IN THE SUPREME COURT
STATE OF GEORGIA

ROCKDALE HOSPITAL, LLC d/b/a ROCKDALE MEDICAL CENTER; 24 ON PHYSICIANS, PC; and DR. ALUNDA E. HUNT, M.D.,	)	
Petitioners,	)	DOCKET NO. _____
vs.	)	
HEATHER OLLER, as Executor of the Estate of Shirley Nobles, deceased and DAVID NOBLES,	)	
Respondents.	)	

PETITION FOR WRIT OF CERTIORARI

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OUTLINE OF ARGUMENT

I. INTRODUCTION

Petitioners ask this Court to grant a writ of certiorari to review the decision of the Court of Appeals in *Heather Oller, as Executor of the Estate of Shirley Nobles, deceased and David Nobles v. Rockdale Hospital, LLC, et al.,* Case No. A17A1208 ("the Opinion.")

A petition for a writ of certiorari "will be granted only in in cases of great concern, gravity, or importance to the public." R. 40, Rules of the Ga. Supreme Ct. This is such a case. Four amicus briefs were filed in the Georgia Court of Appeals evidencing public concern, by the Georgia Trial Lawyers Association, the Medical Association of Georgia, Emory Healthcare, Inc., and the Georgia Hospital Association. The Opinion has significant repercussions for corporate employers of healthcare providers. It authorizes commencement of an imputed professional negligence claim with a complaint and expert affidavit that give no notice of the licensed professional upon whose conduct liability may, eventually, be asserted. An action may be commenced with vague assertions in a complaint that "employees" are negligent and an affidavit with equally vague language or criticisms of one employee, and amended at any time to include other professionals' conduct as an additional basis of liability. The plaintiff may avoid (1) identifying an allegedly negligent professional within the time for filing a direct action, and (2) securing an affidavit criticizing any act of that particular

professional, two of the safeguards that exist in direct claims against licensed professionals.

Last week, the Georgia Supreme Court granted a writ of certiorari to consider whether an imputed simple negligence claim in an amended complaint may relate back to the original action against the hospital. (Order, Thomas v. Tenet Healthsystem, GB, Inc. d/b/a Atlanta Medical Center, Case No. S171021 (Aug. 28, 2017.)) The instant action raises the complimentary question of whether an imputed professional negligence claim may relate back, and whether it may be done by at-will amendment of the O.C.G.A. § 9-11-9.1 affidavit. As in *Thomas v. Tenet*, it presents the opportunity for the Court to align diverging pleading requirements for direct and imputed liability claims.

The trial court in *Thomas v. Tenet* and in this case relied upon *Thomas v. Medical Center of Central Georgia*, 286 Ga. App. 147 (2007) (hereafter "*Thomas v. MCCG,"*) to grant partial summary judgment for imputed negligence claims based on conduct of an actor first raised as a basis of liability after the statute of limitations expired. In each case, the Court of Appeals reversed and distinguished, but did not overrule, *Thomas v. MCCG.* The cases together present this Court with the opportunity to address the principle stated in 2007 in *Thomas v. MCCG*: a plaintiff may not add claims against a corporate defendant based upon conduct of an actor identified for the first time as a basis for liability after the statute of

limitations expires. 286 Ga. App. at 148. Consistent with the text of O.C.G.A. § 9-11-9.1(a), it aligns the procedures to file claims against an actor for direct negligence and an action against his master for vicarious liability.

The reasoning of the two panels is not consistent. If *Thomas v. Tenet* was wrongly decided, so is the Opinion. However, *Thomas v. Tenet* may be correct without the Opinion in this matter also being correct, because *Thomas v. Tenet* permits the addition of imputed simple negligence claims under O.C.G.A. § 9-11-15. However, it held that *Thomas v. MCCG* barred the addition and relation back of imputed professional negligence claims under O.C.G.A. § 9-11-9.1. The Opinion and unanimous "special concurrence" in the current action authorize the addition and relation back of imputed professional negligence claims by way of filing of an amended affidavit under O.C.G.A. § 9-11-15, not O.C.G.A. § 9-11-9.1.

II. ISSUES PRESENTED

A. Whether O.C.G.A. § 9-11-9.1 requires an affidavit criticizing at least one act or omission by each licensed professional upon whom an imputed professional negligence claim is based.

B. Whether an expert affidavit filed after the expiration of the statute of limitations, which asserts imputed negligence against an existing defendant based upon the actions of additional licensed professionals should relate back to the filing of the original complaint.

III. JURISDICTIONAL STATEMENT

The Court of Appeals issued the Opinion on August 14, 2017. A copy is attached as Exhibit A. Petitioners timely filed a Notice of Intention to Petition the Georgia Supreme Court for a Writ of Certiorari on August 24, 2017. Contemporaneously with the filing of this Petition, Petitioners have filed in the Court of Appeals a Notice of Filing a Petition for a Writ of Certiorari. Accordingly, the Petition is properly before this Court.

IV. BACKGROUND

A. Factual Background

Shirley Nobles presented to the emergency room at Rockdale Medical Center on May 7, 2011, and was admitted to the care of Dr. Mitchell, a hospitalist employed by 24 On. R2 4540, 4604, 4608–09, 4663–64. Ms. Nobles was a diabetic, and, at home, took insulin during the day and sixty units of long acting insulin at bedtime. R2 4356-57. On admission, Dr. Mitchell entered orders to check her glucose four times per day and give insulin determined by a sliding scale based on those results. R2 4663-65, 1426. Dr. Mitchell's colleague, Dr. Hunt, assumed Ms. Nobles' care on May 8 and 9, 2011. R2 4313-15. To supplement the insulin ordered by Dr. Mitchell, Dr. Hunt ordered 15 units of long acting insulin, Levemir, to be given at bedtime. R2 4337-38 1424.

