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Georgia's Professional Malpractice Affidavit Requirement

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ARTICLES

GEORGIA'S PROFESSIONAL MALPRACTICE AFFIDAVIT REQUIREMENT

*Robert D. Brussack**

I. INTRODUCTION

Section 9-11-9.1[1] of the Georgia Code might be the state's most

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* Professor of Law, University of Georgia. The author would like to thank Professor Ron Ellington and Ms. Toni Johnson, who reviewed an earlier draft; Professor Tom Eaton, for his valuable insights into the economics of tort litigation; and Mr. Ranse Partin, who helped with the research.

[1] 9-11-9.1 Affidavit to accompany charge of professional malpractice.

(a) In any action for damages alleging professional malpractice against a professional licensed by the State of Georgia and listed in subsection (f) of this Code section or against any licensed healthcare facility alleged to be liable based upon the action or inaction of a healthcare professional licensed by the State of Georgia and listed in subsection (f) 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 filing requirement of 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 and, because of such time constraints, the plaintiff has alleged that an affidavit of an expert could not be prepared. In such cases, the plaintiff

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shall have 45 days after the filing of the complaint to supplement the pleadings with the affidavit. The trial court may, on motion, after hearing and for good cause extend such time as it shall determine justice requires. If an affidavit is not filed within the period specified in this subsection or as extended by the trial court and the defendant against whom an affidavit should have been filed alleges, by motion to dismiss filed contemporaneously with its initial responsive pleading that the plaintiff has failed to file the requisite affidavit, the complaint is subject to dismissal 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 affidavit is filed within the period specified in this Code section, the filing of the affidavit after the expiration of the statute of limitations shall be considered timely and shall provide no basis for a statute of limitations defense.

(d) 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 contemporaneously with its initial responsive pleading, that said affidavit is defective, the plaintiff's complaint is 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 requires.

(e) 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.

(f) The professions to which this Code section applies are:

(1) Architects;
(2) Attorneys at law;
(3) Certified public accountants;
(4) Chiropractors;
(5) Clinical social workers;
(6) Dentists;
(7) Dieticians;
(8) Land surveyors;
(9) Medical doctors;
(10) Marriage and family therapists;
(11) Nurses;
(12) Occupational therapists;
(13) Optometrists;
(14) Osteopathic physicians;
(15) Pharmacists;
(16) Physical therapists;
(17) Physicians' assistants;

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notorious procedural statute. Enacted in 1987[2] to protect professionals against the harm done by groundless malpractice litigation,[3] the statute provides that a professional malpractice claim ordinarily must be accompanied by an affidavit executed by an expert.[4] In the affidavit, the expert must substantiate the claim by attesting that some act or omission alleged in the claim was a negligent act or omission[5]—a departure from a professional standard of conduct.[6] During the past decade, Georgia's appellate courts have returned again and again to the problem of what section 9-11-9.1 means, generating scores of decisions on who qualifies as a professional,[7] what constitutes malpractice,[8] who may serve as an expert,[9] what counts as an adequate affidavit,[10] what must be done to claim the benefit of the statute's grace period,[11] and what happens when a party fails in one way or another to satisfy the affidavit requirement.[12] The judicial preoccupation with section 9-11-9.1 has yielded a complex and in some respects counterintuitive body of procedural doctrine that must be mastered by anyone who brings, defends, or judges a professional malpractice claim in the state.[13]

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(18) Professional counselors;
(19) Professional engineers;
(20) Podiatrists;
(21) Psychologists;
(22) Radiological technicians;
(23) Respiratory therapists; or
(24) Veterinarians."

Act of Apr. 21, 1997, 1997 Ga. Laws 916 (to be codified at O.C.G.A. § 9-11-9.1).

[2] *See infra* note 34 and accompanying text (giving details of statute's enactment).

[3] *See infra* notes 30-33 and accompanying text (discussing tort reform report that provided impetus for § 9-11-9.1).

[4] Act of Apr. 21, 1997, sec. 1(a), 1997 Ga. Laws 916, 917 (to be codified at O.G.G.A. § 9-11-9.1(a)). For the full text of the statute, see *supra* note 1.

[5] *Id.*

[6] *See infra* notes 81-83 and accompanying text (discussing doctrine that equates professional negligence with departure from professional standard of conduct).

[7] *See infra* Parts II.A-C.

[8] *See infra* Parts II.D-E.

[9] *See infra* Part III.B.

[10] *See infra* Parts III.A. & III.C.

[11] *See infra* Part IV.

[12] *See infra* Part V.

[13] The long-running preoccupation of the state's appellate courts with the affidavit requirement has been emphasized by the authors of the annual *Mercer Law Review* survey of Georgia tort law. In their 1995 survey, for example, the authors wrote that "[f]or the fourth consecutive year, the expert witness affidavit requirement of Code section 9-11-9.1

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Interpreting section 9-11-9.1 became a routine chore for Georgia's appellate courts mainly because the statute could be construed,[14] and the state supreme court for a time seemed to construe it,[15] to make professional malpractice claims vulnerable to the extreme penalty of dismissal with prejudice for anything short of complete satisfaction of the affidavit requirement on the first try. A professional malpractice defendant therefore had the strongest of incentives to "fly speck" a plaintiff's compliance with section 9-11-9.1 and to litigate to the hilt in the trial and appellate courts any arguable shortcomings. This state of affairs put the affidavit requirement in conflict with the most fundamental axiom of modern civil pleading: Pleading is not supposed to be "a game of skill in which one misstep by counsel may be decisive to the outcome,"[16] but a mechanism "to facilitate a proper decision on the merits."[17] To their credit, therefore, the state's appellate courts in their more recent encounters with section 9-11-9.1 found wide paths around the statute's apparently unforgiving approach to noncompliance, permitting a party in many circumstances to cure an initial failure to submit a sufficient affidavit.[18]

These judicial efforts, however, came at a price. They added to the thicket of doctrine that the affidavit requirement had become, and they required strained interpretations of statutory language or even what might be described as mutiny[19] against statutory language. Some of the state's appellate judges, therefore, understandably tried to prompt Georgia's legislature to take a fresh look at the affidavit requirement,[20] and in its 1997 session, the legislature finally did enact legislation amending section 9-11-9.1.[21]

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consumed a disproportionate amount of judicial resources." Cynthia Trimboli Adams & Charles R. Adams III, Torts, Annual Survey of Georgia Law, 47 MERCER L. REV. 311, 317 (1995).

[14] *See infra* Part V.A (demonstrating how statute's language could be construed to insist on affidavit satisfying all statutory requirements).

[15] *See infra* notes 246-255 and accompanying text (discussing Cheeley v. Henderson, 405 S.E.2d 865 (Ga. 1991), *overruled in part by* Hewett v. Kalish, 442 S.E.2d 233 (Ga. 1994)).

[16] Conley v. Gibson, 355 U.S. 41, 48 (1957).

[17] *Id.*

[18] The most important of these avenues of redemption were the *Hewett-Washington* doctrine, *see infra* notes 256-267 and accompanying text, and the *Moritz* maneuver, *see infra* Part V.C.

[19] *See infra* notes 286-299 (discussing Sisk v. Patel, 456 S.E.2d 718 (Ga. 1995)).

[20] *See infra* Part VI (noting some judges have called for statute's repeal).

[21] The revised statute, which took effect on July 1, 1997, is set out at note 1 *supra*.

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The 1997 legislation provides welcome ratification of the judicially embraced position[22] that a party may cure through amendment anything other than a complete failure to file an affidavit.[23] On the other hand, the legislation leaves in disarray the doctrine governing a complete failure to file an affidavit, apparently accepting a broad right to cure such a failure, but only through back-door devices involving voluntary dismissal and refiling.[24] Moreover, the legislation tolerates by its silence a number of objectionable judicial glosses on section 9-11-9.1, including the unsound doctrine that an expert's affidavit must accompany a professional malpractice claim even if the claim is for "clear and palpable" professional malpractice that may be proved at trial without any expert evidence.[25] Finally, the legislation narrows and simplifies the scope[26] of section 9-11-9.1, limiting the statute's protection to the Georgia licensees[27] of a closed list of twenty-four professions,[28] and makes less perilous a party's reliance on the statute's grace period.[29]

This Article offers a tenth anniversary critique of section 9-11-9.1, of the case law that has grown up around it, and of the 1997 legislation that revises it. Part II discusses the scope of the affidavit requirement, making the case that the courts and now the legislature have rejected the most straightforward, principled approach to the applicability of the requirement. Part III turns to the elements of the requirement, emphasizing the difficulties that can plague any scheme that employs legal formality to accomplish a policy objective. Part IV highlights the problems that have arisen

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[22] This is the *Hewett-Washington* doctrine. *See infra* notes 256-267 and accompanying text (discussing that doctrine).

[23] Act of Apr. 21, 1997, sec. 1(d), 1997 Ga. Laws 916, 917 (to be codified at O.C.G.A. § 9-11-9.1(d)) (providing explicitly that when a party files an affidavit "which is allegedly defective," the party "may cure the alleged defect by amendment . . . within 30 days of service of the motion alleging that the affidavit is defective.").

[24] *See infra* Parts V.B-C.

[25] *See infra* Part II.D.

[26] *See infra* Part II.

[27] Act of Apr. 21, 1997, sec. 1(a), 1997 Ga. Laws 916, 917 (to be codified at O.C.G.A. § 9-11-9.1(a)).

[28] Act of Apr. 21, 1997, sec. 1(f), 1997 Ga. Laws 916, 918 (to be codified at O.C.G.A. § 9-11-9.1(f)).

[29] For a discussion of the grace period and of the legislation's impact on it, see *infra* Part IV.

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under the grace period provision of section 9-11-9.1 and criticizes the legislature's solution to one of these problems. Part V takes up the critical issue of noncompliance, arguing that more needs to be done to ensure that potentially meritorious professional malpractice claims are not unjustly dismissed with prejudice under section 9-11-9.1 for pleading mistakes. The Article concludes in Part VI with a discussion of the option of repealing the statute and with the suggested text of a further revision.

