IN THE SUPREME COURT
STATE OF GEORGIA

Case No. **S17G0733**

DENNIS C. DOHERTY, D.O.,
APPELLANT

- vs –

STERLING TYRONE BROWN, SR., as Surviving Spouse, Individually, and as Administrator of the Estate of Gwendolyn Lynette Brown, deceased,
APPELLEE

AMICUS CURIAE BRIEF OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION

FROM THE GEORGIA COURT OF APPEALS
Case No. A16A0763

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IN THE SUPREME COURT
STATE OF GEORGIA

DENNIS C. DOHERTY, Appellant, v. STERLING TYRONE BROWN, SR., Appellee.	Case No. S17G0733

AMICUS CURIAE BRIEF OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION

COMES NOW, the Georgia Defense Lawyers Association ("GDLA"), and files this Brief as *amicus curiae* in the above-styled appeal, showing this honorable Court as follows:

I. INTRODUCTION AND STATEMENT OF INTEREST

The 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.

The GDLA and its members seek to ensure that jury instructions in medical malpractice cases promote the specific statutes the Georgia legislature has enacted to distinguish such cases from other tort actions. This Court has consistently recognized the policy reasons for treating medical malpractice cases differently from ordinary negligence cases. The complex scientific and clinical issues and concomitant expert testimony further distinguish a medical malpractice action from an ordinary negligence one. When a trial court instructs the jury on the applicable law in a medical malpractice case, those instructions should – at a minimum – reflect the legislative and judicial efforts to create a unique cause of action. Those instructions should also inform the jury that their verdict must account for the specialized knowledge and skill which are the bases of the allegations as well as the defenses.

The Court presented two questions for the parties to address in this case:

1. **Did the evidence presented at trial support a claim based on ordinary negligence?**

2. **If not, was any resulting error harmful as to each defendant?**

The evidence in this case, particularly the medical facts and expert testimony, did not support an ordinary negligence claim. And, the trial court's ordinary negligence instruction was harmful error because it misled the jury about the appropriate legal principles.

The GDLA adopts Appellant Dennis C. Doherty's ("Doherty") arguments regarding the Georgia Court of Appeals' ruling which affirmed the trial court's ordinary negligence charge. As Doherty points out, the Appellee's "entire case, including the testimony of [Appellee's] own expert, . . ., was oriented to claims of professional negligence. In fact, [Appellee's] counsel, himself, told the trial court this was a 'standard of care.' (V7, T-147)." Brief of Appellant-Defendant Dennis C. Doherty, p. 9.

The GDLA also briefs the Court on Davis v. Armacost, 168 A.3d 1112 (Md. App. 2017), a recent decision by the Maryland Court of Special Appeals which is directly on point. The court in Davis ruled that a jury instruction in a medical malpractice action defining negligence in terms of a "a reasonable person's" conduct constituted prejudicial error. Davis answers both of the Court's questions in this case with a resounding "Yes."

II. ARGUMENT AND CITATION OF AUTHORITY

A. The evidence presented at trial did not support an ordinary negligence claim.

1. Georgia consistently distinguishes professional negligence from ordinary negligence.

This Court has noted that "antecedents of the modern medical malpractice action trace back to the 14th century." Atlanta Oculoplastic Surgery, P.C. v.

Nestlehutt, 286 Ga. 731, 732 (2)(a) (2010). "[M]edical negligence claims appear in Georgia's earliest systematically reported case law, see *Smith v. Overby,* 30 Ga. 241 (1860) (action brought against physician for negligence in delivery of baby); *Perkins v. Attaway,* 14 Ga. 27, 29 (1853) (jury instruction in legal malpractice action stating that counsel was responsible to clients "just as a surgeon is responsible for an unskilful operation in surgery")." Nestlehutt, id. There is also "the fact that the tort of medical malpractice was included in Georgia's earliest Code. See Code of 1861, § 2915 (effective Jan. 1, 1863)." Id.

The General Assembly has enacted more recent, specific statutes for medical malpractice. See, e.g., O.C.G.A. §§ 9-3-70 (definition of an "action for medical malpractice"), 9-3-71 (statute of limitations for medical malpractice actions), 9-3-73(b) and (c) (statutes of limitations and repose for medical malpractice actions of disabled people and minors); 24-7-702(c)(2) (specific qualifications for expert witnesses in medical malpractice cases).

