IN THE SUPREME COURT

STATE OF GEORGIA

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Docket No. S18C0149

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ROCKDALE HOSPITAL, LLC, d/b/a ROCKDALE MEDICAL CENTER, 24 ON PHYSICIANS, PC, and DR. ALUNDA E. HUNT,

*Petitioners,*

v.

HEATHER OLLER, as Executor of the Estate of SHIRLEY NOBLES, deceased, and DAVID NOBLES,

*Respondents.*

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# AMICUS BRIEF OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION

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| *Petitioners,* | ) | Docket No. S18C0149 |
| vs. | ) | |
| HEATHER OLLER, as Executor of the Estate of Shirley Nobles, deceased and DAVID NOBLES, | ) | |
| *Respondents.* | ) | |

**BRIEF IN SUPPORT OF CERTIORARY OF GEORGIA DEFENSE LAWYERS ASSOCIATION AS AMICUS CURIAE**

COMES NOW the Georgia Defense Lawyers Association and respectfully submits this Amicus Curiae brief in support of Petitioners 24 On Physicians, P.C., and Dr. Alunda Hunt.

## I. IDENTITY AND INTEREST OF AMICUS CURIAE

The GDLA is an association of more than 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, its members, and their clients are interested in ensuring fairness to all parties in the litigation process in Georgia courts. This includes ensuring that basic rights are protected. This case is one that could greatly affect the rights of civil defendants, especially their right of notice of who is involved in a lawsuit and the time frame for which they may be held liable for certain events.

## II. ISSUES PRESENTED

Whether the conduct of a professional that was not put at issue in the original complaint nor described or alluded to in any expert affidavits filed within the periods described by O.C.G.A. § 9-11-9.1 can be added into a lawsuit after the statute of limitations expires.

## III. STATEMENT OF FACTS

Amicus GDLA adopts the Statement of Facts set forth in Petitioners' Petition for Writ of Certiorari. The true interest of the GDLA is not in the facts of a particular case, but rather in the important substantive legal and policy issues presented.

## IV. ARGUMENT AND CITATIONS OF AUTHORITY

### A. An initial claim of vicarious liability as to one medical professional does not circumvent a plaintiff's obligation to comply with the statutory requirements of O.C.G.A. § 9-11-9.1 when asserting medical malpractice claims against other, different medical professionals.

A plaintiff does not have a direct negligence claim against an employer when asserting vicarious liability. Therefore, in order to succeed on a vicarious liability claim for conduct of a professional, a plaintiff must have a valid claim against the professional. "*[A]ny* action for

professional malpractice" must be accompanied upon its filing by an affidavit of a competent expert who identifies at least one negligent act or omission by the professional. O.C.G.A. § 9-11-9.1(a) (emphasis added). This requirement applies to *each and every* professional against whom an action is maintained—an affidavit naming one professional cannot be used to maintain an action against a separate, unnamed professional. *HCA Health Services, Inc. v. Hampshire*, 206 Ga. App. 108, 111 (1992).

To commence a direct suit against multiple professionals, a plaintiff must satisfy the affidavit requirements as to each professional. Founded on the most basic principle of vicarious liability, it likewise follows that a plaintiff must satisfy the same affidavit requirements when suing upon a theory of imputed negligence. The "negligence of the master in such a case is entirely derivative from the servant's negligence." *Thomas v. MCCG,* 286 Ga. App. 147 (2007). The Court of Appeals recognized in *Thomas* that imputed negligence based upon the conduct of a separate licensed professional constitutes separate claims, even if they are based upon the same theory of recovery. *Id.* at 148 ("While the theory of recovery against [defendant] may have been the same in both complaints, the underlying liability clearly added a claim for recovery").

Amicus GDLA will not waste this Court's time repeating what has already been comprehensively briefed by Petitioners: the fourth expert affidavit is the first mention of the names or conduct of employees of 24 On other than Drs. Hunt and Mitchell. *See* Brief of Petitioners, p. 8. According to the record, and as admitted by Respondents in their brief, Respondents filed Dr. Cooper's fourth amended affidavit on October 6, 2015. *See* Respondent Brief, p. 10; Fourth Amended Affidavit. Thus, the fourth amended affidavit was filed well beyond the expiration of the statute of limitation, and cannot serve as the basis for a claim against a new physician never previously named in the suit.

The Opinion Below cites to O.C.G.A. § 9-11-9.1(e) and *Bonner v. Peterson*, 301 Ga. App. 443 (2009), in support of its determination that an expert affidavit may be amended at any point in time. However, its reliance upon *Bonner* is misplaced. *Bonner* describes narrow situations governed by O.C.G.A. § 9-11-9.1(e). The language of section 9.1(e) is clear:

> 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.

