IN THE COURT OF APPEALS
FOR THE STATE OF GEORGIA

NO. A17A1208

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

Plaintiffs/Appellants,

v.

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

Defendants/Appellees.

BRIEF OF GEORGIA HOSPITAL ASSOCIATION AS AMICUS CURIAE

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I. STATEMENT OF INTEREST

A. Amicus Curiae – The Georgia Hospital Association.

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 serves over 170 hospitals in Georgia, which in turn employ thousands of physicians and even more nurses and other healthcare providers. Its purpose is to promote the health and welfare of the public through the development of better hospital care for all of Georgia's citizens. GHA members are committed to improving institutional health care services and, in turn, patient care.

B. Interest of Amicus Curiae.

GHA submits this brief in the interest of carrying out its mission for its member hospitals and in furtherance of the overall health and welfare of the citizens of this State. This appeal calls into question whether GHA's members may rely on this Court's clear precedent and statutory interpretation, the expert affidavit vetting procedure, and the statute of limitations in claims for vicarious liability for the alleged negligence of previously unidentified employees. If the trial court's ruling is reversed, the statute of limitations and expert affidavit

requirement will be rendered ineffectual to prevent a plaintiff from adding a new claim based on the actions of previously unidentified professional employees well into the course of costly litigation. Consequently, Georgia hospitals need clarity and consistency regarding this important issue.

II. INTRODUCTION

While this case has attracted a number of briefs already, GHA does not seek to restate the arguments previously presented. Instead, this brief focuses, primarily, on two opinions from this Court that are controlling on the facts of this case: *HCA Health Services of Georgia, Inc. v. Hampshire*, 206 Ga. App. 108 (1992) and *Thomas v. Medical Center of Central Georgia*, 286 Ga. App. 147 (2007). Of course, both of these cases were discussed in prior briefs, but some important things were left unsaid.

In *HCA Health Services*, this Court undertook a detailed analysis of whether a vicarious liability claim against a hospital defendant could survive when the affidavit against the underlying professional was defective, even when a separate vicarious claim against that same hospital was viable. 206 Ga. App. at 110. This Court barred the vicarious claim tied to the defective affidavit. *Id.* This specific holding was not discussed in prior briefings. The opinion controls in this case.

The *Medical Center of Central Georgia* opinion was briefed at length and was discussed at oral argument, which, in part, prompted GHA to submit this amicus brief. At oral argument, this Court questioned whether its prior decision should be overturned, and for the first time in the case, Appellants argued that it should.[1] Thus, the Appellees were not afforded an opportunity to address that issue in their brief.

As discussed below, the doctrine of stare decisis dictates against this Court overturning prior statutory interpretations. Georgia's Supreme Court has been resolute on this principle, especially when statutory interpretations are involved (as opposed to issues involving the constitution, which are not as easily cured through legislative action). In this case, both *HCA Health Services* and *Medical Center of Central Georgia* would have to be overturned in order to reach a new statutory interpretation of O.C.G.A. § 9-11-9.1. Georgia's hospitals and litigants in general must be able to rely on established law, and GHA therefore urges a consistent and uniform application of the law in keeping with established precedent.

[1] As discussed below, while GTLA, in its amicus brief, had argued for an overturning of *Medical Center of Central Georgia*, GTLA's position clashed with that expressed in Appellants' briefs. At oral argument, however, Appellants pivoted to align with GTLA in calling for an overturning.

Moreover, the healthcare industry needs assurance that, once a limitations period has passed, the conduct of previously unidentified providers will not be belatedly called into question. Defendants need the assurance that, in the throes of discovery, they will not be surprised by new claims based on alleged conduct of newly identified professionals. And as MAG points out, allowing Appellants and GTLA's interpretation to go forward "would substantially disrupt parties' settled expectations regarding their dealings and expose employers of professionals (and their insurers) to new claims long after their stale date, when the claims against the professionals themselves are barred." (MAG Br. p. 26.)

The relevant facts of this case have been well briefed, and GHA incorporates the statements of facts of the Appellees and MAG. While it urges this Court to affirm the trial court's order, GHA's interest is not in the outcome of this individual case but rather lies in the consistent, uniform interpretation and application of Georgia law, and in ensuring a level playing field for Georgia's hospitals during litigation. Affirming the trial court's order and reaffirming this Court's prior interpretations of O.C.G.A. § 9-11-9.1 in *HCA Health Services* and *Medical Center of Central Georgia* will accomplish these goals.

