make settlement decisions, (4) the consumer's right to change attorneys without any penalty, (5) the consumer not owing any money to the litigation financier if there is no recovery in the lawsuit or other legal proceeding or if the recovery is not sufficient to satisfy the portion assigned to the litigation financier, and (6) the consumer's right to a fully completed agreement before signing it.

A person who willfully violates any of the requirements of this new law is guilty of a felony and shall be imprisoned for 1-5 years and/or fined up to \$10,000, provided that a judge may punish this crime as a misdemeanor upon the recommendation of the jury.

Section 3 – Discovery of Litigation Financing Agreements

This section amends the Georgia Civil Practice Act to allow a party to obtain discovery of the existence and terms and conditions of any litigation financing agreement. It applies to non-parties only if the agreement is for \$25,000 or more in funding. This section also provides that evidence of a litigation financing agreement is not automatically admissible at trial, but it may be if relevant to a party's claim or defense.

Section 4 – Applicability of SB 69

Section 2 becomes effective on January 1, 2026. Section 3 becomes effective upon its approval by Governor Kemp and applies to (1) civil actions or other legal proceedings commenced on or after its effective date, and (2) any litigation financing agreements entered into on or after its effective date.

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