IN THE SUPREME COURT
STATE OF GEORGIA

RESURGENS, P.C. d/b/a RESURGENS ORTHOPAEDICS and TAPAN K. DAFTARI, M.D.,	)	
Petitioners,	)	Petition No. S16C1214
v.	)	Court of Appeals Case No. A15A2275
SEAN M. ELLIOTT,	)	
Respondent.	)	

AMICUS BRIEF OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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AMICUS GEORGIA DEFENSE LAWYERS ASSOCIATION'S BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

I. INTEREST OF *AMICUS*

Amicus, The Georgia Defense Lawyers Association (GDLA), is an association for all lawyers who practice law principally in the area of civil litigation representing defendants. Generally, its members primarily represent insurers and/or their insureds in the trial and appellate courts of the State of Georgia. The GDLA believes that the decision below violates the basic principles of statutory construction, and if allowed to stand, would contribute to confusion for the trial courts, the lawyers that practice before them and the public. Amicus respectfully asserts that granting the petition for certiorari is truly "desirable to have stability and certainty in the law." *Kaminer v.*

Canas, 282 Ga. 830, 836 (2007). The clarification of these conflicting cases and the Court of Appeals' erroneous analysis, going back more than forty years, is of great concern and is important to the public.

II. FACTS

Amicus adopts the facts set forth in the petition filed by Petitioners Resurgens, P.C., d/b/a Resurgens Orthopaedics and Tapan K. Daftari, M.D.

III. ARGUMENT AND CITATION OF AUTHORITY

A. The Court of Appeals Ignored the Language of O.C.G.A. § 9-11-37.

No one questions the power of a trial court's broad discretion over discovery, sanctions for discovery failures, and control of their courtrooms. See e.g., O.C.G.A. § 9-11-37, "Failure to make discovery; motion to compel; sanctions; expenses" and O.C.G.A. §15-1-3, "Powers of court enumerated." This discretion is broad because trial judges are the impartial eyewitness of the actions of the parties and the juries before them. Multiple examples of the power of a trial court's discretion exist, including the first grant of a new trial, remittitur and additur, the admission of evidence, grants of interlocutory injunctions, protective orders, gatekeepers as to reliability of expert witness testimony, and the grant or denial of sanctions based on spoliation or discovery violations. *See Resource Life Ins. Co. v. Buckner*, 304 Ga.

App. 719, 734 ( ) ("trial judges, through their direct involvement with the case, the parties, and the attorneys . . . are in the best position to evaluate the parties' conduct and to determine the appropriate level of sanctions"). The only exception to this broad discretion is when the trial court decides a question of law. Only then will a reviewing court set aside the abuse of discretion standard and apply the "plain legal error" standard of review. *Hutcheson v. Elizabeth Brennan Antiques, Inc.*, 317 Ga.App. 123, 125 (2015).

In the instant matter, the trial court did not abuse its discretion when it sanctioned Respondent under O.C.G.A. § 9-11-37. Rather, the Court of Appeals of Georgia ("Court of Appeals") erred when it ignored the pertinent statute and applied the wrong standard of review. Thus, applying the controlling statute and the correct standard, Amicus respectfully asserts that this court should grant Petitioner's request to this most important matter, and thereafter reverse the decision of the Court of Appeals. This court should grant this petition to correct the error of the Court of Appeals in its failure to apply the plain language found in O.C.G.A. § 9-11-37.

Discovery is a creature of statutory law and the sanctions that a trial court may use in dealing with discovery misconduct must originate from the statute that controls sanctions. See Title 9, Ch. 11, Article 5, Depositions and Discovery. *Also see, Gill v. Spivey*, 264 Ga.App. 723 (2003)"(Penalties for failure to provide discovery are

provided by OCGA § 9-11-37."). Rather than follow the statutory remedies laid out in the statute, over time the Court of Appeals has erected a common law remedy that does not honor the intent of the language of the statute. Instead of following its once well-meaning rationale, it has now grown well beyond any resemblance of itself. But that was not always so. *See Jones v. Atkins*, 120 Ga.App. 487, 490 (1969) ("Exclusion is proper only where a party deliberately withholds the names of his witnesses)." (cits. omitted) (emphasis added). *Cf. Hunter v. Nissan Motor Co., Ltd. of Japan*, 229 Ga.App. 729 (1997) where the appellate court broadened its analysis by ignoring the legislative intent, holding that exclusion of probative trial evidence "is not an appropriate remedy for curing an alleged discovery omission."

In *Nissan Motor Co.* the Court of Appeals anchored its rationale on this court's decision in *Sharpe v. Department of Transportation*, 267 Ga. 267, 270 (1996). In *Sharpe*, this court rejected the little used and archaic "motion to strike" that was employed to exclude testimony after the testimony was elicited at trial. But *Sharpe* had nothing to do with discovery abuse, or the failure to list witnesses. Rather, at trial the DOT failed to have the testimony struck because of its inability to lay a proper evidentiary foundation.

The discovery sanctions statute plainly gives trial courts the power to prohibit an evasive party "from introducing designated matters in evidence." O.C.G.A. § 9-

11-37(b)(2)(B). But rather than follow the appropriate remedies listed in the statute, the Court of Appeals has constructed a rule that is inconsistent with the statute. The clear language of the statute allows a trial court's exclusion of evidence when a party has acted in an intentionally evasive manner in discovery, or where it plays fast and loose with the pretrial order, as occurred in the trial court below. See O.C.G.A. § 9-11-16. Applying the rules of statutory construction, it is certain that the decision below must be reversed.