Nurse Stacy Grant was assigned to Ms. Nobles during the overnight shift, 6:00 p.m. to 6:00 a.m. on May 9 – 10. R2 4444-45. Nurse Grant administered insulin the evening of May 9, 2011. R2 4460-61, 4478-80. At 6:00 a.m. on May 10, 2011, she found Ms. Nobles unresponsive. R2 1427. She called for help and a designated team of nurses and respiratory therapists responded. R2 1427, 3499 – 3502. After resuscitating Ms. Nobles, one of the responders, an ICU nurse, contacted the overnight hospitalist, Dr. Syed at 6:36 a.m. R2 3366 – 70. Dr. Syed ordered several lab tests "STAT" to evaluate Ms. Nobles. R2 1425, 1434-35. He was at Ms. Nobles' bedside at 6:56 a.m. R2 1425, 1436, 4158. He did not enter any orders relating to diabetes management. R2 1425.

One of the tests ordered by Dr. Syed returned a blood glucose level of less than 3. R2 1435. Ms. Nobles was started on intravenous glucose at 8:10 a.m. R2 1428, 1435. Ms. Nobles remained in the hospital at Rockdale Medical Center until June 2, 2011. R2 4267-68. She passed away on June 3, 2011. R2 1763. Ms. Oller was appointed administrator of Ms. Nobles estate on June 20, 2013. R2 520, 1537.

B. Procedural History

This action was originally filed in May 2013, and then dismissed and re-filed in March 2014. R2 1455-1478, 11-34. 24 On Physicians, P.C., was first named in the Renewal Complaint. R2 1455-1478. Both complaints were supported by identical affidavits of Dr. Robert Cooper. "First Affidavit," R2 1480-84, "Second

Affidavit," R2 1518-21. Dr. Cooper offered criticisms of Dr. Mitchell, Dr. Hunt, and the nursing staff. R2 1518-21. He did not criticize Dr. Syed or any physician or agent of 24 On other than Dr. Mitchell and Dr. Hunt. *Id.* The factual allegations in the Renewal Complaint and affidavits of Dr. Cooper focus on physician management of Ms. Nobles' diabetes before she was found unresponsive. R2 17–21 ¶¶ 25-54, 1494-21, 1538-41, 1548-51. Dr. Cooper criticizes only the nurses for failing to respond to a hypoglycemic episode. *Compare* ¶¶ 19 and 21 in R2 1494-21, 1538-41, 1548-51.

The statute of limitations for wrongful death claims ran on June 3, 2013. The statute of limitations for estate claims ran on June 20, 2015. Dr. Syed was not mentioned by name, role, or description, as a basis of the imputed professional negligence claims against 24 On Physicians until he was criticized by Plaintiffs' experts during their depositions in November 2015. R2 2288, 1969. Until that time, medical negligence was not alleged against any physicians or 24 On for the treatment of Ms. Nobles on May 10, 2011, or response to her hypoglycemic episode.

In his First Affidavit, on May 8, 2013, Dr. Cooper recites that his opinions are based on a certified copy of the medical records from Rockdale Medical Center pertaining to Ms. Nobles' care between May 7 and June 2, 2011. R2 1480 ¶¶ 3, 4.

Dr. Syed's name is legible in the record by orders he gave on the morning of May 10, 2011. R2 1425. However:

- In March 2014, Respondents filed a Renewal Complaint and Second Affidavit that, again, did not criticize, by name, description, or role, any physician other than Dr. Mitchell and Dr. Hunt. R2 1494-1521.
- In May 2014, Respondents file a Third Affidavit of Dr. Cooper in response to a motion to dismiss by 24 On, because the Second Affidavit included no criticisms of 24 On. R2 1538-41. Dr. Cooper does not mention Dr. Syed in his Third Affidavit. R2 1540-41, ¶ 19. His recitation of facts remains identical to the First and Second Affidavits. R2 1539-40, ¶¶ 7-18.
- In May 2014, Respondents represented in response to the Motion to Dismiss that their medical negligence claims against 24 On were based on the acts of Dr. Mitchell and Dr. Hunt. R2 511 - 20. No other physician was mentioned by description, category, or role. R2 1540-41.
- In July 2015, Respondents identified Dr. Cooper and Dr. Gavi as trial experts as to the "negligent departure of the standard of care of defendants, including Dr. Jeffrey C. Mitchell, Dr. Alunda E. Hunt, and Stacy V. Grant, RN." R2 949-62. The disclosures do not reference any other actors. *Id.*

On October 6, 2015, Respondents filed the Fourth Affidavit of Dr. Robert Cooper, adding generic placeholder language for the first time to the paragraph

containing Dr. Cooper's criticisms of Dr. Hunt and Dr. Mitchell in include, "24 On, and its employees and physicians." R2 1548-51 ¶19. The Fourth Affidavit does not include any new factual allegations or criticisms. R2 1548-51.

24 On filed a motion for partial summary judgment as to vicarious liability claims against it based on the professional negligence of any employee or agent whose actions were not criticized prior to the expiration of the statutes of limitations. R2 1392 – 1594. The trial court granted the motion, holding that the "statute of limitations [barred] any claims against Defendant 24 On Physicians, P.C., for vicarious liability of agents other than Dr. Jeffrey C. Mitchell or Dr. Alunda E. Hunt." R2 5752 -54.

C. The Opinion

The Court of Appeals reversed, holding that the statute of limitations did not bar claims against 24 On based upon the actions previously unidentified licensed professionals. The Opinion reasons that licensed professionals for whom 24 On "is allegedly responsible" are sufficiently identified by the phrase "treating physicians" in the Renewal Complaint, ignoring that the cited phrase is followed by "as specifically set forth in the affidavit of Dr. Cooper" - the Second Affidavit that references only Dr. Mitchell and Dr. Hunt. R 23 - 29, ¶¶ 61, 82, 91. The Court of Appeals further held that the Fourth Affidavit, filed after the statutes of limitations expired, satisfies the plaintiff's Section 9-11-9.1 obligation as to Dr.

Syed by including "24 On, its employees and physicians." The concurrence, in which all three judges joined, asserts that plaintiffs may amend as a matter of course under O.C.G.A. § 9-11-15. As no amended complaint was filed in the underlying action, the unanimous concurrence applies O.C.G.A. § 9-11-15, rather than O.C.G.A. § 9-11-9.1, to the amendment of Section 9-11-9.1 expert affidavits.

V. ARGUMENT AND CITATION OF AUTHORITIES

A. O.C.G.A. § 9-11-9.1 requires the filing of an affidavit criticizing at least one act or omission by each licensed professional upon whom an imputed professional negligence claim is based at the commencement of the lawsuit or within specifically defined windows thereafter.

