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Fisher v. Gala: O.C.GA. § 9-11-9.1(e) Keeping Malpractice Claims Afloat

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CASENOTE
Fisher v. Gala: O.C.G.A. § 9-11-9.1(e) Keeping Malpractice Claims Afloat

I. INTRODUCTION

"If at first you don't succeed, Try, try again."
Thomas H. Palmer[1]

For over four decades, the Georgia General Assembly has sought to strike a balance between the need for competent medical care and the role of the judiciary in determining relief for those injured by improper medical treatment.[2] In its effort, Georgia adopted measures to limit the number of frivolous lawsuits to protect its professionals while giving plaintiffs an efficient avenue for relief. One of these adopted measures is the Official Code of Georgia Annotated's (O.C.G.A.) expert affidavit requirement, section 9-11-9.1 (§ 9.1).[3] The use of expert testimony in malpractice cases is "firmly entrenched" in Georgia's policy and crucial to professional malpractice claims.[4] Section 9.1 requires plaintiffs to submit an expert affidavit contemporaneously with the complaint in malpractice actions.[5] The Georgia Court of Appeals determined in *Fisher v. Gala*[6] that, pursuant to the language of § 9.1(e), a plaintiff has the ability to cure an affidavit that is defective because of the expert's incompetency by amendment with a substitute affidavit.[7] *Fisher*,

1. THOMAS H. PALMER, THE TEACHER'S MANUAL: AN EXPOSITION OF AN EFFICIENT AND ECONOMICAL SYSTEM OF EDUCATION SUITED TO THE WANTS OF A FREE PEOPLE 223 (1840).
2. *See, e.g.* Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 286 Ga. 731, 732, 733-34, 691 S.E.2d 218, 221-22 (2010) (discussing the history of medical malpractice actions).
3. O.C.G.A. § 9-11-9.1 (2014).
4. CHARLES R. ADAMS III, GEORGIA LAW OF TORTS § 5:2 (2012-2013 ed.).
5. O.C.G.A. § 9-11-9.1(a).
6. 325 Ga. App. 800, 754 S.E.2d 160 (2014), *cert. granted sub nom* Gala v. Fisher, No. S14G0919, 2014 Ga. LEXIS 455 (June 2, 2014).
7. *Id.* at 804-05, 754 S.E.2d at 164.

therefore, embodies Thomas Palmer's American maxim[8] within the realm of medical malpractice. Georgia plaintiffs: If your first expert affiant is found incompetent, amend and try again with a different one.

II. FACTUAL BACKGROUND

Dorian Fisher received medical treatment after he suffered a back injury in March 2010. After initial diagnostic testing, Mr. Fisher's treating physicians found a possible tumor in his spinal cord.[9] Mr. Fisher then pursued a second opinion from physician Vishal Gala, M.D. Dr. Gala diagnosed Mr. Fisher with an intradural spinal cord tumor, as had the original treating physicians. Dr. Gala specified that the tumor was a benign one called a schwannoma.[10] Dr. Gala then suggested that Mr. Fisher's treatment should include a laminectomy, a surgery to remove the tumor, at the lower level of Mr. Fisher's spine.[11] Specifically, the surgery would occur at the L5-S1 level of Mr. Fisher's spine. Mr. Fisher agreed to have the laminectomy surgery to remove the schwannoma. Dr. Gala and Regis Haid, M.D., both neurosurgeons, performed the laminectomy surgery on July 13, 2010.[12]

After the surgery, Mr. Fisher alleged, the laminectomy showed no schwannoma at the lower level of his spine. Dr. Gala and Dr. Haid did, however, find "a bundle of clumping nerve roots consistent with [the condition] arachnoiditis."[13] After this discovery, the neurosurgeons

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8. *See supra* note 1.

9. *Fisher*, 325 Ga. App. at 800, 754 S.E.2d at 161. This tumor was thought to be an intradural spinal cord tumor. *Id.* An intradural tumor means that the mass is "[w]ithin or enclosed by the dura mater." THOMAS STEDMAN, STEDMAN'S MEDICAL DICTIONARY 916 (27th ed. 2000). The dura mater of the spinal cord is a single-layered strong membrane that covers the central nervous system. *Id.* at 548.

10. *Fisher*, 325 Ga. App. at 800-01, 754 S.E.2d at 161. A schwannoma is a benign tumor made up of Schwann cells that grows on the outside of the nerve. STEDMAN, *supra* note 9, at 1602.

11. *Fisher*, 325 Ga. App. at 801, 754 S.E.2d at 161; *see also* STEDMAN, *supra* note 9, at 964 (defining laminectomy). For a diagram of the different spinal cord levels, see STEDMAN, *supra* note 9, at 1882.

12. *Fisher*, 325 Ga. App at 800, 801, 754 S.E.2d at 161. To understand Mr. Fisher's need for surgery, note that a suspected schwannoma, though benign, must be removed. LOUISE J. GORDY & ROSCOE N. GRAY, 5 ATTORNEY'S TEXTBOOK OF MEDICINE § 15.54 (3rd ed. 2010). The tumor grows "at the expense of healthy organism[s]." *Id.* Typically, once a benign tumor has been surgically taken out it does not return. *Id.* Their existence presents a significant danger when they are in the spinal column because the central nervous system occupies most of this space. *Id.* When the tumor grows, this abnormality may create serious nerve damage. *Id.*

13. *Fisher*, 325 Ga. App. at 801, 754 S.E.2d at 161. Arachnoiditis is an inflammation of nerve membranes. STEDMAN, *supra* note 9, at 119. It is a different medical condition than a schwannoma. *Compare id.* at 119, *with id.* at 1602. Notably, the spinal cord is "[a]

explored the S1-S2-S3 level of Mr. Fisher's spine, which is directly below the original surgical location.[14] The neurosurgeons could not find the schwannoma and thus explored the dura, which is the covering of the spinal cord.[15] Finding no lesion in Mr. Fisher, the neurosurgeons finished the laminectomy.[16]

On July 10, 2012, Mr. Fisher filed his complaint for medical malpractice against the two neurosurgeons and Atlanta Brain and Spine Care, P.C. (collectively, the neurosurgeons). Mr. Fisher alleged in his complaint that misdiagnosing a schwannoma instead of arachnoiditis was negligent. He further alleged that the neurosurgeons' procedures, including a lumbar laminectomy, durotomy, and intradural exploration, were needless.[17] Mr. Fisher's disabilities after the surgery were allegedly because of the negligence of the neurosurgeons.[18]

Mr. Fisher filed the affidavit of James Rogan, M.D. with his initial complaint.[19] Dr. Rogan believed that the neurosurgeons violated the appropriate standard of care[20] by misdiagnosing the schwannoma and

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portion of the central nervous system . . . confined within the vertebral canal of the spinal column." STEVEN E. PEGALIS, 3 AM. LAW MED. MALP. § 15:9 (2005). The three meningeal membranes that encompass the brain, one of them being the arachnoid membrane, also enclose the spinal cord. *Id.* In between the covering of the spinal cord, the dura, and the actual bone, there is a space known as the "epidural space." *Id.* The location between the dura and the membranes enclosing the spine, "between the arachnoid membranes and innermost pia membrane is the [] space through which the cerebral spinal fluid flows." *Id.* When the arachnoid membrane becomes inflamed, the condition is called arachnoiditis. STEDMAN, *supra* note 9, at 119. Thus, this inflammation is not the same as a schwannoma, which is a benign tumor.