O.C.G.A. § 9-11-9.1(e). This subsection is entirely irrelevant to the case at bar. Crucially, no motion to dismiss was filed in the present case within a year of this fourth amended affidavit. *See* Record/Trial Court Docket, generally. The Appellate Court does not use any language in *Bonner*, either directly or implicitly, that supports the contention that expert affidavits may be amended at any time. While Petitioners do not contend that any of the four affidavits were free of defects, no motion to dismiss was filed within 30 days of the fourth amendment. Therefore, according to the plain language of O.C.G.A. § 9-11-9.1, the affidavit was not subject to amendment.

Interpreting O.C.G.A. § 9-11-9.1 in the manner that the Opinion Below suggests would render sections of O.C.G.A. § 9-11-9.1, if not the entire statute, completely useless. The section that would be most affected by the decision in the Opinion Below is the language found in section 9.1(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.

O.C.G.A. § 9-11-9.1(c) (emphasis added). When interpreting statutes, it is a general rule that they

should not be construed "so as to render any language meaningless[.]" *See William L. Bonnell Company, Inc. v. Coweta County Bd. of Tax Assessors*, 252 Ga. App. 151, 152 (2001). There are only three periods specified in O.C.G.A. § 9-11-9.1 applicable to section 9.1(c).[1] Respondents did not file their fourth expert affidavit within any of these periods, therefore, it cannot be construed to defeat a statute of limitations defense. Allowing amended affidavits outside the periods described in 9-11-9.1 would directly contravene the plain language of the General Assembly.

It appears that a motivating force behind the Opinion Below's decision to incorrectly ignore the plain language of O.C.G.A. §9-11-9.1 stems from the fact that Georgia's Civil Practice Act is to be read leniently. While the Opinion Below and Respondents may be correct that the CPA is to be interpreted leniently, this leniency can only extend to *interpretations* of the Statute, and cannot serve as a justification to rewrite the statute as a whole. As the Court noted in *Porquez v. Wash.*, 268 Ga. 649, 652 (1997), 9-11-9.1 is "an *exception* to the general liberality of pleading," meaning it is perfectly acceptable for it to "fly in the face of notice pleading" as that was the legislature's intent. *See Id. (*emphasis added). The General Assembly explained that 9-11-9.1 was in response to the crisis preventing healthcare providers from locating reasonably priced liability insurance; thus, the purpose of the statute was to "promote predictability and improvement in the provision of quality health care services and the resolution of health care liability claims" and "assist in promoting the provision of health care liability insurance by insurance providers." *Ga. L.* 2005, p. 1, § 1/SB 3. The purpose of the General Assembly is not inconsistent with the case law cited by the Opinion Below that describes the expert affidavit requirement as a guard against frivolous lawsuits. (See *Porquez*, 268 Ga. at 652; *Gadd v. Wilson & Co., Engineers & Architects*,

[1] First, in section 9.1(a), the affidavit may be filed contemporaneously with the complaint; second, in section 9.1(b), the affidavit may be filed within 45 days of the filing of the complaint if the statute of limitations is about to expire; and third, in section 9.1(e), where the allegedly defective affidavit may be amended within 30 days following a motion to dismiss.

262 Ga. 234, 235 (1992). But importantly, the issue of frivolity is not at issue in this case. Regardless of whether Respondents claim against 24 On for the conduct of Dr. Syed is frivolous or not, O.C.G.A § 9-11-9.1 is a "procedural hurdle," and is one Respondents did not clear. *Labovitz v. Hopkinson*, 271 Ga. 330, 336 (1999).

Allowing expert affidavits to be amended outside the time periods specifically prescribed by 9-11-9.1 would not only directly flout the purpose of the statute, "to guard against frivolous lawsuits," but would eviscerate the expert affidavit requirement altogether. *Bonner v. Peterson*, 301 Ga. App. 443, 447 (2009). Allowing plaintiffs to amend and substitute affidavits as many times as they please, whenever they please, would completely destroy the contemporaneous filing requirement of 9-11-9.1(a). Requiring plaintiffs to abide by this rule when alleging direct negligence but permitting an end around for *derivative* claims is illogical. Amicus GDLA simply contends that the plain and explicit language of 9-11-9.1 should not be disregarded. The General Assembly would not have enacted 9-11-9.1 if they did not intend for it to serve a purpose.

