

IN THE SUPREME COURT OF GEORGIA

CASE NO. S17C0093

**DARGAN McAFEE and
TWISTED SHAMROCK, INC.,**

Petitioner-Appellant,

v.

JOHN HARRISON,

Respondent-Appellee.

**GEORGIA DEFENSE LAWYERS ASSOCIATION'S
AMICUS CURIAE BRIEF**

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**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:

STATEMENT OF INTEREST

The GDLA is an association of more almost 900 Georgia lawyers, including solo 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.

Ensuring reasonable, accurate, and consistent interpretation and application of statutes of limitation and exceptions thereto is important to any individual or

company that may be subject to suit in the state of Georgia. All persons and companies that reside and do business in – or who simply have a legally cognizable relationship to – Georgia, also have an interest in ensuring that the courts do not improperly and inappropriately expand statutes of limitation beyond what the General Assembly intended. Finally, all citizens of the state of Georgia have an interest in avoiding the detrimental effects that would result from the Court of Appeals’ holding, including, but not limited to, the creation of a loophole that most anyone could take advantage of to file suit long after the applicable statutorily defined time to do so, thereby preventing any potential defendant from being able to predict or plan for possible future litigation with any degree of accuracy or certainty and leading to an influx of lawsuits into the civil justice system that were never intended to be allowed.

STATEMENT OF FACTS

In this case, John Harrison (“Respondent”) filed a premises liability lawsuit against Dargan McAfee and Twisted Shamrock, Inc. (“Petitioners”) as a result of an incident that occurred in a Macon area restaurant formerly owned by Petitioners. During the course of the incident, Respondent was shot in the arm by an unknown assailant. Petitioners were not criminally charged as a result of the incident, nor have there been any allegations that they should have been.

Respondent's lawsuit was filed more than two years after the incident occurred. As a result, the trial court granted Petitioners' motion for summary judgement on the basis that the lawsuit was time-barred by the two-year statute of limitations applicable to personal injury claims.

The Court of Appeals then reversed the grant of summary judgment, holding that the lawsuit was timely filed pursuant to O.C.G.A. § 9-3-99, which tolls statutes of limitation for certain claims belonging to victims of crimes. The Court of Appeals' basis for doing so was its interpretation that the plain language of O.C.G.A. § 9-3-99 applies to any tort claim a crime victim may have that arises out of the crime at issue, regardless of whether the claim is against the alleged perpetrator of the crime. In so holding, the Court of Appeals overturned years of precedent interpreting O.C.G.A. § 9-3-99 to apply only to a crime victim's claims against the alleged perpetrator of the crime that forms the basis of the victim's lawsuit. Petitioners filed a Petition for Writ of Certiorari seeking review of the Court of Appeals' decision.

ARGUMENT AND CITATION OF AUTHORITY

This Court may review cases which present matters of "great concern, gravity, and importance to the public" and cases which create "confusion and unfairness." *Sharp v. Dept. of Transportation*, 267 Ga. 267, 270 (1996); GA. S. CT. R. 40. Whether to extend the two-year statute of limitations for years upon years

in every premises liability case involving a crime, regardless of whether the crime was committed by a party to the case, certainly is a matter of great concern, gravity, and importance to the public and the Court of Appeals' opinion certainly would create confusion and unfairness. Moreover, the GDLA respectfully submits that the Court of Appeals' interpretation and application of O.C.G.A. § 9-3-99 was something other than what the General Assembly intended and, therefore, is erroneous.

First, the Court of Appeals erred in declining to follow its prior decisions, in which the court had correctly applied O.C.G.A. § 9-3-99. *See, e.g., Mays v. Target Corp.*, 322 Ga. App. 44, 46 (2013); *Orr v. River Edge Cmty. Serv. Bd.*, 331 Ga. App. 228, 230 (2015). Second, in misapplying O.C.G.A. § 9-3-99 in this case, the Court of Appeals ignored the clearly established intent of the General Assembly that O.C.G.A. § 9-3-99 was to "provide for a statute of repose in certain tort actions brought by victims of crimes *against the person accused of such crimes.*" *Mays*, 322 Ga. App. at 46 (emphasis in original) (quoting Ga. L. 2005, pp. 88-89, § 1). And third, if O.C.G.A. § 9-3-99 is interpreted to apply to claims by crime victims against any person or entity, regardless of whether said person or entity is alleged to have been involved in committing the crime, it will open a Pandora's box of litigation with far-reaching and negative implications to

Georgia's civil justice system that could not have been intended by the General Assembly.

