IN THE SUPREME COURT OF GEORGIA

VISHAL C. GALA, M.D., REGIS HAID, JR., M.D., and ATLANTA BRAIN AND SPINE CARE, P.C.,	)	
Appellants	)	Case No. S14G0919
v.	)	
DORIAN EUGENE FISHER, and MICHELLE D. FISHER,	)	
Appellees.	)	

BRIEF OF *AMICUS CURIAE*
GEORGIA DEFENSE LAWYERS ASSOCIATION

Kirby G. Mason, *President*
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STATEMENT OF INTEREST

The GEORGIA DEFENSE LAWYERS ASSOCIATION (hereafter "GDLA") consists of more than 750 attorneys, including sole practitioners and members of law firms of all sizes throughout the State of Georgia who dedicate the majority of their professional time to representing defendants in civil suits. GDLA's purposes include supporting and improving the civil defense bar, improving the adversary system of jurisprudence in our courts, eliminating court congestion and delay in civil litigation, and otherwise promoting improvements in the administration of justice. GDLA is therefore concerned with proper interpretation of the statutes enacted by the General Assembly, particularly those statutes that often must be applied together, and the precedential effect of the decisions of Georgia's appellate courts in interpreting and applying such statutes in the trial courts.

Given its members' representation of the broad range of professionals and entities covered by O.C.G.A. § 9-11-9.1(a) and (g), GDLA is justifiably concerned with and interested in issues relating to professional malpractice cases, including but not limited to medical malpractice cases. Thus, the GDLA is concerned with the statute of limitations applicable to such actions

and, most particularly here, the requirement of O.C.G.A. § 9-11-9.1(a) that an affidavit of an expert competent to testify against the target, or targets, of the alleged professional malpractice be contemporaneously filed with the complaint. It is the position of the GDLA that the ruling of the Court of Appeals ("COA") is in contravention of the terms of § 9-11-9.1 and the intent of the legislature. Simply stated, the COA's decision will allow plaintiffs in professional malpractice cases to circumvent the contemporaneous filing requirement of § 9-11-9.1(a), by outright substitution of a qualified affiant for an unqualified affiant, under the guise of an amendment to the affidavit allowed by § 9-11-9.1(e). The interpretation of this statute by the COA, if allowed to stand, not only contravenes the intent of the legislature in enacting the contemporaneous filing requirement of § 9-11-9.1(a), but also allows plaintiffs in such cases to avoid complying with the legislature's requirement that such cases be brought within two years, as clearly expressed in the statute of limitations. *See* O.C.G.A. § 9-3-71. This cannot be what the legislature intended in enacting either § 9-11-9.1(a) or § 9-3-71.

Accordingly, the GDLA respectfully submits this brief as *amicus curiae* and requests that this Court reverse the ruling of the COA. Respectfully, the COA's decision nullifies the contemporaneous filing requirement of § 9-11-9.1(a), ignores the language and intention of the legislature in the procedure set forth in § 9-11-9.1(b) for obtaining additional time for a plaintiff to obtain and file the affidavit of a competent expert, and judicially legislates an option to gain additional time that is neither allowed nor intended by the legislature. Specifically, the amendment provision set forth in § 9-11-9.1(e) is a limited exception to the rules set forth in § 9-11-9.1(a) and § 9-11-9.1(b). This exception should not be allowed to swallow these rules.

Reversing the COA will restore the contemporaneous filing requirement of § 9-11-9.1(a) nullified by the decision below. Reversing the decision will reinforce the sole option provided by the legislature in § 9-11-9.1(b) for gaining additional time to file the affidavit of a qualified expert. For if the door opened by the COA remains open, plaintiffs will be allowed to circumvent the applicable statutes of limitations, in contravention of the specific intent of the General Assembly. Finally, reversing the COA will

create precedent that will more clearly guide the litigants, lawyers, and judges facing these issues in the future.

ARGUMENT AND CITATION OF AUTHORITY

On June 2, 2014, this Court granted certiorari, noting that it was particularly concerned with the following and that briefs should be submitted only on the following question:

> In a professional malpractice action, when the plaintiff files his complaint with an affidavit by a person not competent to testify as an expert in the action, does OCGA § 9-11-9.1(e) permit the plaintiff to cure this defect by filing an amended complaint with an affidavit by a competent expert? *See, e.g., Piscitelli v. Hosp. Auth. of Valdosta*, 302 Ga. App. 746 (691 SE2d 746) (2010).