III. ARGUMENT AND CITATION OF AUTHORITIES

A. This Court's Decision in *HCA Health Services* is Controlling.

There has been much briefing in this case concerning *Medical Center of Central Georgia*, but equally controlling is this Court's earlier opinion in *HCA Health Services*, 206 Ga. App. 108, albeit for a different reason than previously discussed. In *HCA Health Services*, the Hampshires sued a hospital, one allopathic physician, five osteopathic physicians, and the professional corporation that employed several of the physicians. The plaintiffs' expert affidavit, by an allopath, did not mention any defendant by name except the hospital. *Id.* at 109. The claims against the hospital included claims for respondeat superior vicariously liability based on the alleged negligence of the one allopathic and five osteopathic physicians. *Id.* at 111.

This Court's treatment in *HCA Health Services* of the hospital defendant, Northlake, is determinative as it relates to this case. This Court found that the plaintiffs' expert, an allopath, could not offer opinions as to the alleged negligence of the five osteopath physicians or their professional corporation. *Id.* at 111. So, with those defendants out, this Court next turned to the hospital defendant, Northlake, which was alleged to be vicariously liable for the actions of both the

osteopaths and the allopath. *Id.* Could the plaintiff continue to assert vicarious liability theories against Northlake relating to the professional actions of the osteopaths, even though Northlake remained a defendant in the case vis-à-vis the allopath allegations that satisfied § 9-11-9.1? No. This Court explained that "Northlake was entitled to assert the insufficiency of the O.C.G.A. § 9–11–9.1 affidavit as a defense to its liability for the alleged malpractice of the osteopath appellants." *Id.* This Court therefore held that "the trial court erred by denying Northlake's motion to dismiss **insofar as the hospital's liability for the osteopath appellants** is concerned." *Id.* (emphasis added).

So, in summary, the *HCA Health Services* decision allowed the allopathic professional vicarious liability claim against the corporate hospital defendant to proceed, but it foreclosed the osteopathic vicarious liability claim against the same hospital defendant because of the defective 9-11-9.1 affidavit. In so doing, this Court recognized that, even when a corporate respondeat superior defendant is a proper party based on the alleged negligence of one professional, a plaintiff must support her vicarious liability claims against other professionals with affidavits as well. Put another way, each theory of vicarious liability relating to a professional requires the support of an appropriate affidavit relating to that professional. Under

HCA Health Services, it is not sufficient to assert one claim of affidavit-supported professional vicarious liability against a corporate defendant and then expose that same corporate defendant to a spray of additional vicarious liability claims relating to other professionals in the absence of a proper affidavit supporting the additional claims. As with *Medical Center of Central Georgia*, the opinion in *HCA Health Services* was unanimous. The Court of Appeals denied a motion for reconsideration. The Supreme Court rejected a petition for certiorari.

How does the *HCA Health Services* holding come to bear in this case? It is directly on point and controlling. As for their claims against 24 On, it was not enough for Appellants to produce a timely affidavit regarding the professional actions of Drs. Mitchell and Hunt but then later attempt to assert a new theory of liability against 24 On based on the actions of Dr. Syed, when no timely affidavit identified him or alleged any negligent action attributable to him. Therefore, while 24 On may remain a defendant as to one theory of vicarious liability stemming from Drs. Mitchell and Hunt, the trial court properly found, consistent with this Court's decision in *HCA Health Services*, that the separate theory of liability relating to Dr. Syed was foreclosed for lack of a proper affidavit within the limitations period.

B. This Court's Decision in *Thomas v. Medical Center of Central Georgia* is Controlling.

In *Thomas v. Medical Center of Central Georgia*, 286 Ga. App. 147 (2007), this Court held that claims against a corporation for vicarious liability based on the professional negligence of different actors constitute separate claims that must each be asserted within the statute of limitations. That opinion is on all fours with and controls this case.

To recap the facts in *Medical Center of Central Georgia*, the plaintiff filed a medical malpractice complaint against a doctor. The contemporaneously filed expert affidavit alleged that the doctor breached the standard of care and that the hospital defendant was vicariously liable for the doctor's malpractice. No claims regarding the hospital's nurse were brought in the original complaint or supporting affidavit. More than a year after the expiration of the two-year statute of limitations, the plaintiff filed an amended complaint and amended affidavit alleging the hospital's nurses had violated the standard of care and that the hospital, which was already a party to the case, was vicariously liable for these newly identified professionals.