II. THE SCOPE OF THE AFFIDAVIT REQUIREMENT

The impetus for the enactment of section 9-11-9.1 was a report issued in 1986 by a tort reform advisory committee appointed by Georgia's governor.[30] Among the report's many recommendations was one calling for the enactment of an affidavit requirement in professional malpractice actions and products liability actions.[31] The chair of the advisory committee expressed strong support for the recommendation, describing it as "the most important action taken by the [c]ommittee,"[32] because an affidavit requirement "will have a substantial impact in the reduction of the number of groundless suits filed against professionals and against businesses."[33] In its 1987 session, Georgia's legislature partially adopted the recommendation as section 9-11-9.1 of the state code, enacting an affidavit requirement for professional malpractice actions, but not for products liability actions.[34]

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[30] REPORT OF THE GOVERNOR'S ADVISORY COMMITTEE ON TORT REFORM (1986).

[31] *Id.* at 6-7.

[32] *Id.* at 17.

[33] *Id.*

[34] Before its revision by the 1997 legislature, section 9-11-9.1 provided as follows:

> 9-11-9.1 Affidavit to accompany charge of professional malpractice.
>
> (a) In any action for damages alleging professional malpractice, 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 filing requirement of subsection (a) of this Code section shall not apply to any case in which the period of limitation will expire within ten days of the date of filing and, because of such time constraints, the plaintiff has alleged that an affidavit of an expert could not be prepared. In such cases, the plaintiff shall have 45 days after the

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A. BEYOND MEDICAL MALPRACTICE

Although section 9-11-9.1 became law as section 3 of the Medical Malpractice Reform Act of 1987,[35] the affidavit requirement as proposed by the advisory committee obviously was not limited to the malpractice context, much less the medical malpractice context,[36] and the original language of subsection 9-11-9.1(a) made the affidavit requirement applicable "[i]n any action for damages alleging *professional* malpractice"[37] without any explicit limitation to medical malpractice. Soon after the enactment of the statute, the state court of appeals applied it in a number of actions for legal

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> filing of the complaint to supplement the pleadings with the affidavit. The trial court may, on motion, after hearing and for good cause extend such time as it shall determine justice requires.
>
> (c) If an affidavit is filed after the filing of a complaint, as allowed under subsection (b) of this Code section, the defendant shall not be required to file an answer to the complaint and affidavit until 30 days after the filing of the affidavit.
>
> (d) This Code section shall not be construed to extend any applicable period of limitation.
>
> (e) Except as allowed under subsection (b) of this Code section, if a plaintiff fails to file an affidavit as required by this Code section contemporaneously with a complaint alleging professional malpractice and the defendant raises the failure to file such an affidavit in its initial responsive pleading, such complaint is subject to dismissal for failure to state a claim and cannot be cured by amendment pursuant to Code Section 9-11-15 unless a court determines that the plaintiff had the requisite affidavit available prior to filing the complaint and the failure to file the affidavit was the result of a mistake.
>
> (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 in 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 available prior to filing the complaint and the failure to file the affidavit was the result of a mistake.

O.C.G.A. § 9-11-9.1 (1993) (amended 1997). Subsections (a) through (d) constituted the original text of the statute. 1987 Ga. Laws 889-90. Subsections (e) and (f) were added two years later, 1989 Ga. Laws 421-22, to specify the consequences of failure to comply with the affidavit requirement. *See infra* note 242 (noting that statute, as originally enacted, provided no penalty for failure to comply with affidavit requirement).

[35] Housing Auth. v. Greene, 383 S.E.2d 867, 869 (Ga. 1989).

[36] *See supra* text accompanying note 31 (noting advisory committee's report called for affidavit requirement in professional malpractice actions and products liability actions).

[37] O.C.G.A. § 9-11-9.1(a) (1993) (amended 1997) (emphasis added).

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malpractice[38] without discussing the possibility that the legislature had intended to limit its scope to the medical malpractice context. The state supreme court then confirmed that the statute applied beyond the medical malpractice context to any action for professional malpractice,[39] and the twenty-four specific professions[40] to which the affidavit requirement applies under the 1997 legislation range well beyond the medical profession.

B. SECTION 9-11-9.1 AND THE EXPERT EVIDENCE DOCTRINE

The original section 9-11-9.1 included no list of covered professions or any other litmus test for determining when an action was one for professional malpractice. The legislature's employment, however, of an expert's affidavit as the device to demonstrate the substantiality of a professional malpractice claim strongly suggested a litmus test. An established doctrine in Georgia law generally requires expert evidence to prove liability at trial when the crux of a claim is a departure from a standard of occupational performance thought to be beyond the understanding of a layperson.[41] If a plaintiff with such a claim will be unable to secure the required expert evidence, an affidavit requirement can force the plaintiff to confront this reality before filing suit, saving the defendant from the costs that can flow from an unprovable professional malpractice claim.[42] Thus, there was good reason to conclude that the legislature originally intended section 9-11-9.1 to be precisely coextensive with Georgia's expert evidence doctrine:

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[38] The first of the cases was *Barr v. Johnson*, 375 S.E.2d 51, 52-53 (Ga. Ct. App. 1988), which was followed by *Padgett v. Crawford*, 376 S.E.2d 724, 725 (Ga. Ct. App. 1988), and *Frazier v. Merritt*, 380 S.E.2d 495, 496 (Ga. Ct. App. 1989).

[39] *Greene*, 383 S.E.2d at 869 (requiring expert's affidavit in action against architects). In *Lutz v. Foran*, 427 S.E.2d 248, 249 (Ga. 1993), the state supreme court rejected arguments that the provision violates state constitutional prohibitions against the inclusion of more than one subject matter in a bill and the inclusion in the body of a bill of a matter not addressed in the bill's title.

[40] Act of Apr. 21, 1997, sec. 1(f), 1997 Ga. Laws 916, 918 (to be codified at O.C.G.A. § 9-11-9.1(f)).

[41] Hughes v. Malone, 247 S.E.2d 107, 111 (Ga. Ct. App. 1978).

[42] *See* Gillis v. Goodgame, 404 S.E.2d 815, 819 (Ga. Ct. App. 1991) ("The plaintiff is simply required to show at the outset that it is not a frivolous suit. This serves to prevent putting a professional to great expense and adversely affecting his or her professional reputation unjustifiably."), *rev'd on other grounds*, 414 S.E.2d 197 (Ga. 1992).

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Whenever this doctrine required expert evidence at trial, a plaintiff was required to present expert substantiation of the claim at the outset of the litigation through an affidavit.[43]

Over time, however, Georgia's courts completely divorced the affidavit requirement from the expert evidence doctrine, and the 1997 legislation's closed list of twenty-four covered professions[44] ratifies this divorce. The courts developed what can be described as a two-part test for professional malpractice under section 9-11-9.1. First, the defendant's occupation had to be recognized legislatively as a profession.[45] Second, an element of the plaintiff's claim had to be that an act or omission attributable to the defendant departed from a standard of professional conduct.[46] If the defendant's occupation was not recognized legislatively as a profession, then section 9-11-9.1 did not apply, even though the plaintiff would be required at trial to produce expert evidence because the jury was thought to be incapable of evaluating the conduct of the defendant without expert help.[47] Conversely, if the defendant's occupation was recognized legislatively as a profession, and if an element of the claim was a departure from a standard of professional conduct, then section 9-11-9.1 did apply, even though the plaintiff would need no expert evidence at trial because of an exception to the expert evidence doctrine for clear and palpable professional malpractice.[48]

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[43] Without addressing the question of whether § 9-11-9.1 was coextensive with the expert evidence doctrine, the court of appeals lent some support to the notion. *See id.* (stating that the statute "simply contemplates that parties allegedly damaged by malpractice show up front, by expert's affidavit, that they have some evidence of malpractice, which by its nature can 'be established only by professional or expert testimony' "). The *Gillis* court, however, overlooked the doctrine that clear and palpable professional malpractice may be proved in Georgia without the use of expert testimony, so that the requirement of an affidavit in such cases is not justified on the ground that a party is simply required to produce at the outset of the lawsuit the sort of claim substantiation that the party will need later at the trial. *See infra* notes 75-80 and accompanying text (noting that case law requires affidavit even for claims of clear and palpable professional malpractice).

[44] Act of Apr. 21, 1997, sec. 1(f), 1997 Ga. Laws 916, 918 (to be codified at O.C.G.A. § 9-11-9.1(f)).

[45] *See infra* notes 63-68 and accompanying text (describing how courts defined "profession" prior to the 1997 amendments).

[46] *See infra* note 81 and accompanying text (distinguishing malpractice claims from claims of "simple" negligence).

[47] *See infra* notes 54-68 and accompanying text.

[48] *See infra* notes 75-80 and accompanying text.

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C. COMMON-LAW PROFESSIONALS

Initially, the state supreme court indicated that section 9-11-9.1 might protect what can be called common-law professionals—persons whose occupations are not recognized legislatively as professions, but whose occupational conduct can be drawn into question at trial only if the plaintiff offers expert evidence. As one reason for its early ruling in *Housing Authority v. Greene*[49] that section 9-11-9.1 applied in an action against an architectural firm, the court cited two cases with language extending the expert evidence doctrine to actions against architects.[50] Architecture, however, is not a common-law profession. Rather, Georgia statutes denominate it a profession[51] and endow it with the attributes ordinarily associated with professions.[52] The *Greene* court cited these statutes[53] along with the expert evidence doctrine in holding that section 9-11-9.1 applied in the case. *Greene*, therefore, did not establish authoritatively that section 9-11-9.1 protected common-law professionals as well as statutory professionals.

In *Gillis v. Goodgame*,[54] the state court of appeals and then the state supreme court squarely faced the question of whether section 9-11-9.1 protected common-law professionals. The plaintiff in *Gillis* alleged that a physician and a radiological physicist had injured her by administering "unnecessary and excessive" radiation therapy.[55] The expert's affidavit attached to the complaint addressed the plaintiff's claim against the physician but not her claim against the radiological physicist,[56] and the radiological physicist moved to dismiss for failure to comply with section 9-11-

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[49] 383 S.E.2d 867 (Ga. 1989).