GDLA concurs with the Appellant and respectfully submits the only answer to this question is "No."

In a professional malpractice action, where the plaintiff files his complaint with an affidavit with an incompetent expert affiant, O.C.G.A. § 9-11-9.1(e) does not permit the plaintiff to cure this defect by filing an amended complaint with a substitute affidavit by a competent substitute expert. Allowing such wholesale substitution is inconsistent with the language of the relevant statutory provisions and the intent of the legislature

in enacting them. Such substitution neither cures the complained of defect—that the affiant was not competent—nor satisfies the requirement of O.C.G.A. § 9-11-9.1(a)—that the affidavit of an expert competent to testify be filed contemporaneously with the complaint. If the original affiant is not competent, that is a defect that cannot and should not be cured.

A. O.C.G.A. § 9-11-9.1(a) requires that an affidavit of a competent expert be filed contemporaneously with the complaint.

Although the question posed by this Court in its June 2, 2014 Order assumes that both the complaint and the accompanying affidavit are defective if the affidavit is signed by an affiant who is not competent to do so, the statutory bases for these requirements are examined here to provide a necessary background for the analysis that follows. Generally,[1] O.C.G.A. §

[1] O.C.G.A. § 9-11-9.1(b) provides the only legislated exception to the contemporaneous filing requirement. It is available only "if the attorney for the plaintiff files with the complaint an affidavit in which the attorney swears or affirms that his or her law firm was not retained by the plaintiff more than 90 days prior to the expiration of the period of limitation on the plaintiff's claim or claims . . . ." In that event only, "the plaintiff shall have 45 days after the filing of the complaint to supplement the pleadings with the affidavit" of an expert competent to testify. O.C.G.A. § 9-11-9.1(b) (2014).

9-11-9.1(a) requires that "[i]n any action for damages alleging professional malpractice against:

> (1) A 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.

O.C.G.A. § 9-11-9.1(a) (2014) (emphasis added). *See also* O.C.G.A. § 9-11-9.1(b), which expressly references "[t]he contemporaneous affidavit filing requirement pursuant to subsection (a) of this Code section. . . ." O.C.G.A. § 24-7-702(e) states: "An affiant shall meet the requirements of this Code section in order to be deemed qualified to testify as an expert by means of the affidavit required under Code Section 9-11-9.1." Accordingly, in order to be competent under § 9-11-9.1, the expert affiant must be qualified under § 24-7-702. *See also Spacht v. Troyer*, 288 Ga. App. 898 (2007).

Any purported expert who fails to meet the qualifications requirements set out in O.C.G.A. § 24-7-702(c) is not qualified and his or her opinions regarding professional negligence are inadmissible. *See*

Nathans v. Diamond, 282 Ga. 804, 806 (2007).[2] The penalty for failure to supply a proper affidavit per O.C.G.A. § 9-11-9.1 is dismissal. *Akers v. Elsey*, 294 Ga. App. 359, 362 (2008).

B. Substitution is inconsistent with the legislative intent and the language of the relevant statutory provisions.

The cardinal rule of statutory construction requires an examining court to "ascertain the legislative intent and purpose in enacting the law, and then to give it that construction which will effectuate the legislative intent and purpose." *Cardinale v. City of Atlanta*, 290 Ga. 521, 524 (2012)(citation and punctuation omitted). The court must "consider the consequences of any proposed interpretation and not construe the statute to reach an unreasonable result unintended by the legislature." *Id.* (citation and punctuation omitted). The GDLA respectfully submits that the COA's interpretation that O.C.G.A. § 9-11-9.1(e) allows *substitution* of the *affiant* rather than *amendment* by the original affiant of his or her *affidavit*, is inconsistent with the legislative

[2] *See also Hankla v. Postell*, (*"Hankla III"*) 293 Ga. 692, 693-7 (2013) for its thorough analysis of the qualifications requirements of O.C.G.A. § 24-7-702(c).

intent and the language of the relevant statutory provisions and, if allowed to stand, will lead to results unintended by the legislature.

> In the construction of statutes,
>
> > the courts shall look diligently for the intention of the General Assembly. In so doing, the ordinary signification shall be applied to all words. ... Where the language of a statute is plain and susceptible to only one natural and reasonable construction, courts must construe the statute accordingly... In addition, … when we are interpreting a statute, we must presume that the General Assembly had full knowledge of the existing state of the law and enacted the statute with reference to it. We construe statutes in connection and in harmony with the existing law, and as a part of a general and uniform system of jurisprudence, and their meaning and effect is to be determined in connection, not only with the common law and the constitution, but also with reference to other statutes and the decisions of the courts.