This Court has consistently recognized the policy reasons for differentiating medical negligence from ordinary negligence. Recently, in Zarate-Martinez v. Echemendia, 299 Ga. 301 (2016), the Court addressed an equal protection challenge to OCGA § 24-7-702(c), which deals with the qualifications of expert witnesses in professional malpractice actions. Although this was a matter of first impression, the Court had

> previously concluded that it is proper for the legislature to classify medical malpractice cases differently from other professional malpractice cases without running afoul of equal protection under the "rational basis" test. See Nichols v. Gross, 282 Ga. 811, 813, 653 S.E.2d 747 (2007) ("This Court has on several occasions found that a separate classification of medical malpractice apart from all other tort claims is constitutional") (citation omitted). For example, "as a matter of logic, when this Court approved as constitutional a classification treating medical malpractice cases differently from 'other' tort cases for purposes of the statute of limitations, the category 'other' tort cases necessarily included cases involving non-medical professional malpractice." Id. at 814, 653 S.E.2d 747. Because the same sorts of policy concerns regarding the uncertainty of the practice of medicine and the effect that malpractice claims may have on insurance rates are present here just as much as they are in cases involving statutes of limitation—and, indeed, in every medical malpractice action—we find "no merit to [Zarate–Martinez's] claim that OCGA § [24–7–702 (c)] creates an arbitrary classification between claims asserted in medical malpractice cases and claims involving other professional malpractice." Id. at 814, 653 S.E.2d 747.

Zarate-Echmendia, 299 Ga. at 309 (2)(c).

The GDLA points out this history, these statutes, and the Court's recent decision to clarify that medical malpractice cases occupy a unique status in Georgia. All medical malpractice cases, including this one, are subject to distinct and specific statutes, case law, and, of course, jury instructions.

2. Davis v. Armacost is directly on point.

Two months ago, the Maryland Court of Special Appeals issued its opinion Davis v. Armacost, 168 A.3d 1112 (Md. App. 2017). The facts showed that the defendant neurosurgeon performed a discectomy and fusion on the plaintiff. The

plaintiff's "recovery was not a smooth one;" his post-surgical complaints included "a 'pin-point opening at the end of his incision and, later, of chest pain and episodic and progressive left numbness in his left arm." Id. at 1116. He was seen several times at the hospital where the surgery was performed. Id. There was no drainage from the opening, but the hospital gave him oral antibiotics. Id. Radiographic studies of the surgical area were normal. Id.

Five months after his original surgery, the plaintiff presented to the emergency room with complaints of swelling and tenderness, redness around the surgical incision, a fever, and chills. Id. "The 'pin-point opening' had developed into an abscess." Id. The abscess was drained, and the fluid tested positive for a bacterial infection. Id.

The patient sued his neurosurgeon and the hospital "for malpractice and a failure to obtain informed consent." Id. at 1117. At trial the plaintiff's expert witness opined that the fusion procedure "was not medically necessary" and was inappropriate based on the plaintiff's age and health. Id. The expert also testified that the neurosurgeon and hospital failed to timely diagnose and treat the post-surgical infection. Id. The neurosurgeon presented his own experts, who testified that he "had complied with the standard of care in determining that [the plaintiff] was a candidate for the fusion surgery." Id. The defense experts also testified that the neurosurgeon appropriately obtained the plaintiff's informed consent. Id. An

infectious disease expert further testified for the defendants that the post-surgical infection had not "been lingering for months" but, instead, had developed only a few weeks before it was detected. Id.

The trial court's jury charges "included an instruction on the general negligence concept of foreseeable circumstances – describing how '**a reasonable person changes conduct according to the circumstances and the danger that is known or would be appreciated by a reasonable person**'. . . ." (Emphasis added.) Id. at 1115. This was "in addition to an instruction couched in terms of the standard of care that should be employed by a reasonably competent health care provider engaged in a similar practice and acting in similar circumstances." Id. The neurosurgeon's attorney objected to both charges being given, arguing to the trial court that the issue was whether his client was negligent, "did he do a surgery that wasn't indicated, did he fail to advise the Plaintiff about the surgery, and did he fail to properly appreciate the signs and symptoms of infection postoperatively." Id. at 1118. Defense counsel also stated: "There are no facts in this case which would suggest that Doctor Davis had any duty beyond the normal standard that would apply to a health care professional[.]" Id. Nonetheless, the trial "court did not otherwise respond to Dr. Davis's objection or modify the instructions." Id.