In affirming summary judgment to the hospital, this Court reasoned that allowing a plaintiff to assert new theories based on the alleged actions of previously unidentified licensed professionals outside the limitations period "would certainly frustrate the intent of O.C.G.A. § 9-11-9.1." *Id.* at 149.

The opinion in *Medical Center of Central Georgia* was unanimous. The Court of Appeals denied a motion for reconsideration. The Supreme Court rejected a petition for certiorari. Other opinions have cited to the case. In short, the legal conclusion in the case was thoroughly vetted and additional review was declined. No bills have been introduced in the General Assembly in response to the opinion. Because the fundamental facts in this case are indistinguishable from those in *Medical Center of Central Georgia*, the decision should be applied here, and under the doctrine of stare decisis, this Court should decline any invitation to revisit it.

C. Stare Decisis Requires This Court to Adhere to its Decision in *Thomas v. Medical Center of Central Georgia*.

Concerning *Medical Center of Central Georgia*, the arguments of Appellants and their amicus, GTLA, collide with one another. Appellants assert, on the one hand, that this case is distinguishable from *Medical Center of Central*

Georgia. (Appellants' Br. pp. 23-24.) GTLA, on the other hand, argues that *Medical Center of Central Georgia* should be overturned. (*See* GTLA Br. pp. 24-27.) In doing so, GTLA highlights the infirmity of Appellants' argument under the current law and concedes that Appellants cannot prevail unless *Medical Center of Central Georgia* is overturned. At oral argument, Appellants finally conceded as much, pivoting to align with GTLA by asserting that *Medical Center of Central Georgia* should be overturned. (Oral Argument Video at 9:44 to 10:18.)

So, at this juncture, Appellants' position has become nothing more than a frontal assault on *Medical Center of Central Georgia*. The Appellants' legal and factual theories are identical to those of *Medical Center of Central Georgia* in every essential respect. For this reason, if *Medical Center of Central Georgia* remains the law of Georgia, then it is outcome determinative here.

But this Court should reject the invitation for jurisprudential whipsawing. And it should avoid the extraordinary action of overturning two unanimous opinions that have been settled law since 1992. The doctrine of stare decisis compels that the Court follow *Medical Center of Central Georgia* as well as *HCA Health Services*. Litigants and the public deserve uniformity, predictability, and consistency from the Courts. Because this Court does not write on a clean slate, it

must adhere to its prior interpretation of the plain reading and application of the statute, even if this panel would come to a different conclusion based on its reading of the statute.[2] This Court's prior decision in *Medical Center of Central Georgia* is now as much the law as the statute itself, even if this panel of the Court disagrees with the outcome. *See Etkind v. Suarez*, 271 Ga. 352, 358 (1999) ("stare decisis compels that we follow and apply [a prior opinion] despite any disagreement we may have with its analysis").

Under the doctrine of stare decisis, 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." *Norris v. Atlanta & West Point R. Co.*, 254 Ga. 684, 686 (1985). It dictates the conclusion of law to be made upon a given set of facts. *Id.* It is a fundamental

[2] There was some discussion at oral argument regarding the plain reading of the statute, O.C.G.A. § 9-11-9.1. Obviously, the *Medical Center of Central Georgia* Court believed that it was undertaking a plain reading of the statute consistent with the intent and purpose of the statute. For this Court to read the statute differently than the *Medical Center of Central Georgia* Court would itself be a concession that there is no one plain reading and that the statute may have some ambiguity. If so, the doctrine of stare decisis and the exhortations of our Supreme Court require that the *Medical Center of Central Georgia* opinion be followed and that any new interpretations of the statute be left to the legislature.

principle of our legal system that courts rely on binding precedent and established principles of law to determine the outcome of cases presenting particular facts.

> Stare decisis is a rule to insure uniformity. This tribunal, when it ceases to regard it, will greatly impair its value, and fail to secure public confidence. If this Court has been wrong from the beginning, on this subject, let the legislative power be invoked to prescribe a new rule for the future; until altered by that power, we are disposed to adhere to the rule which has been so long applied by our Courts and is so well known to the legal profession.

Adams v. Brooks, 35 Ga. 63, 66(3) (1866).

There are strong policy reasons underpinning the doctrine of stare decisis and the need for consistent application of the law. According to Georgia's Supreme Court, "[W]e recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it. Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable." *Etkind v. Suarez*, 271 Ga. at 356–57, (1999), quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854 (1992) (internal citations omitted).

