IN THE COURT OF APPEALS
STATE OF GEORGIA

HARRIET CURLES, et al.	:	
	:	
Appellants,	:	
	:	
v.	:	Appeal No. A17A1298
	:	
PSYCHIATRIC SOLUTIONS, INC., et al.	:	
	:	
Appellees.	:	

and

IN THE COURT OF APPEALS
STATE OF GEORGIA

BEVERLY KERN, et al.	:	
	:	
Appellants,	:	
	:	
v.	:	Appeal No. A17A1299
	:	
PSYCHIATRIC SOLUTIONS, INC., et al.	:	
	:	
Appellees.	:	

AMICUS CURIAE BRIEF OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION

On Behalf Of:
Sarah B. Akins, President
Martin A. Levinson, Chair
Garret W. Meader, Vice-Chair
AMICUS CURIAE BRIEF COMMITTEE
GEORGIA DEFENSE LAWYERS ASSOCIATION
P.O. Box 191074
Atlanta, Georgia 31119-1074
(404) 816-9455

Prepared By:
Kristin L. Hiscutt, Esq.
Georgia Bar No. 259570
BENDIN SUMRALL & LADNER, LLC
1360 Peachtree Street NE
One Midtown Plaza
Suite 900
Atlanta, Georgia 30309
(404) 671-3100

I. INTRODUCTION & STATEMENT OF INTEREST

The Georgia Defense Lawyers Association ("GDLA") is an association of approximately 900 Georgia lawyers, including sole practitioners and members of law firms of all sizes, who engage in litigation, primarily for defendants in civil lawsuits. The GDLA is dedicated to, among other purposes, supporting and improving the civil defense bar, improving the adversary system of jurisprudence in our courts, eliminating court congestion and delay in litigation, and otherwise promoting improvements in the administration of justice. Though its members are diverse, they share a common interest in ensuring that well-reasoned, longstanding principles of Georgia law that apply to personal injury litigation are applied consistently and predictably for the benefit of the clients its members serve.

The GDLA hereby respectfully submits this Amicus Curiae Brief to demonstrate why the Trial Court correctly dismissed Appellees-Defendants from Appellants-Plaintiffs' lawsuit.

II. ARGUMENT & CITATION OF AUTHORITY

A) THE TRIAL COURT CORRECTLY DETERMINED THAT APPELLANTS-PLAINTIFFS' NEGLIGENCE AND NEGLIGENCE *PER SE* CLAIMS SOUND IN MEDICAL MALPRACTICE/PROFESSIONAL NEGLIGENCE, NOT IN ORDINARY/SIMPLE NEGLIGENCE.

Whether a complaint alleges professional malpractice or simple (ordinary) negligence is a question of law for *a court*. See Carr v. Kindred Healthcare Operating, Inc., 293 Ga. App. 80, 82 (2008); Crisp Reg'l Nursing & Rehab. Ctr. v. Johnson, 258 Ga. App. 540, 542 (2002); Dent v. Mem'l Hosp. of Adel, 270 Ga. 316, 318 (1998). In making this determination, a court must look to the *substance* of the claims; importantly, the "complaint's characterization of the claims as professional or ordinary negligence does *not control*." Carr, 293 Ga. App. at 82 (emphasis added); accord Atlanta Women's Health Group, P.C. v. Clemons, 287 Ga. App. 426, 427 (2007); Brown v. Tift County Hosp. Auth., 280 Ga. App. 847, 849 (2006). Therefore, that Appellants-Plaintiffs style and interpret their claims as ones for ordinary negligence does not make them so; deeper analysis into the claims themselves must be had.

As an initial matter, a claim for medical malpractice is defined as "*any claim for damages resulting from the death of* or injury to *any person arising out of*:

1) *Health, medical*, dental, or surgical *service, diagnosis, prescription, treatment, or care rendered by a person authorized by law to perform such services* or by any person acting under the supervision and control of the lawfully authorized person; or
2) ***Care or service rendered by any*** public or private hospital, nursing home, clinic, hospital authority, ***facility, or institution***, or by any officer, agent, or employee thereof acting within the scope of employment."

