THE FINAL REPORT OF THE SENATE STUDY COMMITTEE ON REDUCING GEORGIA'S COST OF DOING BUSINESS (SR 433)

COMMITTEE MEMBERS

Senator John Wilkinson – Committee Chair
District 50

Senator Steve Gooch
District 51

Dr. Andrew Reisman
Citizen Member

Senator Bill Cowsert
District 46

Mr. Mark Tilkin
Citizen Member

Senator John F. Kennedy
District 18

Mr. Will Fagan
Citizen Member

Senator Emmanuel Jones
District 10

Ms. Barbara Marschalk
Citizen Member

Senator Ben Watson
District 1

Mr. Gino Brogdon
Citizen Member

Mr. Cade Joiner
Citizen Member

Mr. Gilbert Barrett
Citizen Member

Mr. Will Barnette
Citizen Member

Mr. Ben Gillis
Citizen Member

Prepared by the Senate Research Office
2019
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COMMITTEE FOCUS, CREATION, AND DUTIES

The Senate Study Committee on Reducing Georgia’s Cost of Doing Business was created by Senate Resolution 433 to fully review and study the issue of Georgia’s legal climate and its impact on the cost of doing business and performing healthcare services in Georgia.¹

The Committee was comprised of fifteen members; six Senate members, and nine citizen appointees. Senator John Wilkinson served as the Chair of the Committee and the following members were appointed by the President of the Senate:

- Senator Steve Goch of the 51st
- Senator John F. Kennedy of the 18th
- Senator Bill Cowsert of the 46th
- Senator Emanuel Jones of the 10th
- Senator Ben Watson of the 1st
- Mr. Cade Joiner, Georgians First Commission
- Mr. Will Barnette, Home Depot
- Dr. Andrew Reisman, Medical Association of Georgia
- Mr. Mark Tilkin, State Farm
- Mr. Will Fagan, Mag Mutual;
- Ms. Barbara Marschalk, Drew Eckl & Farnham, LLP
- Mr. Gino Brogdon, The Brogdon Firm
- Mr. Gilbert Barrett, White County Farmers Exchange
- Mr. Ben Gillis, Gillis Ag & Timber

The following legislative staff members were assigned to the Study Committee: Ms. Macy McFall of the Senate Research Office; Ms. Elisabeth Fletcher of the Senate Press Office; and Ms. Ryann Miller, Legislative Assistant to Senator Wilkinson.

The Committee held four meetings across the state, and heard testimony from the following individuals: Mr. Tiger Joyce, American Tort Reform Association; Mr. Cary Silverman, US Chamber, Institute for Legal Reform; Mr. Jake Daly, Georgia Defense Lawyers Association; Mr. Bill Custer, Bryan Cave Leighton Paisner LLP; Mr. Al Cartwright, Georgia Farm Bureau Insurance Co.; Mrs. Dee Dee Smith, Georgia Farm Bureau Insurance Co.; Mr. Zach Johnson, Beasley Forest Products; Mr. Lee Mickus, Mr. Taylor Anderson LLP; Mr. Keith Milligan, JTM Corporation DBA Piggly Wiggly; Mr. Tom Cogle, Reynolds Foodliner DBA Piggly Wiggly; Mr. Glen Darbyshire, Bouhan Falligant LLP; Mr. Edward Crowell, President and Chief Executive Officer, Georgia Motor Trucking Association, Inc.; Dr. Rutedge Forney, Immediate Past President, Medical Association of Georgia; Mrs. Stephanie Kindregan, MagMutual Insurance Company; Mr. Jonathan Adelman, Waldon Adelman Castilla Hiestand & Prout; and Mr. Jon Pope, Georgia Trial Lawyers Association.

SUMMARY OF TESTIMONY AND DISCUSSION

Meeting 1 – August 29

The Committee held its first meeting in Atlanta, Georgia at the State Capitol. The initial Study Committee meeting was meant to introduce the members to the state of tort law and reform in Georgia, with a focus on damages in negligence suits and the effect Georgia’s current tort system has on businesses across the state. Testimony was provided by the following individuals:

- **Mr. Tiger Joyce**, American Tort Reform Association
- **Mr. Cary Silverman**, US Chamber, Institute for Legal Reform
- **Mr. Jake Daly**, Georgia Defense Lawyers Association
- **Mr. Bill Custer**, Bryan Cave Leighton Paisner LLP

The vast majority of this meeting’s discussion revolved around the structure of Georgia’s civil litigation system. The Committee heard testimony on increases in premises liability cases, and how standards of negligence for property owners affect all businesses; the relation between the increased litigation in this type of suit and food deserts; the inability to present evidence of seatbelt use in personal injury cases; and allowing juries to consider actual amount paid for medical expenses rather than sticker price (“phantom damages”).