Luangkhot v. State, 292 Ga. 423, 424 (2013) (citations and punctuation omitted). Additionally,

> Legislative intent is determined from consideration of the entire statute; thus we consider a statutory provision not in isolation, but in the context of the other statutory provisions of which it is a part. *Hendry v. Hendry*, 292 Ga. 1, 3 (734 SE2d 46) (2012).

Abdel-Samed v. Dailey, 294 Ga. 758, 763 (2014).[3] In light of the foregoing, it is appropriate to examine the language of, and the legislative intent behind the particular section of the statutory provision directly at issue, O.C.G.A. § 9-11-9.1(e), and all other provisions of that statute including subsections (a) and (b), and the other code sections typically applied with the statute at issue.

1. Language of O.C.G.A. § 9-11-9.1.

O.C.G.A. § 9-11-9.1(a) is set forth above. The remaining relevant provisions of O.C.G.A. § 9-11-9.1 include:

> (b) The contemporaneous affidavit filing requirement pursuant to subsection (a) of this Code section shall not apply to any case in which the period of limitation will expire or there is a good faith basis to believe it will expire on any claim stated in the complaint within ten days of the date of filing the complaint and, because of time constraints, the plaintiff has alleged that an affidavit of an expert could not be prepared. In such cases, if the attorney for the plaintiff files with the complaint an affidavit in which the attorney swears or affirms that his or her law firm was not retained by the plaintiff more than 90 days prior to the expiration of the period of limitation on the plaintiff's claim or claims, the plaintiff shall have 45 days after the filing of the complaint to supplement the pleadings with the affidavit. The trial court shall not extend such time for any reason without

[3] *See also, Hankla v. Postell*, (*"Hankla III"*) 293 Ga. 692, 694 (regarding the importance of looking at the language of all of the provisions of a statute in order to derive its meaning and the legislature's intent).

consent of all parties. If either affidavit is not filed within the periods specified in this Code section, or it is determined that the law firm of the attorney who filed the affidavit permitted in lieu of the contemporaneous filing of an expert affidavit or any attorney who appears on the pleadings was retained by the plaintiff more than 90 days prior to the expiration of the period of limitation, the complaint shall be dismissed for failure to state a claim.

(c) This Code section shall not be construed to extend any applicable period of limitation, except that if the affidavits are filed within the periods specified in this Code section, the filing of the affidavit of an expert after the expiration of the period of limitations shall be considered timely and shall provide no basis for a statute of limitations defense.

(d) If a complaint alleging professional malpractice is filed without the contemporaneous filing of an affidavit as permitted by subsection (b) of this Code section, the defendant shall not be required to file an answer to the complaint until 30 days after the filing of the affidavit of an expert, and no discovery shall take place until after the filing of the answer.

(e) If a plaintiff files an affidavit which is allegedly defective, and the defendant to whom it pertains alleges, with specificity, by motion to dismiss filed on or before the close of discovery, that said affidavit is defective, the plaintiff's complaint shall be subject to dismissal for failure to state a claim, except that the plaintiff may cure the alleged defect by amendment pursuant to Code Section 9-11-15 within 30 days of service of the motion alleging that the affidavit is defective. The trial court may, in the exercise of its discretion, extend the time for filing said amendment or response to the motion, or both, as it shall determine justice requires.

(f) If a plaintiff fails to file an affidavit as required by this Code section and the defendant raises the failure to file such an affidavit by motion to dismiss filed contemporaneously with its initial responsive pleading, such complaint shall not be subject to the renewal provisions of Code Section 9-2-61 after the expiration of the

> applicable period of limitation, unless a court determines that the plaintiff had the requisite affidavit within the time required by this Code section and the failure to file the affidavit was the result of a mistake.

O.C.G.A. § 9-11-9.1 (2014).

2. Legislative intent of O.C.G.A. § 9-11-9.1.

O.C.G.A. **§** 9-11-9.1(a) provides the following mandatory language:

> "In any action for damages alleging professional malpractice against [certain professionals or entities . . .]
>
> > 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.