A. THE COURT OF APPEALS VIOLATED THE DOCTRINE OF *STARE DECISIS* BY FAILING TO FOLLOW ITS PRIOR DECISIONS INTERPRETING O.C.G.A. § 9-3-99.

The Court of Appeals has previously and consistently interpreted O.C.G.A. § 9-3-99 as applying only to tort actions brought against alleged perpetrators of crime, not against other defendants whose alleged liability is based solely on negligence and against whom no criminal charges were brought. In reaching its decision in this case, the Court of Appeals did an about-face in holding that O.C.G.A. § 9-3-99 tolls the limitations period for tort claims filed by crime victims regardless of whether the defendant in the case has been accused of committing the crime from which the cause of action arises.

To summarize the development of the law in this area, the Court of Appeals first noted in 2007 that O.C.G.A. § 9-3-99 “tolls the statute of limitation for ‘any cause of action in tort’ brought by the victim of a crime while the prosecution of the defendant is pending.” *DeKalb Med. Ctr., Inc. v. Hawkins*, 288 Ga. App. 840, 847 (2007) (emphasis added). Then, in 2009, the Court of Appeals held that the two-year statute of limitations period for false arrest and other claims against a county and a county police officer was not tolled pursuant to O.C.G.A. § 9-3-99 because O.C.G.A. § 9-3-99 only tolls the statute of limitations “while the

prosecution of the *defendant* is pending” and the defendant officer was never prosecuted for any crime arising out of the incident at issue. *Valades v. Uslu*, 301 Ga. App. 885, 887-889 (2009) (emphasis in original). Similarly, in 2010, the Court of Appeals held that O.C.G.A. § 9-3-99 did not toll the one-year limitations period to serve an ante-litem notice because neither the defendant county nor the defendant sheriff was prosecuted for any crime arising out of the incident at issue. *Columbia Cnty. v. Branton*, 304 Ga. App. 149, 151-153 (2010).

Thereafter, in 2013, the Court of Appeals held that the two-year statute of limitations period for a plaintiff’s personal injury claims was not tolled pursuant to O.C.G.A. § 9-3-99, as the defendant store “was not accused of any crime of which [the plaintiff] was a victim.” *Mays*, 322 Ga. App. at 45-46. Finally, in 2015, the Court of Appeals affirmed its prior decisions on this issue by holding that the two-year statute of limitations period for the plaintiff’s wrongful death claim was not tolled by O.C.G.A. § 9-3-99 because tolling under O.C.G.A. § 9-3-99 is “only available in suits against criminal defendants” and neither of the defendants “[were] ever charged with any crime.” *Orr*, 331 Ga. App. at 230-231.

Based on the foregoing, it is clear that the law for nearly a decade in Georgia has been that O.C.G.A. § 9-3-99 does not toll the statute of limitations period for someone in Respondent’s position, as Petitioners were never subject to any criminal charges or prosecution as a result of the crime at issue. As a general rule,

courts are directed to stand by their prior decisions pursuant to the principle of *stare decisis*. *Smith v. State*, 295 Ga. 120, 121 (2014). Under this doctrine, “when a court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases, where facts are substantially the same.” *Thomas Cnty. Bd. of Tax Assessors v. Thomasville Garden Ctr., Inc.*, 277 Ga. App. 591, 592 (2006). In this case, it is indisputable that the facts are substantially the same as those involved in the line of cases holding that O.C.G.A. § 9-3-99 does not apply to claims brought against persons/entities who were never subject to criminal charges or prosecution arising out of the crime at issue. Therefore, the doctrine of *stare decisis* should dictate that O.C.G.A. § 9-3-99 does not toll the statute of limitations for Respondent’s claims against Petitioners.

