



**BRIEF OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION  
AS AMICUS CURIAE**

**I. IDENTITY AND STATEMENT OF INTEREST  
IN AMICUS CURIAE**

The Georgia Defense Lawyers Association (hereinafter "GDLA") is an association of Georgia lawyers who engage in litigation, primarily for defendants in civil lawsuits, and is dedicated to supporting and improving the civil defense bar. GDLA consists of approximately 650 attorneys, which include sole practitioners and members of law firms of all sizes throughout the state of Georgia.

The GDLA is justifiably concerned with issues related to medical malpractice cases, and in particular, the statutes of limitation and statutes of repose that apply to such actions. The GDLA is also concerned and interested in fair application of statutes enacted by the General Assembly and the value of precedent in interpreting such statutes. Pursuant to this Court's Order dated August 6, 2007, the GDLA respectfully submits this brief as *amicus curiae*. The GDLA requests that this Court, in consideration of the Georgia Court of Appeals decision in *Canas v. Al-Jabi, et al.*, 282 Ga. App. 764, 639 S.E.2d 494 (2006), find in favor of the Appellants and reverse the Georgia Court of Appeals holding that a change in symptoms or development of new symptoms of the same illness, allegedly misdiagnosed, are new causes of action that extend the application of the statutes of limitation and repose.

## II. ARGUMENT AND CITATION OF AUTHORITY

### THE COURT OF APPEALS ERRED BY CREATING AN UNPREDICTABLE AND CHANGING STATUTE OF LIMITATIONS AND REPOSE IN MEDICAL MALPRACTICE MISDIAGNOSIS CASES

- A. **Not only does the *Canas* decision, if allowed to stand, destroy the statute of repose and the statute of limitations, it would be completely impractical and unworkable as applied to every misdiagnosis case.**

O.C.G.A. § 9-3-71 represents clear legislative intent that medical malpractice actions are time-barred if not brought within two years after the date of an injury or wrongful death occurred. Likewise, O.C.G.A. § 9-3-71(b) makes clear that no medical malpractice action shall be brought more than five years after the date on which the negligent act or omission took place. The “new injury” extension, created by the *Canas* court cannot be reconciled with these two statutes. A “new injury” from a subsequent encounter where a misdiagnosis has continued, under *Canas*, restarts the limitation period for both the statute of limitations and the statute of repose. By definition, a patient who has new or changed symptoms under *Canas* is a symptomatic patient. Under the *Canas* analysis, the statute of repose would become meaningless. Either the two year statute of limitations would bar a claim not filed within two years of the “new injury” or at a subsequent visit the statute is restarted. Under either scenario the five year statute of repose would never apply to misdiagnosis cases. This is absolutely contrary to the intent of the legislature and numerous decisions of this Court upholding the statute of repose and justifies reversal.

The medical malpractice statute of limitations will also become unpredictable, because it will be left for juries to decide. Although Derek Canas' situation is certainly unique, the issues regarding his care and treatment and the claims he is making are very

common in medical malpractice cases. When diseases or conditions are misdiagnosed, and not treated, they can cause symptoms which can worsen. In fact, the Georgia Court of Appeals has recognized that patients usually continue to experience pain, suffering, or economic loss from the time of the misdiagnosis until the problem is diagnosed. *Whitaker v. Zirkle*, 188 Ga. App. 706, 707, 374 S.E.2d 106 (1988); *Ward v. Bergan*, 277 Ga. App. 256, 258, 626 S.E.2d 224 (2006). Patients may have other conditions or symptoms from related diseases taking place at the same time. Instead of the longstanding principles set forth by this Court and the Court of Appeals in misdiagnosis cases holding that the date of the misdiagnosis is the date of the injury except in rare circumstances, the Court of Appeals decision in *Canas* would subject defendants to lawsuits years after alleged acts of negligence.

At best, parties in litigation regarding misdiagnosis cases will litigate the merits of all subsequent encounters years beyond an original misdiagnosis to claim that "new symptoms" or a "new injury" took place which extends the statute of limitations. The statute of limitations has been largely decided on motions for summary judgment and motions to dismiss, not jury trials. If the *Canas* decision is allowed to stand, this Court will have endorsed an incredibly slippery slope in which all medical malpractice cases will fall. In any case where the patient testifies they reported a new or additional symptom, a jury issue will be created. Regardless of whether the physician noted the new symptom or not, the patient can create a jury issue with their testimony. Trial courts will be faced with jury trials on the issues of whether "new injuries" have taken place. Telephone calls to physician's offices will become jury issues on whether a "new injury" exists, sufficient to allow the case to proceed. Ultimately, in every misdiagnosis case,

every subsequent visit will be defined as a new cause of action. There will be no statute of limitation or repose for any doctor who continues to treat a patient.

**B. The Court of Appeals holding disregards this Court's decision in *Young v. Williams* and adopts the continuing tort theory of extending the statute of limitations and statute of repose in medical malpractice cases.**

Compelling and sympathetic stories like the story of Derek Canas' young life naturally foster creative and motivated arguments to disregard clear and longstanding laws.

Although the facts set forth in this Court's decision in *Young v. Williams*, 274 Ga. 845, 560 S.E.2d 690 (2002), are less sympathetic than the facts of this case, the principles and policies behind the *Young* decision remain as established as they were in 2002. In a unanimous decision, this Court rejected the Georgia Court of Appeals extension of the accrual of the statute of limitations from the date of the alleged misdiagnosis to a subsequent date the health-care provider saw the patient again. *Id.* at 848. Despite heroic efforts, this case cannot be distinguished from *Young*. It is axiomatic, in a medical malpractice case that once a cause of action accrues, the statute of limitations set forth at O.C.G.A. § 9-11-71 provides a procedural rule granting a patient two years to file their lawsuit. The numerous decisions cited by both the Appellants and the Appellees in this case have held that in misdiagnosis cases, injury to the patient and therefore the accrual of the cause of action occurs at the time of the misdiagnosis.