14. *Fisher*, 325 Ga. App. at 801, 754 S.E.2d at 161-62; *see also* STEDMAN, *supra* note 9, at 1882.

15. *Fisher*, 325 Ga. App. at 801, 754 S.E.2d at 162; *see also* STEDMAN, *supra* note 9, at 548.

16. *Fisher*, 325 Ga. App at 801, 754 S.E.2d at 162.

17. *Id.* at 800, 801, 754 S.E.2d at 161, 162. In understanding Mr. Fisher's alleged malpractice claim, note that the suspected tumor typically attaches at the bottom of the spinal cord and pierces the membrane. LOUISE J. GORDY & ROSCOE N. GRAY, 4 ATTORNEY'S TEXTBOOK OF MEDICINE § 11.70 (3d ed. 2011). Symptoms of an intradural tumor "include pain, difficulty walking, sensory changes, and loss of bowel and bladder control." *Id.* at § 11.71. Nerve damage is a potential complication from this kind of tumor, as is the potential that the patient could become paralyzed below the site of surgery. *Id.* at § 11.73.

18. *Fisher*, 325 Ga. App. at 801, 754 S.E.2d at 162.

19. *Id.*

20. The minimum standard of care for practicing medicine in Georgia was established in 1863:

> A person professing to practice surgery or the administering of medicine for compensation must bring to the exercise of his profession a reasonable degree of care and skill. Any injury resulting from a want of such care and skill shall be a

by performing needless surgery. Dr. Rogan opined that the surgery, which did not reveal an intradural tumor, caused Mr. Fisher's disabilities. Dr. Rogan's basis of knowledge regarding Mr. Fisher's procedures, diagnosis, and treatment in this case was based on the following: (1) his certification through the American Board of Family Practice; (2) the fact that eighty percent, at least, of his practice involved the care of disabled patients as well as patients with neurological disabilities; and (3) the fact that he is familiar with the standard of care used in similar cases.[21]

In response, the neurosurgeons filed a motion to dismiss on August 9, 2012, contesting Dr. Rogan's competency in regards to the standard of care allegedly breached by the neurosurgeons. On September 7, 2012, Mr. Fisher filed his amended complaint with the affidavit of a different doctor, Michael Dogali, M.D. In the new affidavit, Dr. Dogali belived that the neurosurgeons' failure to protect Mr. Fisher's cauda equina nerves during surgery, which led to permanent nerve damage, was negligent.[22] Dr. Dogali's affidavit stated that he was a board-certified neurosurgeon and that he was actively practicing neurosurgery for three of the last five years. This active practice of neurosurgery included the type of surgery and treatment involved in this case.[23]

At the hearing on the neurosurgeon's motion to dismiss, the Superior Court of Fulton County found that Mr. Fisher did not prove Dr. Rogan's competency.[24] The court concluded that the affidavit was defective and "that Georgia law does not authorize a plaintiff to cure such a defect by filing an amended complaint with the affidavit of a different expert."[25] Thus, the court ruled in favor of the neurosurgeons and granted the motion to dismiss Mr. Fisher's complaint.[26]

Mr. Fisher then appealed, and the Georgia Court of Appeals reversed the decision.[27] The court of appeals disagreed with the trial court on

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tort for which a recovery may be had.

O.C.G.A. § 51-1-27 (2000).

21. *Fisher*, 325 Ga. App. at 801, 754 S.E.2d at 162.

22. *Id.* In understanding the term "cauda equina," note that the arachnoid and dural membranes form a sleeve around the spinal cord nerve roots. PEGALIS, *supra* note 13, at § 15:9. In the lower back, the nerve roots "descend" and resemble a horse's tail. *Id.* Therefore, "cauda equina is used to refer to the descending lumbosacral nerve roots." *Id.* For a diagram of the different levels of the human spinal cord and an illustration of the cauda equine, see STEDMAN, *supra* note 9, at 1882.

23. *Fisher*, 325 Ga. App. at 801, 754 S.E.2d at 162.

24. *Id.* at 800, 754 S.E.2d at 161.

25. *Id.*

26. *Id.*

27. *Id.*

the grounds that the cure provision *does* allow a plaintiff to file an amended complaint with a substituted affidavit.[28] Reconsideration was denied on February 24, 2014, and on March 17, 2014, a petition for writ of certiorari was filed. The Georgia Supreme Court granted the petition on June 2, 2014, in a 4-3 vote.[29] The supreme court heard oral arguments on September 8, 2014, and the parties filed supplemental and response briefs shortly thereafter.[30] Most recently, on October 29, 2014, an amicus brief was filed in support of Mr. Fisher.[31] Specifically, the supreme court granted certiorari to resolve the issue of whether a plaintiff, after filing an incompetent expert's affidavit, is permitted to cure this defect by filing an amended complaint with an affidavit by a competent expert.[32]

III. LEGAL BACKGROUND

A. *Statutory Development*

Georgia has required, for many years, experts as a necessary tool to establish the "negligent acts or omissions on the part of a professional . . . in malpractice actions."[33] The importance that the state places on this expert requirement was embodied by the 1987 Georgia General Assembly when it amended the Civil Practice Act[34] to add expert witness requirements.[35] Codified as § 9.1, the statute stated that the complaint "in any action for damages alleging professional malpractice" must be accompanied by an expert's affidavit specifically setting forth at least "one negligent act or omission" and the factual basis therefore.[36] The General Assembly adopted the affidavit requirement to protect professionals from unwarranted litigation.[37]

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28. *Id.* at 804-05, 754 S.E.2d at 164.

29. Gala v. Fisher, No. S14G0919, 2014 Ga. LEXIS 455, at *1 (June 2, 2014).

30. *Case No. S14G0919*, SUPREME CT. OF GA., www.gasupreme.us/docket_search/results_one_record.php?caseNumber=S14G0919 (last visited Feb. 27, 2015).

31. *Id.*

32. *Gala*, 2014 Ga. LEXIS 455, at *1.

33. ADAMS, *supra* note 4, at § 5:2; *see generally* Hughes v. Malone, 146 Ga. App. 341, 345, 247 S.E.2d 107, 111 (1978).

