IN THE SUPREME COURT
STATE OF GEORGIA

NO. S17C1021

TENET HEALTHSYSTEM GB, INC.
d/b/a ATLANTA MEDICAL CENTER,

Petitioner,
v.

LORRINE THOMAS,

Respondent.

BRIEF OF GEORGIA HOSPITAL ASSOCIATION AS AMICUS CURIAE

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Georgia Hospital Association ("GHA") is a nonprofit trade association made up of member health systems, hospitals and individuals in administrative and decision-making positions within those institutions. Founded in 1929, GHA services over 170 hospitals in Georgia, which in turn employ thousands of physicians, nurses, and other healthcare providers. GHA's purpose is to promote the health and welfare of the public by improving institutional health care services, and, in turn patient care.

Accordingly, GHA is intently interested in this case because if the trial court's correct ruling – that the statute of limitations barred the adding of a new claim based on the actions of a previously unidentified agent or employee – is not upheld, hospitals throughout Georgia will be forced to completely overhaul their risk management policies and reallocate resources due to the uncertainty of potential claims of vicarious liability emerging years down the road based on the actions of heretofore unknown actors. GHA is further concerned that the Court of Appeals' Opinion will have the unprecedented consequence of transforming internal hospital policies into standards of care, having a chilling effect on implementation of best practices within hospitals.

II. ISSUES PRESENTED

1. Whether *Thomas v. Medical Center of Central Georgia* can be distinguished based on the nature of the claim, i.e., ordinary versus professional negligence?

2. Whether the violation of an internal hospital policy constitutes simple negligence as a matter of law?

III. STATEMENT OF RELEVANT FACTS

GHA adopts by reference the Background set forth by Petitioner Tenet Healthsystem GB, Inc. d/b/a Atlanta Medical Center. GHA's interest is not in the facts of this particular case but rather in the important substantive legal and policy issues presented.

IV. ARGUMENT AND CITATION OF AUTHORITY

ISSUE I

A. *Thomas v. Medical Center of Central Georgia* is controlling regardless of whether the claim brought is professional or simple negligence.

The doctrine of relation back has never turned on whether the claim sought to be added is one of professional or simple negligence. The rule set forth by *Thomas v. Medical Center of Central Georgia*, 286 Ga. App. 147 (2007) a decade

ago is that where a plaintiff seeks to add a claim based on the conduct of a different actor outside the statute of limitations—that constitutes the commencement of a "new action" which cannot relate back. *Id.* at 149. The Court of Appeals clarified that this rule does not change even if it is a claim of vicarious liability against an employer who already has preexisting vicarious liability claims alleged against it. *Id.*

The facts of *Medical Center of Central Georgia* are remarkably similar to the case at bar: the deceased patient's estate brought a wrongful death action after she was treated and discharged at the emergency department of the Medical Center of Central Georgia (MCCG), and died later that same day. 286 Ga. App. at 147. The plaintiff had originally brought a wrongful death action against the physician with imputed liability to MCCG. *Id.* More than one year after the statute of limitations had expired, the plaintiff filed an amended complaint against MCCG based on the negligence of certain nurses under the theory of respondeat superior. *Id.* The Court of Appeals affirmed the trial court's grant of summary judgment to MCCG on the ground that new claims against the nursing staff were barred by the statute of limitations. *Id.*

The Court rejected plaintiff's argument that "the complaint did not add a new party or a new claim because the original complaint alleged MCCG was liable for [the decedent's] wrongful death based on the theory of vicarious liability, the same as the amended complaint," and instead held that this constituted a new claim of vicarious liability based on the actions of a new actor. *Id.* at 148-49. The Court relied on the following facts to arrive at this holding: 1) neither the original complaint nor the attached expert affidavit alleged any negligence against any nurse employed by MCCG; 2) MCCG's vicarious liability could only be based on the direct liability of its employees and allegations of direct negligence against the nurse is wholly separate and distinct from that against the physician; and 3) amending a complaint to add a new and separate actor is distinguishable from amending a complaint to add "additional evidence of deviation from the standard of care" against the same actor, distinguishing *Porquez v. Washington,* 268 Ga. 649 (1997). *Id.* at 147-49.