Exceptionally fitting to the case at hand are the timeless words of the Supreme Court in *Wooten v. Wilkins*: "[w]hen a rule has been well settled, the fact that it is not consistent with principle, or with other rules, is no reason for courts to set it aside. Courts ought not to make law. That is the province of the legislature." 39 Ga. 223 (1869). The Opinion Below disregards the language of the statute and applies an entirely incongruous rule. While 9-11-9.1 is a very low "procedural hurdle" for plaintiffs, it is still a hurdle that must be overcome to state a claim for medical malpractice. *Labovitz*, 271 Ga. at 336. Under the Opinion Below, this statutory hurdle would be tossed aside, and expert affidavits could be amended at any time, providing frivolous lawsuits with a smooth, unobstructed path to the courthouse steps. Frivolity aside, a statute would become moot, permitting plaintiffs to embark on endless fishing expeditions, immune to the statute

of limitations, free to edit or substitute their affidavits whenever they feel a nibble. This would be a manifest injustice to civil defendants.

**B. The language in the Renewed Complaint and accompanying Affidavit was insufficient to put Defendants on notice that Dr. Syed's conduct was at issue.**

As described above, the statute of limitation clearly was not tolled by 9-11-9.1(c), therefore the Opinion Below incorrectly determined that Respondents' renewed complaint was sufficient to put 24 On on notice that Dr. Syed's conduct was at issue. The first Complaint filed by Respondents did not assert a claim against 24 On. Respondents asserted a vicarious liability claim against 24 On for the conduct of Drs. Hunt and Mitchell in their Renewal Complaint. As comprehensively briefed by Petitioners and others, the Renewed Complaint—which used the term "treating physicians"—and accompanying affidavit did not directly or implicitly describe any conduct that could be associated with Dr. Syed or any other 24 On employee other than Drs. Hunt and Mitchell. When plaintiffs choose to bring a specific claim against a civil defendant it is not the responsibility of the defendant to prepare a defense to every possible issue that the plaintiffs could have but did not choose to raise. If the Renewal Complaint and Affidavit did not put Dr. Syed on notice for any allegations of direct negligence, it makes no sense that the Renewal Complaint could put 24 On on notice as to any potential vicarious liability from Dr. Syed's actions. Amicus GDLA is very concerned with the potentially drastic ramifications of the Opinion Below's decision, particularly the obvious discrepancy between the treatment of corporate and individual defendants.

The Civil Practice Act requires plaintiffs to plead a short plain statement sufficient to give defendants notice of the nature of the claim. *Bush v. Bank of New York Mellon*, 313 Ga. App. 84, 89 - 90 (2011). However, like O.C.G.A. § 9-11-9.1, statutes of limitation are procedural hurdles

that were "designed to promote justice" and "even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Order of Railroad Telegraphers v. Railway Exp. Agency*, 321 U. S. 342, 348-349 (1944). The statute of limitation and 9-11-9.1 are two of the few defenses awarded to defendants under the plaintiff friendly CPA and should not be disregarded lightly. This would not only prejudice defendants but the judiciary as well. Courts would be flooded with professional malpractice cases as there would be absolutely no incentive to present a qualified expert at the outset of the plaintiff's case, or even before the statute of limitations expired. Plaintiffs could file an affidavit prepared by absolutely anyone, knowing that the affidavit could be switched out, modified, or edited without restriction.

The case at bar can be boiled down to two very important, and surprisingly simple issues: the notice that a plaintiff must afford a civil defendant about what is at issue in a lawsuit, and the amount of time for which civil defendants can be held liable for a certain event. Notice of the underlying issue in a lawsuit is one of the fundamental rights of a civil defendant. *Bush*, 313 Ga. App. at 89-90. The CPA is to be construed liberally in favor of the plaintiff as it is one of notice pleading. However, the Opinion Below does not spend any time discussing the actual notice, or lack of notice, that Petitioners/Defendants received about the nature of the issues in the case at bar. A liberal construction does not mean that plaintiffs are free to construe the language of their complaints in whatever manner they wish.

There is no arguing the fact that Dr. Syed cannot be named individually at this point in the lawsuit. Respondents admit that 24 On was not named in the original complaint; therefore, pursuant to the renewal statute, the wrongful death claim does not relate back to the original

complaint date.[2] This is the exact reason why Respondents did not simply add Dr. Syed as a defendant through the proper vehicle: an amended complaint. The statute of limitations for Dr. Syed had run for his conduct through no fault of anyone but the Respondents. Respondents have now attempted to overrule both case law and plain statutory language in order to get a second bite out of the apple. It is the plaintiff's obligation to bring her suit against the allegedly negligent parties within the time period prescribed by the statute of limitations. A civil defendant, such as 24 On, should not have their basic rights pushed aside merely because Respondents did not properly research their case before filing their first two complaints.