Each presentation brought to light issues the presenters believe negatively affect the business climate in Georgia. Presenters indicated that legal reform is a critically important part of attracting businesses to the state. Presentations addressed the rising trend in high damage awards and focused on how this results in higher insurance premiums, negatively impacting businesses large and small.

Meeting 2 – September 26

The Committee held its second meeting in Perry, Georgia at the Perry National Fair Grounds. During the second meeting, the Study Committee members continued to focus on how current Georgia law may affect litigation and settlement exposure for Georgia businesses. The Committee discussed the presumed effect increased litigation has on insurance premiums for farmers, truckers and consumers. Testimony was provided by the following individuals:

- **Mr. Al Cartwright**, Georgia Farm Bureau Insurance Co.
- **Mrs. Dee Dee Smith**, Georgia Farm Bureau Insurance Co.
- **Mr. Zach Johnson**, Beasley Forest Products
- **Mr. Lee Mickus**, Taylor Anderson, LLP

Presenters discussed a variety of factors, including, perceived increases in frivolous lawsuits, “exorbitant” settlement exposure, and increased litigation costs. Representatives from Georgia Farm Bureau Insurance described in broad strokes the issues their business has with current Georgia law, which they believe exposes the insurer to damages that can substantially exceed an insured’s policy limits. For example in cases where an auto insurer is involved, an auto insurer’s failure to respond appropriately (in good faith and timely) to requests from a claimant for the max policy limit amount.²

Mr. Zach Johnson, from Beasley Forest Products, illustrated how drastic increases to his company’s liability insurance premiums affect his ability to be effective in business. The presentation invited numerous reforms to the tort system, such as, capping plaintiffs’ attorney fees, disclosing all entities receiving a portion of the judgment, and requiring attorney fees in all civil cases be paid by a losing plaintiff. The Committee’s discussion once again moved to the issue of the “seatbelt statute”, which currently bars the admissibility of seatbelt evidence in crash liability suits. Data asserting that the risk of fatal injury is reduced by 45-60% when a seatbelt is utilized, and unbelted occupants rack up medical costs three times higher than belted motorists was also discussed.³

Meeting 3 – October 21

The third meeting of the Study Committee was held in Savannah, Georgia at the Armstrong Center at Georgia Southern University. During the meeting, the Committee heard from presenters who own independent brick and mortar grocery store corporations. Testimony addressed issues that affect the cost of doing business for these corporations, such as, increased insurance premiums and the length of the statute of limitations — allowing plaintiffs to wait years to file suit when evidence is difficult to compile. Presenters also spoke to the difficulty and cost they experience in protecting themselves against slip-and-fall suits, including the cost of discovery, camera systems and proper storage, and “plaintiff-proofing” their stores. Testimony was provided by the following individuals:

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² See *McCall v. Allstate Insurance Co.*, 251 Ga. 869, 870 (1984). “An insurance company may be liable for damages to its insured for failing to settle the claim of an injured person where the insurer is guilty of negligence, fraud, or bad faith in failing to compromise the claim.”

³ Testimony presented on September 26, 2019 by Mr. Lee Mickus of Taylor Anderson, LLP.
• Mr. Keith Milligan, JTM Corporation DBA Piggly Wiggly
• Mr. Tom Goode, Reynolds Foodliner DBA Piggly Wiggly
• Mr. Glen Darbyshire, Bouhan Falligant LLP