[50] *Id.* at 868 (citing Housing Auth. v. Ayers, 88 S.E.2d 368 (Ga. 1955) and Hudgins v. Bacon, 321 S.E.2d 359 (Ga. Ct. App. 1984)).

[51] The Georgia Professional Corporation Act explicitly includes architecture among the sixteen occupations that count as professions under the Act. O.C.G.A. § 14-7-2(2) (1994).

[52] As a general proposition, the practice of architecture in the state requires a certificate of registration from the State Board of Architects, O.C.G.A. §§ 43-4-10, -14, and an applicant for a certificate generally must meet substantial educational qualifications, O.C.G.A. § 43-4-11(b), and must pass an examination, *id.*

[53] *Greene*, 383 S.E.2d at 868.

[54] 404 S.E.2d 815 (Ga. Ct. App. 1991), *rev'd*, 414 S.E.2d 197 (Ga. 1992).

[55] *Gillis*, 414 S.E.2d at 197.

[56] *Id.*

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9.1.[57] The radiological physicist was at most a common-law professional. He conceded at his deposition that he was "not required to be licensed or certified to practice his occupation by any state authority."[58] Nevertheless, a majority of the court of appeals, invoking the expert evidence doctrine, held that the claim against him was one for professional malpractice under section 9-11-9.1.[59]

In a dissent joined by three other judges, Judge Pope rejected the proposition that section 9-11-9.1 applied whenever an action counted as a professional malpractice action under the expert evidence doctrine.[60] Judge Pope indicated that the affidavit requirement applied only when an occupation was denominated a profession by the legislature or endowed by the legislature with the attributes of a profession.[61]

Preferring the general approach advocated by Judge Pope and by Justice Weltner in a special concurrence in an earlier case,[62] the state supreme court reversed the court of appeals in *Gillis*, ruling that the affidavit requirement applied only to occupations recognized as professions under three particular provisions of the state code.[63] The *Gillis* court treated these three provisions as exhaus-

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[57] *Id.*

[58] *Gillis*, 404 S.E.2d at 820 (Pope, J., dissenting).

[59] *Id.* at 819.

[60] *Id.* at 820 (Pope, J., dissenting).

[61] "The practice of radiological physics is certainly a learned skill but it is neither a 'profession' as that term is defined by statute nor a service requiring a state license or certificate to practice." *Id.*

[62] Creel v. Cotton States Mut. Ins. Co., 397 S.E.2d 294, 295-96 (Ga. 1990) (Weltner, J., specially concurring).

[63] The *Gillis* court held that "the affidavit requirements of § 9-11-9.1 apply only to those professions recognized under Georgia law in O.C.G.A. §§ 14-7-2(2); 14-10-2(2) and 43-1-24." 414 S.E.2d at 198. Subsection 14-7-2(2), which is part of the Georgia Professional Corporation Act, provides that the term "profession," as used in the Act, encompasses sixteen specific occupations: "certified public accountancy, architecture, chiropractic, dentistry, professional engineering, land surveying, law, psychology, medicine and surgery, optometry, osteopathy, podiatry, veterinary medicine, registered professional nursing, or harbor piloting." Subsection 14-10-2(2), which is part of the Georgia Professional Association Act, provides that, as used in the Act, "professional service" means:

> the personal services rendered by attorneys at law and any type of professional service which may be legally performed only pursuant to a license from a state examining board pursuant to Title 43, for example, the personal services rendered by certified public accountants, chiropractors, dentists, osteopaths, physicians and surgeons, and podiatrists (chiropodists).

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tive on the question of who counted as a professional under the statute, because "the term 'professional' is no where defined in the code other than in these cited code sections."[64] The *Gillis* court, however, overlooked at least one occupation—pharmacy—that is universally regarded as a profession and treated legislatively as a profession in code sections other than the three litmus-test code sections specified in *Gillis*.[65] In *Harrell v. Lusk*, the state supreme court confronted the issue of the applicability of the statute to an action against a pharmacist.[66] The *Harrell* court ruled that the affidavit requirement applied.[67] Refining the *Gillis* approach, the *Harrell* court articulated a threshold test for the applicability of the statute that required a legislative conferral of professional status, but was not tied to any particular code provisions: the affidavit requirement, according to the *Harrell* court, "applies only to those licensed professions regulated by state examining boards where licensure is predicated upon the successful completion of the

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Finally, § 43-1-24, which is among the general provisions of the title of the O.C.G.A. governing "Professions and Businesses," provides that:

> [a]ny person licensed by a state examining board and who practices a "profession," as defined in Chapter 7 of Title 14, the "Georgia Professional Corporation Act," or who renders "professional services," as defined in Chapter 10 of Title 14, "The Professional Association Act," whether such person is practicing or rendering services as a proprietorship, partnership, professional corporation, professional association, other corporation, limited liability company, or any other business entity, shall remain subject to regulation by that state examining board, and such practice or rendering of services in that business entity shall not change the law or existing standards applicable to the relationship between that person rendering a professional service and the person receiving such service, including but not limited to the rules of privileged communication and the contract, tort, and other legal liabilities and professional relationships between such persons.

[64] *Gillis*, 414 S.E.2d at 198.

[65] Pharmacy has been legislatively defined as a profession. O.C.G.A. § 26-4-2. The practice of pharmacy is regulated by the State Board of Pharmacy, O.C.G.A. § 26-4-37, and an applicant is entitled to receive a license to practice pharmacy only upon compliance with the requirements in O.C.G.A. § 26-4-72, including graduating from a recognized school or college of pharmacy and successfully passing an examination administered by the State Board of Pharmacy.

Harrell v. Lusk, 439 S.E.2d 896, 898 (Ga. 1994).

[66] *Id.* at 897-98.

[67] *Id.* at 898-99.

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specialized schooling or training necessary to obtain the expertise to practice that profession."[68] Thus, under the *Gillis-Harrell* approach, the statute did not protect common-law professionals.

The 1997 legislation narrows and simplifies the *Gillis-Harrell* approach, limiting the applicability of the affidavit requirement to a closed list of twenty-four professions listed specifically in a rewritten subsection 9-11-9.1(f).[69] Moreover, only a professional "licensed by the State of Georgia"[70] may claim the protection of the requirement. The legislation simplifies the *Gillis-Harrell* approach, because a party can determine the eligibility of a particular occupation for the protection of the requirement by consulting a single subsection of 9-11-9.1 without the need to scour the entire Georgia code for provisions that might or might not be interpreted to confer professional status on an occupation. The legislation narrows the *Gillis-Harrell* approach, not only by limiting the protection of the affidavit requirement to Georgia licensees, but by excluding from its protection a number of occupations that qualified as professions under *Gillis-Harrell*. These excluded occupations fall into two categories: First, there are occupations that enjoyed the protection of the affidavit requirement, but that a party might not think of as professions and therefore might not associate with the affidavit requirement. There were cases, for example, holding that the affidavit requirement applied to claims brought against real estate brokers,[71] pest exterminators,[72] and plumbers.[73] None of these occupations made the list of twenty-four. Second, there are occupations that the ordinary person would characterize as professions, but that were omitted from the list of

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[68] *Id.* at 898. Justice Carley concurred specially in *Harrell*, rejecting the *Gillis-Harrell* approach and embracing the view that section 9-11-9.1 was precisely co-extensive with the expert evidence doctrine. *Id.* at 899.

[69] Act of Apr. 21, 1997, sec. 1(f), 1997 Ga. Laws 916, 918 (to be codified at O.C.G.A. § 9-11-9.1(f)).

[70] Act of Apr. 21, 1997, sec. 1(a), 1997 Ga. Laws 916, 917 (to be codified at O.C.G.A. § 9-11-9.1(a)). The question might be raised whether this protection afforded only to Georgia licensees violates the Privileges and Immunities Clause of the United States Constitution. *Cf.* Supreme Court v. Friedman, 487 U.S. 59, 65-67 (1988) (holding Privileges and Immunities Clause applicable whenever state does not permit qualified nonresidents to practice law within its borders on terms of substantial equality with its own residents).

[71] Allen v. ReMAX N. Atlanta, Inc., 445 S.E.2d 774, 776 (Ga. Ct. App. 1994).

[72] Fender v. Adams Exterminators, Inc., 460 S.E.2d 528 (Ga. Ct. App. 1995).

[73] Seely v. Loyd H. Johnson Const. Co., 470 S.E.2d 283, 288 (Ga. Ct. App. 1996).

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twenty-four without any explanation. The list, for example, specifically includes dentists, but omits dental hygienists.[74]

Treating the affidavit requirement as precisely co-extensive with the expert evidence doctrine would have been a principled, straightforward approach to the scope of the requirement. On the other hand, as the framers of the 1997 legislation must have concluded, it is unfair to require a party to be right the first time about the applicability of the affidavit requirement unless the scope of the requirement is set out very clearly and simply. If the litmus test for the requirement's applicability were the expert evidence doctrine, then the fate of some potentially meritorious claims would be hostage to the skill of a lawyer or a pro se litigant in correctly identifying ex ante the boundaries of a common-law evidence doctrine. Moreover, as a practical matter, extending the coverage of the affidavit requirement to all common-law professionals probably would not benefit large numbers of defendants. The set of all occupations that involve expertise beyond the ken of a lay jury but that did not make the list of twenty-four cannot be very large.

Still, there is something deeply unsatisfying about the willingness of a court or a legislature to sacrifice coherence for simplicity. The problem is not just that neither the *Gillis-Harrell* approach nor the 1997 legislation embraces the expert evidence doctrine as the most obvious organizing principle for the affidavit requirement. The problem is that unless the reason for the affidavit requirement is the reason offered by the expert evidence doctrine, then there is no immediately apparent normative principle that justifies conferring the protection of the affidavit requirement on some defendants, but not on others. One need not be a professional, let alone a professional on the list of twenty-four, to suffer the slings and arrows of groundless litigation.