Likewise, in the instant case, plaintiff filed a complaint for medical malpractice against Defendant Atlanta Medical Center (AMC) under the theory of vicarious liability based on the direct negligence of two treating physicians: Dr. Grossman and Dr. Lowman. No allegation of negligence against any nurse was

made either in the complaint or the attached expert affidavits. The complaint set forth the relevant facts, including "The C-collar was removed by Defendant Atlanta Medical personnel." (Complaint, ¶ 75.) The complaint, however, never attributed any negligence to "Atlanta Medical Center personnel" in connection with this act.[1]

Almost fifteen months after the expiration of the statute of limitations, plaintiff filed a second amended complaint adding, *inter alia*, a new claim of vicarious liability against AMC based on the action of the nurse who removed the cervical collar. Again, no allegation was made that it was removed negligently apart from the purported violation of the policy. It should be noted that the policy at issue never prohibited the physician from delegating the actual removal of the cervical collar to a nurse; it simply provides that the decision to "clear the cervical spine[] and terminate cervical spine immobilization" shall only be made by four specialties of attending physicians (trauma surgeons, neurosurgeons, orthopedic surgeons and emergency medicine physicians). (R. 745-46.)

[1] The Court of Appeals based its holding in part on plaintiff's misrepresentation that "both the original and amended complaints set out allegations about the improper removal of the cervical spine collar by an employee of AMC." 340 Ga. App. at 74.

On appeal, the Plaintiff made the same exact relation back argument that was rejected by the Court of Appeals in *Medical Center of Central Georgia*: the amended complaint did not add a new party or a new claim because the original complaint alleged AMC was vicariously liable for "activities within the hospital arising from Ms. Thomas's care and treatment at the hospital on May 10 and 11, 2012" and because the complaint specifically alleged that the cervical collar was removed by AMC personnel. (Brief of Appellant in the Court of Appeals, p. 12.) This argument must be rejected for the same reason that it was in *Medical Center of Central Georgia*: it alleges a new claim of negligence against a *new actor*[2] that was never pled in the original complaint. And contrary to Plaintiff's argument, a mere recitation of the facts is not sufficient to constitute the assertion of a claim of negligence. *See Starr v. Emory Univ.*, 93 Ga. App. 864, 878 (1956) (a claim of negligence and its underlying factual basis must be alleged in the complaint).

While the Court of Appeals' opinion in *Medical Center of Central Georgia* included discussion analyzing the claim under O.C.G.A. § 9-11-9.1 (the statute

[2] The Court of Appeals' reliance on *Jensen v. Engler,* 317 Ga. 879 (2012) is similarly flawed because in that case, the amended complaint adding additional claims of negligence was against the same actor—Dr. Jensen—and is therefore factually distinguishable from the instant case which involves a new claim against a new actor.

mandating an expert affidavit for all professional malpractice actions), and in particular the sentence seized upon by the Plaintiff, "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," this was merely dicta and in no way essential to the court's holding. 286 Ga. App. at 149. *See James B. Beam Distilling Co. v. State*, 259 Ga. 363, 372 (1989), *rev'd on other grounds*, 501 U.S. 529, 111 S. Ct. 2439 (1991) (warning that reliance on dicta is without foundation or substance). The Court of Appeals did not make this comment in order to distinguish a professional negligence claim from an ordinary negligence claim (that question was never presented as no ordinary negligence claim was at issue) and at no point in the opinion did the court ever insinuate, suggest, or hint that its holding should be limited to professional malpractice claims. The court performed a straight-forward relation back analysis which would not have differed had it involved a claim of ordinary negligence.

B. Hospitals will face rising costs due to the inability to rely on the statute of limitations.

Plaintiff's position would allow the statute of limitation to be effortlessly circumvented by simply labelling a claim as simple negligence. From a hospital's

risk management perspective, this presents insurmountable hardship with regard to ensuring adequate malpractice insurance for providers, internal allocation of defense funds, and administrative hurdles such as reporting duties under various federal laws. The risk calculations underpinning malpractice insurance underwriting would be drastically changed because a two-year statute of limitations would no longer provide any assurances as to when liability is cut off. Discovery costs would increase exponentially and would center around the production of all internal policies even remotely related to the claim to allow plaintiffs to embark on an endless fishing expedition to find breaches of policies years after the statue has run. In short, a hospital's ability to adequately defend itself would be severely hampered due to the inability to rely on the statute of limitations as the General Assembly intended.

ISSUE II

A. Under *Thomas v. Tenet Healthsystem GB,* violations of private policies constitute negligence per se in direct contravention of well-established case law.