The meeting’s early discussion revolved around the rising costs of running brick and mortar stores in Georgia. Grocers are affected by the increase in personal injury cases and Georgia’s current premises liability statutes. The Committee also engaged in significant discussion regarding the Georgia Rules of Civil Procedure. Mr. Glen Darbyshire, an attorney in Savannah and aide to Sen. Ben Watson, addressed the Committee and described several changes he believed would tighten up procedural aspects of litigation, and subsequently reduce court costs for litigants and insurance companies. He suggested that conforming the Georgia Rules of Civil Procedure to the Federal Rules of Civil Procedure (“FRCP”) would limit the scope and the cost to both parties. Mr. Darbyshire explained that FRCP Rule 26 requires both parties and the judge to have a scheduling conference as soon as possible to set a calendar that the parties live by. According to the FRCP, if a deadline is missed, a party is not allowed a “re-do” in Federal Court, but in Georgia, looser rules result in missed deadlines, or judges who fail to adhere to the requisite deadlines. Further testimony asserted that additional risks and costs are experienced by both parties in these situations. Additionally, he suggested Georgia follow the federal standard, which limits the parties to 10 depositions and 25 interrogatories. He suggested that this standard would set a bar that would lower costs, but would also allow parties to request additional depositions or interrogatories from the judge when dealing with more complicated cases.

Meeting 4 – November 19

The Committee’s fourth meeting was held in Young Harris, Georgia at the Towns County Recreation Center. The discussion largely revolved around issues explored in earlier meetings held by the Study Committee. The Study Committee once again heard testimony in favor of repealing the prohibition against introducing seatbelt evidence, and to allow juries in a civil action to consider evidence that a plaintiff failed to use an available seat belt when assessing comparative fault. Several presenters explained that this change would allow juries to have evidence necessary for deciding and properly apportioning damages. Testimony was provided by the following individuals:

• Mr. Edward Crowell, President and Chief Executive Officer, Georgia Motor Trucking Association, Inc.
• Dr. Rutledge Forney, Immediate Past President, Medical Association of Georgia
• Mrs. Stephanie Kindregan, Director of Government Affairs, MagMutual Insurance Company
• Mr. Jonathan Adelman, Waldon Adelman Castilla Hiestand & Prout
• Mr. Jon Pope, Hasty Pope LLP; Executive Vice President, Georgia Trial Lawyers Association

The Study Committee was also briefed on the issue of third party litigation investors. According to testimony by several of the presenters, third parties are in essence gambling on the outcomes of trials. The U.S. Chamber Institute for Legal Reform defines third party litigation funding as, “the practice of hedge funds and other financiers investing in lawsuits in exchange for a percentage of any settlement or judgment.” The Committee heard from individuals that claim these practices increase the probability that meritless claims will be brought which makes settling lawsuits far more difficult and expensive.

Additionally, the Study Committee heard from Mrs. Stephanie Kindregan, Director of Government Affairs at MagMutual, who described how other states are managing their tort systems. One option raised was trial bifurcation, which North Carolina has adopted, that allows for two separate trials, one to determine the issue of liability, and one to determine damages, although both trials have the same jury and judge.

The Study Committee was also briefed on medical funding companies, which offer lawsuit loans, or loans against a future settlement award. The Study Committee questioned whether medical funding companies are beneficial to plaintiffs, or whether they exacerbate issues similar to those of third party litigation investing – making it more difficult for parties to settle and taking bargaining power away from the litigants themselves.
The Committee also heard from Mr. Jon Pope, Executive Vice President and Legislative Co-Chair of the Georgia Trial Lawyers Association, whose testimony centered on Georgia’s ranking as the “Top State for Business” by Area Development Magazine. Mr. Pope testified that the reality of allowing evidence of seat belt use would be unduly prejudicial to the jury. He included several reasons why he and the Georgia Trial Lawyers Association opposed seatbelt admissibility, specifically, that evidence regarding seat belt usage is not always determined on the scene, and is often investigated well after the collision; and that victims would be forced to hire costly experts to testify to whether or not the lack of use resulted in their specific injury — driving up the cost of litigation. Further, he commented on the fact that an at-fault defendant’s driving record and related citations are also excluded along with evidence of seat belt usage.

Lastly, Mr. Pope referenced previous discussions of the Study Committee regarding Georgia’s Collateral Source Rule. In previous testimony made to the Committee, presenters recommended limiting plaintiff recovery to the actual amount the plaintiff’s health insurance agreed to pay for the injury. Mr. Pope explained that limiting recovery in this manner would not accurately reflect the insurance premiums the insured previously paid.