O.C.G.A. **§** 9-11-9.1(a) (2014) (emphasis added). The COA is generally correct in its citations regarding the legislative intent of O.C.G.A. § 9-11-9.1, including the following:

> "The purpose of OCGA § 9-11-9.1 is to reduce the number of frivolous malpractice lawsuits being filed against professionals. The requirement of filing an expert affidavit at the time the complaint is filed serves this stated purpose because it requires plaintiffs to find an expert who will attest that at least one act of professional negligence has occurred, thereby reducing the number of frivolous claims filed.";

and

> With regard to amended or substituted affidavits, "plaintiffs must be afforded wide berth to conform to the requirements of OCGA § 9-11-9.1 in accordance with the liberality of the Civil Practice Act as long as the purpose of the affidavit requirement, which is to reduce frivolous malpractice actions, is not thwarted."

Fisher v. Gala, 325 Ga. App. 800, 805 n.5 (2014) (citations omitted). Plaintiffs' right to *amend*, however, is not without limitation and GDLA respectfully submits that the COA did not go far enough to recognize the import of the intention of the legislature in this regard. This is particularly so when this statute is applied, as it was here, in combination with other applicable code sections, including not only the expert competency/qualifications requirements of O.C.G.A. § 24-7-702(c), but also the statute of limitations found in O.C.G.A. § 9-3-71.

The terms of the statute itself reflect the General Assembly's intent that, in cases to which O.C.G.A. § 9-11-9.1 applies, the complaint be timely and properly filed, accompanied by the affidavit of an expert *competent* to testify. O.C.G.A. § 9-11-9.1(a). O.C.G.A. § 9-11-9.1(b) expressly references "[t]he **contemporaneous affidavit filing requirement** pursuant to subsection (a) of this Code section. . . ." O.C.G.A. § 9-11-9.1(b)

(2014)(emphasis added). In enacting O.C.G.A. § 9-11-9.1(b), the General Assembly intended to give plaintiffs extra time to secure an affidavit when the statute of limitation is soon to expire. *Bell v. Phoebe Putney Health Sys.*, 272 Ga. App. 856, 860 (2005). O.C.G.A. § 9-11-9.1(b) provides "if the attorney for the plaintiff files with the complaint an affidavit in which the attorney swears or affirms that his or her law firm was not retained by the plaintiff more than 90 days prior to the expiration of the period of limitation on the plaintiff's claim or claims . . .," and in that event only, ". . .the plaintiff shall have 45 days after the filing of the complaint to supplement the pleadings with the affidavit" of an expert competent to testify. O.C.G.A. § 9-11-9.1(b) (2014). This is the only legislated exception to the contemporaneous filing requirement of O.C.G.A. § 9-11-9.1(a). O.C.G.A. § 9-11-9.1 (2014).

If the COA's decision is allowed to stand, the result would be inconsistent with the intent of the legislature regarding § 9-11-9.1(a) and § 9-11-9.1(b). To illustrate, if a plaintiff's lawyer is in precisely the situation defined by the legislature in § 9-11-9.1(b), that attorney is faced with a significant problem given the strict qualifications requirements for

qualifying experts in medical malpractice cases found in § 24-7-702(c). Under O.C.G.A § 9-11-9.1(b), the attorney is given an additional 45 days after the filing of the complaint to secure and file the affidavit of an expert who is competent to testify under § 9-11-9.1(a) and § 24-7-702(c). *See* O.C.G.A. § 24-7-702(e). Utilizing the option created by the COA in this case, however, gives plaintiffs more time, roughly 60 days[4] rather than 45. The decision of the COA now allows plaintiffs to file a complaint, just before the expiration of the two-year statute of limitations, accompanied by an affidavit of *anyone* – no matter how unqualified. Under the COA's rule, a plaintiff need not actually file the affidavit of a competent and qualified expert until 30 days after being served with a defendant's motion to dismiss. Accordingly, the Court of Appeals' interpretation that § 9-11-9.1(e) allows

[4] Given thirty days from service of the summons and complaint to file and serve the Answer and Motion to Dismiss, and the 30 days from service of the Motion to Dismiss to file an amended affidavit under § 9-11-9.1(e), or to "amend" via a substitute affidavit from a substitute qualified expert affiant, assuming service was perfected quickly, this would typically give such a plaintiff and his or her attorney roughly an additional two months, 60 days or more, after the expiration of the statute of limitations to attempt to find a qualified expert, get them the records to review, have them reviewed, get their opinions reduced to writing in an affidavit, and to get that substitute expert's affidavit filed.

substitution of an affiant, rather than amendment by the same affiant, is inconsistent with the intent of the legislature as clearly reflected in terms it utilized in both § 9-11-9.1(a) and § 9-11-9.1(b). Substitution thwarts both the contemporaneous filing requirement of the affidavit of a competent expert, as well as the *only* option provided by the legislature when the plaintiff's attorney is faced with limited time to obtain and file the affidavit of a competent and qualified expert provided in § 9-11-9.1(b).