1. Nurse's removal of a cervical collar is professional not ordinary negligence.

The Court of Appeals' distinguishing of *Medical Center of Central Georgia* based on whether a claim is one for professional or ordinary negligence is based on

the faulty premise which the court accepts, without any analysis, that the plaintiff's characterization of a nurse's removal of a cervical collar is ordinary rather than professional negligence:

> Specifically, Thomas's amended complaint alleges that the nurse who violated hospital policy by removing the collar, that this caused or contributed to Thomas's injuries and that AMC was liable for the nurse's *simple negligence* in that regard.

340 Ga. App. at 74 (emphasis added). However, "the complaint's characterization of the claims…does not control. . . . Whether a complaint alleges. . . professional negligence is a question of law for the court." *Carr v. Kindred Healthcare Operating, Inc.,* 293 Ga. App. 80, 82 (2008); *Baskette v. Atlanta Ctr. for Reproductive Medicine, LLC,* 285 Ga. App. 876, 878-79 (2007). O.C.G.A. § 9-3-70(1) defines an "action for medical malpractice" as "any claim for damages resulting from the death or injury to any person arising out of: . . . health, medical, dental, or surgical service, diagnosis, prescription, treatment, or care rendered by a person authorized by law to perform such a service." The breadth of this definition is obvious as it encompasses *any* claim arising out of medical service or care. Accordingly, our appellate courts have consistently held that claims for ordinary negligence arising out of breaches of policies, manuals, guidelines, etc. which

occur in the course of providing medical care are "actions for medical malpractice" as defined in O.C.G.A. § 9-3-70(1).

For example, most recently in *Ziglar v. St. Joseph's/Candler Health Systems Inc.*, 341 Ga. App. 371 (2017), the plaintiff sued the hospital for professional malpractice as well as simple negligence arising from the development of pressure ulcers during his admission. *Id.* at 397-98. The Court of Appeals held that the plaintiff's claim for simple negligence by the hospital staff in actuality required highly specialized expert knowledge that was the hallmark of a professional malpractice claim.

> Ziglar alleged negligence based on the failure of the Hospital's nurses and unspecified staff to take the appropriate steps to ensure that he, as an unconscious patient, did not develop a pressure ulcer while confined to his hospital bed and to appropriately treat it once they discovered it. Clearly, just what these steps are and what should have been done to prevent the development of the ulcer would require "highly specialized expert knowledge with respect to which a layman can have no knowledge at all, and the court and jury must be dependent on expert advice." Likewise, a "medical judgment" clearly would be involved in assessing the severity of the ulcer and prescribing a course of treatment. "'Medical judgments' are 'decisions which normally require the evaluation of the medical condition of a particular patient and, therefore, the application of professional knowledge, skill, and experience.'

Ziglar v. St. Joseph's/Candler Health Sys., Inc., 341 Ga. App. 371 (2017) (internal citations omitted).

Similarly, in *Carr, supra,* the survivors of a deceased nursing home resident sued the facility for negligence per se, ordinary negligence and violation of a "bill of rights" for patients of such facilities. The Court of Appeals held that all such claims arose out of allegedly negligent medical or nursing care and were therefore claims of professional negligence. *Carr,* 293 Ga. App. at 82-83. In *Baskette, supra,* it was alleged that the injury to the plaintiffs was caused by the administrative or clerical negligence of support staff in mishandling Mr. Baskette's stored sperm, and was therefore ordinary negligence. The Court of Appeals nevertheless held that such conduct was encompassed by the physician's medical care and, if negligent, constituted medical malpractice. 285 Ga. App. at 879-81. In *Stafford-Fox v. Jenkins,* 282 Ga. App. 667 (2006), the plaintiff alleged along with medical malpractice, ordinary negligence and breach of fiduciary duty based upon an alleged failure to diagnose, treat or advise the patient that she had a vitamin B-12 deficiency which led ultimately to a permanent neurological disability. The court held that all claims, including the ordinary negligence claim, were professional malpractice claims. 292 Ga. App. at 671-72. *See also Bradway v. American National Red Cross,* 263 Ga. 19 (1993) (holding a patient's ordinary negligence claim against the Red Cross for negligent screening of blood donors leading to the

contraction of HIV from blood transfusions sounded in medical malpractice rather than simple negligence); *cf. Strickland v. Hosp. Auth. of Albany/Dougherty County,* 241 Ga. App. 1 (1999) (holding moving a patient from one wheelchair to another was simple negligence); *Gilbert v. R.J Taylor Memorial Hosp., Inc.*, 265 Ga. 580 (1995) (holding loss of a tumor excised from a patient was simple negligence); *Moore v. St. Louis Smith Memorial Hosp. Inc.,* 216 Ga. App. 299 (1995) (holding fall during move from wheelchair to bed was simple negligence).