During closing arguments, the plaintiff's counsel told the jury:

> What do you look to if you want to *ignore all of the expert testimony*? You could do that in this case. It is your right [to]

> credit what you want to credit and ignore what you want to ignore.

(Emphasis and punctuation in original.) Id. The jury returned a defense verdict on the informed consent claim but found for the plaintiff on the medical malpractice count. Id. at 1117. The neurosurgeon appealed.

The Maryland Court of Special Appeals identified one of the issues before it as "whether the trial court in a medical malpractice action was wrong to give jury instructions on negligence framed in terms of the conduct of a reasonable person." Id. at 1115. The court initially noted that this issue is "fairly well settled in other jurisdictions but apparently [a matter] of first impression in Maryland." Id. The court was also quick to recognize that

> "whereas the conduct of the average layman charged with negligence is evaluated in terms of the hypothetical conduct of a reasonably prudent person acting under the same or similar circumstances, the standard applied in medical malpractice cases must also take into account the specialized knowledge or skill of the defendant." *Shilkret*, 276 Md. at 190–91, 349 A.2d 245 (1975) (citing W. Prosser, *Torts* 32 (4th ed. 1971)). That is why Maryland law has maintained, since the 1889 decision of *State v. Housekeeper*, a separate standard of care in medical negligence cases, expecting of doctors "[t]hat reasonable degree of care and skill which *physicians and surgeons* ordinarily exercise in the treatment of their patients." 70 Md. 162, 172, 16 A. 382 (emphasis added). Modern formulations require that physicians "exercise the degree of care or skill expected of a *reasonably competent health care provider* in the same or similar circumstances." *Crise v. Maryland General Hosp., Inc.*, 212 Md.App. 492, 521, 69 A.3d 536 (2013) (emphasis added).

Davis, 168 A.3d at 1119-1120.

As in Georgia, Maryland law holds that "[b]ecause of this special standard of care, expert testimony is essential in almost all medical malpractice claims to determine whether a doctor has been negligent." (Cits. omitted.) Id. at 1120. "Expert testimony is not required in only the rarest of cases in which the average juror can determine independently that the physician was negligent – by amputating the wrong leg for example. This is because medical malpractice claims are usually more complex than general negligence claims." Cits. omitted.) Id.

The court could not find any other Maryland cases which "explicitly addressed the suitability of general negligence or foreseeable circumstances instructions in medical negligence cases." Id. However, the court identified cases from Arizona[1], Ohio[2], and South Carolina[3] which "decided that instructions on ordinary care, foreseeability of risk and other general negligence principles muddle or misstate the applicable standard of care in malpractice cases." Id. at 1120-1121.[4]

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[1] Hales v. Pittman, 576 P.2d 493, 498 (Ariz. 1978).
[2] Cromer v. Children's Hosp. Med. Ctr. of Akron, 29 N.E.2d 921, 931 and 934 (Ohio 2015); Hinkle v. Cleveland Clinic Found., 823 N.E.2d 945, 960 (2004).
[3] Pittman v. Stevens, 613 S.E.2d 378 (S.C. 2005).
[4] Other courts have held similarly. In Harrington v. Rush-Presbyterian-St. Luke's Hospital, 569 N.E.2d 15, 19 (Ill. App. 1991), the Illinois Court of Appeals declared that both "ordinary negligence" and "medical malpractice" jury instructions "should not be given in a medical malpractice case." See also Casper v. Ayasanonda, 2014 WL 2558396 (Hawaii Ct. App. 2014) ("It was improper to mix the standards for medical malpractice and ordinary negligence in regard to the claim against" the defendant physician); Gramling v. Jennings, 625 S.W.2d 463,

Turning to the specific jury charges at issue, the court found: "While the instructions on general negligence and foreseeable circumstances may have been correct statements of negligence law in Maryland, they failed to account for a medical doctor's specialized knowledge and skill." Id. at 1121. The trial court also charged[5] the jury on the "appropriate standard of care for" the defendant neurosurgeon, which took "account of the risks involved in the decision to operate and in any post-operative treatment. The standard also rightly asks jurors to consider how a *physician* – not the average reasonable person – responds to those risks." (Emphasis in original.) Id.