Our case law also recognizes that the intent of O.C.G.A. § 9-11-9.1 includes statute of limitations concerns. For example, in *Thomas v. Medical Ctr. of Cent. Ga.*, the plaintiff filed a medical malpractice complaint against a doctor. The contemporaneously filed expert affidavit alleged the doctor breached the standard of care and the hospital defendant was vicariously liable for the doctor's malpractice. *Thomas v. Medical Ctr. of Cent. Ga.*, 286 Ga. App. 147, 147 (2007). No claims regarding the hospital's nurse were brought in the original complaint or supporting affidavit. *Id.* at 148. More than a year after the expiration of the two-year statute of limitations, the plaintiff filed an amended complaint and amended affidavit alleging the hospital's nurses had violated the standard of care and that the hospital was

vicariously liable. *Id.* In affirming summary judgment to the hospital, the COA included the following:

> . . .we can find no case law, and Thomas cites no case law, permitting her to add new claims of vicarious liability and allowing them to relate back to the filing of the original complaint. To allow a plaintiff to switch or add professionals upon which she bases her claims would certainly frustrate the intent of OCGA § 9-11-9.1.

Id. at 149. This decision recognizes that the intent of the legislature in enacting the relevant statute was to limit a plaintiff's ability to amend. The purpose of this limitation of the right to amend is the same purpose behind the entire statutory scheme -- discouraging the filing of frivolous lawsuits. This is particularly true where the right to amend impacts the statute of limitations. *See also Fales v. Jacobs*, 263 Ga. App. 461 (2003) (permitting a late filing of an expert affidavit to "cure" the lack of filing an affidavit with the complaint "would impermissibly gut the contemporaneous filing requirement of O.C.G.A. § 9-11-9.1(a)").

a. In ordinary use, amendment does mean substitution.

Further, with respect to the interpretation of terms contained within the statute, as recognized by this Court's recent opinion in *Abdel-Samed v. Dailey*, where a term or phrase is not defined within the statute utilizing it,

or elsewhere within the more general section of statutes in which it is found, and where it is a term or phrase of general usage, it must be given its ordinary meaning.[5] O.C.G.A. § 9-11-9.1(e) includes "... the plaintiff may cure the alleged defect by amendment pursuant to Code Section 9-11-15...," but the term "amendment" is not defined in O.C.G.A. § 9-11-9.1. Although the process of "amendment" of pleadings is described in Section 9-11-15, it is not defined therein. "Amendment" is not defined elsewhere in the Civil Practice Act, O.C.G.A. §§ 9-11-1 through 9-11-133. Similarly, although O.C.G.A. 9-10-130 provides that "all affidavits that are the foundation of legal proceedings ... shall be amendable to the same extent as ordinary pleadings and with only the restrictions, limitations, and consequences of ordinary pleadings," the terms "amendment" or "amendable" are not defined therein either. O.C.G.A. § 9-10-130 (2014). Accordingly, as required by O.C.G.A. § 1-3-1(b), "the ordinary signification shall be applied to" the word "amendment" as utilized in O.C.G.A. § 9-11-9.1(e). Therefore, despite Appellees' contrary protestations, references to definitions found in general

[5] *See Abdel-Samed v. Dailey*, 294 Ga. 758, 763 (2014) (regarding the use of "bona fide" in O.C.G.A. § 51-1-29.5 and citing O.C.G.A. § 1-3-1(b)).

dictionaries and in legal dictionaries are perfectly appropriate. *See, e.g.*, *Abdel-Samed v. Dailey*, 294 Ga. 758, 763 (2014).

Amendment does not mean substitution.[6] An "amendment" is "[a] correction or revision of a writing to correct errors or better to state its intended purpose." Ballentine's Law Dictionary, 3d ed. (2010). "Substitution" means "[p]utting one person or thing in the place of another." *Id.*

That amendment does not mean substitution is also supported by the same sources utilized in this Court's opinion in *Abdel-Samed v. Dailey*. The American Heritage Dictionary's definitions of amendment include: "1. The act of changing for the better; improvement"; or "2. A correction or alteration, as in a manuscript"; and "3.a. The process of formally altering or adding to a document or record."[7] Webster's Dictionary similarly defines an amendment as "a change in the words or meaning of a law or document."[8] Black's Law Dictionary defines amendment, as used in practice rather than

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[6] As noted by the Appellant Neurosurgeons, *see* Brief of Appellants at 15.