In this case, the nurse's action in removing the cervical collar was clearly in the course of providing medical treatment to the plaintiff, and required the nurse's medical judgment as a matter of law. *See Upson Cnty. Hosp., Inc., supra* (directing courts to look at whether the allegedly negligent actor was a licensed professional listed in O.C.G.A. § 9-11-9.1(g) in answering the question of which claims constituted professional rather than simple malpractice). Moreover, acting pursuant to a physician's order does not relieve a nurse of her duty to exercise independent medical judgment. *See Grady Gen. Hosp. v. King*, 288 Ga. App. 101, 102 (2007) ("We do not expect nurses to obey a physician's order without exercising their professional judgment to determine whether the order as written was proper, and we expect them to call the physician's attention to any question

that arises."); *see also* O.C.G.A. § 43-26-3(6) (defining the practice of nursing to include the administration of treatments as prescribed by a physician).

Plaintiff's bedrock argument that this is simple rather than professional negligence is that there happened to be an internal hospital policy regarding the removal of cervical spine collars (AMC's policy entitled "Termination of Cervical Spine Immobilization") and the nurse allegedly violated said policy. However, the Court of Appeals has previously addressed this precise issue and held:

> [Plaintiff]'s claim that the hospital either failed to follow established anesthesia procedures or protocols or failed to have any established procedures or protocols in place is a claim for professional negligence.

Upson County Hosp., Inc. v. Head, 246 Ga. App. at 392. This is particularly true where the allegedly negligent actor is a nurse, "recognized as a professional subject to its own general standards of care and qualifications." *Grady Gen. Hosp. v. King,* 288 Ga. App. 101, 102 (2007).

Thus, neither the fact that the nurse's action was taken in response to a physician's order or that it was in violation of an internal policy transmutes this claim from a classic professional malpractice claim to one of simple negligence. The Court of Appeals gave no analysis on this issue when it distinguished *Medical*

Center of Central Georgia as not controlling for the sole reason that that case involved professional rather than simple negligence.

2. The Court of Appeals' opinion effectively expands the doctrine of negligence per se to all private policies.

"The essential elements of a negligence claim include a legal duty and breach of that duty." *Coosa Valley Tech. Coll. v. West*, 299 Ga. App. 171, 178 (2009). If, as the Court of Appeals held below, no exercise of professional judgment was required by the nurse, then the only basis of negligence is the violation of AMC's internal policy--"Termination of Cervical Spine Immobilization." In other words, this policy is the only basis for the imposition of a duty from which the breach arises. This then becomes a straightforward application of the doctrine of negligence per se: the use of a statute or regulation as a standard of care, violation of which gives rise to the tort of negligence per se. *See Central Anesthesia Associates P.C. v. Worthy,* 173 Ga. App. 150 (1984).

The Court of Appeals' acceptance of the nurse's alleged breach of the policy as negligence in and of itself effectively expands the doctrine of negligence per se to private, internal policies, rules, and protocol which is an unprecedented departure from the basic tenets of tort law. It is further in direct contravention of

well-established case law holding that violation of private policies does not constitute negligence per se because such internal policies are not standards of care[3] and therefore do not establish a duty that can give rise to a civil tort.

For example, in *Leal v. Hobbs,* 245 Ga. App. 443 (2000), a patient who had been subdued by police with pepper spray suffered a cardiac arrest while being transported via ambulance to Grady Memorial Hospital. A paramedic student trainee was riding along and administered various drugs to increase the heartrate as directed by the supervising paramedic. This action was in violation of a Grady policy which stated student trainees could only ride in an "observer status." The Court of Appeals ruled that the negligence per se theory did not apply because "[w]e find no authority for the proposition that violation of an internal policy can constitute negligence per se." *Id.* at 446. *See also Smith v. Am. Trans. Hosps., Inc.*, 330 F. Supp. 2d 1358, 1361 (S.D. Ga. 2004) (applying Georgia law in holding that the standard of care is not measured by a particular facility's policies and procedures); *Wages v. Amisub of Georgia*, 235 Ga. App. 156, 159 (1998) (holding

[3] In medical malpractice, the standard of care is that degree of care and skill "which under similar conditions and like surrounding circumstances is ordinarily employed by the medical profession generally." *Hayes v. Brown*, 108 Ga. App. 360, 363 (1963).

a hospital's violation of internal policies on appropriate disposal of deceased bodies did not constitute negligence per se); *Butler v. S. Fulton Med. Ctr., Inc.*, 215 Ga. App. 809, 812 (1994) (holding where patient was rendered quadriplegic after administration of a nerve block that "failure of the nurses to comply with a rule of the hospital does not give rise to negligence per se"); *Luckie v. Piggly-Wiggly Southern, Inc.,* 173 Ga. App. 177 (1984) (violation of a privately established rule is not negligence in and of itself).