And where, as here, the precedent relates to the interpretation and application of a statute (as opposed to a constitutional issue), the principle of stare decisis "carries even greater weight." *Abernathy v. City of Albany*, 269 Ga. 88, 90

(1998). "A reinterpretation of a statute after the General Assembly's implicit acceptance of the original interpretation would constitute a judicial usurpation of the legislative function." *Id.* Even when Georgia's Supreme Court has recognized public policy arguments that support a broader application of Georgia's malpractice statute, it has abstained from reversing itself, noting that "it appears that the General Assembly has not found those arguments to be persuasive, since it has not amended that statute …." *Etkind v. Suarez*, 271 Ga. at 358. "[The Court's] institutional duty is to follow until changed the law as it now is, not as some Members of the Court might wish it to be." *Id.*, quoting *Hudgens v. NLRB*, 424 U.S. 507, 518 (1976).

As it relates to this case, hospitals and health systems need the assurance that when this Court issues a decision and interprets a statute, they can follow the Court's guidance without fear that a new panel will overrule the prior decision and interject uncertainty into the judicial process. Physicians need assurance that, once a limitations period has passed, their conduct will not belatedly be called into question. Employers need the assurance that, at the conclusion of a case, they will not be surprised by new vicarious liability claims based on conduct of newly identified professionals. And as amicus Emory University points out, hospitals

need to allocate adequate malpractice insurance, obtain tail insurance, and comply with administrative federal reporting requirements. (Emory Br. pp. 15-16.) In short, the *Medical Center of Central Georgia* decision should "be followed in the present case unless the law upon which [it is] based has been subsequently changed *by legislative action* so as to require a different ruling at the present time." *Brinkley v. Dixie Constr. Co.*, 205 Ga. 415, 416 (1949) (emphasis supplied).

D. *Medical Center of Central Georgia* Has Been Reviewed Several Times and Has Not Been Criticized.

The opinion in *Medical Center of Central Georgia* does not stand on an island. First, it is entirely consistent with *HCA Health Services*. Moreover, this Court has discussed it on several occasions and, while distinguishing it factually, has recognized is continued viability on its facts—the same facts as are present in this case. For example, in *Anthony v. Am. Gen. Fin. Servs., Inc.*, this Court cited *Medical Center of Central Georgia* for the proposition that a claim against a "master is entirely derivative from the servant's negligence." 287 Ga. 448, 454, n. 4 (2010).

More recently, in *Thomas v. Tenet Healthsystem GB, Inc.*, this Court distinguished the *Medical Center of Central Georgia* decision and found that it

was inapplicable but only "**inasmuch as the new claims do not allege professional negligence**." 340 Ga. App. 70, 73 (2017) (emphasis added).[3] Thus, ipso facto, had the new claims in Tenet alleged professional negligence, as here and as in *Medical Center of Central Georgia*, then this Court indicated that its *Medical Center of Central Georgia* decision would have controlled. The *Tenet Healthsystem* Court found no flaws in this Court's analysis or the holding in *Medical Center of Central Georgia*. *Tenet Healthsystem* did not even suggest that this Court wrongly based its decision in *Medical Center of Central Georgia* on Section 9.1 instead of O.C.G.A. § 9-11-15. *Tenet Healthsystem* actually explained that the rule in *Medical Center of Central Georgia* applying O.C.G.A. § 9-11-9.1 governs the timeliness of new claims for professional negligence when a different professional negligence claim has previously been made. By implication, the *Tenet Healthsystem* decision reaffirmed *Medical Center of Central Georgia* for those limited situations when, as here, claims stemming from a new professional are asserted after the limitations period.

[3] While GHA disagrees with the finding in *Tenet Healthsystem* that the new claims in that case did not allege professional negligence, the holding shows that if the claims had been classified as professional, then *Medical Center of Central Georgia* would have controlled. In this case, there is no question that Plaintiffs allege professional negligence against Dr. Syed.

E. The Statute Does Not Contemplate Discovery as a Precursor to Identifying Professionals Who Allegedly Committed a Breach.

The Appellants' argument of lack of discovery to identify professionals is unfounded and is inconsistent with the statute. The statute does not provide plaintiffs any additional time to name new professional defendants whose activities are outside the limitations period. The Appellants did not attempt to name Dr. Syed individually and have conceded that they could not have done so after the limitations period expired. It is therefore inconsistent to argue that the statute would be harshly applied by excluding a new vicarious liability claim based on the actions of a newly identified professional. In fact, this Court has already held: "To allow a plaintiff to switch or add professionals upon which she bases her claims would certainly frustrate the intent of O.C.G.A. § 9-11-9.1." *Medical Center of Central Georgia,* 286 Ga. App. at 149.