[7] The American Heritage® Dictionary of the English Language (5th ed. 2014), https://www.ahdictionary.com/word/search.html?q=amendment.

[8] Merriam-Webster.com, http://www.merriamwebster.com/dictionary/amendment.

in creating and modifying legislation, as "[t]he correction of an error committed in any process, pleading, or proceeding at law, or in equity, and which is done either of course, or by the consent of parties, or upon motion to the court in which the proceeding is pending", or as "[a]ny writing made or proposed as an improvement of some principal writing."[9]

Likewise, substitution does not mean amendment. The American Heritage Dictionary's definitions of substitution include "The act or an instance of substituting . . . The state of being substituted . . ." and "One that is substituted; a replacement."[10] That dictionary's first definition of the noun "substitute" is: "One that takes the place of another; a replacement". Its first definition of the verb "substitute" is: "To put or use (a person or thing) in place of another".[11] Webster's Dictionary similarly defines substitution as "the act of substituting or replacing one person or thing with another."[12]

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[9] Thelawdicitionary.org, http://thelawdictionary.org/amendment/.
[10] The American Heritage® Dictionary of the English Language (5th ed. 2014), https://www.ahdictionary.com/word/search.html?q=substitution.
[11] *Id.* at https://www.ahdictionary.com/word/search.html?q=substitute.
[12] Merriam-Webster.com, http://www.merriam-webster.com/dictionary/substitution.

Black's Law Dictionary defines substitution as "The putting one person in place of another…."[13]

Thus, in ordinary usage, substitution is a different concept than amendment. These dictionary definitions indicate the ordinary meaning of the word "amendment" is a modification or change made by the author of the document, or by consent of the parties involved, or by the court pursuant to a motion. None of those apply here. The affidavit involved was not modified or changed by its author, the Appellants certainly never consented to the substitution that was made, and the substitution, rather than amendment, was made by Appellees without first filing a motion seeking to do so, or obtaining any approval from the trial court to do so.

The differing concepts of amendment and substitution are recognized in other areas of the law. For example, the law allows correcting a misnomer by amendment, but only when it does not constitute a substitution. The COA has repeatedly recognized this distinction.

> Under Georgia law, "where there has been actual service on the correct defendant but the defendant has been denominated by the wrong name in the pleadings . . . correction by amendment of this

[13] Thelawdicitionary.org, http://thelawdictionary.org/substitution/.

> misnomer may be done, *which [amendment] does not constitute a substitution of parties*." (Citations omitted; emphasis supplied.) *Foskey v. Vidalia City School*. [fn. omitted] See also *Anderson v. Bruce* [fn. omitted] ("where the real defendant has been properly served, a plaintiff has the right to amend in order to correct a misnomer in the description of the defendant contained in the complaint. *Correction of a misnomer involves no substitution of parties* and does not add a new and distinct party") (emphasis supplied).

Mathis v. Bellsouth Telecommunications, Inc., 301 Ga. App. 881, 883 (2010) (emphasis in original, footnotes and internal citations to the Court of Appeals' earlier opinions omitted). Also as noted therein,

> OCGA § 9-10-132 provides: "All misnomers, whether in the Christian name or surname, made in writs, pleadings, or other civil judicial proceedings, *shall, on motion, be amended and corrected instanter* without working unnecessary delay to the party making the same." (Emphasis supplied.)

Id. at n. 6 (emphasis in original).

In contrast, the "amendment" here is not an amendment but is, instead, a substitution. This is not a correction by the plaintiff of the name of a defendant who, despite being served, was misnamed in the complaint. Here, James Rogan, M.D., the general practice physician who was the author of the affidavit originally filed with the complaint against the Appellant Neurosurgeons, did not change or correct anything. Instead, his affidavit was

substituted with an affidavit authored by a new and different physician. As established above, our legislature is charged with knowing the law. Had it intended that a § 9-11-9.1 affidavit could be substituted with one by another affiant, rather than amended by its affiant, the legislature could have specifically provided for that in O.C.G.A. § 9-11-9.1. It did not. The presumption is that the General Assembly means what it says and says what it means. *Northeast Atlanta Bonding Co. v. State of Ga.*, 308 Ga. App. 573, 577 (2011).

b. In the context in which it is used here, amendment does not mean substitution.