While there are some situations in which prior holdings must be reexamined by courts, this Court has recognized that “*stare decisis* is an important principle that promotes the rule of law, particularly in the context of statutory interpretation, where our incorrect decisions are more easily corrected by the democratic process.” *State v. Jackson*, 287 Ga. 646, 658 (2010) (emphasis added). In this case, there is no reason to overrule the robust body of existing case law interpreting O.C.G.A. § 9-3-99, and to the extent any changes in this law are necessary, that would more appropriately be taken up by the General Assembly.

Despite the foregoing, the Court of Appeals concluded that it was not bound by *stare decisis* in this instance because of the factors outlined in *State v. Jackson*. Contrary to the Court of Appeals' assessment of those factors and as explained in more detail below, the reasoning of the prior decisions on this issue is not unsound. In addition, the precedent is not so "young" as to make overturning those decisions inconsequential. Furthermore, the case law on this issue does not create "workability concerns," as the case law is overwhelmingly clear and workable as it relates to those in Petitioners' shoes – in other words, the case law is clear that O.C.G.A. § 9-3-99 does not toll statutes of limitation against parties who have never been subject to criminal charges or prosecution as a result of the crime at issue, which is a position that is easy to apply and has been so applied without issue for close to a decade.

To the extent O.C.G.A. § 9-3-99 is ambiguous as to how it should be applied to defendants who have been charged but not prosecuted for the crime at issue, it is up to the courts to decipher the intent of the legislature on such issue, and to the extent the legislature disagrees with the courts' decisions with respect to same, it is up to the legislature to amend O.C.G.A. § 9-3-99 to clear up any rulings it deems incorrect. It is not appropriate, on the other hand, for the Court of Appeals to completely overrule years of precedent on the basis that there are still kinks to iron out with respect to the case law interpreting O.C.G.A. § 9-3-99, especially when

those kinks have no impact on the case before the Court of Appeals. Therefore, the Court of Appeals should have, on the basis of *stare decisis*, affirmed the trial court's decision to grant Petitioners' motion for summary judgment in this case.¹

B. IT WAS THE INTENT OF THE LEGISLATURE TO LIMIT THE APPLICATION OF O.C.G.A. § 9-3-99 TO CLAIMS AGAINST CRIMINAL DEFENDANTS.

Next, assuming that there is some ambiguity in O.C.G.A. § 9-3-99 requiring interpretation by the courts, the first and most obvious step would be to look to the legislative intent of the statute, which shows that O.C.G.A. § 9-3-99 was enacted to give crime victims additional time to file lawsuits against those who allegedly committed the crimes against them. This not only makes complete sense, it is the only logical interpretation of the statute.

When a statute is ambiguous, courts should “look diligently for the intent of the General Assembly.” *State v. Mulkey*, 252 Ga. 201, 202 (1984). The fact that the Court of Appeals had one interpretation of O.C.G.A. § 9-3-99 across multiple cases and for close to a decade before completely changing course in this case would seem to suggest that the statute is susceptible of more than one “natural and reasonable interpretation.” *Fulton Cnty. Bd. of Tax Assessors v. Greenfield Inv. Grp., LLC*, 313 Ga. App. 195, 198 (2011). The Court of Appeals further recognized the ambiguity of O.C.G.A. § 9-3-99 as early as the *Mays* case when it

¹ It is worth noting that this Court denied *certiorari* in all of the prior cases overruled by the Court of Appeals in this case.

noted that the statute is unclear “as to whether it tolls the limitation period for a crime victim’s cause of action against the person accused of the crime only.” *Mays*, 322 Ga. App. at 46.