34. Ga. H.R. Bill 6, Reg. Sess., 1966 Ga. Laws 609 (1966).

35. Ga. S. Bill 2, Reg. Sess., 1987 Ga. Laws 887, 888-89 (codified as amended at O.C.G.A. § 9-11-9.1).

36. *Id.* at 889-90; *see, e.g.*, Hous. Auth. of Savannah v. Greene, 259 Ga. 435, 435, 383 S.E.2d 867, 867 (1989).

37. *See generally* REPORT, THE GOVERNOR'S ADVISORY COMMITTEE ON TORT REFORM 1, 6-7 (1986).

Notably, the 1987 version of § 9.1 did not include a cure provision, but did include complicated language and unnecessary technicalities.[38] The statute was amended again in 1989, but without the addition of a cure provision.[39] In interpreting the statute, appellate courts created scores of decisions that struggled to find the appropriate response to deficient affidavits.[40] Georgia professionals, scholars, and more importantly, the judiciary, began to speak out against § 9.1.[41] In response, the General Assembly extensively amended the statute in 1997.[42] The amendments added an explicit cure provision, simplified § 9.1's procedures, and maintained the spirit of its purpose: "to protect professionals from frivolous lawsuits."[43] The legislature adopted the judicially accepted doctrine[44] that a party may cure "an affidavit which is allegedly defective . . . by amendment . . . within 30 days of service of the motion alleging that the affidavit is defective."[45]

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38. *See* Robert D. Brussack, *Georgia's Professional Malpractice Affidavit Requirement*, 31 GA. L. REV. 1031, 1033-34, 1072 (1997); *see also* Cheeley v. Henderson, 261 Ga. 498, 502-03, 405 S.E.2d 865, 868 (1991).

39. Ga. S. Bill 329, Reg. Sess., 1989 Ga. Laws 419, 422 (codified as amended at O.C.G.A. § 9-11-9.1).

40. Brussack, *supra* note 38, at 1033.

41. *See* Sisk v. Patel, 217 Ga. App. 156, 159-60, 456 S.E.2d 718, 720 (1995); Cynthia Trimboli Adams & Charles R. Adams III, *Torts, Annual Survey of Georgia Law*, 47 MERCER L. REV. 311, 317 (1995). In the *Torts* article, the authors wrote that "the expert witness affidavit requirement of [§ 9.1] consumed a disproportionate amount of judicial resources." Adams & Adams, *supra*, at 317 (footnote omitted); Brussack, *supra* note 38, at 1033-34 n.13.

42. Ga. S. Bill 276, Reg. Sess., 1997 Ga. Laws 916 (codified at O.C.G.A. § 9-11-9.1).

43. ADAMS, *supra* note 4, at § 5:2; *see also* Bell v. Figueredo, 259 Ga. 321, 322, 381 S.E.2d 29, 30 (1989); Ga. S. Bill 276, *supra* note 42. The 1997 amendments also maintained that a plaintiff is not required to prove a prima facie case allowing immediate recovery. Bowen v. Adams, 203 Ga. App. 123, 124, 416 S.E.2d 102, 103 (1992). Another case established, "In no sense is the pleading requirement of section 9-11-9.1 intended to facilitate the just and efficient resolution of motions for summary judgment." Rooks v. Tenet Health Sys. GB, Inc., 292 Ga. App. 477, 481-82, 664 S.E.2d 861, 865 (2008) (quoting Thompson v. Ezor, 272 Ga. 849, 852, 536 S.E.2d 749, 752 (2000)) (internal quotation marks omitted).

44. Two of these judicially accepted doctrines are known as the *Hewett-Washington* doctrine and the *Moritz* maneuver. Brussack, *supra* note 38, at 1035 & n.22, 1086; Hewett v. Kalish, 264 Ga. 183, 185-86, 442 S.E.2d 233, 235 (1994); Washington v. Ga. Baptist Med. Ctr., 223 Ga. App. 762, 764, 478 S.E.2d 892, 895 (1996) ("[W]hen an affidavit has been filed with the complaint, it can be amended to respond to challenges to its sufficiency."); Moritz v. Orkin Exterminating Co., 215 Ga. App. 255, 256-57, 450 S.E.2d 233, 234 (1994) (holding that the plaintiff could cure by voluntarily dismissing original lawsuit then refiling it with an affidavit before the limitations period).

45. Ga. S. Bill 276, *supra* note 42, at 917. The statute itself currently states:

(a) In any action for damages 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, business trust, general partnership, limited partnership, limited liability company, limited liability partnership, association, 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 health care facility alleged to be liable based upon the action or inaction of a health care professional licensed by the State of Georgia and listed in subsection (g) of this Code section,
the plaintiff shall be required to file with the complaint an affidavit of an expert competent to testify, which affidavit shall set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim.
(b) The contemporaneous affidavit filing requirement pursuant to subsection (a) of this Code section shall not apply to any case in which the period of limitation will expire or there is a good faith basis to believe it will expire on any claim stated in the complaint within ten days of the date of filing the complaint and, because of time constraints, the plaintiff has alleged that an affidavit of an expert could not be prepared. In such cases, if the attorney for the plaintiff files with the complaint an affidavit in which the attorney swears or affirms that his or her law firm was not retained by the plaintiff more than 90 days prior to the expiration of the period of limitation on the plaintiff's claim or claims, the plaintiff shall have 45 days after the filing of the complaint to supplement the pleadings with the affidavit. The trial court shall not extend such time for any reason without consent of all parties. If either affidavit is not filed within the periods specified in this Code section, or it is determined that the law firm of the attorney who filed the affidavit permitted in lieu of the contemporaneous filing of an expert affidavit or any attorney who appears on the pleadings was retained by the plaintiff more than 90 days prior to the expiration of the period of limitation, the complaint shall be dismissed for failure to state a claim.
(c) This Code section shall not be construed to extend any applicable period of limitation, except that if the affidavits are filed within the periods specified in this Code section, the filing of the affidavit of an expert after the expiration of the period of limitations shall be considered timely and shall provide no basis for a statute of limitations defense.
(d) If a complaint alleging professional malpractice is filed without the contemporaneous filing of an affidavit as permitted by subsection (b) of this Code section, the defendant shall not be required to file an answer to the complaint until 30 days after the filing of the affidavit of an expert, and no discovery shall take place until after the filing of the answer.
(e) 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. The trial court may, in the exercise of its discretion, extend the time for filing said amendment or response to the motion, or both, as it shall determine justice

When applying section 9.1,[46] courts should interpret the affidavit in line with the generally liberal pleading standards of the Civil Practice Act as long as that interpretation does not diminish § 9.1's goal of reducing frivolous lawsuits.[47] This generous interpretation must also