In interpreting O.C.G.A § 9-11-37, three rules come into play: the legislative intent; the clear language of the statute; and construction of the statute such that it does not render portions of them ineffective or meaningless. *See Norred v. Teaver*, 320 Ga.App. 508, 512 (2013) ("Moreover, '[o]ur well established rules of statutory interpretation require courts to ascertain the legislature's intent in enacting the law in question. OCGA § 1–3–1(a). *Inagawa v. Fayette County*, 291 Ga. 715, 717(1), 732 S.E.2d 421 (2012). As long as the (statutory) language is clear and does not lead to an unreasonable or absurd results, it is the sole evidence of the ultimate legislative intent.' "). Given the intent and plain language, the courts cannot construe statutes in a manner which renders any portion of them ineffective or meaningless. *Wetzel v. State*, 298 Ga. 20, 28 (2015). When the Court of Appeals held that a trial court has no discretion to exclude testimony of a witness, it rendered subsection (b)(2)(B) both

ineffective and meaningless, ignored the clear language of the act and it denied the legislature's intent.

Despite the clear language of the statute and its reasonable results, the Court of Appeals has decided that a party's inexcusable failure to disclose witnesses requires trial courts to ignore the statute, allowing witnesses to testify and parties to game the system. *E.g., City of Atlanta v. Bennett*, 322 Ga. App. 726, 731 (2013); *Hart v. Northside Hospital, Inc.*, 291 Ga. App. 208, 209-210 (2008); *Hunter v. Nissan Motor Co. of Japan*, 229 Ga. App. 729, 729 (1997). Such failures should not result in the introduction of otherwise admissible evidence where a party has acted in the manner of the Plaintiff below.

As to the public's interest, the greatest concern is that the decision implicates the doctrine of separation of powers. As such, amicus respectfully asserts that the Court should grant certiorari to reaffirm, both the language of subsection (b)(2)(B), and as well, the proper role of the courts in interpreting and enforcing, but not rewriting statutes. *See Van Dyck v. Van Dyck*, 262 Ga. 720, 722 (1993) (legislatures, not courts, amend statutes). The Court of Appeals' overly expansive interpretation of the *Sharpe* case, and its lack of attention of the pertinent statute, is the very reason for the court's analytical failure, and the conflicting cases arising over the last 40 years.

B. The Opinion Below Is in Conflict With Other Decisions and Certiorari Should Be Granted to Resolve This Conflict.

In its decision, the Court of Appeals went well beyond the issues before it. That is, it did not restrict its ruling to just the exclusion of witnesses. It also held the exclusion of any probative trial "evidence" as a discovery sanction constitutes an abuse of a trial court's discretion as a matter of law. *Elliott*, 782 S.E.2d 867 (2016). This is not the only example of the court's broad brush. Prior decisions have ruled similarly. *E.g., Bennett*, 322 Ga. App. at 731.

Incongruously, other decisions by the Court of Appeals have affirmed the trial court's exclusion of relevant evidence because of discovery violations. *See Jones v. Livingston*, 203 Ga.App. 99 (1992), where the Court of Appeals affirmed the exclusion of opinion testimony by a testifying expert at trial. The trial court excluded the opinions because they had not been disclosed in discovery. The Court of Appeals held:

> O.C.G.A. § 9-11-26(b)(4)(A)(i) allows a party to require the opposing party to identify all expert witnesses the opposing party plans to call at trial and to state the subject matter about which the expert will testify, the opinions the expert will render, and a summary of the grounds for each opinion. The trial court did not abuse its discretion by refusing to allow defendants' expert to testify concerning a subject matter not revealed to plaintiffs.

203 Ga. App. at 102-103. While the proffered expert opinion was relevant to various issues in the trial, nonetheless the Court of Appeals affirmed its exclusion for the defendant's discovery violation. Other Court of Appeals opinions have held that exclusion of a witness is at least within the court's discretion "where a party deliberately withholds the names of his witnesses." *Jones v. Atkins*, 120 Ga. App. 290, 291 (1969); *accord*, *Trustees of Trinity College v. Ferris*, 228 Ga. App. 476, 480 (1997). As noted in Petitioner's filing, the result of these cases leaves litigants and trial courts with three inconsistent possibilities:

> "(1) Exclusion is not a proper remedy for even an inexcusable failure to disclose during discovery. *See Opinion*; *Hart, supra*, 291 Ga. App. at 209-210;
>
> (2) Exclusion is only proper where a party intentionally withholds its witnesses. *See Atkins*, 120 Ga. App. at 291; or
>
> (3) Exclusion is proper, in the trial court's discretion, for failure to disclose the anticipated testimony during discovery. *See O.C.G.A.* § 9-11-37(b)(2)(B); *Livingston*, 203 Ga. App. at 102-103; *Ferris*, 228 Ga. App. at 480."

Petitioners' Br., at 13.

The confusion and the conundrum beg to be clarified. This matter meets the requirements of a grant of certiorari, and Amicus respectfully requests that the Court enter such an order.

IV. CONCLUSION

For the reasons outlined herein, Amicus respectfully requests the Court grant the petition.

This 11th day of May, 2016.

HALL BOOTH SMITH, P.C.

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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the within and foregoing **AMICUS BRIEF OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI** upon the following counsel of record by e-mail and postage prepaid U.S. Mail as follows:

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This 11th day of May, 2016.

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