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[74] In title 43, chapter 11, article 3 of the Georgia Code, the legislature clearly confers on the occupation of dental hygienist the traditional attributes of a profession. *See* O.C.G.A. § 43-11-70 (1994) ("No person shall practice as a dental hygienist in this state until such person has passed a written and a clinical examination conducted by the Georgia Board of Dentistry."); O.C.G.A. § 43-11-71 (requiring a two-year course of academic study for qualification as a dental hygienist).

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D. CLEAR AND PALPABLE PROFESSIONAL MALPRACTICE

Under Georgia law, a claim of clear and palpable professional malpractice may be established at trial without the aid of expert evidence.[75] The expert evidence doctrine includes an exception for such cases on the ground that a layperson can recognize clear and palpable professional malpractice without help from an expert.[76] Although section 9-11-9.1 includes no explicit exemption from the affidavit requirement for claims of clear and palpable professional malpractice, it would have been reasonable to conclude that the term "professional malpractice" in the statute did not encompass clear and palpable professional malpractice, because requiring an expert's affidavit for a claim of clear and palpable professional malpractice forces a party to clear a higher hurdle at the courthouse door than the party will need to clear to win at trial. Nonetheless, in *Barr v. Johnson*[77] the state court of appeals ruled that the statute applies even in cases of clear and palpable professional malpractice.[78] The state supreme court has cited *Barr* with apparent approval,[79] and the *Barr* doctrine now seems well-entrenched.[80] Moreover, the 1997 legislation, by its silence, invites the conclusion that the *Barr* doctrine remains intact under the revised statute.

It might be said in defense of the *Barr* doctrine that a claim of clear and palpable professional malpractice, like any other professional malpractice claim, can be groundless, justifying at-the-courthouse-door substantiation of such claims. There is something intuitively unfair, however, about requiring initial *expert* substantiation of a claim that needs no expert substantiation at trial. The legislature presumably would not enact a statute requiring a party

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[75] Hughes v. Malone, 247 S.E.2d 107, 111 (Ga. Ct. App. 1978).

[76] *Id.*

[77] 375 S.E.2d 51 (Ga. Ct. App. 1988).

[78] *Id.* at 52; *see also* Whitley v. Gwinnett County, 470 S.E.2d 724, 727 (Ga. Ct. App. 1996) (holding that even if need for traffic signal at intersection was "patently obvious," plaintiff was required to attach expert's affidavit in action for engineering malpractice).

[79] Hous. Auth. v. Greene, 383 S.E.2d 867, 868 (Ga. 1989).

[80] *See* Adams v. Coweta County, 430 S.E.2d 599, 601 (Ga. Ct. App. 1993) (following *Barr* rule); *see also* Richmond Leasing Co. v. Cooper, Cooper, Maioriello & Stalnaker, 428 S.E.2d 603, 603-04 (Ga. Ct. App. 1993) (requiring expert affidavit in cases of "clear and palpable" professional negligence).

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to submit, along with an automobile collision claim, the affidavit of some sort of professional driver attesting that driving through a red light or over the center line constitutes a departure from the standard of conduct expected of drivers. Such a statute might deter the filing of some groundless automobile collision claims, but the statute rightly would be regarded as a form of legislative overkill. Similarly, no initial expert substantiation should be required for a claim that a surgeon left a pair of surgical scissors inside a patient.

A second point that might be offered in favor of the *Barr* doctrine is that when professional malpractice is clear and palpable, so that a layperson should be able to recognize it, a plaintiff should have no trouble finding an expert to condemn it in an affidavit. The argument is not convincing. First, it cannot count as anything more than a makeweight. To say that something might be easy to do is not by itself a reason to require that it be done. Second, the argument fails to distinguish between the theoretical availability of an expert and the cost of securing an affidavit from the expert. The argument supplies no justification for requiring the plaintiff to bear the cost. Third, and most importantly, the argument fails to justify unnecessarily exposing a claim of clear and palpable professional malpractice to the risk of dismissal with prejudice for an error by counsel in complying with section 9-11-9.1.

A practical alternative to the *Barr* doctrine would be for the trial judge to determine whether a claim that is presented as a claim of clear and palpable professional malpractice really does state such a claim in the sense that the factual allegations, if proved, amount to the sort of professional malpractice that a layperson can recognize without expert help. If the answer is yes, then the claim should be permitted to proceed unless it is groundless in some other sense. If the answer is no, because only an expert may say whether the particular factual allegations amount to a departure from a professional standard of conduct, then the court can enforce section 9-11-9.1. If the answer is no, but for the different reason that it would be unreasonable as a matter of law to conclude that professional malpractice occurred, then the trial judge can resolve the claim in favor of the defendant.

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E. SIMPLE NEGLIGENCE AND OTHER THEORIES OF RECOVERY

Not every claim calling into question the conduct of a statutory professional is a "malpractice" claim triggering section 9-11-9.1. As the state's courts have made clear in a number of cases—and as the 1997 legislation apparently ratifies by its silence on the point—a claim is one for "malpractice" only if some departure from a professional standard of conduct must be proved to establish liability. Thus, there is no need to attach an expert's affidavit to a claim seeking recovery for "simple" negligence: "Where the alleged negligence does not involve the exercise of professional judgment and skill, the cause of action is in simple negligence, and no expert's affidavit is necessary."[81] The failure, for example, of a professional to do a ministerial act such as conveying information accurately to a third person[82] or asking a third person for an answer to a question and then reporting the substance of the answer[83] is not professional malpractice, but simple negligence, and no expert's affidavit is required.

Although the distinction between malpractice and simple negligence is clear enough in theory, the distinction is not always an easy one to apply. In *Robinson v. Medical Center of Central Georgia*,[84] a man who had fallen from his hospital bed blamed the fall on the failure of hospital employees to raise the side rails on the bed.[85] The trial court dismissed for failure to comply with section 9-11-9.1. A majority of the full court of appeals affirmed.[86] Judge Blackburn, writing for the majority, emphasized that the decision whether to raise the side rails on the plaintiff's bed was a matter of nursing judgment, with the judgment to be exercised in accordance with a written "fall risk protocol" identifying the factors to be weighed.[87] As Judge McMurray suggested in his dissenting opinion, however, there is reason to view what happened to the plaintiff as the product of a failure of common sense, rather than

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[81] Hodo v. General Hosp. of Humana, Inc., 438 S.E.2d 378, 380 (Ga. Ct. App. 1993).
[82] Creel v. Cotton States Mut. Ins. Co., 397 S.E.2d 294, 295 (Ga. 1990).
[83] Allen v. ReMAX N. Atlanta, Inc., 445 S.E.2d 774, 777 (Ga. Ct. App. 1994) (dictum).
[84] 456 S.E.2d 254 (Ga. Ct. App. 1995).
[85] *Id.* at 255.
[86] *Id.* at 256.
[87] *Id.* at 255.

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as the product of any departure from a professional standard of conduct.[88]

In a number of other cases involving falls in medical settings, the court of appeals has ruled against the applicability of the expert's affidavit requirement. Like *Robinson*, the case of *Smith v. North Fulton Medical Center*[89] involved a claim that hospital personnel had failed to raise the side rails on a patient's bed, allowing the patient to fall.[90] The court of appeals held that the general language of the complaint could be construed to allege simple negligence by nurses or other hospital employees as well as nursing malpractice, so that the trial court was wrong in dismissing the complaint altogether with prejudice.[91] The court of appeals reached a similar conclusion in *Flowers v. Memorial Medical Center, Inc.*,[92] holding that the complaint could be construed as alleging simple negligence in the failure of hospital nurses to keep a secure hold of the decedent to prevent her from falling.[93] The *Flowers* court noted that a claim is not one for professional malpractice, even if it is asserted against a professional, if the claim can be established "without proof of a customary procedure and violation of it . . . ."[94] Finally, in *Brown v. Durden*[95] the court of appeals treated as simple negligence rather than professional malpractice the decision of a medical assistant in a doctor's office to leave unattended on a high examining table a patient with a known history of seizures who had been brought in because of a seizure.[96] The court concluded that the liability of the medical assistant and, through respondeat superior, the doctor did not turn

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[88] *See id.* at 256-57 (McMurray, J., dissenting) (noting that the record included evidence that at least one nurse knew plaintiff was legally blind and plaintiff was suffering from severe abdominal pain when left unattended in unsecured bed).

[89] 408 S.E.2d 468 (Ga. Ct. App. 1991).

[90] *Id.* at 469.

[91] *Id.* at 470.

[92] 402 S.E.2d 541 (Ga. Ct. App. 1991).

[93] *Id.* at 541-42. *Accord* Piedmont Hosp., Inc. v. Milton, 377 S.E.2d 198, 199 (Ga. Ct. App. 1988).

[94] *Flowers*, 402 S.E.2d at 541. In his dissenting opinion in *Smith v. North Fulton Medical Center*, Judge Andrews emphasized that the plaintiff had been unable to produce anything in the summary judgment process to suggest that the fall was the product of something other than nursing malpractice. 408 S.E.2d at 471-72 (Andrews, J., dissenting).

[95] 393 S.E.2d 450 (Ga. Ct. App. 1990).

[96] *Id.* at 452.

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on any "medical question."[97] It is tempting to conclude that the pivotal difference between these cases and the more recent decision in *Robinson* is that in *Robinson* the defendants were able, through the "fall risk protocol," to portray the question of whether to raise the guard rails on the bed as a "medical question."

The line between simple negligence on the one hand and clear and palpable professional malpractice on the other hand can be especially difficult to locate. In *Razete v. Preferred Research, Inc.*,[98] the court of appeals ruled that no expert's affidavit was necessary for a claim that the defendant had neglected to send along the last page of a title examination report.[99] After noting that the title examination itself had been done properly,[100] the court of appeals concluded that "[t]he omission of the last page showing the liens was a simple act of negligence and not an act of malpractice"[101] because "the plaintiff can prove negligence or breach without proof of a customary procedure and violation of it . . . ."[102] It is far from clear, however, that the failure to send along the last page of the report should be characterized as simple negligence rather than as clear and palpable professional malpractice along the lines of leaving a pair of surgical scissors inside a patient.