COMMITTEE FINDINGS AND RECOMMENDATIONS

Testimony presented to the Study Committee often referenced Georgia case law and provisions of the O.C.G.A. Certain provisions, reviewed by the Committee multiple times, are described in more detail for additional context.

Georgia’s Seat Belt Statute

Under Georgia law, the failure of an occupant to wear a seat belt in any seat of a motor vehicle is not admissible in civil cases. Georgia’s “Seat Belt Statute” specifically provides:

“The failure of an occupant of a motor vehicle to wear a seat safety belt in any seat of a motor vehicle which has a seat safety belt or belts shall not be considered evidence of negligence or causation, shall not otherwise be considered by the finder of fact on any question of liability of any person, corporation, or insurer, shall not be any basis for cancellation of coverage or increase in insurance rates, and shall not be evidence used to diminish any recovery for damages arising out of the ownership, maintenance, occupancy, or operation of a motor vehicle.”

O.C.G.A. § 40-8-76.1(d). The Committee heard testimony in favor of repealing these provisions in order to allow juries in a civil action to consider evidence that a plaintiff failed to use an available seat belt when assessing comparative fault. Testimony presented to the Committee alleged a change to this statute would allow juries to more accurately decide damage awards.

Additionally, during the 2019 Legislative session House Bill 171 was introduced, which proposed to change current law and allow “failure to wear a seat belt” to be the basis for an increase in insurance rates. The bill further sought to revise current law to allow the failure to wear a seat belt to be considered in a civil action as evidence admissible on issues of failure to mitigate damages, assumption of risk, negligence, comparative negligence, contributory negligence, apportionment of fault, or causation. The legislation also provided that evidence of one’s failure to wear a seatbelt may be evidence used to diminish any recovery for damages arising out of the ownership, maintenance, occupancy, or operation of a motor vehicle. House Bill 171 is currently pending in the Senate Chamber, but will be recommitted to the Senate Public Safety Committee at the beginning of the 2020 Legislative session.

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5 See O.C.G.A. § 40-8-76.1
6 Testimony first presented on August 29, 2019 by Mr. Tiger Joyce of the American Tort Reform Association.
Damage Awards
Throughout the meetings of the Study Committee, testimony often referenced the last major change that was made to Georgia’s tort system. In 2005, the Georgia General Assembly enacted comprehensive tort reform legislation known as Senate Bill 3. Provisions in Senate Bill 3 set statutory limits on recovery for non-economic damages in medical malpractice actions at $350,000 per defendant. However, in Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, the Georgia Supreme Court held that statutory limits for noneconomic damages in medical malpractice cases were unconstitutional because they violated the right to jury trial.

The Committee continually engaged in discussion on damage awards and how to balance the scales. There is no federal tort reform law that caps damage awards—based on the Commerce Clause such laws have been left to the states. The Committee reviewed current law and heard testimony on different ways to cap certain damage awards, including those for punitive damages. In Georgia, punitive damages are used to deter, punish, or penalize the repetition of reprehensible conduct by the defendant.⁷ In certain circumstances, punitive damages are awarded in addition to actual damages. Synonymous with “vindictive damages”, punitive damages cannot be imposed without a finding of some form of culpable conduct. Negligence, even gross negligence, is inadequate to support a claim for a punitive damage award.⁸

Georgia only caps punitive damages in certain cases. Subject to three exceptions, punitive damage awards are limited to $250,000.⁹ In a tort action in which the cause of action arises from products liability, in cases of intentional harm, or in cases where the defendant acted under the influence of alcohol or drugs, there is no cap to the amount of punitive damages that may be awarded. In an award for punitive damages in tort actions, it must be proven by clear and convincing evidence that the defendant’s actions showed willful misconduct, malice, fraud, wantonness, oppression, or an entire indifference to consequences.¹⁰

Premises Liability Standard
The Committee spent several meetings discussing the rise in premises liability cases in Georgia. O.C.G.A § 51-3-1 provides that “where an owner or occupier of land, by express or implied invitation, induces or leads others to come upon his premises for any lawful purpose, he is liable in damages to such persons for injuries caused by his failure to exercise ordinary care in keeping the premises and approaches safe.”