In subsection (a) of its opinion and the unanimous "special concurrence," the Court of Appeals held that allegation in the Renewal Complaint that 24 On is vicariously liable for the negligence of "physicians that attended" the patient and an affidavit that asserts that two particular employed physicians committed malpractice, commences an action against 24 On in which the plaintiff may ultimately recover for the acts of *any* physician employed by 24 On. The court ignored the text of O.C.G.A. § 9-11-9.1 and established case law holding that the affidavit requirement must be satisfied as to *each licensed professional* – not each entity – upon whom a claim is based. This Court must reverse the Court of Appeals and reinstate the practices dictated by the legislature.

1. O.C.G.A. § 9-11-9.1 and the case law interpreting it require an affidavit showing at least one negligent act or omission per licensed professional, whether the liability is imputed or direct.

A professional malpractice action must be commenced with the filing of a complaint and an affidavit. The complaint shall contain "[a] short and plain statement of the claims showing that the pleader is entitled to relief." O.C.G.A. § 9-11-8(a)(2)(A). The "short and plan statement must include enough detail to afford the defendant fair notice of the nature of the claim and a fair opportunity to frame a responsive pleading." *Bush v. Bank of New York Mellon*, 313 Ga. App. 84, 89 - 90, 370 S.E.2d 370 (2011). "The burden of clearly identifying claims should not lie with the defendants or the courts; it should lie with the plaintiff, who has under the Civil Practice Act the burden to make a 'short and plain' statement of his claim." *Id*. at 313 Ga. App. at 91. The plaintiff must "file with the complaint an affidavit of an expert competent to testify, which affidavit shall set forth specifically at least negligent act or omission claimed to exist and the factual basis for each such claim." O.C.G.A. § 9-11-9.1(a).

A plaintiff may not avoid the affidavit requirement by filing an imputed negligence claim rather than a direct action against the professional. An affidavit must be filed in any action alleging professional malpractice against:

(1) ***A professional licensed by the State of Georgia*** and listed in subsection (g) of this Code section;

(2) A domestic or foreign partnership, corporation, professional corporation . . . or any other legal entity ***alleged to be liable based upon the action or inaction of a professional licensed by the State of Georgia*** and listed in subsection (g) of this Code section; or

(3) Any licensed healthcare facility ***alleged to be liable based upon the action or inaction of a professional licensed by the State of Georgia*** and listed in subsection (g) of this Code section.

O.C.G.A. § 9-11-9.1(a)(emphasis added). Whether a plaintiff names the individual licensed professional or the corporate entity, she must file an affidavit setting forth "at least one negligent act or omission" by "a professional licensed by the state of Georgia."

The statutory requirements do not change because a corporation is alleged to be liable based upon the action or inaction of more than one professional. To commence a direct suit against five licensed professionals, the plaintiff must satisfy the affidavit requirement as to each. Likewise, a plaintiff suing a corporate entity for the imputed negligence of five professionals must file an affidavit criticizing "at least one negligent act or omission" of each professional.

The Court of Appeals recognized this concept twenty-five years ago. *HCA Health Services, Inc. v. Hampshire*, 206 Ga. App. 108 (1992). In *Hampshire*, the plaintiff filed an action against a hospital for the imputed negligence of multiple physicians. *Id*., at 109. He attempted to satisfy the affidavit requirement with the affidavit of an allopathic physician. The court evaluated whether the plaintiff had

met the initial pleading requirements against the hospital as to each licensed professional upon whose acts vicarious liability was based. The court dismissed the vicarious liability claims based upon the conduct of osteopathic physicians, because an allopathic physician is not competent to testify against an osteopath. *Id.* at 111. However, the court permitted the claims to proceed against the hospital based upon the conduct of the allopath, because the initial pleading requirements were satisfied. *Id.* at 111.

Fifteen years later, the Court of Appeals explicitly confirmed this principle: "O.G.C.A. § 9-11-9.1 requires an affidavit setting forth at least one of negligence *as to each professional whose conduct is challenged as negligent." Thomas v. MCCG*, 286 Ga. App. at 148, n. 6 (emphasis added). The court recognized that requiring a plaintiff to satisfy the same affidavit requirements whether he or she is suing individual professionals or the employer is founded on the most basic principle of vicarious liability: the liability of a master is entirely derivative of the act of its servant. *Id.* at 148.

Thomas v. MCCG explained that imputed negligence based upon the conduct of a separate licensed professionals constitutes separate claims. The statute dictates that, to satisfy the pleading requirements, the affidavit must "set forth specifically at least negligent act or omission claimed to exist and the factual basis *for each such claim*." O.C.G.A. § 9-11-9.1(a) (emphasis added). In *Thomas*

v. MCCG, the plaintiffs filed suit against the hospital for vicarious liability of the emergency room physician. *Id.* at 147. After the statute of limitations expired, plaintiffs filed an amended complaint and affidavit alleging that MCCG was also liable for the acts of the nurses. *Id.* The court held that the plaintiff was attempting "to commence a new action based on the conduct of different professionals." *Id.* at 149. "While the theory of recovery against MCCG may have been the same in both complaints, the underlying liability clearly added a new claim for recovery." *Id.* at 148.

Therefore, the state of the law at the time the Opinion was issued demanded that a complaint asserting imputed professional negligence must be accompanied by an affidavit criticizing each professional upon whose conduct liability is predicated. This is required by the language and purpose of O.C.G.A. § 9-11-9.1. It is consistent with the principles underlying vicarious liability. And, it is demanded by common sense. A claim against two separate professionals for negligence are no less two claims simply because the plaintiff choses to bring each against their common employer, rather than against the professionals directly.