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requires.
(f) If a plaintiff fails to file an affidavit as required by this Code section and the defendant raises the failure to file such an affidavit by motion to dismiss filed contemporaneously with its initial responsive pleading, such complaint shall not be subject to the renewal provisions of Code Section 9-2-61 after the expiration of the applicable period of limitation, unless a court determines that the plaintiff had the requisite affidavit within the time required by this Code section and the failure to file the affidavit was the result of a mistake.
(g) The professions to which this Code section shall apply are:
(1) Architects;
(2) Attorneys at law;
(3) Audiologists;
(4) Certified public accountants;
(5) Chiropractors;
(6) Clinical social workers;
(7) Dentists;
(8) Dietitians;
(9) Land surveyors;
(10) Marriage and family therapists;
(11) Medical doctors;
(12) Nurses;
(13) Occupational therapists;
(14) Optometrists;
(15) Osteopathic physicians;
(16) Pharmacists;
(17) Physical therapists;
(18) Physicians' assistants;
(19) Podiatrists;
(20) Professional counselors;
(21) Professional engineers;
(22) Psychologists;
(23) Radiological technicians;
(24) Respiratory therapists;
(25) Speech-language pathologists; or
(26) Veterinarians.
O.C.G.A. § 9-11-9.1.

46. Georgia does not require that the affidavit itself include any "magic words;" it must simply "state[] a standard of care and a deviation" from that standard. ADAMS, *supra* note 4, at § 5:2; *see also* Fid. Enters., Inc. v. Beltran, 214 Ga. App. 205, 206, 447 S.E.2d 150, 151-52 (1994).

47. ADAMS, *supra* note 4, at § 5:2; *see also* Gadd v. Wilson & Co., 262 Ga. 234, 235, 416 S.E.2d 285, 286 (1992); Hutchinson v. Divorce & Custody Law Ctr. of Arline Kerman & Assocs., 215 Ga. App. 25, 26-27, 449 S.E.2d 866, 868 (1994).

be kept in mind when dealing with O.C.G.A. § 24-7-702(c),[48] which provides strict requirements for expert qualification.[49] Thus, affidavits should be interpreted in favor of the plaintiff despite the possibility of an unfavorable interpretation.[50]

An expert is needed when a lay person would have zero knowledge, and the expert has specialized knowledge, of the topic at issue.[51] Common instances where expert medical knowledge is needed are "allege[d] . . . use of inappropriate medication, wrongful administration of medication, failure to properly assess the degree of support required by a patient, or failure to follow medical orders."[52]

Tort reform measures enacted in 2005[53] affected the construction of § 9.1 by adding more necessary qualifications for experts in malpractice cases.[54] O.C.G.A. § 24-7-702(c)(1) provides that the expert must be licensed in the state in which the expert was "practicing or teaching the profession at such time."[55] In medical malpractice cases, experts must have been in the active practice of their field for "at least three of the last five years" or have taught in that field for the same amount of time.[56] The statute also allows for a physician to serve as an expert if, for "at least three of the last five years," the physician has supervised

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48. O.C.G.A. 24-7-702(c) (2013).

49. ADAMS, *supra* note 4, at § 5:2; *see also* Houston v. Phoebe Putney Mem'l Hosp., Inc., 295 Ga. App. 674, 677, 673 S.E.2d 54, 57 (2009).

50. ADAMS, *supra* note 4, at § 5:2; Harris v. Murray, 233 Ga. App. 661, 666, 504 S.E.2d 736, 741 (1998).

51. ADAMS, *supra* note 4, at § 5:2; Ga. Real Estate Appraisers Bd. v. Krouse, 299 Ga. App. 73, 76, 681 S.E.2d 737, 741 (2009); Gen. Hosps. of Humana v. Bentley, 184 Ga. App. 489, 490–91, 361 S.E.2d 718, 719 (1987); *see* Walker v. Bishop, 169 Ga. App. 236, 240–41, 312 S.E.2d 349, 354 (1983); *Hughes*, 146 Ga. App. at 345, 247 S.E.2d at 111; Emory Univ. v. Lee, 97 Ga. App. 680, 695-96, 104 S.E.2d 234, 246 (1958); Pilgrim v. Landham, 63 Ga. App. 451, 454-55, 11 S.E.2d 420, 423 (1940).

52. ADAMS, *supra* note 4, at § 5:2 (footnotes omitted); Shirley v. Hosp. Auth. of Valdosta/Lowndes Cnty., 263 Ga. App. 408, 409, 587 S.E.2d 873, 874 (2003); *see* Chandler v. Opensided MRI of Atlanta, LLC, 299 Ga. App. 145, 145, 147, 682 S.E.2d 165, 168, 169 (2009); Holloway v. Northside Hosp., 230 Ga. App. 371, 372, 496 S.E.2d 510, 511 (1998). A notable exception to the expert witness requirement in malpractice cases is where the professional is being sued for an intentional tort. *See* Labovitz v. Hopkinson, 271 Ga. 330, 334-35, 519 S.E.2d 672, 676-77 (1999).

53. Ga. S. Bill 3, Ext. Sess., 2005 Ga. Laws 1.

54. *See* O.C.G.A. § 24-7-702(c). For additional information on Georgia's 2005 tort reform legislation, *see* ADAMS, *supra* note 4, at § 1.4.

55. O.C.G.A. § 24-7-702(c)(1); Wilson v. McNeely, 307 Ga. App. 876, 877, 705 S.E.2d 874, 876 (2011). The expert cannot be licensed in a foreign country. Cagle v. Ehirim, 304 Ga. App. 451, 451, 696 S.E.2d 438, 438 (2010); ADAMS, *supra* note 4, at § 5:2 n.24.

56. O.C.G.A. § 24-7-702(c)(2)(A) to (B). "[T]his prevents a professional of less than three years' standing from testifying as his own expert witness." ADAMS, *supra* note 4, at § 5:2 n.33.

certain enumerated medical professionals and has knowledge of their standards of care.[57]

To add to the complexity of expert requirements, Georgia also adopted the *Daubert* standard as a part of its 2005 tort reform legislation.[58] O.C.G.A. § 24-7-702[59] adopts an expanded procedure allowing a party to move the court to hold a hearing "no later than the final pretrial conference," and directs courts to federal cases, such as *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[60] for appropriate interpretive standards.[61] The *Daubert* test and the allowance of extensive pretrial hearings provide more hoops for litigants to jump through in terms of qualifying their experts.[62] This is relevant to § 9.1's expert affiant requirement because it is increasingly difficult to find a competent expert under Georgia's heightened standards.[63]

B. Mechanics

In filing a malpractice suit, plaintiffs' attorneys must abide by the time frame set out by § 9.1.[64] Subsection (b) explains that "the contemporaneous affidavit filing requirement [governed by] subsection (a) [will] not apply to any case in which the period of limitation will expire . . . within ten days [after the plaintiff] file[s] the complaint."[65] Under the same subsection, there is an option for the plaintiff to receive a forty-five day grace period "to supplement the pleadings with the affidavit."[66] This can only happen if "there is a good faith basis to believe [the period of limitation] will expire," and it is clear the plaintiff could not "prepare" an expert because the attorneys were not retained "more than ninety days prior" to the date of expiration.[67] With that being said, the complaint will be dismissed for failure to state a claim if the affidavit is not filed within the periods set out by § 9.1 and it is

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57. O.C.G.A. § 24-7-702(c)(2)(D). This applies to "nurses, nurse practitioners, certified registered nurse anesthetists, nurse midwives, physician assistants, physical therapists, occupational therapists, or medical support staff." *Id.*; ADAMS, *supra* note 4, at § 5:2.