As the Court of Appeals explained in *Mays*, the text of O.C.G.A. § 9-3-99 does not “specify the party or parties against whom a victim may assert the statute of limitation has been tolled.” *Id.* While the Court of Appeals held below that this is an indication that the General Assembly intended O.C.G.A. § 9-3-99 to apply to all defendants, the qualifying portion of the statute that states it applies to any claim “which arises out of the facts and circumstances relating to the commission of such alleged crime” suggests otherwise. *Id.* (emphasis added). More specifically, it is certainly a natural and reasonable interpretation of O.C.G.A. § 9-3-99 to conclude that the word “commission” is used to direct the application of the statute to those who allegedly committed the crime, as opposed to those who did not. O.C.G.A. § 9-3-99 is, therefore, ambiguous, making it appropriate to look to the legislative history of the statute to determine what the General Assembly intended.

In so doing, the Court of Appeals in *Mays* found that the preamble to the Crime Victims Restitution Act, of which O.C.G.A. § 9-3-99 is part, stated that one of its purposes was “to provide for a statute of repose in certain tort actions brought

by victims of crimes *against the person accused of such crimes.*”² *Mays*, 322 Ga. App. at 46 (emphasis in original) (quoting Ga. L. 2005, p. 88-89, § 1). While the Court of Appeals in *Mays* recognized that “a preamble is not a part of the act and therefore cannot control over its plain meaning,” it also noted that a preamble “may be considered as evidence of the meaning of an ambiguous, codified statute.” *Id.* (citing *Spalding Cnty. Bd. of Elections v. McCord*, 287 Ga. 835 (2010)). Therefore, unless there is legislative history that indicates O.C.G.A. § 9-3-99 should also apply to defendants who were not charged or prosecuted with the crime at issue, which there is not, the aforementioned preamble is the best source and guide for what the General Assembly intended.³

² While the legislative history does not indicate why the General Assembly felt the need to give crime victims this civil protection, one can easily understand why that might have been the case (e.g., to allow the criminal proceedings to run their course before having to complicate matters with a civil lawsuit against the accused). The Court of Appeals, on the other hand, uses this relative silence to set forth reasons why O.C.G.A. § 9-3-99 may have been intended to give the crime victim protection against all people, including those not accused of the crime. The problem with this position is that there is nothing in the legislative history that suggests this was the intent of the General Assembly.

³ It should be noted that the term "restitution" is specifically defined by Georgia statute as payment or services **made to a victim by the criminal "offender."** O.C.G.A. § 17-14-2(7) (emphasis added). Thus, the fact that the term “restitution” is used in the title of the Crime Victims Restitution Act indicates that the provisions contained therein are specifically intended to provide civil recourse for a crime victim against those accused of the crime. *See Moore v. Robinson*, 206 Ga. 27, 40 (1949) (stating that courts may examine the title or caption of an act “when the act is doubtful, for the purpose of finding the legislative intent thereof”).

In addition to the above, the Court of Appeals' prior interpretation of O.C.G.A. § 9-3-99 is the only logical interpretation when public policy considerations are taken into account. As discussed at length in Section C below, the Court of Appeals' decision in this case would have very real and negative consequences that the more limited prior interpretation of O.C.G.A. § 9-3-99 would not, which is surely not what the General Assembly intended when it enacted the statute. Thus, for all the reasons stated above, the Court of Appeals' prior interpretation that O.C.G.A. § 9-3-99 only applies to claims against criminal defendants is not only proper, it is the only interpretation that comports with and puts into effect the legislative intent.

C. THE COURT OF APPEALS' MISINTERPRETATION OF O.C.G.A. § 9-3-99 WOULD HAVE FAR-REACHING AND NEGATIVE CONSEQUENCES THAT WERE NEVER INTENDED BY THE GENERAL ASSEMBLY.

It is clear that O.C.G.A. § 9-3-99 tolls statutes of limitations for claims against criminal defendants. The question is whether O.C.G.A. § 9-3-99 is broader than that, bringing in any and all claims belonging to a crime victim, regardless of whether such claims are against someone charged or prosecuted with a crime. As shown above, O.C.G.A. § 9-3-99 arguably is ambiguous on this point. So, this Court must attempt to determine the legislative intent behind O.C.G.A. § 9-3-99, which necessarily involves the public policy underlying same. *See Statesboro Tel. Co. v. Georgia Pub. Serv. Comm'n*, 235 Ga. 179, 183 (1975). When the applicable

public policy goals are considered, it becomes even more evident that O.C.G.A. § 9-3-99 could not have been intended to be as broad as the Court of Appeals below determined.