Georgia's courts have recognized theories of liability besides simple negligence that do not depend on a showing of any departure from a professional standard of conduct and therefore do not count as "malpractice" under section 9-11-9.1.[103] No affidavit is required, for example, to support a claim for strict products liability, even though the injury might have been caused by a professional engineer's defective design: "A claim of strict liability is not proved by reference to 'a reasonable degree of skill and care'

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[97] *Id.*

[98] 397 S.E.2d 489 (Ga. Ct. App. 1990).

[99] *Id.* at 490.

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] If a claim can be construed to assert other theories of liability besides professional malpractice, then the claim should be permitted to proceed under these other theories even if the party did not comply with the affidavit requirement. *See* Peacock v. Beall, 477 S.E.2d 883 (Ga. Ct. App. 1996) (allowing claim to proceed on theories of fraud and breach of contract).

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as measured against a certain community; the nature of a strict liability claim is not that services were negligently provided."[104]

In *Howard v. City of Columbus*,[105] the plaintiffs alleged that a sheriff and the medical personnel at a county jail deliberately overlooked the deteriorating medical condition of an inmate and the inmate's pleas for help, resulting in the inmate's death due to untreated diabetes.[106] The court of appeals ruled in *Howard* that the claims "[did] not relate to the exercise of professional judgment and therefore [did] not require backing of an expert's affidavit."[107] Other court of appeals decisions holding that claims under the federal civil rights laws for deliberate indifference to inmates' medical needs are not professional malpractice claims requiring affidavits include *Howard v. Jonah*[108] and *Parker v. Brinson*.[109]

Similarly, a claim is not necessarily one for professional malpractice even if it is brought by a client against a lawyer for the lawyer's conduct during the course of representation of the client. In *Tante v. Herring*,[110] the state supreme court ruled that no expert's affidavit was necessary to support a claim that a lawyer had breached his fiduciary duty to a client by using confidential information about the client, secured in the course of representation, to convince her to have an affair with him.[111] The action was not one for professional malpractice because the lawyer's conduct had no adverse effect on his legal representation of the client: "[A] satisfactory result under an agreement for legal services by necessity precludes a claim for legal malpractice."[112]

A claim that a surgeon committed a battery is not a claim for professional malpractice,[113] nor is a claim that a mental health counselor committed an intentional tort by subjecting the plaintiff

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[104] SK Hand Tool Corp. v. Lowman, 479 S.E.2d 103, 106 (Ga. Ct. App. 1996).
[105] 466 S.E.2d 51 (Ga. Ct. App. 1995).
[106] *Id.* at 55.
[107] *Id.*
[108] 430 S.E.2d 833 (Ga. Ct. App. 1993).
[109] 432 S.E.2d 626 (Ga. Ct. App. 1993).
[110] 453 S.E.2d 686 (Ga. 1994).
[111] *Id.* at 687-88.
[112] *Id.* at 687.
[113] Newton v. Porter, 424 S.E.2d 323, 323-24 (Ga. Ct. App. 1992) (discussing assertion that defendant surgeon's puncturing plaintiff's duodenum while performing bilateral tubal ligation was not professional malpractice claim and no expert's affidavit was required).

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to "perverted mental health counseling" by outlining a course of treatment that included "the plaintiff taking off his clothes in the session, the defendant and the plaintiff exchanging clothes, and the defendant whipping the plaintiff . . . ."[114] And no expert's affidavit is required to support a fraud claim against a professional.[115]

The term "malpractice," however, does extend well beyond the typical tort claim asserted by a client against a doctor, lawyer, or other statutory professional. Section 9-11-9.1 applies, for example, to claims for breach of contract for failure to perform professional services properly,[116] claims sounding in breach of warranty,[117] statutory claims in which liability depends on a showing of professional malpractice,[118] and claims for contribution or indemnity.[119] Moreover, a claim against a professional's employer is a professional malpractice claim, even if the employer is not a professional, if employer's liability flows from the professional malpractice

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[114] Roebuck v. Smith, 418 S.E.2d 165, 166 (Ga. Ct. App. 1992). The *Roebuck* opinion includes language strongly suggesting that the court of appeals refused to apply the affidavit requirement because the professional malpractice in the case was clear and palpable. By the time of the *Roebuck* decision, however, the court of appeals already had concluded in *Barr v. Johnson* that section 9-11-9.1 applies even in cases of clear and palpable professional malpractice, *see supra* note 77 and accompanying text, and the state supreme court had cited *Barr* with apparent approval, *see supra* note 79 and accompanying text. The alternative reading of *Roebuck* reflected in the text is that the court of appeals was merely affirming, somewhat inartfully, the explicit conclusion of the trial court that section 9-11-9.1 was inapplicable because the claim alleged an intentional tort not dependent on any departure from a professional standard of conduct.

[115] Hilton v. Callaghan, 453 S.E.2d 509, 510 (Ga. Ct. App. 1995); Hodge v. Jennings Mill, Ltd., 451 S.E.2d 66, 68 (Ga. Ct. App. 1994).

[116] *See* Centrust Mortgage Corp. v. Smith & Jenkins, P.C., 469 S.E.2d 466, 467 (Ga. Ct. App. 1996) (requiring expert affidavit in action by client against law firm for failure of firm's non-lawyer title examiner to conduct adequate title search); *Hilton*, 453 S.E.2d at 510 (finding allegations of breach of contract against accountant "fall squarely within the rule requiring an expert affidavit"); *Hodge*, 451 S.E.2d at 68 (holding that trial court should have dismissed, for lack of expert's affidavit, claim against lawyers for breach of contract of representation in handling real estate transaction to extent that claim sounded in professional malpractice); Richmond Leasing Co. v. Cooper, Cooper, Maioriello & Stalnaker, 428 S.E.2d 603, 604 (Ga. Ct. App. 1993) (holding expert affidavit requirement applied to contractual claim against defendant who provided legal services in bankruptcy proceedings).

[117] *See* Sparks v. Kroger Co., 407 S.E.2d 105, 106 (Ga. Ct. App. 1991) (expert's affidavit required for claim that pharmacist breached warranty in dispensing drug other than drug called for in prescription).

[118] *Id.*

[119] *See* Housing Auth. v. Greene, 383 S.E.2d 867, 869 (Ga. 1989) (finding expert affidavit requirement applied to third-party claim against architectural and engineering firm).

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of the employee.[120] Conversely, if a professional assigns work to a non-professional, and if the work requires the exercise of professional skill and judgment, then the professional may be held liable in professional malpractice for the work of the non-professional, and a claim against the professional must comply with section 9-11-9.1.[121] Also, the affidavit requirement extends beyond claims brought by the clients of professionals to any claim that "alleges harm as a result of the defendant professional's negligent performance of professional services."[122] Finally, despite the fact that section 9-11-9.1 specifies what "the plaintiff" must file "with the complaint,"[123] Georgia's courts have held that the section extends to claims for professional malpractice asserted as third-party claims[124] or as counterclaims.[125]

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[120] *E.g.*, Georgia Physical Therapy, Inc. v. McCullough, 466 S.E.2d 635, 637 (Ga. Ct. App. 1995); Legum v. Crouch, 430 S.E.2d 360, 363 (Ga. Ct. App. 1993); Adams v. Coweta County, 430 S.E.2d 599, 600-01 (Ga. Ct. App. 1993). The 1997 legislation makes the affidavit requirement applicable "[i]n any action for damages alleging professional malpractice against a professional licensed by the State of Georgia and listed in subsection (f) of this Code section *or against any licensed healthcare facility alleged to be liable based upon the action or inaction of a healthcare professional licensed by the State of Georgia and listed in subsection (f) of this Code section . . . .*" Act of Apr. 21, 1997, sec. 1(a), 1997 Ga. Laws 916, 917 (to be codified at O.C.G.A. § 9-11-9.1(a)) (emphasis added). Presumably, a reviewing court would hold that the italicized language makes no changes in the doctrine already embraced in the *McCullough*, *Legum*, and *Couch* decisions. That is to say, a court would reject the almost inevitable argument that because the legislature singled out licensed healthcare facilities for the protection of the affidavit requirement, it impliedly removed the protection from other, similarly situated entities.

[121] *Centrust Mortgage Corp.*, 469 S.E.2d at 467 (mandating expert affidavit in suit by client against law firm where firm's non-lawyer title examiner failed to conduct adequate title search).

[122] McLendon & Cox v. Roberts, 398 S.E.2d 579, 580 (Ga. Ct. App. 1990); *see also* Jordan, Jones & Goulding, Inc. v. Wilson, 398 S.E.2d 385, 386-87 (Ga. Ct. App. 1990) (holding any plaintiff, regardless of privity, who brings suit against professional and seeks to recover for negligent performance of professional services must comply with section 9-11-9.1).

[123] Act of Apr. 21, 1997, sec. 1(a), 1997 Ga. Laws 916, 917 (to be codified at § 9-11-9.1(a)).

[124] *Greene*, 383 S.E.2d at 869; *see also* Seely v. Loyd H. Johnson Constr. Co., 470 S.E.2d 283, 288 (Ga. Ct. App. 1996) (taking for granted applicability to third-party complaints).

[125] *See* French Quarter, Inc. v. Peterson Young Self & Asselin, 471 S.E.2d 9, 11 (Ga. Ct. App. 1996) (applying § 9-11-9.1 to counterclaim asserted by clients in law firm's action for recovery of fees); Jordan v. Lamberth, Bonapfel, Cifelli, Willson & Stokes, P.A., 424 S.E.2d 859, 860 (Ga. Ct. App. 1992) (ruling explicitly that § 9-11-9.1 applies to counterclaims for professional malpractice); Hardman v. Knight, 417 S.E.2d 338, 339-40 (Ga. Ct. App. 1992) (concluding that § 9-11-9.1 requires expert's affidavit for counterclaim alleging legal malpractice).