The *Canas* decision is internally inconsistent. The Court of Appeals correctly held that the continuous tort and continuous treatment doctrines do not apply to extend the statute of limitation or statute of repose. Despite this recognition, the *Canas* court labeled Derek Canas' continued treatment encounters new acts of negligence because he

presented with new or changed symptoms. Despite new or changed symptoms, the injury never changed, it remained the misdiagnosis. Most patients who have an undiagnosed condition have symptoms. Continuing treatment with symptoms as an extension of the accrual of a statute of limitation or repose is the continuous treatment doctrine. To say that symptoms stretch this injury out to subsequent visits is exactly what this Court rejected in *Young*.

Like the vast majority of misdiagnosis cases, it was the failure to make the correct diagnosis of Derek Canas' HIV status that harmed him. That action allowed his condition to remain untreated. Regardless of what his subsequent presenting symptoms were, continuing a misdiagnosis is the exact same injury – allowing his untreated condition to continue. Arguing that this was a “new injury” on other occasions is simply wrong. New or different symptoms do not change the fact that the injury is still the failure to make a correct diagnosis. In its *amicus* brief, the GTLA argues that such a holding would excuse a physician who had misdiagnosed a patient over time from an action that could be maintained against a subsequent physician misdiagnosing the patient for the first time. This unhelpful hypothetical argument was present in every case arguing the application of the continuous treatment or continuous tort doctrines, and has been rejected each time. A subsequent physician has no opportunity to make any diagnosis until seeing the patient, and cannot “injure” a patient until that time. Likewise, a patient could not maintain an action against a physician until a physician-patient relationship is established.

The only limited exception to the rule that the misdiagnosis itself is the injury is when the injury does not occur at the time of the misdiagnosis. This exception, which is

limited to very rare circumstances, was first set forth in *Whitaker v. Zirkle*, 188 Ga. App. 706, 374 S.E.2d 106 (1988). The distinctive fact in that case was that the plaintiff did not sustain an injury, the subsequent metastasis of a misdiagnosed mole, until a significant period of time after the alleged misdiagnosis. The plaintiff could not legally maintain a cause of action until there had been some injury, which was subsequent to the date of the misdiagnosis. This exception is limited to the most extreme circumstances, see *Burt v. James*, 276 Ga. App. 370, 372, 263 S.E.2d 223 (2005), and confined to those cases where a patient remains asymptomatic following the misdiagnosis. See *Harrison v. Daly*, 268 Ga. App. 280, 284, 601 S.E.2d 771 (2004). Nevertheless, the statute of repose stands as an ultimate bar, five years after a negligent act, despite the application of this rare exception.

In stark contrast, Derek Canas' injury began at the time he was first misdiagnosed and it is the same injury, the misdiagnosis, which caused damages right away. Derek Canas' damages continued until the correct diagnosis was made. Only by torturing the meaning of the "rare exception" for misdiagnosis cases, set forth in *Whitaker*, does GTLA as *amicus* and the Court of Appeals justify a position that directly contradicts *Young*. The argument that the manifestation of new or different symptoms constitutes a "new injury" for purposes of re-starting the statute of limitations and statute of repose completely ignores the purpose of why symptom manifestation is analyzed in misdiagnosis cases. As a preliminary matter, manifestation of new or different symptoms has never been applied to the statute of repose until *Canas*. The manifestation of new symptoms argument has only been applied to the statute of limitations, and as the Court of Appeals recently observed:

[t]he focus on manifested symptoms is intended to serve as a straightforward analytic tool for identifying the date when the new injury actually arose, given the difficulty, if not impossibility, in many cases of accurately pinpointing that date, given that the new injury arises at some point between the misdiagnosis and correct diagnosis, but when the patient is not experiencing symptoms. Hence, the subsequent injury exception does not disregard O.C.G.A. § 9-3-71(a), but rather attempts to reconcile the statute's date of injury language with the fact that it is often difficult or impossible in the misdiagnosis context to calculate precisely when the new injury arose.

*Amu v. Barnes*, 2007 WL 1881124, --- S.E.2d ---, 7 FCDR 2200 (Decided July 2, 2007).

(applying the subsequent injury exception to colon cancer misdiagnosis case). The manifestation of symptoms is relevant only to an asymptomatic patient who truly sustains a new injury after the misdiagnosis. New or additional symptoms have no application to a symptomatic patient like Derek Canas.

### **III. CONCLUSION**

For the above reasons, the GDLA hereby requests that this Court reject the Georgia Court of Appeals decision in *Canas* and uphold Georgia's statute of limitations and statute of repose along with this Court's decision in *Young v. Williams*. The current framework for these cases is not perfect, but has been fair and workable. This Court is being asked to let one claim outweigh this established legal framework. Georgia has been fortunate to have numerous well-reasoned opinions and decisions balancing the values of patients in misdiagnosis cases and the merits of the statutes of limitation and repose. Adopting the holding in *Canas* is a rejection of this longstanding balance.

Respectfully submitted this 27<sup>th</sup> day of August, 2007.

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**CERTIFICATE OF SERVICE**

This is to certify that I have this day served counsel for all interested parties to this action with a copy of **BRIEF OF AMICUS CURIAE** by depositing a copy of same in the United States Mail, in properly addressed envelopes with adequate postage affixed thereon to:

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