O.C.G.A. § 9-3-70 (2016) (emphases added). While the statutory language does not mean that absolutely any lawsuit filed against an individual or institutional health care provider automatically sounds in medical malpractice, it does, importantly, represent a clear intention of the General Assembly to be broad, expansive, and overly inclusive when it comes to construing claims as ones for medical malpractice; otherwise, the statute would have been easily written in a much more restrictive and narrow way.

There can be no doubt that the definition of O.C.G.A. § 9-3-70(2) is satisfied in this case, as the claims against UHS and PSI are that the very health care, services,

and treatment delivered to Amy Kern that they were in "control" of were negligent and led to the deaths of Ms. Donna Kern and Mr. William Chapman.

In continuing the analysis, when it comes to determining substantively whether claims against health care persons or individuals—as opposed to institutions or entities—are ones for medical malpractice, Georgia common law has established several, guiding principles.

> Whether an action alleges professional malpractice or simple negligence depends on whether the professional's alleged negligence required the *exercise of professional judgment and skill.* A professional negligence or malpractice action calls into question *the conduct of the professional in his area of expertise.* Administrative, clerical, or routine acts demanding no special expertise fall in the realm of simple negligence.

Mendoza v. Pennington, 239 Ga. App. 300, 300 (1999) (internal citations omitted) (emphases added); see also Bardo v. Liss, 273 Ga. App. 103, 104 (2005) ("Where the professional's alleged negligence requires the *exercise of professional skill and judgment to comply with a standard of conduct* within the professional's area of expertise, the action states professional negligence.") (emphasis added). Accordingly, such allegations require expert testimony to establish whether the professional

"deviated from the applicable standard of care." Holloway v. Northside Hosp., 230 Ga. App. 371, 372 (1998). Put differently, if a claim "goes to the *propriety of a professional decision* rather than to the efficacy of conduct in carrying out a decision previously made . . . .[,]" the claim is one for professional malpractice. Robinson v. Med. Ctr. of Cent. Ga., 217 Ga. App. 8, 10 (1995) (emphasis added).

Georgia statutory law, likewise, provides guidance in determining whether a claim against a health care provider is one for medical malpractice: a professional negligence claim exists when it is "grounded upon the averment of acts or omissions requiring the exercise of professional skill and judgment by agents or employees who themselves are recognized as *'professionals' under O.C.G.A. §§ 14-7-2(2), 14-10-2(2) and 43-1-24*." Dozier v. Clayton County Hosp. Auth., 206 Ga. App. 62, 65 (1992) (emphasis added). O.C.G.A. § 43-1-24 provides that a licensed professional is "[a]ny person licensed by a professional licensing board and who practices a 'profession,' as defined in Chapter 7 of Title 14 . . . or who renders 'professional services,' as defined in Chapter 10 of Title 14 . . . ." § 43-1-24 (2016). O.C.G.A. § 14-10-2(2) defines "professional services" as "any type of professional service which may be legally performed only pursuant to a license from a board pursuant to Title 43 . . . ." § 14-10-

2(2) (2016). Indeed, a license to practice medicine is specifically required under the laws of the State of Georgia. See O.C.G.A. § 43-10A-1 *et seq.* (2016).

These common law and statutory principles are useful and translatable when we apply them to claims against health care institutions or entities, like UHS and PSI. While Appellants-Plaintiffs attempt to distance themselves from the medical malpractice label by grammatically styling their claims as ones for "ordinary negligence" and by using seemingly bland, medically-devoid phrases such as "ownership, management, and control of Focus," "control Amy Kern to prevent her from doing harm to others" "imposing a policy . . . by which patients were to be discharged from Focus when their insurance would no longer pay for inpatient treatment," and "performance of its administrative and management duties under the Management Services Agreement," the gravamen of these allegations sounds in professional negligence.

First, whether the ways in which UHS and PSI elected to structure and deliver health care to its patients, like Amy Kern, can involve nothing but the exercise of their own professional judgment and reasoning as providers of health care services and treatment—not some rote following of steps in a cookbook or mindless execution of secretarial tasks. The claims undoubtedly call into question their conduct in their own

area of expertise of providing professional, psychiatric, inpatient health care services. The claims challenge the legitimacy, suitableness, and appropriateness of the professional decisions they made at an institutional level that allegedly shaped the actual delivery of health care services rendered by physicians to Amy Kern. Finally, whether UHS and PSI acted reasonably or unreasonably can only be determined by reference to standards of conduct customary in their own field of psychiatric, inpatient health care providers—a matter that undoubtedly requires the benefit of expert testimony and is clearly outside the comprehension of lay jurors.