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III. THE ELEMENTS OF THE AFFIDAVIT REQUIREMENT

A. FORMAL ADEQUACY

If the action is one for professional malpractice, then "the plaintiff shall be required to file with the complaint an affidavit . . . ."[126] This unelaborated legislative insistence on "an affidavit" presents a difficult question of statutory interpretation: What documents, if any, other than technically sufficient, conventionally fashioned affidavits may be used to satisfy section 9-11-9.1? The most liberal approach would accept as an affidavit any document that established, to some suitable degree of probability, that a professional malpractice claim was not frivolous. This approach, of course, might be thought to cross the boundary from judicial interpretation of section 9-11-9.1 to judicial disregard of the statutory language, and in *Johnson v. Brueckner*[127] the state court of appeals felt constrained to reject it. The *Johnson* plaintiff failed to attach a conventional affidavit to her complaint alleging medical malpractice, but she did attach medical records "in which Dr. Brueckner acknowledged the he inadvertently severed the median nerve of her right hand during surgery."[128] The court of appeals affirmed the trial court's dismissal of the action under section 9-11-9.1 because the medical records did not constitute an affidavit.[129] The *Johnson* court expressed its frustration with section 9-11-9.1's insistence on an affidavit, but the court considered its hands bound by the statutory language: "[T]he medical records . . . demonstrate that [the] claim is not frivolous," but "[t]he mandatory language of the statute does not permit this court to ignore the affidavit requirement . . ., even though justice may not be served and plaintiff will be denied her day in court . . . ."[130]

The medical records in *Johnson* presumably were not *sworn* statements and therefore lacked the principal defining attribute of an affidavit. The distinction between sworn and unsworn statements provides the basis for a flexible, but properly constrained

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[126] Act of Apr. 21, 1997, sec. 1(a), 1997 Ga. Laws 916, 917 (to be codified at § 9-11-9.1(a)).
[127] 453 S.E.2d 76 (Ga. Ct. App. 1994).
[128] *Id.* at 77.
[129] *Id.*
[130] *Id.* at 77-78.

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definition of an affidavit under section 9-11-9.1: A document counts as an affidavit if it is a sworn statement that otherwise meets the requirements of the statute, whether or not it takes the form of a conventional affidavit. Georgia's courts have not adopted this reading of the statute explicitly, but some implicit support for it can be found in the case law, including the opinion of the state court of appeals in *Hospital Authority v. McDaniel*.[131]

The *McDaniel* case involved a deposition, which should qualify as a sworn statement. It is possible to read the court's opinion in *McDaniel* as endorsing the view that a deposition may be used to satisfy section 9-11-9.1. *McDaniel* was decided shortly after the enactment of section 9-11-9.1. The *McDaniel* plaintiffs "specifically incorporated"[132] in their renewed medical malpractice complaint the discovery taken in their original action, which had been filed before the passage of section 9-11-9.1[133] and dismissed without prejudice for failure to appear at a calendar call.[134] The "specifically incorporated" discovery included the deposition, presumably sworn, of the plaintiffs' expert.[135] The defendant moved to dismiss the renewed complaint for noncompliance with section 9-11-9.1.[136] The plaintiffs then amended their complaint to include an affidavit from the same expert.[137] The court of appeals ruled that the trial court was right in allowing the amendment.[138] Judge Pope wrote for the panel that "[b]y incorporating the discovery from the original action in the complaint for the renewed action, the [plaintiffs] complied with the spirit, if not the letter, of O.C.G.A. § 9-11-9.1. The purpose of the Code requirement is to ensure a substantial basis for actions against professionals. Clearly, such a basis existed in the present case . . . ."[139]

Although the *McDaniel* court noted in its opinion that the plaintiffs had failed "to attach the required affidavit"[140] to their

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[131] 385 S.E.2d 8 (Ga. Ct. App. 1989).
[132] *Id.*
[133] The original action was filed in 1985, two years before the passage of § 9-11-9.1. *Id.*
[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *Id.* at 9.
[139] *Id.*
[140] *Id.* at 8.

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renewed complaint, the observation almost certainly should not be read as a rejection of the proposition that the deposition counted as an affidavit under section 9-11-9.1, but rather as a recognition that the plaintiffs should have filed their "affidavit" physically with the complaint rather than incorporating it by reference. The *McDaniel* court's invocation of *St. Joseph's Hospital v. Nease*[141] as controlling authority[142] strongly supports this view. In *Nease*, there was no doubt that the relevant document qualified as an affidavit—it was a conventional affidavit. The only question was whether the affidavit—which had been obtained in advance of the lawsuit, but not filed with it—could be added to the record by amendment. The state supreme court held in *Nease* that the failure to file the affidavit was an amendable defect.[143] The *Nease* court distinguished between failing to obtain an affidavit, which the court concluded "might be a fatal defect,"[144] and failing to file an already obtained affidavit with the complaint, which the court held was an amendable defect.[145] The *McDaniel* court characterized the two cases as "similar,"[146] noting that in *Nease* "[t]he testimony of the expert in the original action . . . was in the form of an affidavit"[147] and that in *McDaniel* "the expert's testimony was in the form of a deposition."[148]

In *Raskin v. Wallace*,[149] the court of appeals confirmed that *McDaniel* should be understood as holding that a deposition is "sufficient to constitute an affidavit"[150] under section 9-11-9.1. *Raskin* was a medical malpractice action brought pro se by a man who had been convicted of killing his wife.[151] The plaintiff sued his psychiatrist, alleging that the psychiatrist should have hospitalized the plaintiff when the plaintiff began threatening to kill his

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[141] 377 S.E.2d 847 (1989).
[142] *McDaniel*, 385 S.E.2d at 8.
[143] *Nease*, 377 S.E.2d at 849.
[144] *Id.*
[145] *Id.*
[146] *McDaniel*, 385 S.E.2d at 9.
[147] *Id.*
[148] *Id.*
[149] 451 S.E.2d 485 (Ga. Ct. App. 1994).
[150] *Id.*
[151] *Id.*

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wife.[152] Instead of attaching an affidavit to the complaint, the plaintiff attached portions of the transcript of the testimony given in his criminal trial. The excerpts set out the testimony of a board-certified psychiatrist. The testimony directly supported the plaintiff's position that the defendant should have hospitalized him to prevent him from carrying out his threats to kill his wife. The *Raskin* court acknowledged that the plaintiff's action "likely . . . is not frivolous,"[153] given the psychiatrist's testimony, but affirmed the dismissal of the complaint, describing the plaintiff's approach as "[an attempt] to incorporate isolated pages of an uncertified trial transcript from a separate action in which the [accused's] psychological state, not the physician's alleged negligence, was at issue . . . ."[154] The *Raskin* court thought that these features of the transcript sufficiently distinguished it from the *McDaniel* deposition.[155] It is well worth noting, however, that the *Raskin* court did not reject the proposition that a trial transcript, like a deposition, could satisfy section 9-11-9.1 if the transcript were properly certified and edited and if the circumstances permitted the conclusion that the witness was focusing carefully on the question of possible liability for professional malpractice.

A photocopy or facsimile of a conventional affidavit is something like an uncertified copy of a trial transcript, and in *Gooden v. Georgia Baptist Hospital & Medical Center*,[156] the court of appeals rejected the proposition that a plaintiff may satisfy section 9-11-9.1 by filing a photocopy of an affidavit.[157] The question, however, of whether a copy of an affidavit or an uncertified copy of a trial transcript itself counts as an affidavit under the statute always should be kept separate from the question of whether the initial filing of such a copy may be cured by an amendment adding a formally sufficient document to the record. In *Sisk v. Patel*,[158] which will be addressed more fully in the discussion of section 9-11-

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[152] *Id.*
[153] *Id.* at 486.
[154] *Id.*
[155] *Id.*
[156] 401 S.E.2d 602 (Ga. Ct. App. 1991).
[157] *Id.* at 603.
[158] 456 S.E.2d 718 (Ga. Ct. App. 1995).

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9.1's approach to noncompliance,[159] the full court of appeals voted "to allow the filing of a facsimile of a properly executed affidavit with a complaint in a professional malpractice action"[160] and then "[to allow] the original . . . to be filed as a supplemental pleading."[161]

A document that is offered as an original affidavit, but that lacks the formality necessary for an affidavit, does not satisfy section 9-11-9.1. A document, for example, that lacks notarization is insufficient because notarization is what establishes that the statement is properly sworn.[162] Likewise, a document with an apparently valid notarization does not satisfy section 9-11-9.1 if the notarization was done improperly: A document, for example, that was executed in one place and "notarized" in another lacks proper notarization and is not an affidavit, even if the document was executed only after the notary public administered an oath to the signer over the telephone.[163] "There must be some solemnity, not mere telephone talk. Long-distance swearing is not permissible."[164] Moreover, the initial filing of an original document that lacks the appropriate formality to qualify as an affidavit arguably is quite different from the initial filing of a copy of a formally sufficient affidavit, and no appellate court in Georgia has held that the initial filing of an original document, offered as an affidavit but lacking the appropriate formality, may be cured by amendment.[165]

There is no compelling reason why an expert's initial substantiation of a professional malpractice claim should be packaged in the form of a sworn statement, much less a conventional affidavit. Any written statement surely ought to suffice. It is highly unlikely that requiring an expert to swear to an initial evaluation of a professional's performance adds anything to the reliability of the evaluation.

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[159] *Infra* Part V.

[160] *Id.* at 720.

[161] *Id.*

[162] Allen v. Caldwell, 470 S.E.2d 696, 697 (Ga. Ct. App. 1996); Hill-Everett v. Jones, 399 S.E.2d 739, 740 (Ga. Ct. App. 1990).

[163] Redmond v. Shook, 462 S.E.2d 172, 172-73 (Ga. Ct. App. 1995).

[164] *Id.* at 173 (quoting Carnes v. Carnes, 74 S.E. 785, 788 (Ga. 1912)).

[165] To the contrary, in *Allen v. Caldwell*, 470 S.E.2d 696, 697 (Ga. Ct. App. 1996), the full court of appeals ruled that the redemptive doctrine of *Sisk* was not available when what was filed initially was a facsimile of a document that purported to be a conventional affidavit, but that lacked notarization. *See infra* notes 300-301 and accompanying text (setting forth *Allen* decision).