The ordinary usage rule of construction is not the only support for the position that the statute does not allow substitution. In construing language used in a statute, in addition to the ordinary usage of a term or phrase, the context in which a term or phrase is used and the legislative intent behind enactment of the statute must also be considered. *E.g., Abdel-Samed v. Dailey*, 294 Ga. 758, 763 (2014). Language in one part of a statute must be construed in light of the legislative intent as found in the statute as a whole. *Fair v. State*, 288 Ga. 244, 252 (2010). "It is a well-established principle that

a statute must be viewed so as to make all its parts harmonize and to give a sensible and intelligent effect to each part. It is not presumed that the legislature intended that any part would be without meaning." *Houston v. Lowes of Savannah, Inc.*, 235 Ga. 201, 203 (1975).

This Court applies the "basic rules of statutory construction," which it has noted specifically include the following:

> . . . we apply the fundamental rules of statutory construction that require us to construe [the] statute according to its terms, to give words their plain and ordinary meaning, and to avoid a construction that makes some language mere surplusage. At the same time, we must seek to effectuate the intent of the legislature.
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> . . . Furthermore, "[w]here the language of a statute is plain and unambiguous, judicial construction is not only unnecessary but forbidden."
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> . . . In this regard, "under our system of separation of powers this Court does not have the authority to rewrite statutes."

(Citations omitted). *Colon v. Fulton County*, 294 Ga. 93, 96-7 (2013). Like this Court, the COA does not have the authority to judicially legislate by rewriting statutes. The GDLA respectfully submits that this is what the COA did. Taken in context with *all* of the provisions of O.C.G.A. § 9-11-9.1, the term "amendment" as used in O.C.G.A. § 9-11-9.1(e) cannot mean

"substitution" and to equate the two required the COA to rewrite the statute. Such a construction is not consistent with the terms of O.C.G.A. § 9-11-9.1(a), (b), (c), (d) or (f) and the Court of Appeals may not, either in *Piscitelli v. Hosp. Auth. of Valdosta*, 302 Ga. App. 746 (2010), or in the instant case, rewrite this statute by interpreting into existence an option to avoid the operation of the statute of limitations that was not enacted by the General Assembly.

3. Language and intent of the statutes with which O.C.G.A. § 9-11-9.1 is applied.

Additionally, in its analysis, the reviewing court must also interpret the statute in a manner consistent with other statutes and the decisions of the courts. *See e.g.*, *Luangkhot v. State*, 292 Ga. 423, 424 (2013). As that rule is applied here, the relevant statutes include O.C.G.A. § 9-11-15, and 9-10-130, 24-7-702(c) and (e), and 9-3-71.

O.C.G.A. § 9-11-15(a) provides that "A party may amend his pleading as a matter of course and without leave of court at any time before the entry of a pretrial order", O.C.G.A. § 9-11-15(c) includes:

> An amendment changing the party against whom a claim is asserted relates back to the date of the original pleadings if the

> foregoing provisions are satisfied, and if within the period provided by law for commencing the action against him the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

O.C.G.A. § 9-11-15 (2014). These special conditions relate to both the statute of limitations and changing a name from one person or entity to another, albeit by the same author, the plaintiff. There are no corresponding special conditions listed in O.C.G.A. § 9-11-9.1 that would expressly allow substitution of one affiant for another. Again, if the legislature had intended there to be such provisions, it would have put them there. It did not do so. O.C.G.A. § 9-10-130 merely "piggybacks" onto § 9-11-15, providing in pertinent part that

> "…all affidavits that are the foundation of legal proceedings, and all counter affidavits shall be amendable to the same extent as ordinary pleadings and with only the restrictions, limitations, and consequences of ordinary pleadings."

O.C.G.A. § 9-10-130 (2014). Again, nothing the legislature placed in O.C.G.A. § 9-11-9.1 expressly allows substitution of one affiant for another.