The screening intent of the statute serves not only to prevent frivolous lawsuits, *S K Hand Tool Corp. v. Lowman*, 223 Ga. App. 712, 714 (1996), but also "to protect professionals against the harm done by groundless malpractice litigation…." R.D. Brussack, *Georgia's Professional Malpractice Affidavit Requirement*, 31 Ga.L.R. 1031, 1033 (1997). "This serves to prevent putting a

professional to great expense and adversely affecting his or her professional reputation unjustifiably...." *Johnson v. Brueckner*, 216 Ga. App. 52, 53 (1994). Of course, the cost of litigation goes far beyond attorneys' fees and expenses, as the impact on a provider's professional reputation, even when a claim is unfounded, can be irreparable.

Plaintiffs have ample access to medical records prior to litigation (*see* O.C.G.A. § 31-33-2), as well as the ability to speak with all treating providers. *See Baker v. WellStar Health Sys., Inc.*, 288 Ga. 336, 340 (2010). Thus, consistent with the purpose of O.C.G.A. § 9-11-9.1, they have ample opportunity to identify alleged negligent professionals before filing suit. That's what the General Assembly required through its enactment of the statute. But even if a plaintiff identifies another alleged negligent professional during discovery, a reasonably diligent plaintiff has time to add the new professional as a defendant or to identify the professional as the genesis for a new vicarious liability claim against an existing defendant. As Emory points out, the purposes of the affidavit statute and limitations periods in general are to provide certainty and prevent surprise; defendants should not bear the burden of an expanded limitations period because of a plaintiff's lack of diligence. (*See* Emory Br. pp. 12-14 and 16-17; MAG Br. at

14-15 and 22.) "Instead of unpredictability, it is desirable to have stability and certainty in the law." *Kaminer v. Canas*, 282 Ga. 830, 836 (2007), quoting *Dowis v. Mud Slingers*, 279 Ga. 808, 811, 621 S.E.2d 413 (2005). "Stability and certainty are not advanced by holding that it is possible for the statute of limitations to recommence…." *Kaminer*, 282 Ga. at 836.

F. The Parade of Horribles Painted by Appellants is Unfounded; *Medical Center of Central Georgia* has not had a Negative Impact.

Appellants argue that, if the trial court's decision in this case is not reversed, it will have far flung "negative implications." (Appellants' Br. at 24.) Not so. And we know it is not so because the trial court's order simply applies *Medical Center of Central Georgia* which has been in place for ten years without any negative consequences, much less far reaching negative consequences. No law review or *Georgia Bar Journal* articles have been written about the case. The opinion caused hardly a ripple until this case, and the problems here are, without doubt, of Appellants' own making.

Appellants failed to sue Dr. Syed, and they failed to identify any alleged breaches by Dr. Syed during the limitations period. They cannot add Dr. Syed as a party to this case. So they are attempting an end run around the affidavit statute in

order to interject Dr. Syed into the case when they cannot otherwise add him as a party. The law does not condone end runs, and as this Court has already held: "To allow a plaintiff to switch or add professionals upon which she bases her claims would certainly frustrate the intent of O.C.G.A. § 9-11-9.1." *Id.* at 149.

G. Merely Suing a Practice or Institution is Insufficient; A Plaintiff Must Identify the Professionals Upon Whom the Malpractice Action is Based.

Plaintiffs asserted in their briefing and at oral argument that O.C.G.A. § 9-11-9.1 does not require identifying the allegedly negligent employed professional and that simply identifying a practice or institution is sufficient. (*See* Appellants' Br., p. 20.) But this position is inconsistent with both the statute and a long line of cases, including a recent one from this Court just two months ago.

As discussed earlier, in *HCA Health Servs. of Georgia,* a vicarious liability claim against a defendant hospital was permitted to continue based on affidavit-supported allegations relating to the actions of one physician, but a separate claim against the same hospital defendant relating to another group of physicians and unsupported by an affidavit was dismissed. 206 Ga. App. at 110. Thus, under *HCA Health*, regardless of whether the plaintiff chooses to identify the employed professional by name, she must still comply with O.C.G.A. § 9-11-9.1(a) in

providing an affidavit describing a specific act of negligence against the licensed professional.