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B. AN EXPERT COMPETENT TO TESTIFY

To satisfy section 9-11-9.1, an affidavit must reflect that it was executed by "an expert competent to testify."[166] If it cannot be inferred from an affidavit's language that the affiant is a testimonially competent expert, or if the affiant is not in fact testimonially competent, then the action is vulnerable to dismissal with prejudice. Under more recent case law,[167] now confirmed by the 1997 legislation,[168] the shortcoming probably can be cured by amendment, because what the party has filed should be considered a defective affidavit rather than no affidavit at all. Redemption through amendment is especially important, because it is all too easy to be wrong about who counts under Georgia law as a testimonially competent expert. In *Riggins v. Wyatt*,[169] for example, a bare majority of the full court of appeals reached the remarkable conclusion that a professor of applied biomechanics at Cornell's medical school was not competent to supply an expert's affidavit in a medical malpractice action against an orthopedic surgeon because the professor was not licensed to practice medicine: "A person cannot be qualified as an expert in an area where he or she would not be lawfully qualified (by holding a valid state license) to perform the treatment which is the subject of the expert opinion."[170] Writing for the four dissenters, Judge Ruffin pointed out that the professor taught medical students and residents at Cornell in the very areas in controversy in the action, and "[t]here is nothing in the record . . . to suggest the methods of care he teaches to his students, and within his expertise, are any different from those practiced by orthopedic surgeons."[171]

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[166] Act of Apr. 21, 1997, sec. 1(a), 1997 Ga. Laws 916, 917 (to be codified at § 9-11-9.1(a)).

[167] *See infra* notes 256-267 and accompanying text (discussing *Hewett-Washington* doctrine).

[168] Act of Apr. 21, 1997, sec. 1(d), 1997 Ga. Laws 916, 917 (to be codified at O.C.G.A. § 9-11-9.1(d)) (providing a right to cure through amendment "an affidavit which is allegedly defective").

[169] 452 S.E.2d 577 (Ga. Ct. App. 1994).

[170] *Id.* at 578.

[171] *Id.* at 579-80 (Ruffin, J., dissenting).

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An earlier decision, *Chandler v. Koenig*,[172] foreshadowed *Riggins*. In *Chandler*, a 5-4 court of appeals majority ruled that a pharmacologist's affidavit was insufficient[173] in an action alleging that physicians negligently prescribed certain medications and prescribed certain medications without adequate warnings or patient monitoring.[174] The majority held that the pharmacologist's affidavit failed to establish his expertise on the standard of care for physicians in prescribing medications:

> Dr. Buccafusco's affidavit establishes that he is an internationally recognized pharmacologist and possesses expertise in that area which probably far exceeds that of the average medical doctor. However, other than Dr. Buccafusco's bare assertion that he is familiar with the applicable standard of care, nothing in Dr. Buccafusco's affidavit explains how his pharmacological education or his professorial duties has provided him with expert knowledge of the standard of care in the prescribing of drugs ordinarily employed throughout the general medical profession by physicians who are years removed from the intensive pharmacological training they received in medical school and for whom the prescribing of drugs is but one facet of their practice.[175]

In his dissent, joined by three other judges, Judge Andrews wrote:

> [W]hen medical doctors prescribe drugs for a patient to use, the standard of medical care applying to this aspect of the patient's treatment arises from the same body of scientific knowledge which is the basis of the pharmacologist's expertise. The fact that the pharmacologist's expertise may be based solely on education and training, and does not extend to other

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[172] 417 S.E.2d 715 (Ga. Ct. App. 1992).
[173] *Id.* at 717-18.
[174] *Id.* at 718 (Andrews, J., dissenting).
[175] *Id.* at 717.

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> aspects of diagnosis and treatment of patients, does not render the pharmacologist less qualified to give an opinion in the specific area of his expertise.[176]

In a footnote, Judge Andrews was able to cite a number of decisions from other states holding that pharmacologists may serve as expert witnesses on the negligence of physicians in prescribing medications.[177]

Whatever else the *Chandler-Riggins* approach might require, it apparently does not insist on an expert who practices the relevant profession in Georgia. In *Morris v. Atlanta Legal Aid Society, Inc.*,[178] a recent legal malpractice case, the court of appeals stated that "[w]hether the expert resided in Georgia or was a licensed member of the Bar at the time of the alleged negligence is not indicative of competency."[179] Citing *Chandler*, the court concluded that "[t]he correct standard is whether at the time of testifying the expert has knowledge of the applicable standard of care on at least one matter on which the malpractice claim is based."[180] Moreover, it is clear from the cases that the affiant and the defendant need not practice within the same specialty, need not have received the same course of professional instruction, and need not be members of the same profession, so long as the affiant possesses the expertise to evaluate the challenged conduct of the defendant. Thus, a general surgeon is competent to assess the professional conduct of a radiologist in areas in which the expertise of the general surgeon overlaps with the expertise of the radiologist,[181] an allopathically-trained emergency room physician may evaluate the work of an osteopathically-trained emergency room physician,[182] a physician may be competent to assess the professional

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[176] *Id.* at 720 (Andrews, J., dissenting).

[177] *Id.* at 720 n.1 (Andrews, J., dissenting).

[178] 473 S.E.2d 501 (Ga. Ct. App. 1996).

[179] *Id.* at 503.

[180] *Id.*

[181] Stubbs v. Ray, 461 S.E.2d 906, 908 (Ga. Ct. App. 1995) (concluding that general surgery performed by radiologist may be reviewed by general surgeon).

[182] Handson v. HCA Health Servs. of Ga., Inc., 443 S.E.2d 831, 833 (Ga. 1994).

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conduct of a nurse,[183] and a nurse may be competent to assess the professional conduct of a physician.[184]

In *Hewett v. Kalish*,[185] the state supreme court ruled that because section 9-11-9.1 constitutes a pleading requirement rather than an evidentiary requirement, there is no need for an affidavit to recite in detail the facts demonstrating overlapping expertise.[186] A general claim of testimonial competence is sufficient, "because such conclusions are permissible in pleadings."[187] Moreover, if it is clear from an affidavit that the affiant's expertise ordinarily would qualify the affiant to evaluate the work of the defendant, the affidavit need not state specifically that the overlapping expertise extends to the specific actions or inactions challenged as malpractice in the case.[188] In *Handson v. HCA Health Services of Georgia, Inc.*,[189] for example, the court ruled that an allopathic physician's affidavit was sufficient in an action against an osteopathic physician, even though the affidavit failed to address specifically the question of overlapping methods of treatment.[190] The *Handson* court emphasized that the affidavit did establish that both the affiant and the defendant were emergency room physicians:

> [The defendant] examined and treated the Handsons' daughter in his capacity as an emergency room physician. Likewise, it was in his capacity as an

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[183] *See* Howard v. City of Columbus, 466 S.E.2d 51, 56 (Ga. Ct. App. 1995) (holding physician competent to testify as to standard of care required of licensed practical nurses); Crook v. Funk, 447 S.E.2d 60, 62-63 (Ga. Ct. App. 1994) (deciding that medical doctor's expertise overlaps with nurse's expertise on issue of what constitutes adequate response to call for assistance from cardiac patient in distress); Tye v. Wilson, 430 S.E.2d 129, 131 (Ga. Ct. App. 1993) ("There is nothing to suggest that medical doctors and nurses are trained to treat intubated patients differently.").

[184] Nowak v. High, 433 S.E.2d 602, 604 (Ga. Ct. App. 1993) (holding that expert's affidavit executed by nurse satisfies section 9-11-9.1 in action against physician alleging negligent administration of an injection because nurse's affidavit itself establishes that there is no difference in training in this area for doctors and nurses).

[185] 442 S.E.2d 233 (Ga. 1994).

[186] *Id.* at 234.

[187] *Id.* at 236.

[188] *See id.* at 234-36 (holding affidavit sufficient even though it did not state that two schools of medicine overlapped in treatment of plaintiff's condition).

[189] 443 S.E.2d 831 (Ga. 1994).

[190] *Id.* at 832-33.

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> emergency room physician that [the affiant] testified in his affidavit that [the defendant] had failed to meet the standard of care and skill required of an emergency room physician. There is nothing to suggest that an osteopathic physician who practices emergency room medicine and an allopathic physician who practices in the same field are trained to treat emergency patients with pediatric meningitis differently.[191]

C. A NEGLIGENT ACT OR OMISSION

The characterization of section 9-11-9.1 as a pleading requirement rather than an evidentiary requirement, employed by the *Hewett* court in construing the statute's testimonial competence language, also has shaped the judicial interpretation of the heart of the statute—the requirement that an affidavit must "set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim."[192] It is not necessary for an affidavit to use any particular "magic words."[193] An affidavit that "includes . . . many useless generalities about the responsibilities of attorneys"[194] nevertheless is sufficient if it comes to focus at some point on what the defendant in the case "did not do that he should have done."[195] There is no need for an affidavit to include specific language stating that the defendant violated the applicable professional standard of care,[196] nor must an affidavit

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[191] *Id.* at 833.

[192] O.C.G.A. § 9-11-9.1(a) (1993).

[193] Fidelity Enters., Inc. v. Beltran, 447 S.E.2d 150, 151 (Ga. Ct. App. 1994); Minster v. Pohl, 426 S.E.2d 204, 208 (Ga. Ct. App. 1992); *see also* Samuelson v. Lord, Aeck & Sergeant, Inc., 423 S.E.2d 268, 270 (Ga. Ct. App. 1992) (holding that in action against engineers alleging negligent construction design, affiant's opinion that another specified design "might" have been used and that failure to use such design or another appropriate alternative constituted malpractice is sufficient to set forth negligent act or omission as required by § 9-11-9.1).

[194] *Beltran*, 447 S.E.2d at 152.

[195] *Id.* at 151.