Second, and from a more granular perspective, UHS and PSI—as corporate defendants—can themselves render no direct medical care to any patient, like Amy Kern. Rather, these corporate entities can only operate by and through persons—here, professional medical doctors who themselves fit squarely within the definition of a medical malpractice claim in § 9-3-70(a) and who are professionals under Titles 14 and 43. It is, then, only by virtue of the actions of these physicians treating Amy Kern drawing on their own professional skill, judgment, and experience that any such institutional "control" could ever take place that could subject UHS and PSI to vicarious liability in this lawsuit. Stamping allegations as ordinary negligence which are inherently and can only be born out of decisions and actions made by health care

professionals in the course of their medical treatment of a patient is an illusory end-run around the spirit and intent of the medical malpractice definition.

B) IN THE CASE BELOW, THE TRIAL COURT CORRECTLY DISMISSED APPELLANTS-PLAINTIFFS' NEGLIGENCE AND NEGLIGENCE *PER SE* CLAIMS FOR FAILURE TO ATTACH A § 9-11-9.1 EXPERT AFFIDAVIT.

O.C.G.A. § 9-11-9.1 provides: "In *any action* for damages alleging professional malpractice against . . . *[a]ny licensed health care facility alleged to be liable based upon the action or inaction of a health care professional* licensed by the State of Georgia and listed in subsection (g) of this Code section," *the plaintiff shall be required to file with the complaint an affidavit of an expert* competent to testify, which affidavit shall set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim." § 9-11-9.1(a) (2016) (emphases added). Subsection (g) specifically identifies "medical doctors." § 9-11-9.1(g). The "failure to file an expert affidavit contemporaneously with [the] complaint . . . [is] ***fatal*** . . . ." Gaddis v. Chatsworth Health Care Ctr., Inc., 282 Ga. App. 615, 618 (2006) (emphasis added).

Importantly, Georgia courts have applied this affidavit requirement to claims that sound in professional negligence, even if they are not denominated as such by

plaintiffs and "regardless of nomenclature." Hobbs v. Great Expressions Dental Centers of Ga., P.C., 337 Ga. App. 248, 249 (2016) (citing Crawford v. Johnson, 227 Ga. App. 548, 551(1997)). For instance, this Court has insisted upon an expert affidavit for a "breach of contract" claim because it was, in fact, predicated upon "the failure to perform professional services in accordance with the applicable standard of care[.]" Hobbs, 337 Ga. App. at 248. This Court has likewise insisted on an expert affidavit even where a claim for an alleged incorrect reading of an ultrasound and failure to properly diagnose a patient was styled by plaintiffs as a "breach of fiduciary duty." Johnson v. Jones, 327 Ga. App. 371, 375-376 (2014). To be sure of applicability to the instant case, this Court has previously explained that an expert affidavit is required "[i]n a suit against a licensed *health care facility* . . . when the facility's alleged liability is based on the *action or inaction of a health care professional*." Ambrose v. Saint Joseph's Hosp. of Atl., Inc., 325 Ga. App. 557, 560 (2014).

Appellants-Plaintiffs' negligence *per se* claims under O.C.G.A. §37-3-94 and § 37-3-95 do not change this result. This Court has previously determined that claims predicated upon alleged statutory violations can still retain their proper characterization as professional malpractice claims requiring compliance with the

expert affidavit requirement. See e.g., Piedmont Hosp., Inc. v. Colquitt, 335 Ga. App. 442, 443, 446-447 (2015) (finding negligence *per se* claim alleging violations of §§ 24-12-21 and 31-12-2 requiring notification of positive HIV status to Georgia Department of Public Health and to patient, "even if designated as ordinary negligence or fraud claims, arise out of the breach of a professional duty to inform [patient] of his medical condition and thus must be considered classic medical malpractice claims."); In re Carter, 288 Ga. App. 276, 278, 288 (2007) (rejecting plaintiff's contention that negligence *per se* claim alleging violations of §§ 31-12-6 and 31-12-7 requiring notification of child's sickle cell anemia diagnosis to parents was for simple negligence and finding, instead, that such claim "arose in the context of a medical malpractice claim . . . . [and] are thus barred by Plaintiff's failure to file an expert affidavit pursuant to OCGA § 9-11-9.1"). So, while determining whether UHS and PSI acted appropriately under the circumstances applicable to them as professional health care providers can certainly be informed by reference to statutory authorities, the simple allegation that they violated statutory authorities in no way disintegrates the true professional-negligence nature of Appellants-Plaintiffs' claims against them.