58. ADAMS, *supra* note 4, at § 1:4.

59. O.C.G.A. 24-7-702 (2013).

60. 509 U.S. 579 (1993).

61. O.C.G.A. § 24-7-702(d), (f); *see also* 509 U.S. 579, 585-601; ADAMS, *supra* note 4, at § 1:4.

62. *See Daubert*, 509 U.S. at 585-601 (discussing at great length the newly adopted standards for determining the admissibility of scientific expert testimony); ADAMS, *supra* note 4, at § 1:4.

63. *See* O.C.G.A. § 24-7-702(c).

64. O.C.G.A. § 9-11-9.1(b)-(f).

65. O.C.G.A. § 9-11-9.1(b).

66. *Id.*; Brussack, *supra* note 38, at 1065-66 (discussing § 9.1's "grace period").

67. O.C.G.A. § 9-11-9.1(b); ADAMS, *supra* note 4, at § 5:2.

determined that the plaintiff's attorney was retained within the appropriate ninety-day window before the statute of limitations runs.[68] When filing an answer, the defendant does not have to answer "until thirty days after the filing of the affidavit of an expert" if the plaintiff filed the "complaint . . . without the contemporaneous filing of an affidavit as permitted by subsection (b)."[69] Subsection (d) further outlines that no discovery between the two parties is allowed until after the defendant files an answer.[70]

To challenge the sufficiency of an affidavit, the defendant may file a motion to dismiss before discovery ends alleging with specificity why the affidavit is defective.[71] Consequently, "the plaintiff's complaint shall be subject to dismissal for failure to state a claim."[72] However, under the amended provisions of § 9.1, "the plaintiff may cure the alleged defect by amendment pursuant to Code Section 9-11-15 within 30 days."[73] All expert witness affidavit amendments must comply with O.C.G.A. § 9-11-15, which governs amendments on the pleadings.[74] The trial court has discretion in determining whether to extend the time of filing such an amendment.[75] Once a plaintiff fails to file an affidavit altogether, their only option "is to voluntarily dismiss the complaint before the trial court grants the motion to dismiss."[76] This way, the plaintiff "avoid[s] a decision on the merits of the complaint."[77] Although plaintiffs cannot cure the failure to file an affidavit, courts do allow plaintiffs "to amend the complaint as a matter of right any time prior to the entry of a pretrial order."[78]

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68. O.C.G.A. § 9-11-9.1(f); *see generally* Atlanta Women's Health Grp., P.C. v. Clemons, 299 Ga. App. 102, 105, 681 S.E.2d 754, 757 (2009); Peck v. Bishop, 294 Ga. App. 132, 133-34, 668 S. E.2d 558, 559-60 (2008).

69. O.C.G.A. § 9-11-9.1(d).

70. *Id.*

71. O.C.G.A. § 9-11-9.1(e); ADAMS, *supra* note 4, at § 5:2.

72. O.C.G.A. § 9-11-9.1(e).

73. *Id.*; *see also* O.C.G.A. § 9-11-15 (2014).

74. *See* O.C.G.A. § 9-11-9.1(e); O.C.G.A. § 9-11-15.

75. O.C.G.A. § 9-11-9.1(e); Schofill v. Phoebe Putney Health Sys., Inc., 315 Ga. App. 817, 820, 728 S.E.2d 331, 333 (2012); Piscitelli v. Hosp. Auth. of Valdosta & Lowndes Cnty., 302 Ga. App. 746, 748, 691 S.E.2d 615, 617 (2010).

76. 15 GA. JUR. § 36:21 (2013); *see also* Roberson v. Northrup, 302 Ga. App. 405, 407, 691 S.E.2d 547, 549 (2010).

77. 15 GA. JUR., *supra* note 76, at § 36:21.

78. *Id.*; *see also* Shuler v. Hicks, Massey & Gardner, LLP, 280 Ga. App. 738, 740, 634 S.E.2d 786, 788 (2006).

C. *Judicial Application*

In the 1997 case *Porquez v. Washington*,[79] Justice Hines stated that the recent amendments to § 9.1 maintained the spirit of the General Assembly by allowing plaintiffs to amend a defective affidavit.[80] When an expert affidavit is initially filed with the medical malpractice complaint, a plaintiff is allowed to amend their affidavit if its sufficiency is disputed.[81] Justice Hines concluded that "[p]ermitting the plaintiff to amend the expert affidavit in order to meet the requirement that it set forth at least one claimed negligent act or omission by each defendant and its factual basis [did] not defeat the purpose of the statute."[82] Instead, that allowance helped "to insure that the complaint is not frivolous."[83]

In *Bhansali v. Moncada*,[84] the defendants argued that the denial of their motion to dismiss was in error due to the late filing of the plaintiff's expert affidavit.[85] The court of appeals adopted the trial court's reasoning, which relied on the *Porquez* analysis: as long as expert affidavit is filed with the initial complaint, § 9.1 allows a plaintiff to amend their complaint by substitution with a new affidavit.[86] Because the plaintiff had filed an affidavit with the complaint, the court of appeals held that the denial of the defendants' motion to dismiss under § 9.1 was correct because, as of the 1997 amendment, subsection (e) blocks plaintiffs from amendment only when no affidavit is filed with the original complaint.[87]

In *Piscitelli v. Hospital Authority of Valdosta & Lowndes County*,[88] the plaintiff amended her original affidavit within thirty days after the defendant's amended motioned for dismissal alleging the affidavit's defects, specifically the expert's incompetency. The plaintiff attached an additional affidavit by another medical professional to her amended complaint that discussed the alleged breaches in the defendant's standard of care.[89] The trial court granted the defendant's amended