2. <u>O.C.G.A. § 9-11-9.1 defines when an affidavit may be amended.</u>

Contrary to the assertions in the unanimous "special concurrence," the liberal provisions of O.C.G.A. § 9-11-15 do not govern the amendment of

O.C.G.A. § 9-11-9.1 affidavits. Section 9-11-9.1 contains its own provision governing when an expert affidavit must be filed in order to satisfy the initial pleading requirements. If not filed with the complaint, a satisfactory expert affidavit may be filed in three specific circumstances. First, it may be filed within forty-five days of the filing of the complaint, if the plaintiff's counsel files his own affidavit setting out specific criteria. O.C.G.A. § 9-11-9.1(b). Second, it may be filed within thirty days of the filing of a motion alleging the previously filed affidavit is defective. O.C.G.A. § 9-11-9.1(e). Third, it may be filed with a renewal complaint, after a motion to dismiss for failure to file an expert affidavit, if the court finds that the plaintiff had an affidavit at the time the original complaint was filed and only failed to file it due to mistake. O.C.G.A. § 9-11-9.1(e). An affidavit filed outside of these parameters does not satisfy the pleading requirements. *Goodin v. Gwinnett Health Sys.*, 273 Ga. App. 461, 462 (2005).

Therefore, under the terms of the statute, an amended affidavit may only satisfy the initial pleading requirements when made in response to a motion challenging the affidavit as defective. O.C.G.A. § 9-11-9.1(e).

The legislature did not intend to permit liberal amendment of affidavits; else it would not have so specifically limited how such an affidavit may be filed. Section 9-11-9.1 was designed to ensure that an expert screens the actions of the licensed professional at issue *before* costly litigation is commenced. Therefore, the

statute not only bars the ability of a plaintiff to dodge the requirement by suing an employer, it also blocks a plaintiff from filing a substandard affidavit and amending it at will under the liberal pleading provisions of O.C.G.A. § 9-11-15.

Even if amendment were permitted in circumstances other than those set out in Section 9-11-9.1, an affidavit may not be amended to state an entirely new claim by asserting conduct of a new licensed professional as the basis of an imputed negligence claim against a corporate entity.

> A plaintiff may amend an expert affidavit to cure an allegedly defective affidavit accompanying a charge of professional malpractice. This includes presenting additional evidence of deviation from the standard of care against defendants sued in the original complaint in order to meet the requirement that the affidavit set forth at least one claimed negligent act or omission by each defendant. However, we can find no case law, and Thomas cites no case law, permitting her to add *new claims of vicarious liability* and allowing them to relate back to the filing of the original complaint.

Thomas v. MCCG, 286 Ga. App. at 149. An affidavit that wholly fails to mention a licensed professional upon whom an imputed negligence claim is based is not 'defective' and curable under subsection (e). It fails to satisfy the threshold pleading requirements under subsection (f), and cannot be cured. *See Bonner v. Peterson*, 301 Ga. App. 443, 452 n. 6 (2009).

In this suit, there is no affidavit filed within the parameters of Section 9-11-9.1 that meets the threshold pleading requirement to commence an action against 24 On based upon the conduct of Dr. Syed, or any other employee or agent of 24

On, except Dr. Hunt and Dr. Mitchell. The Second Affidavit, which was attached to the Renewal Complaint, criticized Dr. Mitchell, Dr. Hunt, Stacy Grant, RN, and the nursing staff. The Third Affidavit, filed within the thirty day window after 24 On filed a motion challenging its sufficiency, likewise limits its professional negligence criticisms to Dr. Michell, Dr. Hunt, Stacy Grant, RN, and the nursing staff. Neither the Second nor Third Affidavits have a "catch all" provision.

The Fourth Affidavit of Dr. Cooper was not filed within the parameters for amending the affidavit listed in O.C.G.A. § 9-11-9.1(e), and therefore does not satisfy the initial pleading requirement to commence claims against 24 On based upon the conduct of Dr. Syed. Furthermore, it cannot under *Thomas* assert a claim for imputed professional negligence based on conduct of a new actor, Dr. Syed.

The Opinion references O.C.G.A. § 9-11-9.1(e)'s 30-day amendment provision. However, 24 On never moved to dismiss based on that statute after the filing of the Third Affidavit of Dr. Cooper. 24 On does not contend that the Third Affidavit is *defective*. 24 On moved for partial summary judgment on the grounds that the initial pleading requirements were not satisfied as to any physician other than Dr. Hunt and Dr. Mitchell. Section 9-11-9.1 does not authorize amendment of Dr. Cooper's affidavit under those circumstances.

The Opinion, however, found that "Appellants were acting within the scope of the law when they filed the amended affidavit." It cites *Bonner v. Peterson* for

the proposition that "an amended affidavit that was filed after the statute of limitations did not state a new claim, and that the complaint was therefore the controlling pleading as to the statute of limitations." 301 Ga. App. 443 (2009). However, in *Bonner*, the plaintiff timely filed an amended affidavit *within the parameters of subsection (e)*. *Id.*at 446. The statute itself provides that, "affidavits . . . filed within the periods specified in this Code section . . . shall be deemed timely." O.C.G.A. § 9-11-9.1 (c).

Because plaintiff never satisfied the initial pleading requirements to commence a lawsuit against 24 On based on the acts of any professional other than Dr. Hunt and Dr. Mitchell, summary judgment as to imputed professional negligence for the acts of any other agents was appropriate.

3. <u>The Opinion creates divergent requirements for institutional defendants that conflict with the statutory text and precedent.</u>

Requiring an affidavit as to each licensed professional upon whom vicarious liability rests is necessary in imputed negligence cases for the requirement to be meaningful. The legislature included subsections (1) through (3) to O.C.G.A. § 9-11-9.1 (a) to ensure that a plaintiff cannot avoid the affidavit requirement by commencing an action against a corporate employer rather than an individual. *Hampshire* and *Thomas v. MCCG* effectuate that intent. In contrast, the Opinion,

if allowed to stand, eases a plaintiff's obligation if he or she chooses to sue an entity rather than file a direct action.

To commence a direct action, a plaintiff must obtain an affidavit criticizing each potential provider at the outset of the lawsuit. This could mean obtaining affidavits from experts in different specialties. It places all parties on notice at the commencement of the lawsuit as to the professionals whose conduct is at issue, which allows streamlined litigation and discovery based upon the role of those professionals, as well as early identification of whether a claim is defensible or should be resolved.