It is of outstanding importance to individual and institutional health care providers represented by The Georgia Defense Lawyers Association that this Court not take the opportunity offered to it by Appellants-Plaintiffs in this case to degrade the profession of health care by finding claims like the ones brought against UHS and PSI "ordinary" and "simple." Downgrading intensely important decisions and actions by health care professionals and facilities that derive from years of judgment and expertise to clerical, elementary, robotic actions is discourteous to the very professionals whose conduct is being challenged in litigation. Moreover, it strips them from the deserved ability to be judged by their peers—experts on both sides who have similarly devoted years to the same kind of professional endeavors and who are best suited to reflect upon the care at issue. This Court should afford health care professionals across the State the proper regard and force of the § 9-3-70 medical malpractice definition and the related § 9-11-9.1 expert affidavit requirement intended by the General Assembly; it should reject any attempt, like the one by Appellants-Plaintiffs here, to underrate the hard work done every day by health care professionals and facilities across the State for its citizens.

C) THE TRIAL COURT ALSO CORRECTLY DISMISSED APPELLANTS-PLAINTIFFS' CLAIMS AS TIME-BARRED UNDER THE FIVE-YEAR STATUTE OF REPOSE.

Despite the convoluted labyrinth that is the procedural history of this case, it is clear that the five-year statute of repose provided by O.C.G.A. § 9-3-71 expired in January 2014. Appellants-Plaintiffs' negligence *per se* claims (brought against UHS and PSI for the first time in October 2014) and negligence claims concerning the alleged no-insurance policy and the management duties (brought against UHS and PSI for the first time in March 2016) were simply asserted too late. Notwithstanding the efforts undertaken by Appellants-Plaintiffs to obfuscate this issue, the simple reality remains that the statute of repose is unassailable, and this Court should not accept any invitation to weaken its walls. On this point, The Georgia Defense Lawyers Association and its members, as well as the healthcare clients they represent, have great interest.

First, this Court should consider the intent behind the Georgia 2005 Tort Reform Act:

> The General Assembly finds that there presently exists a crisis affecting the provision and quality of health care services in this state. Hospitals and other health care providers in this state are having

increasing difficulty in locating liability insurance and, when such hospitals and providers are able to locate such insurance, the insurance is extremely costly. The result of this crisis is the potential for a diminution of the availability of access to health care services and a resulting adverse impact on the health and well-being of the citizens of this state. The General Assembly further finds that certain civil justice and health care regulatory reforms as provided in this Act will promote *predictability and improvement in the provision of quality health care services and the resolution of health care liability claims* and will thereby assist in promoting the provision of health care liability insurance by insurance providers. The General Assembly further finds that certain needed reforms affect not only health care liability claims but also other civil actions and accordingly provides such general reforms in this Act.

2005 Ga. SB 3 (emphasis added).

While the five-year statute of repose pre-dated Georgia's Tort Reform Act, the emphasis on "predictability" recognized in 2005 only highlights the importance of the pre-existing statue of repose to health care providers. In order to best provide quality

health care services to the citizens of Georgia, there simply must come a time when the providers of these important services no longer bear exposure of financial and non-financial resources to alleged past grievances. Permitting health care providers to be answerable in perpetuity to such disputes about the quality of their services not only unduly encumbers health care providers but flies in the face of legislative intent.

Not long ago, The Supreme Court of the United States reflected upon the sanctity of the statute of repose in a meaningful and instructive way for this Court to consider.