And this rule has been consistently applied, even as recently as two months ago in this Court's opinion in *Ziglar v. St. Joseph's Candler Health Sys., Inc.*, A17A0214, 2017 WL 2023429, at *1 (Ga. Ct. App. May 12, 2017). There, this Court applied § 9-11-9.1(a) to an affidavit which alleged "only generally that the nurses and staff at the Hospital" were negligent, without naming any individual licensed professionals. On those facts, this Court held that the affidavit was insufficient, and it dismissed the complaint. *See also Health Mgmt. Associates, Inc. v. Bazemore*, 286 Ga. App. 285, 288 (2007) (plaintiff must file an affidavit under § 9-11-9.1 even as to an unidentified employee); *Candler Hosp., Inc. v. Carter*, 224 Ga. App. 425, 426 (1997) (deeming affidavits insufficient when they failed to specify negligent conduct of employed hospital professionals or facts upon which the malpractice claim against the hospital was based).

The holdings in *HCA Health Services* and *Medical Center of Central Georgia* adhere to the text and purpose of the statute. As MAG points out, nothing changes under the text of the statute when the employer happens to employ more than one potentially negligent professional. (MAG Br. pp. 20-21.) As MAG

succinctly states, "when liability is entirely derivative, a plaintiff must be able to state from whom the liability derives." (*Id.* at 20.) *HCA Health Services* holds that the requirement should not be any different when the liability starts with the professional and runs vicariously to his or her employer. To state a valid claim, then, the affidavit must opine as to each professional. *Medical Center of Central Georgia*, 286 Ga. App. at 148-49. But as pointed out earlier, even if this panel were inclined to paint a different gloss on the reading on the text of the statute, the doctrine of stare decisis dictates against disturbing or not following *HCA Health Services* or *Medical Center of Central Georgia*. *See Etkind*, 271 Ga. at 358.

In effect, Plaintiffs are urging a new and expansive interpretation of Georgia's professional malpractice statute, one that would allow the identification of a "corporate" defendant without the identification of the alleged negligent professionals for whom the corporation is allegedly vicariously liable. But the claim is called "professional malpractice" for a reason: it requires the identification of professionals who were allegedly at fault. And Georgia, like the majority of jurisdictions, does not recognize a doctrine of "corporate malpractice."

A corporation acts only through its agents and employees, and if an employee acted negligently, a corporation can be held liable through respondeat

superior. *See Hoffman v. Wells*, 260 Ga. 588, 589 (1990) (finding liability against a hospital for the negligent actions of its nurse employees, under a theory of respondeat superior). The basic principle of vicarious liability—that the negligence of a master is entirely derivative of that of the servant—demands this conclusion as well. *See Medical Center of Central Georgia*, 286 Ga. App. at 148. A vicarious liability claim could not be complete where the plaintiff has not pled the direct negligence of the employee. To allow otherwise would be to turn the "vicarious liability [analysis] on its head" as it would essentially hold the employer directly liable for an otherwise strictly derivative claim. *Anthony v. Am. Gen. Fin. Servs., Inc.*, 287 Ga. 448, 454 (2010).

As MAG summarized, when the liability is direct, the alleged negligent conduct of each named defendant professional must be set forth in the affidavit. (MAG Br. 20.) Likewise, when the liability is vicarious, the conduct of each professional whose alleged negligence gives rise to the liability must be set forth in the affidavit. (*Id.*) Therefore, if an affidavit filed outside those windows calls into question the conduct of a new professional, a separate limitations analysis must be done. As applied in this case, the newly identified professional, Dr. Syed, was not included in an affidavit until after the expiration of the limitations period, and

therefore the trial court correctly applied *Medical Center of Central Georgia* to hold that no new claims can be based on Dr. Syed's professional conduct.

IV. CONCLUSION

For the reasons set forth above, GHA urges this Court to affirm the trial court's order and find that it is bound by its precedent in *HCA Health Services* and *Medical Association of Central Georgia*. GHA further asks the Court to find that, in claims for vicarious liability, O.C.G.A. § 9-11-9.1 requires a plaintiff to identify at least one act of alleged negligence on the part of each alleged professional prior to the expiration of the statute of limitations.

Respectfully submitted this 18th day of July, 2017.

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Rule 24(f) Certificate of Compliance

I certify that this submission does not exceed the word count limit imposed by Rule 24, in that it contains 5,395 words.

This 18th day of July, 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day caused the foregoing Brief of Georgia Hospital Association as Amicus Curiae to be served upon counsel for Appellants and counsel for Appellees by depositing a copy of same in the United States Mai, with sufficient postage affixed thereto to ensure deliver, addressed to the following:

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