Under *Hampshire* and *Thomas v. MCCG*, a plaintiff who commences an imputed liability action must also obtain an affidavit criticizing each potential provider at the outset of the lawsuit. *See* discussion *supra.* However, under the Opinion, a plaintiff may file suit against a corporate employer with vague language criticizing all employed providers and an affidavit that criticizes a single employed licensed professional, and then engage in a fishing expedition and amend at any time to include acts of any other employed professionals as an additional basis for liability. The defendant does not know which professionals' conduct are at issue. The plaintiff has the discovery period to search for an expert to support claims against any other employed professional, or lead a defendant to believe that the suit is focused on the conduct of one professional while secretly building a case against

another. During that period, the defendant is expending time and resources to defend itself - expenditures that the legislature intended to limit to claims that had first been screened by a qualified expert. It is impossible to assess exposure. The plaintiff may "switch horses in midstream" after factual and expert discovery has been conducted based on the professional identified in the affidavit, to the prejudice and cost of the defendants. Much time and expense could be wasted.

B. After the expiration of the statute of limitations, a plaintiff may not commence imputed professional negligence claims against an existing defendant for the conduct of additional licensed professionals.

Because the conduct of each licensed professional upon whose conduct imputed liability is based constitutes a separate claim, each must be brought within the statute of limitations. The principles behind the creation of statutes of limitations apply whether a claim is direct or vicarious:

> Statutes of limitation ... in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that 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.

Allrid v. Emory Univ., 249 Ga. 35, 39, 285 S.E.2d 521, 525 (1982), *citing Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-9, 64 S.Ct. 582 (1943.)

Here, it is undisputed that the statutes of limitations barred Respondents from amending their pleadings to add direct claims against Dr. Syed in October 2015. Likewise, if 24 On had not been named as the employer of Dr. Hunt and Dr. Mitchell, it is undisputed that Respondents could not amend the pleadings to add claims against 24 On based on the conduct of Dr. Syed. *Thomas v. MCCG* clarifies that, in such circumstances, a plaintiff likewise may not amend the pleadings to add the same, otherwise-barred claims simply because the corporate defendant happened to have employed another licensed professional against whom negligence was timely asserted. Because the "negligence of the master in such a case is entirely derivative from the servant's negligence," when claims may not be initiated against the servant, imputed negligence claims are not permitted against the master. *Thomas v. MCCG*, 286 Ga. App. at 148. A plaintiff must determine within the statutory period which professionals she contends are negligent; she then has the choice of filing a direct action, a vicarious liability action, or both.

The Georgia legislature intended that the requisite affidavit(s) be filed *before* the expiration of the statute of limitations, because it specifically provides that, if filed after the statute of limitations, only an affidavit filed as permitted by Section 9-11-9.1 is timely. "This Code section shall not be construed to extend any applicable period of limitations, 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).

Consistently, the *Thomas v. MCCG* court held that an action against an entity for the conduct of a licensed professional is barred if not asserted, by a complaint and affidavit, within the statutory window. *Thomas v. MCCG*, 286 Ga. App. 147. In *Thomas v. MCCG*, the plaintiff had timely filed a complaint against the hospital for imputed professional negligence of Dr. Whatley, along with an affidavit criticizing Dr. Whatley. *Id.* However, the plaintiff did not make a claim against the hospital "based on the nurse professionals' conduct within the limitation period." Because her "original complaint did not allege any negligence on the part of any nurse employed by MCCG, and the attached expert affidavit did not allege any act of negligence by any healthcare professional other than Whatley," the amendment constitutes an attempt "to commence a new action based upon the conduct of different professionals outside the statute of limitations." *Id.* at 148, 149 (emphasis added). "This claim of recovery was not raised in Thomas' original complaint and is time-barred." *Id.* at 148.

Because *Thomas v. MCCG* effectuates the purpose of Section 9-11-9.1, to require screening of suits criticizing licensed professionals whether they are brought as direct or vicarious liability actions, it does not impose any burden on plaintiffs in medical malpractice actions that the legislature did not require.

Plaintiffs in medical malpractice actions must identify in some manner, within the statute of limitations, the agents upon whose alleged professional negligence they intend to base claims - direct or vicarious.

Until this Opinion was issued, no legal authority permitted a plaintiff to amend a complaint and/or affidavit to state a vicarious liability claim against a named defendant based upon conduct of a new professional after the time for filing a direct claim against the professional has expired. The Opinion cites none. Further, the Opinion did not overrule *Thomas v. MCCG* and certainly cannot affect the text of Section 9-11-9.1. As a result, whether and how a plaintiff may amend a complaint against an existing corporate defendant is unclear.

C. The Opinion creates a confusing split in the case law and is itself internally inconsistent.

The Opinion creates a split in the law, which leaves open the question of whether a plaintiff must file an affidavit criticizing the conduct of each licensed professional at the commence of a lawsuit, or may later amend. The Court of Appeals did not overrule *Hampshire* or *Thomas v. MCCG*. Indeed, the three-judge panel who issued the Opinion could not have overruled these decisions, as they were both binding precedent. As a result, there is no clear guidance for litigants to be assured when claims based upon the conduct of professionals not at issue in the original complaint and affidavit are barred.

The Opinion does not even address *Hampshire* when it holds that there is no requirement that an affidavit criticize the action of each licensed professional whose conduct forms the basis of an imputed negligence claim. It makes a confusing and unconvincing attempt to distinguish *Thomas v. MCCG*, essentially holding that *Thomas v. MCCG* bars relation back only when a plaintiff tries to add new vicarious liability claims against a different "group" of professionals (i.e., nurses instead of doctors). Nothing in the reasoning of the *Thomas v. MCCG* case supports that distinction. More importantly, no such distinction is made in the governing statute. Claims that two different physicians were each negligent can be every bit as different from each other as a claim that one physician and one nurse were negligent. Section 9-11-9.1 requires an affidavit showing a negligent act for each professional named, not an affidavit showing a negligent act for each class of professional named.

Moreover, the unanimous "special concurrence" is not consistent with the Opinion's reading of *Thomas v. MCCG*. The "special concurrence" suggests that a complaint and affidavit that name only a single professional as the basis of an imputed negligence claim may be amended at any time pursuant to O.C.G.A. § 9-11-15 before the entry of the pretrial order and freely thereafter to assert claims based upon the conduct of additional professionals. Such amendments, it proposes, relate back as long as they are part of the same "conduct, transaction, or

occurrence." The "special concurrence" essentially does away with the initial affidavit requirement of O.C.G.A. § 9-11-9.1. Furthermore, free amendment at any time, as advocated by the concurrence, would presumably apply even in cases where the conduct of a different "group of professionals" is at issue, in direct contradiction of even the Opinion's limited reading of *Thomas v. MCCG*.