The court concluded:

> Medical malpractice claims are not general negligence claims, and so jury instructions on general negligence, although correct statements of Maryland law, are not supported by the facts of a case **centered on the allegedly negligent conduct of a physician**. Accordingly, we hold that the trial court erred in giving general negligence instructions in a medical malpractice case.

(Emphasis added.) Id. at 1121.

464-465 (Ark. 1982) (under Arkansas law jury charges on negligence and ordinary care are not appropriate in a medical malpractice case).

[5] This charge is Maryland Civil Pattern Jury Instruction 27:1 ("Health Care Providers – Standard of Care"), which states: "A health care provider in negligent if the health care provider does not use that degree of care and skill which a reasonably competent health care provider engaged in a similar practice and acting in similar circumstances would use." Id. at 1117-1118, and n.7.

The reasoning and holding in Davis apply here and require reversal of the court of appeals' decision. Appellee Brown's entire case, until the trial court charged the jury, was based on medical malpractice. His complaint and first amended complaint were entitled "Complaint for Medical Malpractice." (V1, R-5.) His expert witness, Dr. Stephen Abram, identified – what Dr. Abram contended to be – the applicable standard of care for a physician under the circumstances of this case. (V4, T-189, 192-193.) Dr. Abram also testified that Dr. Doherty breached this standard of care "(1) by using Propofol sedation on an obese patient without proper anesthesia personnel being available; (2) by failing to recognize hypoxemia and treat it aggressively; and (3) by failing to provide a reasonable assessment of Ms. Brown's history. (V4, T-178)." Brief of Appellant-Defendant Dennis C. Doherty, pp. 7-8. Dr. Doherty presented his own expert to counter Dr. Abram. (V6, T-50, 54-55, 68.) Simply put, this was a "case centered on the allegedly negligent conduct of a physician." See Davis, 168 A.3d at 1121.

As in Davis, Appellee Brown's counsel used the ordinary negligence charge in his closing argument to the jury.

> Now, look, this case is about a case of negligence, right? Neglect. And negligence the judge will tell you . . . the law reads the negligence is the failure to use care that is ordinarily used by ordinarily careful persons. . . . That is the law you're applying. . . . When you boil it down, did they use care that's ordinarily used by careful people and the skill required of a doctor or nurse?

(V9, T-95-96.)

Counsel's jury argument on ordinary and professional negligence, and the trial court's subsequent ordinary negligence charge, had the combined effect of "muddling and misstating" the appropriate standard of care in this case. See Davis, 168 A.3d at 1120. How can it be logical for a case to progress through initial pleadings, written discovery, lay witness depositions, expert witness disclosures and depositions, pre-trial proceedings, voir dire, opening statements, and presentation of evidence to the jury, *all on a theory of medical malpractice*, to then transform into a medical malpractice "and/or" ordinary negligence case immediately before the jury gets the case? Likewise, how is this fair to the physician defendant who prepares his defense *in response to what are uniformly professional negligence claims*?

The trial court's ordinary negligence charge, and the Georgia Court of Appeals' opinion affirming it, effectively allow a plaintiff who files a medical malpractice lawsuit, with the requisite expert affidavit under O.C.G.A. § 9-11-9.1 and additional expert medical testimony, to prosecute the case as such, but to wait until the jury gets the case to decide if he wants the jury to apply a professional standard of care or an ordinary negligence one. This is not a case where the plaintiff alleged, either originally or during discovery, that certain alleged acts were medical malpractice and that other, independent acts constituted ordinary negligence. To maintain any kind of consistency in medical malpractice litigation,

this Court should not allow a trial court to abruptly add an inappropriate standard which only serves to confuse and mislead the jury – *and particularly a jury that had only heard the allegations and defenses presented in the context of medical malpractice.*

B. The ordinary negligence charge was harmful.

After determining that the trial court erred in giving an ordinary negligence charge in a medical malpractice case, the court in Davis turned to whether the "general negligence instructions" were prejudicial. Id. at 1121. Although Maryland law did not require "definitive proof of prejudice," "[t]he mere uncertainty as to prejudice may be grounds for holding error is reversible." (Cits. omitted.) Id. at 1122. "This approach is especially apt in cases in which the form of the jury's verdict makes it difficult – if not impossible – for a reviewing court to decide whether the erroneous instruction was relied upon in reaching that verdict. This is because a court cannot 'unbake' the jury verdict and examine the impact of any one ingredient." (Cits. omitted.) Id.