In Vaughn v. Pleasant, the Georgia Supreme court held that plaintiffs are barred, by the affirmative defense of assumption of the risk, from recovering in a negligence claim if it is established that they chose a course of action, without coercion of circumstances, with full knowledge of its dangers.¹¹ In Georgia, a defendant asserting an assumption of the risk defense must establish that the plaintiff: (1) had actual knowledge of the danger; (2) understood and appreciated the risks associated with such danger; and (3) voluntarily exposed themselves to those risks.¹²

The Committee heard from several presenters who described cases where a property owner’s duty extended to protecting those on their property against risk of injury from third-party criminal activity. If adequate security measures would have prevented a criminal act, a property or business owner can be found negligent and held liable for injures that resulted from the criminal act.¹³ For example, the Georgia Supreme Court held in Starbridge Partners, Ltd. v. Walker, the issue presented is no: the foreseeability of the specific crime, but whether the property owner had actual knowledge of the prior crimes and, because of that knowledge, should have reasonably anticipated the risk of personal harm which might occur.¹⁴

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⁷ See O.C.G.A. §51-12-5.1(c).
⁹ See O.C.G.A. §51-12-5.1(c).
¹⁰ Id.
¹⁴ Id.
Third Party Litigation Investors
The Study Committee also heard testimony on the practices of litigation investors. In 2018, the Georgia Supreme Court ruled that money advanced by a litigation finance company was not a "loan" under the Industrial Loan Act or the Payday Lending Act, and therefore was not subject to usury laws.15

The court observed, “Personal-injury plaintiffs . . . fit neatly within the population that usury laws historically have been enacted to protect. But it is not the place of this Court to extend existing usury laws beyond their plain terms. The Industrial Loan Act and the Payday Lending Act do not apply to the transactions at issue in this case (as those transactions are framed by the pleadings). If the General Assembly wishes to revisit the scope of those laws and extend them to cover transactions of these sorts, it certainly may do so.”

FINAL RECOMMENDATIONS

After substantial discussion and review the Committee finds a need to safeguard the integrity and balance of Georgia’s Civil Litigation System. Thus, the Committee recommends the following:

1. **Punitive Damages Cap** – Institute a $250,000 cap on punitive damages for products liability claims in order to level the playing field, and extend the benefits of the punitive damages cap to all industries, including job-creating product manufacturers.

2. **Seatbelt Admissibility** – Allow the failure to wear a seatbelt to be considered in civil actions, as evidence admissible on issues of failure to mitigate damages, assumption of risk, negligence, comparative negligence, contributory negligence, apportionment of fault, or causation.

3. **Phantom Damages (Truth in Damages)** – Legislation should be introduced which clearly sets forth that the injured party is only entitled to the actual amount necessary to satisfy their medical providers for their treatment.

4. **Premises Liability Reform** – Legislation should be introduced to set a reasonable standard of liability when an unrelated third party commits an act against a person on the landowner’s property. The standard should require some overt act on the part of the landowner that directly causes the harm.

5. **Pre-Dismissal Rule** – Georgia law currently allows the plaintiff to dismiss a lawsuit in a case at any time before the first witness is sworn in at trial. Recommend adopting Federal Rule of Civil Procedure 41, which does not allow dismissal, unless with prejudice, once an answer is filed.

6. **Proportionality in Discovery** – Place reasonable limitations on document discovery based on projected cost of discovery, the total amount of the lawsuit and the needs of the case.

7. **Jury Anchoring** – Prohibit the ability of a plaintiff’s attorney from referencing a specific sum when arguing damages for pain and suffering.

8. **Default Judgment Reform** – Amend Georgia law to allow judges, at their discretion, to open a default judgment after the court term has expired.

9. **Written Jury Instructions** – Require judges to reduce jury instructions to writing.

10. **Regulation of Loan Companies in Litigation** – Introduce legislation that would protect plaintiffs by capping interest rates in litigation funding, for expenses on a case, medical treatment, or a direct loan to a plaintiff.

11. **Mandatory Scheduling Orders** – Require mandatory scheduling orders to be set in a timely manner.

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12. Business Judgment Rule – Include Georgia non-profits, foundations, and cooperative officers and directors in the requirements and protections of the Business Judgment Rule, and establish that gross negligence is the standard applicable to these organization officials.

13. Direct Actions in Trucking Suits – Prohibit direct actions against a tortfeasor’s insurance company in trucking incidents.