The current state of the law is confusion. It is unclear whether imputed negligence claims against an entity are barred if not supported by an affidavit at the commencement of an action, or may be barred the statute of limitations. It will cause uncertainty in future cases if not corrected by this Court.

D. The Opinion shifts the burden of identifying potentially negligent agents to corporate defendants and significantly expands the resources required to defend an imputed professional negligence claim.

Based upon the Opinion, any corporate defendant named for imputed professional negligence must prepare to defend the conduct of each and every agent involved in the care of the patient. Otherwise, the defendant could be surprised at any point in litigation by the filing of an amended affidavit or complaint that adds conduct of a new professional as the basis of liability. As a practical matter, a plaintiff may simply name the employer with an affidavit criticizing one provider and embark on a fishing expedition to determine whether there is a basis for any additional professional negligence claims. At the same time,

rather than conducting a focused investigation based upon the conduct of a licensed professional against whom an expert has already opined, the corporate defendant must investigate and evaluate the conduct of all agents. This shifts the burden of bringing a professional negligence claim from the plaintiff, where it was placed by Section 9-11-9.1, to the defendant.

Emory Healthcare, Inc., and the Georgia Hospital Association filed amicus briefs in support of Petitioners' position at the Court of Appeals, because the impact of this decision on defending claims against hospitals is disastrous. It imposes similar burdens on physician practices, such as 24 On, that employ multiple physicians who may see a patient during an extended hospital stay. Emory highlighted in its amicus brief the practical effects of such an action on large corporate healthcare providers such as hospitals. During an hospital admission, a patient may come into contact with physicians, mid-level providers, nurses, patient technicians, residents, interns and medical fellows. If an action based upon the imputed professional negligence of all such professionals could be commenced with the filing of a complaint with general language and affidavit criticizing a single provider, Emory would be required to review the entire electronic medical record constituting thousands of pages in order to identify all possible providers a plaintiff may decide to criticize. It must contact former employees, interns, residents and fellows who have left Emory for other practices

and, often, other countries. Otherwise, the corporate employer cannot fully defend itself and its employees. Such an activity requires significantly greater resources than are currently necessary to investigate and evaluate claims.

The opinion also affects the entire basis of malpractice insurance underwriting, because the two year statute of limitations no longer providers assurances that the conduct of a licensed professional must be challenged within two years. Tail coverage windows would need to be extended.

Section 9-11-9.1 previously required at least that plaintiff ensure that an expert is willing to criticize the licensed professional before forcing such a costly investigation, and even then the investigation was limited to the conduct criticized in the affidavit. The Opinion removes this prerequisite, and impermissibly shifts the burden and costs of such litigation to corporate defendants.

VI. CONCLUSION

For all these reasons, Petitioners respectfully request that this Court grant their Petition for a Writ of Certiorari. As set forth above, this case presents issues of great concern, gravity, and importance to the public that will affect the filing of any lawsuit against a corporation based upon the acts of licensed professionals. The Georgia Supreme Court needs to correct this error now. If it stands, the Court of Appeals decision authorizes the filing and litigation of lawsuits with no limit to the time to add professional liability claims based on the actions of additional

agents and/or with insufficient notice to prepare a defense, which will result in expanded litigation and future appeals seeking its correction.

This 5th day of September, 2017.

Respectfully submitted,

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Exhibit A

FOURTH DIVISION
DILLARD, C. J.,
RAY, P. J., and SELF, J.

August 14, 2017

In the Court of Appeals of Georgia

A17A1208. OLLER et al. v. ROCKDALE HOSPITAL, LLC et al.

RAY, Judge.

Heather Oller, as the executor of the estate of Shirley Nobles, and David Nobles ("Appellants") filed a renewal complaint asserting medical malpractice claims against various defendants, including 24 On Physicians, PC ("24 On"). The trial court granted partial summary judgment to 24 On, finding that certain claims were barred by the statute of limitation. Appellants filed this appeal, contending that the trial court erred in concluding: (i) that any claims against 24 On for vicarious liability of its agents, other than those specifically named in the renewal complaint and OCGA § 9-11-9.1 affidavit, were barred by the expiration of the statute of limitation; (ii) that the language of the amended OCGA § 9-11-9.1 affidavit, as opposed to the timely filed renewal complaint, controls the determination of the expiration of the statute of

limitation; and (iii) that Appellants could not file an amended expert affidavit to conform to the renewal complaint and the evidence revealed during discovery. For the following reasons, we reverse.

The standard of review for an appeal from a grant of summary judgment is de novo, viewing the evidence in the light most favorable to the nonmoving party, to determine whether a genuine issue of material fact remains or whether the moving party is entitled to judgment as a matter of law. *Smith v. Lott*, 317 Ga. App. 37, 37 (730 SE2d 663) (2012).

So viewed, the record shows that Shirley Nobles ("Nobles") was admitted to Rockdale Medical Center on May 7, 2011. Three days later, Nobles was found unresponsive due to a hypoglycemic event. Nobles never regained full neurological function and was discharged for hospice care with a diagnosis of a severe brain injury caused by hypoglycemia. Nobles ultimately died on June 3, 2011.

The initial lawsuit was filed on May 10, 2013, against Lifepoint Hospitals, Inc., Rockdale Hospital, LLC d/b/a Rockdale Medical Center, Dr. Jeffrey C. Mitchell, Dr. Alunda E. Hunt, Rockdale Physician Practices, LLC, and Stacey V. Grant, RN. Appellants sought to recover wrongful death and estate damages for the acts and omissions leading to Nobles' untimely death. Pursuant to OCGA § 9-11-9.1,

Appellants simultaneously filed an expert affidavit of Dr. Robert Cooper. Appellants voluntarily dismissed the original complaint without prejudice on October 21, 2013, and filed a renewal complaint, pursuant to OCGA § 9-2-61, on March 18, 2014. In the renewal complaint, Appellants asserted their claims against 24 On Physicians, PC, as well as Rockdale Hospital, LLC d/b/a Rockdale Medical Center, Dr. Jeffrey C. Mitchell, Dr. Alunda E. Hunt, and Stacey V. Grant, RN. However, the OCGA § 9-11-9.1 affidavit that was filed with the renewal complaint did not specifically mention 24 On.