The court concluded that the ordinary/general negligence charge was prejudicial because it involved a fundamental aspect of the case.

> The general negligence instructions struck at the heart of the case, *viz.*, Dr. Davis's liability, and permitted speculation about inapplicable legal principles (the hypothetical conduct of a reasonable person in the face of foreseeable harm). The concept of reasonable care as decided by ordinary people, "permeated" the charge given to the jury and left the jurors with two distinct

> standards against which Dr. Davis's conduct was to be measured: that of a "reasonable person" and that of a "reasonably competent health care provider engaged in a similar practice and acting in similar circumstances." . . . The misleading effect of the instruction was compounded by comments in Mr. Armacost's closing arguments inviting the jurors to disregard the expert testimony needed to establish the appropriate standard of care.

Id.

Since this was a medical malpractice case, "[t]he law is clear that the jury was supposed to evaluate Dr. Davis against his peers." Id. at 1124. However, the trial court's "erroneous instructions" and the argument of plaintiff's counsel "permitted a jury not made up of neurosurgeons to impermissibly speculate about how they would have approached the" subject medical procedure. Id. Therefore, "the challenged instructions were both erroneous and prejudicial." Id.

The Hawaii Court of Appeals held similarly that "mix[ing] the standards for medical malpractice and ordinary negligence in regard to" a claim against a defendant physician was reversible error. Casper, 2014 WL 2558396, *6 (Hawaii Ct. App. 2014). The *plaintiff* in that medical malpractice case argued on appeal that the trial court erred in "giving jury instructions on ordinary negligence, thus setting out two different and confusing instructions – medical negligence and ordinary negligence – that [she] had to prove." Id. at *1. In reversing the trial court, the Hawaii Court of Appeals concluded that "the jury instructions improperly indicate that [the plaintiff] was required to prove, among other things,

ordinary negligence. These instructions are erroneous, misleading and prejudicial in the context of the medical malpractice claims asserted against Dr. Ayasanonda, and the jury instructions improperly contain two different standards of negligence pertaining to Dr. Ayasanonda." Id. "The jury instructions read as a whole presented conflicting standards and some of the instructions suggested that Dr. Ayasanonda could be found not negligent based on the jurors' own knowledge and expectations." Id. at *6. Casper shows, therefore, that giving both professional negligence and ordinary negligence charges in a medical malpractice case is erroneous and prejudicial, regardless of whether it affects the plaintiff or defendant.

For these reasons, this Court should find that the trial court's ordinary negligence charge was prejudicial and reversible error. The jury here was invited to disregard the expert testimony presented at trial (both plaintiff's and defendant's) and to apply a non-physician standard of care. Georgia law has consistently held that physicians are not subject to different standards of care; when they are providing medical care, they are doing so pursuant to the standards of other professionally educated and trained physicians. To hold otherwise, as the court of appeals did, creates a dangerous precedent which conflicts with the General Assembly's enactments and this Court's prior rulings.

III. CONCLUSION

The GDLA respectfully submits that the Georgia Court of Appeals erred in affirming the trial court's giving of an ordinary negligence instruction in this medical malpractice case. Ordinary negligence and medical malpractice are distinct, unique things. In a case that "centered on the allegedly negligent conduct of a physician," abruptly telling jurors that they can apply an ordinary negligence standard to the same acts which form the medical malpractice claims can be nothing else but reversible error.

This 20th day of November, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing **AMICUS CURIAE BRIEF OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION** in the above-listed case on all parties by depositing a copy of same in the United States Mail with sufficient postage thereon to ensure delivery, addressed as follows:

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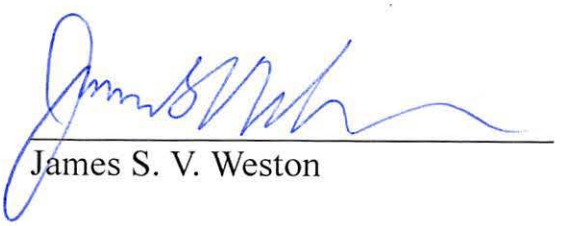

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