14. Reducing Costs for Georgia’s Trucking Industry – Urge Congress to change federal regulatory law and allow commercial timber trucks to utilize the Federal Interstate Highway System with an indivisible load of no more than 80,000-pounds. Improve Georgia’s enforcement of weight limits and increase the current 5 percent gross weight variance to a 10 percent variance for trucks traveling within the state.

15. Statute of Repose – Legislation should be introduced to correct Georgia’s Statute of Repose to specifically define the notice standard for product liability cases and expressly enforce the 10 year statute of limitations.

16. Offer/Acceptance of Settlement Demands – Set up committee comprised of plaintiffs and defense lawyers to reach agreement on time limited demands. Procedures reviewed by the committee could include: 1) ensuring that the material terms listed in the law are the only material terms that can be included in the settlement; 2) applying the law to all personal injury settlements; 3) allowing for communication, both verbal and in writing, to discuss terms without it being considered a counter offer; and 3) tying the timeframe to satisfy the settlement to the date of the settlement demand.

17. Asbestos Trust Transparency – Introduce legislation to require asbestos plaintiffs’ lawyers to obtain prompt compensation from asbestos trusts and allow trust-related exposures and compensation to be considered by a jury in asbestos-related personal injury cases.

18. Trial Bifurcation – Amend current law to allow, upon the motion of one party, separate trials for the determination of liability and the determination of damages, if any.

19. Contingency Fee Caps – Recommend the legislature review contingency fee caps during the 2020 Legislative session, and set up a committee of both plaintiff and defense attorneys in order to derive collective wisdom to maximize returns for plaintiffs, while maintaining fair compensation for plaintiffs’ attorneys.
Respectfully Submitted,

THE FINAL REPORT OF THE SENATE STUDY COMMITTEE ON REDUCING GEORGIA'S COST OF DOING BUSINESS (SR 433)

[Signature]

Senator John Wilkinson – Committee Chairman
District 50
# APPENDIX A

## Costs and Compensation of the U.S. Tort System Report 2018

Data: Costs and Compensation Paid in the Tort System in 2016 ($ Millions)

<table>
<thead>
<tr>
<th>State</th>
<th>General/Professional Malpractice</th>
<th>Medical Malpractice</th>
<th>Automobile</th>
<th>Total</th>
<th>Tort costs as % of state GDP</th>
<th>Tort costs per household ($)</th>
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<tbody>
<tr>
<td>AL</td>
<td>2,894</td>
<td>157</td>
<td>2,071</td>
<td>5,122</td>
<td>2.5%</td>
<td>2,765</td>
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<tr>
<td>AK</td>
<td>330</td>
<td>39</td>
<td>342</td>
<td>711</td>
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<tr>
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<td>309</td>
<td>3,081</td>
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<td>3,396</td>
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<td>ME</td>
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<td>406</td>
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<td>2,501</td>
<td>6,173</td>
<td>1.8%</td>
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<tr>
<td>MS</td>
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<td>140</td>
<td>1,312</td>
<td>2,821</td>
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<td>2,676</td>
</tr>
<tr>
<td>MO</td>
<td>4,514</td>
<td>331</td>
<td>2,507</td>
<td>7,352</td>
<td>2.5%</td>
<td>3,099</td>
</tr>
<tr>
<td>MT</td>
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<td>591</td>
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<tr>
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<td>2.1%</td>
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</tbody>
</table>

**Sources and Notes:**
1. Includes general/professional and homeowners’ liability.
2. Sourced from SERFF physicians and hospital rate filings.
3. Includes general and personal automobile liability.
4. Total = [1] + [2] + [3].
5. 2016 state household estimates from the U.S. Census.

APPENDIX B

Georgia at a Glance

State Lawsuit Climate Report

<table>
<thead>
<tr>
<th>Year</th>
<th>Ranking</th>
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<td>2019</td>
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<tr>
<td>2017</td>
<td>#40</td>
</tr>
<tr>
<td>2015</td>
<td>#31</td>
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</tbody>
</table>

Costs and Compensation of the U.S. Tort System - State Details

Get the Full Report | Detailed State Chart Only

- 2.5% Tort Costs as % of State GDP
- $3,631 Tort Costs per Household ($)

Source: U.S. Chamber institute for Legal Reform, 2019.