Reference to the expert qualifications statute is also relevant to the construction of the affidavit statute. O.C.G.A. § 24-7-702(e) states: "An affiant shall meet the requirements of this Code section in order to be deemed qualified to testify as an expert by means of the affidavit required under Code Section 9-11-9.1." The expert qualifications requirements of O.C.G.A. § 24-7-702(c) are complex, but in essence, in order to be qualified to testify, the proposed expert must either (a) have experience in performing the procedure or providing the care at issue with sufficient frequency within three of the five years prior to the alleged malpractice, or (b) have taught the procedure or care at issue, as an employee of an accredited medical education institution, with sufficient frequency during the same time frame. O.C.G.A. § 24-7-702(c)(2)(A), (B); *Nathans v. Diamond*, 282 Ga. 804, 806 (2007). The intent of the expert qualification statute is expressly stated in the statute itself:

> The intent of the expert witness statute in particular is codified in the statute itself: "It is the intent of the legislature that, in all civil proceedings, the courts of the State of Georgia not be viewed as open to expert evidence that would not be admissible in other states." OCGA § 24-7-702 (f); *see also Nathans v. Diamond*, 282 Ga. 804, 806 (1) (654 SE2d 121) (2007) (purpose of statute was to ensure that expert testimony be given only by those who have

> "significant familiarity" with subject matter at issue). The "same profession" requirement, which had not previously been recognized in Georgia, *see, e.g., Nowak v. High*, 209 Ga. App. 536 (433 SE2d 602) (1993) (nurse qualified to testify as to standard of care for physician), was part of the legislature's effort to impose more exacting requirements on expert witnesses in medical malpractice cases.

Hankla III, 293 Ga. at 695-6.

The medical malpractice statute of limitations is also relevant to a construction of the affidavit statute. That statute expressly includes its legislative intent. O.C.G.A. § 9-3-71(a) provides:

> (a) Except as otherwise provided in this article, an action for medical malpractice shall be brought within two years after the date on which an injury or death arising from a negligent or wrongful act or omission occurred.

O.C.G.A. § 9-3-71(c) expressly states the legislative intent of § 9-3-71(a) as follows:

> Subsection (a) of this Code section is intended to create a two-year statute of limitations.

O.C.G.A. § 9-3-71 (2014).

In light of the foregoing, GDLA submits that the decision of the COA does not give due deference to the requirement that the claim be timely and properly commenced within the two-year statute of limitations, by meeting

the requirements of contemporaneously filing with the complaint an affidavit of an expert competent and qualified to testify.

C. Substitution does not cure the defect that the original affiant, the author of the contemporaneously filed affidavit, is not qualified.

As shown above, to properly initiate a medical malpractice claim, the complaint must be filed within the two-year statute of limitations and must be filed with the affidavit of an expert who meets the qualifications requirements of O.C.G.A. § 24-7-702(c). The specific defect alleged here is that the affiant, James Rogan, M.D., a general practice physician, was not competent and qualified to testify against the Appellant Neurosurgeons. Later substitution of a competent and qualified expert does not, and cannot, cure that defect.

D. Later Substitution of an affidavit by a competent and qualified expert does not does not satisfy the contemporaneous filing requirement of O.C.G.A. § 9-11-9.1(a).

Likewise, substitution of an affidavit by a substitute affiant who is qualified does not, and cannot, satisfy the *contemporaneous* filing requirement of O.C.G.A. § 9-11-9.1(a). Just as allowing a late-filed affidavit

to "cure" the defect of failing to contemporaneously file any expert affidavit with the complaint would impermissibly gut the contemporaneous filing requirement,[14] allowing the later "amendment" by filing an affidavit by a different, but qualified substitute expert, would impermissibly gut the contemporaneous requirement of subsection (a) that "the plaintiff **shall be required to file with the complaint an affidavit of an expert competent to testify.**"

CONCLUSION

For the reasons cited in the Brief of Appellants, as well as the considerations reflected above, the Georgia Defense Lawyers Association hereby urges this Court to reverse the Court of Appeals' decision in this case.

This 28th day of August, 2014.

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[14] *See Fales v. Jacobs*, 263 Ga. App. 461 (2003).

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IN THE SUPREME COURT OF GEORGIA

VISHAL C. GALA, M.D., REGIS HAID, JR., M.D., and ATLANTA BRAIN AND SPINE CARE, P.C.,	)	
Appellants	)	Case No. S14G0919
v.	)	
DORIAN EUGENE FISHER, and MICHELLE D. FISHER,	)	
Appellees.	)	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served upon all parties the within and foregoing **BRIEF OF *AMICUS CURIAE by the Georgia Defense Lawyers Association*** both by operation of the Court's electronic filing system and by depositing a true and correct copy of same in the United States Mail in a properly addressed envelope with adequate postage to all counsel of record as follows:

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