79. 268 Ga. 649, 492 S.E.2d 665 (1997).
80. *Id.* at 652, 492 S.E.2d at 668.
81. *Id.* at 651, 492 S.E.2d at 667-68.
82. *Id.* at 652, 492 S.E.2d at 668.
83. *Id.*
84. 275 Ga. App. 221, 620 S.E.2d 404 (2005).
85. *Id.* at 226, 620 S.E.2d at 408.
86. *Id.* at 227, 620 S.E.2d at 409.
87. *Id.* at 226-28, 620 S.E.2d at 408-10.
88. 302 Ga. App. 746, 691 S.E.2d 615 (2010).
89. *Id.* at 747-48, 691 S.E.2d at 616.

motion to dismiss under § 9.1, but the court of appeals reversed.[90] Although the court of appeals declined to decide whether the original expert was incompetent, it concluded that the additional affidavit was not defective and was filed in a timely manner.[91] The court of appeals held that dismissal of the action based solely on the original affiant's competency was in error.[92] Thus, the court allowed the consideration of an additional expert affidavit filed by amendment.[93]

IV. COURT'S RATIONALE

A. *The Foundation*

In *Fisher v. Gala*, the superior court had ruled that when a plaintiff files an incompetent expert's affidavit contemporaneously with their complaint, § 9.1's cure provision does not allow the plaintiff to substitute that affidavit with a competent expert's affidavit.[94] The Georgia Court of Appeals reviewed the case de novo, viewing "the pleadings in the light most favorable to Fisher, resolving any doubts in his favor."[95]

The court of appeals examined § 9.1(a), which required Fisher to file his complaint with an expert affidavit attached.[96] This affidavit had to set forth "specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim."[97] Fisher had to abide by that statutory requirement because his complaint raised a negligence claim dealing with professional malpractice against doctors and a licensed health care facility.[98] When Fisher filed his complaint, former O.C.G.A. § 24-9-67.1[99] established the standard for determining an

90. *Id.* at 753, 691 S.E.2d at 619-20.
91. *Id.* at 752-53, 691 S.E.2d at 619-20.
92. *Id.* at 753, 691 S.E.2d at 619-20.
93. *Id.* at 748-49, 752-53, 691 S.E.2d at 617, 619-20.
94. *Fisher*, 325 Ga. App. at 801-02, 754 S.E.2d at 162.
95. *Id.* at 802, 754 S.E.2d at 162.
96. *Id.*
97. *Id.* (quoting O.C.G.A. § 9-11-9.1(a)).
98. *Id.*
99. O.C.G.A. § 24-9-67.1 (2010) (repealed 2013). In 2013, amendments to the Georgia Evidence Code, title 24 of the O.C.G.A., took effect. John E. Hall, Jr., et al., *Evidence, Annual Survey of Georgia Law*, 66 MERCER L. REV. 81, 81 (2014). As part of these amendments, O.C.G.A. § 24-7-702, replaced O.C.G.A. § 24-9-67.1. *See Fisher*, 325 Ga. App. at 802 n.3, 754 S.E.2d at 162 n.3. Nevertheless, O.C.G.A. § 24-7-702 "contains the same standard for determining an expert's competence to testify as former O.C.G.A. § 24-9-67.1." *Id.*

expert's competence to testify and § 9.1 established the standard for expert affidavits.[100]

The court of appeals agreed with the neurosurgeons' argument that Dr. Rogan, the original expert, was incompetent to testify regarding the standard of neurological care at issue in Mr. Fisher's case.[101] The court then investigated the nuances of Georgia's procedural requirements when filing a medical malpractice complaint in terms of the required expert affidavit.[102] Once a plaintiff files the § 9.1 affidavit with the complaint, the defendant can allege that the expert affidavit is defective.[103] Under this provision, the court further noted that dismissal is warranted only if the motion identifies how the affidavit is defective and the plaintiff does not act within the thirty-day period to fix the deficiencies.[104]

B. Analysis

The court analogized Mr. Fisher's case to the facts in *Piscitelli v. Hospital Authority of Valdosta and Lowndes County* because in both cases, after the plaintiff amended the complaint and filed the affidavit of the new expert, the defendant did not challenge the new affiant's competency to testify.[105] Thus, the court did not reevaluate the new affiant's satisfaction of § 9.1's pleading requirement.[106] In doing so, the court weighed the importance of the broad pleading standard under the Georgia Civil Practice Act while maintaining the gatekeeping function of § 9.1.[107] The court reasoned, under the analysis utilized in *Porquez v. Washington*, that allowing a plaintiff the ability to cure a defective affidavit by amendment "does not defeat the purpose of the statute, but instead helps to insure that the complaint is not frivolous."[108] Because Fisher utilized the cure provision of § 9.1, and the

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100. *Fisher*, 325 Ga. App. at 802, 754 S.E.2d at 162.

101. *Id.* at 803, 754 S.E.2d at 163.

102. *Id.*

103. *Id.* The code states that if the defendant can

> allege[] 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.

Id. (quoting O.C.G.A. § 9-11-9.1 (e)).

104. *Id.* at 803, 754 S.E.2d at 163.

105. *Id.* at 804, 754 S.E.2d at 163-64; *see also Piscitelli*, 302 Ga. App. at 753, 691 S.E.2d at 619.

106. *Fisher*, 325 Ga. App. at 804-05, 754 S.E.2d at 164.

107. *Id.*

108. *Id.* (quoting *Porquez*, 268 Ga. at 652, 492 S.E.2d at 668).

defendants did not challenge the new expert's affidavit, the court held that the purpose of § 9.1 was satisfied.[109] The court ruled that Dr. Dogali's expert affidavit should not have been ignored, and the dismissal of the action because of the insufficiency of Dr. Rogan's affidavit was in error.[110] Consequently, the court reversed the judgment.[111]

V. IMPLICATIONS

To understanding the implications of *Fisher v. Gala* and its interpretation of § 9.1(e), a hearkening back to the purpose of the statute is necessary. Section 9.1 serves as a guard against frivolous lawsuits, but as *Fisher* affirms, it is not intended "to serve as a tactical tool for defense counsel."[112] *Fisher*'s holding embodies the legislative intent of the 1997 amendments to § 9.1. As *Porquez* established, the plaintiff's ability to amend its expert affidavit does not defeat the purpose of the statute, but helps ensure valid lawsuits.[113] Subsection (e) effectively maintains the intended gatekeeping function by maintaining the parameter of thirty days but will not preclude a plaintiff from relief on the basis of technicalities.[114] The court of appeals accurately held that where a plaintiff files his complaint with an affidavit by a person not competent to testify as an expert in the action, subsection (e) permits the plaintiff to cure this defect by filing an amended complaint with an affidavit by a competent expert.[115] The Georgia Supreme Court will likely hold the same, as "neither statutes nor case law" advocate the barring of a plaintiff's ability to cure defects by substituting an expert's affidavit.[116]

Generally, the Civil Practice Act provides for liberality in pleading.[117] Section 9.1 functions as a gatekeeper in medical malpractice litigation as it requires the plaintiff to attach an expert affidavit alleging the negligence on the part of the defendant to the complaint.[118] This

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109. *Id.* at 805, 754 S.E.2d at 164.