A violation of an internal policy or procedure does not constitute negligence per se because such privately-imposed duties are not standards of care "raised by the law for the protection of others." *Leal,* 245 Ga. App. at 446. In a hospital setting, they are instead a collection of policies designed to be an "extra step" in ensuring quality patient care, decreasing practice variation and reducing the likelihood of foreseeable human error, often known as a "best practice bundle."

The policy at issue, "Termination of Cervical Spine Immobilization" is a perfect example. The stated purpose behind AMC's implementation of this policy is to "provide consistency in the termination of cervical spine immobilization." Specifically, it lays out a protocol of various checks, such as obtaining "radiographic clearance" and clearing the termination with a "blue sticker" signed

and dated by a physician with proper documentation in the patient's medical record. (R. 745-46.) It further limits this authority to four specialties of attendings (trauma surgeons, neurosurgeons, orthopedic surgeons, and emergency medicine physicians) which the hospital deems possesses sufficient expertise in the field to make this clinical decision. This does not set forth the standard of care, but rather a procedural guide intended to minimize risk of error. In addition, pragmatically, policies vary by hospital and cannot be implemented wholesale as standards of care (e.g., some smaller community hospitals do not have access to on-call specialties such as trauma surgeons, neurosurgeons and orthopedic surgeons).

Thus, the Court of Appeals in casting aside *Medical Center of Central Georgia* to arrive at a particular result has unintentionally and dangerously created an additional layer of liability for hospitals by elevating such internal policies and procedures into standards of care, the violation of which would result in negligence per se.

3. The *Thomas* Opinion will have an unmitigated chilling effect on hospitals' willingness to implement internal policies and procedures.

The pragmatic effect of this opinion on the day-to-day operations of hospitals throughout Georgia cannot be overstated. Best practice bundles are just

that—best practices and it is unrealistic (and indeed dangerous at times)[4] to expect strict unbending adherence to each and every internal policy at all times. As explained above, that is not the intent and purpose behind a best practice policy. But under the Court of Appeals' opinion, any deviation would constitute negligence per se, regardless of whether there is any showing of negligence, and would embolden plaintiffs to use such breaches as admissions of fault to demand quick settlements as well as bolster otherwise meritless claims.

Accordingly, should this opinion stand, it will most certainly trigger a swift chilling effect on Georgia hospitals' willingness to voluntarily develop and implement best practice bundles comprising of various policies that encompass not only hospital-wide general safety procedures but also practice-specific treatment protocols. This opinion will force hospitals to prioritize risk management concerns over that of patient safety, and eliminate all but the most basic safety guidelines in

[4] A best practice bundle is based on generalized data sets and models and a clinician does not (and should not) treat a patient based on fastidious compliance with a checklist without taking into account the presentation of symptoms specific to each patient and overall clinical picture. Deviations at times can be in the best interest of the patient. Ultimately, this decision must be made by the trained practitioner, not a policy.

anticipation of the onslaught of negligence per se lawsuits sure to follow this opinion.

CONCLUSION

The *Thomas* Court's determination to arrive at a certain outcome in disregard of controlling precedent comes at a dangerous price—the establishment of negligence per se based on the breach of private policies. For all the foregoing reasons and based on the above-cited authorities, Georgia Hospital Association, as amicus curiae, respectfully requests that this Court grant Tenet Healthsystem GB, Inc. d/b/a Atlanta Medical Center's Petition for Certiorari as it concerns an issue of grave importance to the Georgia hospital community.

This 26th day of July, 2017.

Respectfully submitted,
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CERTIFICATE OF SERVICE

This is to certify that I have this day served true and correct copies of the foregoing **BRIEF OF GEORGIA HOSPITAL ASSOCIATION AS AMICUS CURIAE** on all counsel via the Court's eFast docketing system which electronically sends a copy to all counsel of record and by placing copies in the U.S. Mail, First Class postage prepaid, in envelopes properly addressed to counsel to their last known addresses as follows:

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This 26th day of July, 2017.

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