> A statute of repose . . . puts an *outer limit* on the right to bring a civil action.
>
> . . .
>
> The repose provision is therefore equivalent to a cutoff, in essence *an absolute . . . bar on a defendant's temporal liability*[.]
>
> . . .
>
> Statutes of repose effect a legislative judgment that a defendant should be free from liability after the legislatively determined period of time. [S]tatutes of repose reflect legislative decisions that as a matter of policy there should be a specific time beyond which a defendant should no

longer be subjected to *protracted liability*. Like a discharge in bankruptcy, a statute of repose can be said to provide *a fresh start or freedom from liability*. Indeed, the Double Jeopardy Clause has been described as a statute of repose because it in part embodies the idea that *at some point a defendant should be able to put past events behind him.*

. . .

Statutes of limitations, but not statutes of repose, are subject to equitable tolling, a doctrine that pauses the running of, or tolls, a statute of limitations when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action. *Statutes of repose, on the other hand, generally may not be tolled, even in cases of extraordinary circumstances beyond a plaintiff's control.*

. . .

[A] statute of repose is a judgment that defendants should be free from liability after the legislatively determined period of time, beyond which the liability will no longer exist and will *not be tolled for any reason.*

CTS Corp. v. Waldburger, 134 S. Ct. 2175, 2182-2183 (2014) (internal citations omitted) (emphases added).

It is likewise of paramount importance not just to individual and institutional health care providers represented by The Georgia Defense Lawyers Association but to all Georgia citizens that this Court not take the opportunity offered to it by Appellants-Plaintiffs in this case to crumble the statute of repose. The protracted, lingering, costly, and drawn-out litigation created here need not be an endorsement by this Court for future litigation by any plaintiff against any defendant. Instead, efficiency of stating claims, organization of pleadings, and expeditious litigation conduct ought to be championed. Appellants-Plaintiffs' inability in this matter to present an organized, consistent, and efficient case within five years should not be endorsed by this Court and to the clear detriment of Appellees-Defendants in this case or to all defendants and citizens across this State.

III. CONCLUSION

For the above-stated reasons, this Court should **AFFIRM** the Trial Court's dismissal of Appellees-Defendants UHS and PSI from this case.

This submission does not exceed the word count limit imposed by Rule 24.

Respectfully submitted, this 28th day of JUNE, 2017.

BENDIN SUMRALL & LADNER, LLC

KRISTIN L. HISCUTT
Georgia Bar No. 259570

On Behalf of The Georgia Defense Lawyers Association

One Midtown Plaza, Suite 800
1360 Peachtree Street, NE
Atlanta, Georgia 30309
404-671-3100

CERTIFICATE OF SERVICE

I herby certify that I have this day served a copy of the within and foregoing **AMICUS CURIAE BRIEF OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION** upon all parties in this matter by depositing a true and correct copy of same in the U.S. Mail, in a properly addressed envelope with adequate postage to counsel of record as follows:

ATTORNEYS FOR APPELLANTS-PLAINTIFFS:

Darren W. Penn, Esq.
PENN LAW, LLC
4200 Northside Parkway NW
Building One, Suite 100
Atlanta, Georgia 30327
404-961-7655

Nathan Williams, Esq.
THE WILLIAMS LITIGATION GROUP, PC
P.O. Box 279
Brunswick, Georgia 31521
912-208-3721

Michael B. Terry, Esq.
Timothy S. Rigsbee, Esq.
Jane D. Vincent, Esq.
BONDURANT MIXSON & ELMORE, LLP
1201 West Peachtree Street NW, Suite 3900
Atlanta, Georgia 30309
404-881-4100

ATTORNEYS FOR APPELLEES-DEFENDANTS:

Patrick T. O'Connor, Esq.
Christopher L. Ray, Esq.
I. William Drought, III, Esq.
OLIVER MANER, LLP
P.O. Box 10186
Savannah, Georgia 31412
912-236-3311

Andrew C.S. Efaw, Esq.
Stephen E. Oertle, Esq.
Thomas A. Olsen, Esq.
WHEELER TRIGG O'DONNELL, LLP
370 Seventeenth Street, Suite 4500
Denver, Colorado 80202-5647
303-244-1800

This 28th day of JUNE, 2017.

KRISTIN L. HISCUTT
Georgia Bar No. 259570

BENDIN SUMRALL & LADNER, LLC
One Midtown Plaza, Suite 800
1360 Peachtree Street NE
Atlanta, Georgia 30309
404-671-3100

On Behalf of The Georgia Defense Lawyers Association