110. *Id.*

111. *Id.* at 805, 754 S.E.2d at 165.

112. Bonner v. Peterson, 301 Ga. App. 443, 447, 687 S.E.2d 676, 681 (2009); *see also Fisher*, 325 Ga. App. at 804-05, 754 S.E.2d at 164.

113. *Porquez*, 268 Ga. at 652, 492 S.E.2d at 668.

114. *See* O.C.G.A. § 9-11-9.1(e); *see also* Ndlovu v. Pham, 314 Ga. App. 337, 342-43, 723 S.E.2d 729, 732-33.

115. *Fisher*, 325 Ga. App. at 804-05, 754 S.E.2d at 164.

116. Brief of Appellees, Gala v. Fisher, No. S14G0919 (Ga. argued Sept. 8, 2014), 2014 Ga. S. Ct. Briefs LEXIS 263, at *16-18.

117. *See* Brake v. Mintz, 193 Ga. App. 662, 666, 388 S.E.2d 715, 719 (1989).

118. O.C.G.A. § 9-11-9.1.

reduces the number of frivolous malpractice suits.[119] Decreasing the amount of invalid malpractice suits is the primary goal of § 9.1; however, the plaintiff is not required to show a prima facie case to defeat a motion for summary judgment.[120] This standard bars frivolous lawsuits because "it requires plaintiffs to find an expert who will attest that at least one act of professional negligence has occurred."[121]

When an affidavit has been amended or substituted, plaintiffs must be given every chance to meet the standard of § 9.1, which complies with the breadth of the Civil Practice Act.[122] The court of appeals has emphasized that even when there is the possibility of an "unfavorable construction," favorable interpretation of the plaintiff's affidavits is necessary, "with all doubts resolved in [the] plaintiff's favor."[123] Although the § 9.1 affidavit is an exception to the general liberality utilized in pleadings, the rule must be interpreted in a manner consistent with the Civil Practice Act and in conjunction with the expert requirements set by O.C.G.A. § 24-7-702.[124] *Fisher* maintains this balance. The plaintiff followed the § 9.1 requirements by filing an original affidavit contemporaneously with the complaint and followed the cure provision under subsection (e).[125]

The Georgia code establishes a broad definition for medical malpractice actions.[126] This broad definition, in conjunction with the second chance for plaintiff's under subsection (e), may leave plaintiffs a latitude

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119. *Porquez*, 268 Ga. at 652, 492 S.E.2d at 668.

120. *Bowen*, 203 Ga. App. at 124, 416 S.E.2d 103; 0-1 Doctors Mem'l Holding Co. v. Moore, 190 Ga. App. 286, 288, 378 S.E.2d 708, 710 (1989).

121. Walker v. Cromartie, 287 Ga. 511, 512, 696 S.E.2d 654, 657 (2010).

122. *Phoebe Putney Mem'l Hosp.*, 235 Ga. App. at 534–35, 510 S.E.2d at 103.

123. *Id.*; *see Porquez*, 268 Ga. at 650, 492 S.E.2d at 667; *Hewett*, 264 Ga. at 184, 442 S.E.2d at 234.

124. *See* Houston, 295 Ga. App. 678-79, 673 S.E.2d at 58 (holding that the affidavit met the statutory requirement after resolving all doubts in the plaintiff's favor).

125. O.C.G.A. § 9-11-9.1, O.C.G.A. § 9-11-15; *Fisher*, 325 Ga. App. at 804-05, 754 S.E.2d at 164-65.

126. O.C.G.A. § 9–3–70 (2007); O.C.G.A. § 9–11–8(a) (2014). The code defines medical malpractice as

> any claim for damages resulting from the death of or injury to any person arising out of:
>
> (A) Health, medical, dental, or surgical service, diagnosis, prescription, treatment, or care rendered by a person authorized by law to perform such services or by any person acting under the supervision and control of a lawfully authorized person; or
>
> (B) Care or service rendered by any public or private hospital, nursing home, clinic, hospital authority, facility, or institution, or by any officer, agent, or employee thereof acting within the scope of his employment.

O.C.G.A. § 9-11-8(a)(1).

for claims that is too wide. From a policy standpoint, the lack of restriction on medical malpractice litigation may open the floodgates for malpractice claims against healthcare providers. Although this is a valid concern, § 9.1 still serves its gatekeeping function through the same subsection that allows plaintiffs to amend because plaintiffs still must amend within thirty days or their claims will be dismissed.[127] Therefore, thirty-one days after the pleadings, the defense wins if the plaintiff cannot find a competent expert.[128]

In the appeal of *Fisher* currently under consideration by the supreme court, the appellants argue that allowing the plaintiff to amend with an additional affidavit "gut[s] the contemporaneous filing requirement of [§ 9.1(a)]."[129] They further argue that in 2005, the General Assembly amended § 9.1 as a part of its effort to address a crisis in the quality of health care services in Georgia.[130] Allowing plaintiffs to substitute new affidavits does away with § 9.1's gatekeeping function.[131] This would allow practically any person to serve as an expert to meet the contemporaneous filing requirement, and thus frivolous claims would be easier to file.[132]

Fisher is indeed a plaintiff-friendly decision, and it is in line with the Georgia General Assembly's intent. After the cure provision was initially added in 1997,[133] § 9.1 was amended again in 2005,[134] 2006[135] and 2007.[136] Significantly, the General Assembly did not alter the subsection (e) provision and maintained plaintiffs' broad right to cure.[137] It is up to the General Assembly to change the language of § 9.1 if so desired, and they have not.[138] It is clear that a substituted affidavit constitutes a valid amendment.

Georgia's expert affidavit statute does not just apply to medical malpractice but many areas of professional malpractice. The 1997 amendments codified who qualifies as a professional in the state of

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127. O.C.G.A. § 9–11–9.1(e).

128. *See* Brief of Appellants, Gala v. Fisher, No. S14G0919 (Ga. argued Sept. 8, 2014), 2014 Ga. S. Ct. Briefs LEXIS 262, at *7.

129. *Id.* at *14.

130. *Id.* at *16; *see also* Ga. S. Bill 3, *supra* note 53, at 1.

131. *Gala,* 2014 Ga. S. Ct. Briefs LEXIS 262, at *17.

132. *Id.*

133. Ga. S. Bill 276, *supra* note 42, at 916-17.

134. Ga. S. Bill 3, *supra* note 53, at 3-4. "The 2005 amendment eliminated the 45-day grace period altogether," but the 2007 amendments restored it. *Peck*, 294 Ga. App. at 133, 668 S.E.2d at 559.