On April 23, 2014, 24 On filed a motion to dismiss on various grounds, including allegations that the second affidavit failed to set forth "even one negligent act or omission on the part of Defendant 24 On Physicians, PC." In response, on May 27, 2014, Appellants filed a third affidavit of Dr. Cooper, in order to include specific acts of negligence against 24 On. The trial court denied 24 On's motion to dismiss on June 4, 2014. Finally, on October 8, 2015, Appellants filed the fourth and final affidavit of Dr. Cooper which, inter alia, clarified that his expert opinion regarding negligence and breaches of the standard of care extended to 24 On's employees and

physicians who treated Nobles, bringing the language of the final affidavit in line with the averments of Count 1 of the renewal complaint.[1]

On March 16, 2016, 24 On filed a motion for partial summary judgment, contending that Appellants' claims for vicarious liability by any of 24 On's employees or physicians other than Dr. Mitchell and Dr. Hunt should be dismissed as untimely because such claims had been asserted after the expiration of the statute of limitation. Appellants responded on April 18, 2016, arguing that the statute of limitation for the claims on behalf of the estate had not expired prior to the assertion of the vicarious liability claims in the pleadings and that the fourth amended affidavit simply supported the existing claims in the renewal complaint. On September 12, 2016, the trial court entered an order granting 24 On's motion for partial summary judgment. Appellants filed a motion for reconsideration of the trial court's order on September 19, 2016. The trial court denied the motion for reconsideration on November 16, 2016, and issued a certificate of immediate review on November 22, 2016. We granted Appellants' application for interlocutory appeal, and this appeal ensued.

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[1] Dr. Cooper later testified at his deposition that his amended affidavit was based, in part, on the acts or omissions of Dr. Syed, a physician employed by 24 On who had treated Nobles immediately after she was found unresponsive.

1. In three related enumerations of error, Appellants essentially contend that the trial court erred in determining that the vicarious liability claims against 24 On for the negligent acts of any of its physicians other than Dr. Mitchell and Dr. Hunt were barred by the expiration of the statute of limitation. For the reasons that follow, we agree.

(a) Appellants were not required to specifically name each physician for which 24 On was allegedly responsible in the renewal complaint. In an action for medical malpractice, Georgia law simply requires that "any pleading which sets forth a claim for relief . . . shall contain . . . [a] short and plain statement of the claims showing that the pleader is entitled to relief[.]" OCGA § 9-11-8 (a) (2) (A). In the renewal complaint, which was timely filed, Appellants claimed that 24 On was vicariously liable for the negligence of the "*physicians that attended Shirley Nobles*" and that "*the treating physicians [were] actual and/or ostensible agents or otherwise servants and/or employees of . . . 24 On*[.]" (Emphasis supplied). As the agents for which 24 On was allegedly liable were identified as "the treating physicians" in the renewal complaint, 24 On was provided with sufficient notice of the agents for which it was allegedly responsible.

(b) In considering the statute of limitation, the renewal complaint is the controlling pleading in this case. Furthermore, as the renewal complaint contemplated physicians other than those specifically named in the initial expert affidavit, the amended expert affidavit did not assert new claims after the expiration of the statute of limitation.

This Court has held that an amended affidavit that was filed after the expiration of the statute of limitation did not state a new claim, and that the complaint therefore was the controlling pleading as to the statute of limitation. See *Bonner v. Peterson*, 301 Ga. App. 443, 445-448 (1) (687 SE2d 676) (2009). All that is required of an expert affidavit is that it "set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim." OCGA § 9-11-9.1 (a) (3). Furthermore, OCGA § 9-11-9.1 (e) provides, in pertinent part:

> 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.*

(Emphasis supplied). It is well-settled that the purpose of OCGA § 9-11-9.1 is to avoid frivolous lawsuits, and that allowing a plaintiff to amend an expert affidavit does not frustrate this purpose. See *Porquez v. Washington*, 268 Ga. 649, 652 (1) (492 SE2d 665) (1997) (physical precedent only) (allowing the amendment of OCGA § 9-11-9.1 affidavit "does not defeat the purpose of the statute, but instead helps to insure that the complaint is not frivolous"); *Gadd v. Wilson & Co., Engineers & Architects*, 262 Ga. 234, 235 (416 SE2d 285) (1992) (initial OCGA § 9-11-9.1 affidavit which did not specifically identify defendant as a negligent party was curable by amendment, where the pleadings indicated that the defendant was implicitly the party to whom plaintiff was attributing the alleged negligence).

Here, Appellants were acting within the scope of the law when they filed the amended affidavit. The fourth and final affidavit of Dr. Cooper, though it was filed after the expiration of the statute of limitation, simply conformed to the language of the renewal complaint, and it corrected the language of the third affidavit to include the negligence of "24 On, [*and*] *its employees and physicians*[.]" Thus, when viewed in comparison to the language of the renewal complaint, which includes "the treating physicians as actual and/or ostensible agents or otherwise servants and/or employees

of . . . 24 On[,]" it is clear that the purpose of Dr. Cooper's fourth affidavit was simply to track the language of the renewal complaint.

The facts here can be distinguished from those in *Thomas v. Med. Ctr. of Central Ga.*, 286 Ga. App. 147 (648 SE2d 409) (2007), which 24 On cited as support for its contention that the fourth amended OCGA § 9-11-9.1 affidavit constituted a new claim outside of the statute of limitation. In *Thomas*, the plaintiff initially filed an initial complaint against the hospital alleging that it was responsible for the negligence of one if its physicians. After the expiration of the statute of limitation, however, the plaintiff filed an amended complaint and an amended expert affidavit to include the conduct of the hospital's nurses. Id. at 147-148. This Court held that the amended affidavit asserted a new claim based on the conduct of a group of professionals who were not contemplated in the initial complaint and, therefore, such a claim was barred by the expiration of the statute of limitation. In so holding, we reasoned that allowing a plaintiff to add a different group of professionals under such circumstances would frustrate the intent of OCGA § 9-11-9.1. Id. at 148-149. In the present case, however, the alleged negligence of the "treating physicians" who were agents or employees of 24 On was contemplated in the renewal complaint. Therefore,

the language of the fourth amended OCGA § 9-11-9.1 affidavit cannot be considered to state a new claim outside the expiration of the statute of limitation.