Importantly, this was not a subsequent discovery that caused a delayed addition of a party or their conduct. Respondents were presented with the medical records containing Dr. Syed's name before their first expert affidavit was filed. Respondents could have filed a claim alleging Dr. Syed's conduct was negligent up until the expiration of the statute of limitations. Therefore, it is not an issue of deterring frivolous lawsuits, as the Opinion Below and Respondents contend. Frivolous or not, claims cannot be brought after the statute of limitations have expired. This is a decision made by the citizens of Georgia through the General Assembly. Amicus GDLA agrees that 9-11-9.1 and the statute of limitations impose a greater burden than notice pleading. That was the General Assembly's intent when it enacted the statute. *Ga. L.* 2005, p. 1, § 1/SB 3. A civil defendant should not be prejudiced and stripped of their ability to rely on well-established rules of law just to give a plaintiff as many bites out of the apple as they want. The statute of limitation and 9-11-9.1 are both requirements that plaintiffs must follow. If a party is unhappy with these requirements, they should petition the General Assembly, not the

[2] Interaction of O.C.G.A. § 9-2-61 with the amendment provisions of O.C.G.A. § 9-11-15(c) does not permit the addition of a new party to a second lawsuit which is filed within the six-month renewal period but outside the statute of limitations. Wagner v. Casey, 169 Ga. App. 500 (1984); Patterson v. Rosser Fabrap Int'l, Inc., 190 Ga. App. 657 (1989).

judiciary. It is the courts' function to apply the law as written. That is precisely what the trial court did in this case, and that decision should be affirmed.

Even putting these statutes aside and looking only at the language of the complaint, Respondents still come up short. Neither their original nor their Renewed Complaint adequately put Dr. Syed on notice that his conduct was at issue the lawsuit, which is why they did not attempt to add Dr. Syed and his conduct through an amended complaint pursuant to O.C.G.A. 9-11-15(c). The rationale is simple: Respondents attempted to recover against 24 On vicariously through Drs. Hunt and Mitchell, and when that failed they attempted to circumvent statutory law to include Dr. Syed's conduct outside the statute of limitation. This Court cannot allow lack of preparation to be rewarded at the expense of civil defendants. The express purpose of the statutes of limitation is to prevent this exact scenario, and the judiciary must apply this law as written.

The Opinion Below cites no case law as to why Dr. Syed's involvement in subsequent care is sufficient to put 24 On on notice that his care was at issue when it was not addressed in the original complaints or affidavits and the statute of limitations had run. Neither Dr. Syed nor 24 On were given any indication that the treatment provided after the hypoglycemic shock was at issue in the case at hand. Dr. Syed was not named in the Renewed Complaint nor was his conduct described in any of the complaints and affidavits filed within the statute of limitations. The allegations properly presented within the statute of limitation were that the parties named in the original lawsuit failed to detect the hypoglycemic shock and that this failure proximately caused Plaintiff to suffer hypoglycemic shock. (*See* Brief of Respondents, p. 11). Respondents generically used "treating physicians" and "24 On, and its employees and physicians" and then explicitly listed Drs. Mitchell and Hunt in their complaints and affidavits. This did nothing to link Dr. Syed's conduct to the detection or causation of the hypoglycemic shock. If Respondents succeed in this

case, potential civil defendants would be stripped of the ability to rely on the well-established rules of law such as statutes of limitation.

Finally, the Opinion Below did not overrule *Thomas v. MCCG,* but instead makes a confusing and unconvincing attempt to distinguish it, essentially holding that *Thomas* only applies when plaintiffs attempt to add new "groups" of professionals—such as a nurse instead of a doctor. However, nothing in the reasoning of Thomas discusses this "group" distinction, and no such distinction is made in the governing statute. Claims between two doctors can be just as different as claims made between doctors and nurses. Respondents in this case cited and alluded to medical care that was completely unrelated to Dr. Syed at all times before the statute of limitations expired as opposed to the plaintiff in *Thomas,* who was seeking to recover on a wrongful death claim. Section 9-1-9.1 requires that an affidavit show a negligent act for each professional named, not an affidavit showing a negligent act for each class of professional named. For all the reasons detailed above, the case at hand is the appropriate case to restrict the addition of a vicarious liability claim, even if *Thomas* has not already done so.

## CONCLUSION

This Court should grant certiorari to clarify whether vicarious claims are subject to the same affidavit requirements under 9-11-9.1 as direct claims, and should reverse the erroneous ruling of the Court of Appeals below.

Respectfully submitted this 31st day of October, 2017.

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## CERTIFICATE OF SERVICE

This is to certify that I have on this day served a copy of the foregoing **AMICUS BRIEF OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION** upon all parties via U.S. Mail as follows:

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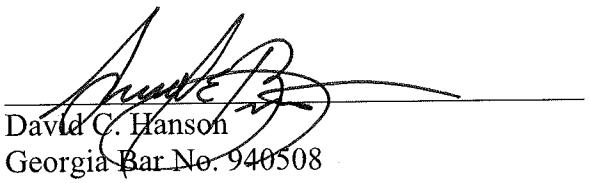
Respectfully submitted this 31st day of October, 2017.



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