135. Ga. S. Bill 465, Ext. Sess., 2006 Ga. Laws 72, 73.

136. Ga. H. Bill 221, Reg. Sess., 2007 Ga. Laws 216, 217-19.

137. Brief of Appellees, *supra* note 116, at *2-3.

138. *Id.* at *10.

Georgia.[139] The current list of twenty-six types of professionals[140] is a narrower list than those originally protected under former versions of § 9.1–common-law professionals.[141] The twenty-six enumerated types of professionals are all affected by *Fisher* because of the lessened protection they receive as the result of plaintiffs' judicially affirmed ability to cure their affidavits by amendment.

Georgia is not alone in its attempt to limit frivolous lawsuits through expert opinion in medical malpractice cases.[142] Many states either have medical malpractice panels or have enacted "certificate of merit" statutes.[143] Arizona,[144] Florida,[145] Maryland,[146] Michigan,[147] Minnesota,[148] North Dakota,[149] and West Virginia[150] are among the many states with these requirements in medical malpractice cases.

Florida, for example, requires a pre-suit corroborating medical opinion in medical malpractice claims.[151] The medical opinion must come from a medical professional with relevant experience about the subject upon which he or she is asked to give an opinion.[152] If the plaintiff's complaint is filed without the appropriate corroborating expert opinion, the defendant can move to dismiss.[153] Like Georgia, Florida's statutory requirement that plaintiffs obtain an expert's corroborating opinion

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139. Ga. S. Bill 276, *supra* note 42, at 918.

140. O.C.G.A. § 9–11–9.1(g).

141. *See generally Housing Auth. of Savannah*, 259 Ga. at 436, 383 S.E.2d at 868 (applying professional malpractice principles to "persons performing architectural and engineering services").

142. *See* Fort Walton Beach Med. Ctr. v. Dingler, 697 So. 2d 575, 578 (Fla. Dist. Ct. App. 1997).

143. *See* STEVEN E. PEGALIS, 2 AM. LAW MED. MALP. 3d § 9:1 (2005 & Supp. 2014).

144. ARIZ. REV. STAT. ANN. § 12–2603 (Supp. 2006); Gorney v. Meaney, 150 P.3d 799, 801-02 (Ariz. Ct. App. 2007).

145. FLA. STAT. ANN. § 766.203 (West 2011); O'Hanrahan v. Moore, 731 So. 2d 95, 96-97 (Fla. Dist. Ct. App. 1999).

146. MD. CODE ANN., CTS. & JUD. PROC. § 3–2A–04 (LexisNexis 2006); Carroll v. Konits, 929 A.2d 19, 26 (Md. 2007).

147. MICH. COMP. LAWS ANN. § 600.2169 (West 2010); Bates v. Gilbert, 736 N.W.2d 566, 570 (Mich. 2007).

148. MINN. STAT. ANN. § 145.682 (West 2005); Stroud v. Hennepin Cnty. Med. Ctr., 556 N.W.2d 552, 555 (Minn. 1996).

149. N.D. CENT. CODE § 28–01–46 (2006); Weasel v. St. Alexius Med. Ctr., 230 F.3d 348, 350-51 (8th Cir. 2000) (applying North Dakota law).

150. W. VA. CODE ANN. § 55–7B–6 (LexisNexis 2008); *see* Blankenship v. Ethicon, Inc., 656 S.E.2d 451, 453 (W. Va. 2007).

151. FLA. STAT. ANN. § 766.203(4); *see* Yocom v. Wuesthoff Health Sys., 880 So. 2d 787, 788, 790 (Fla. Dist. Ct. App. 2004).

152. *Yocom*, 880 So. 2d at 790.

153. Archer v. Maddux, 645 So. 2d 544, 547 (Fla. Dist. Ct. App. 1994).

in a malpractice suit is designed to stop "baseless litigation."[154] Florida and Georgia, like many other states, share the same policy concerns.

In dealing with a plaintiff's right to cure an expert opinion after the filing of a complaint, there is only one relevant out-of-state decision. In *Cookson v. Price*,[155] the Illinois Appellate Court upheld the plaintiff's amended complaint.[156] In its analysis, the court decided that allowing the plaintiff to amend his complaint furthered the purpose of Illinois's malpractice statue because his allegations were not frivolous.[157]

Georgia shares the same policy concerns that states are grappling with nationwide in the realm of medical malpractice. As Illinois and Georgia have now established, a plaintiff's ability to cure an expert opinion by amendment does not allow frivolous claims, but instead ensures their merit. In 1997, Robert Brussack accurately predicted that if an affiant is not in fact competent, the shortcoming could be cured by amendment because the affidavit would be "considered a defective affidavit rather than no affidavit at all."[158] Brussack notes that the ability to amend is important because "it is all too easy to be wrong about who counts under Georgia law as a testimonially competent expert."[159]

Fisher v. Gala is important because it maintained the spirit of § 9.1's 1997 amendments, which codified Georgia's judicially adopted cure provision.[160] In cases like Mr. Fisher's, where claims are not frivolous, and thus not the type that the statute was intended to weed out, subsection (e) of § 9.1 allows plaintiffs to obtain meaningful recovery. Overall, the purpose of § 9.1 is to ensure that malpractice cases do not go to discovery and onward without real, legitimate experts on the plaintiff's side. Georgia wants a competent expert early on in the case. *Fisher v. Gala* serves as a message to plaintiffs in the state of Georgia: If your first expert affiant is found incompetent, amend and try again with a different one. However, subsection (e)'s cure provision will not open the floodgates of frivolous litigation – plaintiffs still must abide by the thirty day limitation as outlined by O.C.G.A. § 9-11-15.

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154. Apostolico v. Orlando Reg'l Health Care Sys., 871 So. 2d 283, 286 n.3 (Fla. Dist. Ct. App. 2004); Cent. State Reg'l Hosp. v. Hill, 721 So. 2d 404, 405 (Fla. Dist. Ct. App. 1998) (per curiam); *Fort Walton Beach Med. Ctr.*, 697 So. 2d at 579; *see also* Kukral v. Mekras, 679 So. 2d 278, 284 (Fla. 1996); Shands Teaching Hosp. & Clinics v. Barber, 638 So. 2d 570, 572 (Fla. Dist. Ct. App. 1994).

155. 914 N.E.2d 229 (Ill. App. Ct. 2009).

156. *Id.* at 230.

157. *Id.* at 232-33.

158. Brussack, *supra* note 38, at 1058.

159. *Id.*

160. *See* O.C.G.A. 9-11-9.1(e).

"If at first you don't succeed, try, try again. Then quit. There's no point in being a damn fool about it."
W.C. Fields[161]

KATHRYN S. DUNNAM

161. BOB FENSTER, LAUGH OFF: THE COMEDY SHOWDOWN BETWEEN REAL LIFE AND THE PROS 90 (2005).