Judgment reversed. Dillard, C. J., Ray, P. J., and Self, J., concur fully and specially.

A17A1208. OLLER et al. v. ROCKDALE HOSPITAL, LLC et al.

DILLARD, Chief Judge.

I fully concur with the majority's well-reasoned opinion. I write separately to further address 24 On's argument that the renewal complaint cannot be amended to assert a vicarious liability claim involving Dr. Syed outside the statute of limitation.

I agree with the majority that the renewal complaint satisfies Georgia's notice-pleading requirements with respect to the alleged negligence of Nobles's treating physicians even if they were not specifically named in the complaint. But even if that were not the case, Georgia's Civil Practice Act allows for *initial* theories of liability to be amended as more information is discovered during the course of litigation.[1]

Specifically, OCGA § 9-11-15 (a) provides that "[a] party may amend his pleading as a matter of course and without leave of court at any time before the entry of a pretrial order." And even after that, "the party may amend his pleading . . . by leave of court . . . ."[2] Moreover, such leave "shall be freely given when justice so

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[1] *See* OCGA § 9-11-15 (a); *see also Life Ins. Co. v. Meeks*, 274 Ga. App. 212, 216 (2) (2005) ("When entered, the pretrial order supersedes the pleadings and controls the subsequent scope and course of the action.").

[2] OCGA § 9-11-15 (a).

requires."[3] Indeed, we have held that OCGA § 9-11-15 (a) is to be forgivingly construed "in favor of the allowance of amendments, particularly when the party opposing the amendment is not prejudiced thereby."[4] Additionally, even if the Appellants never formally amend their complaint, OCGA § 9-11-15 (b) provides that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Thus, as discovery proceeds in this case, "[s]uch amendment of the pleadings . . . may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time . . . ."[5]

Finally, under OCGA § 9-11-15 (c), "[w]henever the claim or defense asserted in the amended pleading arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." And here, 24 On has not alleged that Dr. Syed's treatment of Nobles arose out of separate and distinct set of circumstances from those

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[3] *Id.*

[4] *Edenfield & Cox, P.C. v. Mack*, 282 Ga. App. 816, 817 (640 SE2d 343) (2006) (punctuation omitted); *see Thomas v. Tenet Healthsystem GB, Inc.*, 340 Ga. App. 70, 72 (796 SE2d 301) (2017) ("[W]e are to construe OCGA § 9–11–15 [forgivingly] in favor of allowing amendments.").

[5] OCGA § 9-11-15 (b).

set forth in the *initial* complaint. Instead, 24 On essentially argues that every theory of vicarious liability against it involving the treatment of Nobles by its physicians must include each treating physician's name in the renewal complaint. But as ably explained by the majority, that is not how notice pleading works. Indeed, the forgiving notice pleading standard of OCGA § 9-11-8 (a) (2) (A)—Georgia's statutory codification of Federal Rule of Civil Procedure 8 (a) (2)—is "the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim."[6] Thus, while 24 On attempts to characterize the vicarious liability claim involving Dr. Syed as a separate time-barred claim, it is simply another theory

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[6] *Swierkiewicz v. Sorema N. A.*, 534 U. S. 506, 514 (II) (122 Sct 992, 152 LE2d 1) (2002) (Thomas, J.); *see also Bell Atlantic Corp. v. Twombly*, 550 U. S. 544, 575 (I) (127 SCt 1955, 167 LE2d 929) (2007) (Stevens, J., dissenting) ("Under the relaxed pleading standards of the Federal Rules, the idea was not to keep litigants out of court but rather to keep them in. The merits of a claim would be sorted out during a flexible pretrial process and, as appropriate, through the crucible of trial."); *Walker v. Oglethorpe Power Corp.*, No. A17A0384, 2017 WL 2493285 at *15 (Ga. App. June 9, 2017) ("[I]n Georgia, it is not necessary for a complaint to set forth all of the elements of a cause of action in order to survive a motion to dismiss for failure to state a claim. Instead, the Georgia Civil Practice Act requires only notice pleading and, under the Act, pleadings are to be construed forgivingly and reasonably to achieve substantial justice consistent with the statutory requirements of the Act." (cleaned up)).

of vicarious liability against it for medical malpractice that may be raised, upon remand, in any manner authorized by OCGA § 9-11-15.[7]

I am authorized to state that Ray, P. J. and Self, J. join in this special concurrence.

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[7] As aptly noted in the Georgia Trial Lawyers Association's amicus brief, we have recently held in the medical-malpractice context that, under OCGA § 9-11-15 (c), amendments filed outside the statute of limitation related back to the original complaint under circumstances similar to this case. *See Thomas*, 340 Ga. App. at 73-74 (holding that a claim that a medical facility was vicariously liable for negligence of its nurses during a plaintiff's visit to the emergency room that was filed outside the statute of limitation related back to the original complaint that alleged only that the medical center was vicariously liable for the negligence of its physicians during the same emergency room visit); *Jensen v. Yong Ha Engler*, 317 Ga. App. 879, 883-84 (1) (b), (2) (733 SE2d 52) (2012) (holding that claims of professional negligence and battery asserted outside the applicable statute of limitation related back to the plaintiff's timely ordinary negligence claim because, even if they did not arise from the same factual allegations, they arose from "out of the conduct, transaction, or occurrence set forth in the original pleading, which we described as the plaintiff's "surgery, emergency room visit, and discharge.")

CERTIFICATE OF SERVICE

This certifies I have served **PETITION FOR WRIT OF CERTIORARI** has been filed electronically and served upon all counsel of record by placing same in the United States Mail as well as electronic mail, postage prepaid addressed to:

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This 5th day of September, 2017.

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