Georgia courts have recognized that “OCGA § 9-3-33 and other statutes of limitations [] serve the legitimate public policy goal of promoting justice and furthering the certainty of time limitations while preventing unfair surprise.” *Martin v. Herrington Mill, LP*, 316 Ga. App. 696, 701 (2012) (quoting *Walker v. Brannan*, 243 Ga. App. 235, 238 (2000)). Based upon these legitimate public policy goals, Georgia courts have held that an exception to a statute of limitation should be “strictly construed.” *Bates v. Metro. Transit Sys., Inc.*, 128 Ga. App. 720, 721 (1973). Since O.C.G.A. § 9-3-99 is an exception to statutes of limitation, including O.C.G.A. § 9-3-33, it must be strictly construed in line with the purpose for which it was enacted, namely to give crime victims every opportunity to successfully bring a civil lawsuit against the person who committed the crime (without indefinitely leaving open the possibility of civil liability). *Adams v. Davis*, 47 Ga. 339 (1879); *Bates v. Metropolitan Transit System, Inc.*, 128 Ga. App. 720 (1973).

If O.C.G.A. § 9-3-99 is given the interpretation set forth by the Court of Appeals below, the public policy goals of promoting justice, furthering certainty, and preventing unfair surprise would not be served and the statute would not be

strictly construed pursuant to its legislative intent. In fact, the opposite would be occur. One of the unintended consequences that would likely result from this interpretation is the creation of a loophole that most any plaintiff with a tort claim could take advantage of, even if the claim did not involve a legitimate crime. For example, one can imagine a scenario in which a person simply falls on the property of another (without any contributing criminal act), fails to file suit within two years, and then later alleges he/she was the victim of a crime (e.g., battery that caused him/her to be thrown to the ground) in order to take advantage of the tolling provided by O.C.G.A. § 9-3-99. Similar scenarios could be imagined in almost any area of tort law. However, the more likely and equally troubling scenario is just what the Court of Appeals advocates in this case; that is, allowing a crime victim to wait six years to bring a lawsuit against a party who had absolutely nothing to do with the crime at issue, leaving potential defendants with complete uncertainty as to whether and when a lawsuit would be faced, how long to preserve evidence, and a host of other uncertainties that would exist merely because *some other person or entity* is/was charged with a crime.

In all of the scenarios above, the result would be that a potential defendant could have to wait as long as six years before learning whether or not suit will be brought against it, all the while having a legal duty to maintain relevant evidence and other documents in its possession and hoping that critical evidence not under

its control is not lost or destroyed. This says nothing of parties who are completely unaware that they could potentially be subject to a civil lawsuit and who could be blindsided six years after an incident occurred by a lawsuit it never contemplated. Could all this really be what the General Assembly intended and envisioned when it enacted O.C.G.A. § 9-3-99? The GDLA contends that the answer is certainly not, but in any event, this Court should grant *certiorari* to answer the question definitively.

CONCLUSION

For the reasons stated above, the GDLA respectfully submits that the Court of Appeals erred in holding that O.C.G.A. § 9-3-99 tolls the limitations period for civil tort claims brought by crime victims against persons and entities who have never been charged or prosecuted as a result of the crime at issue. Therefore, this Court should grant *certiorari* and should reverse the Court of Appeals' holding and affirm those prior decisions of the Court of Appeals that limit the application of O.C.G.A. § 9-3-99 to claims against those accused of the crime at issue.

Respectfully submitted this 2 day of December, 2016.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served a copy of the within and foregoing GEORGIA DEFENSE LAWYERS ASSOCIATION'S AMICUS CURIAE BRIEF upon all parties to this matter by depositing a true copy of same in the U.S. Mail, proper postage prepaid, addressed to counsel of record as follows:

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