[196] *Id.* at 151-52; Minster v. Pohl, 426 S.E.2d 204, 208 (Ga. Ct. App. 1992); Bowen v. Adams, 416 S.E.2d 102, 103 (Ga. Ct. App. 1992). *But see* Piedmont Hosp., Inc. v. Milton, 377 S.E.2d 198, 199 (Ga. Ct. App. 1988) (holding physician's affidavit insufficient in action alleging nursing malpractice because affidavit failed to show that nursing staff breached

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refer to the defendant by name if it is clear from the circumstances that the affidavit refers to the conduct of the defendant.[197] Additionally, doubts about the sufficiency of an affidavit's language should be resolved in favor of the sufficiency of the affidavit.[198]

Moreover, because the statute constitutes a pleading requirement rather than an evidentiary requirement, there is no need for the plaintiff to offer evidence, through the language of the affidavit or otherwise, at the outset of the litigation to show that the affiant's opinions are based on events that actually happened. An affidavit is sufficient if the affiant, taking the plaintiff's factual allegations as true,[199] characterizes as negligent some particular act or failure to act[200] that is attributable to the defendant.[201] Thus, for example, the affiant may base his or her opinions on medical records that are not themselves attached to the affidavit[202] and

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requisite degree of care and skill required of nursing profession generally by deviating from treating physician's postoperative instructions).

On the other hand, an affidavit that states generally that the conduct of the defendant violated the applicable standard of care, but does not single out any particular negligent act or omission, is an insufficient affidavit under § 9-11-9.1. Edwards v. Vanstrom, 424 S.E.2d 326, 327 (Ga. Ct. App. 1992) (finding that expert's affidavit declaring merely that defendant dentists failed to follow procedures expected of licensed dentists but focusing on no particular acts or omissions of defendants was not sufficient affidavit under § 9-11-9.1).

[197] Gadd v. Wilson & Co., 416 S.E.2d 285, 286 (Ga. 1992).

[198] Hutchinson v. Divorce & Custody Law Ctr. of Arline Kerman & Assocs., 449 S.E.2d 866, 868 (Ga. Ct. App. 1994); Crook v. Funk, 447 S.E.2d 60, 62 (Ga. Ct. App. 1994).

[199] Thus, of course, an affidavit need not be based on the affiant's personal knowledge of the defendant's conduct. *Hutchinson*, 449 S.E.2d at 868; *Crook*, 447 S.E.2d at 62. Moreover, an affidavit may be considered sufficient even if the expert's opinion depends on an inference that might or might not be drawn from the facts alleged. *See Hutchinson*, 449 S.E.2d at 867 (allowing inference that defendant divorce attorney simply forgot about client's right to share of spouse's military benefits in preparing settlement agreement in divorce action).

[200] If the alleged professional malpractice is a failure to provide sufficient notice of the dangers associated with a particular procedure, the expert's affidavit sufficiently identifies a negligent act or omission if it notes the absence of any indication of the notice in the relevant records. Allen v. Belinfante, 458 S.E.2d 867, 868 (Ga. Ct. App. 1995).

[201] *See Hutchinson*, 449 S.E.2d at 868 (discussing requirements for affidavit); Druckman v. Ethridge, 401 S.E.2d 336, 337 (Ga. Ct. App. 1991) (holding it only necessary that such facts, if true, would constitute professional malpractice).

[202] Bryant v. Crider, 434 S.E.2d 161, 163 (Ga. Ct. App. 1993); Dozier v. Clayton County Hosp. Auth., 424 S.E.2d 632, 636-38 (Ga. Ct. App. 1992); HCA Health Servs. of Ga., Inc. v. Hampshire, 424 S.E.2d 293, 297-98 (Ga. Ct. App. 1992). *But see* Gooden v. Georgia Baptist Hosp. & Med. Ctr., 401 S.E.2d 602, 603 (Ga. Ct. App. 1991) (characterizing as defect failure to attach to experts' affidavits medical records referred to in affidavits).

On the other hand, an affidavit that is otherwise insufficient under § 9-11-9.1 is not made sufficient if the affidavit does incorporate by reference other documents that contain what

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are not otherwise included in the official record of the case.[203] In *Thurman v. Pruitt Corp.*,[204] the court of appeals upheld the sufficiency of an expert's affidavit over a dissent that complained that the affidavit was based neither on factual allegations included in the complaint nor on factual material reflected in medical records, but only on information related by the plaintiffs through counsel.[205] In *Ulbrich v. Batts*,[206] the court of appeals stated that:

> The affiant may review the medical records, take the relevant facts therein to be true, and restate those facts in the affidavit to provide the basis for the expert opinion. As long as the affidavit itself adequately sets forth the factual basis for at least one negligent act or omission of the defendant alleged in the complaint, it is not necessary that the medical records from which the stated facts were taken be attached to the affidavit.[207]

The decision of the court of appeals in *Williams v. Hajosy*[208] nicely illustrates the distinction between the pleading function of a section 9-11-9.1 affidavit and the evidentiary function of affidavits offered in another context—summary judgment. In *Williams*, the plaintiff relied on the same affidavit both to satisfy section 9-11-9.1 and to oppose the defendant's motion for summary judgment. The court held that the affidavit was sufficient to satisfy section 9-11-9.1, despite the fact that the affiant had relied on medical records that were not attached to the affidavit and were not otherwise included in the record of the case.[209] On the other hand, the court ruled that the affidavit was insufficient to defeat the defendant's motion for summary judgment, because the affidavit itself—without the medical records—was not evidence that the

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the affidavit itself lacks. Crook v. Funk, 447 S.E.2d 60, 61-62 (Ga. Ct. App. 1994).

[203] Williams v. Hajosy, 436 S.E.2d 716, 718 (Ga. Ct. App. 1993).

[204] 442 S.E.2d 849 (Ga. Ct. App. 1994).

[205] *Id.* at 851 (Smith, J., dissenting).

[206] 424 S.E.2d 288 (Ga. Ct. App. 1992).

[207] *Id.* at 289.

[208] 436 S.E.2d 716 (Ga. Ct. App. 1993).

[209] *Id.* at 718.

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defendant actually had done the things that in the affiant's view constituted professional malpractice.[210]

In *0-1 Doctors Memorial Holding Co. v. Moore*,[211] the court of appeals drew a revealing analogy between section 9-11-9.1 and the provision of the Civil Practice Act governing the pleading of fraud:

> In its requirement that a plaintiff elaborate upon and verify the existence of a cause of action, OCGA § 9-11-9.1 bears a far closer similarity to OCGA § 9-11-9(b) (pleading fraud with particularity) than the procedural requirements under OCGA § 9-11-56, which allows parties, after discovery has been exhausted, to obtain judgment on the merits of a claim in factually uncontested cases. . . . The purpose of OCGA § 9-11-9.1 is to reduce the number of frivolous malpractice suits being filed, not to require a plaintiff to prove a prima facie case entitling him to recover and capable of withstanding a motion for summary judgment before the defendant need file his answer.[212]

IV. THE GRACE PERIOD

The 1997 legislation makes less perilous a party's reliance on the grace period provided by subsection 9-11-9.1(b). The original subsection 9-11-9.1(b) excused the submission of an affidavit with the initial filing of a professional malpractice claim if "the period of limitation will expire within ten days of the date of filing and, because of such time constraints, the plaintiff has alleged that an

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[210] *Id.* at 718-19; *see also* Hailey v. Blalock, 433 S.E.2d 337, 338 (Ga. Ct. App. 1993) (holding affidavit that meets pleading requirements of § 9-11-9.1 will not necessarily satisfy evidentiary requirements of § 9-11-56); Sanders v. Ramo, 416 S.E.2d 333, 334 (Ga. Ct. App. 1992) (noting that when expert's affidavit used to satisfy § 9-11-9.1 was submitted later to oppose summary judgment, affidavit "became subject to the stringent evidentiary standards" required of summary judgment affidavits); Turner v. Kitchings, 406 S.E.2d 280, 281-82 (Ga. Ct. App. 1991) (explaining that whether or not conclusory assertions in expert's affidavit were sufficient to comply with § 9-11-9.1, they were not sufficient to meet defendant's affidavit in summary judgment setting).

[211] 378 S.E.2d 708 (Ga. Ct. App. 1989).

[212] *Id.* at 710.

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affidavit of an expert could not be prepared."[213] A forty-five day grace period was provided for the addition of an affidavit to the record,[214] and the trial court was empowered to extend the grace period for good cause.[215] The 1997 legislation excuses contemporaneous filing and makes the grace period available if "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 and, because of such time constraints, the plaintiff has alleged that an affidavit of an expert could not be prepared."[216]

Under the original statutory text, a plaintiff who relied on subsection 9-11-9.1(b) in the mistaken belief that the limitations period was about to expire risked dismissal with prejudice. In *Legum v. Crouch*,[217] a widow suing for the wrongful death of her husband and for medical malpractice as the administratrix of the deceased's estate invoked the grace period.[218] The court ruled that the plaintiff was not entitled to take advantage of the grace period, because the statute of limitations was not about to expire on either of the claims.[219] With respect to the wrongful death claim, the court pointed out that the statute of limitations began to run only with the death of the plaintiff's husband and not at some earlier point.[220] With respect to the medical malpractice claim, the court ruled that the statute of limitations had been tolled automatically under a state statute during the eighty-nine day period when the deceased's estate was not represented.[221] Thus, provisions intended to benefit the plaintiff were instead instruments of the plaintiff's defeat. The 1997 legislation overrules *Legum* by extending the protection of the grace period to a party who files a professional malpractice claim without an affidavit in

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[213] O.C.G.A. § 9-11-9.1(b) (1993) (amended 1997).

[214] *Id.*

[215] *Id.*

[216] Act of Apr. 21, 1997, sec. 1(b), 1997 Ga. Laws 916, 917 (to be codified at O.C.G.A. § 9-11-9.1(b)) (emphasis added).

[217] 430 S.E.2d 360 (Ga. Ct. App. 1993).

[218] *Id.* at 362-63.

[219] *Id.* at 364.

[220] *Id.* at 363.

[221] *Id.* at 363-64.

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good faith, but with the mistaken belief that the statute of limitations is about to expire.[222]

The new language added to subsection 9-11-9.1(b) by the 1997 legislation addresses another problem as well. A single complaint alleging professional malpractice can sound in both tort and contract,[223] and the limitations periods for the tort and contract elements of the complaint can differ,[224] so that when the complaint is filed, the limitations period might be within ten days of expiration on the tort theory, but not on the contract theory. The only sensible approach in such circumstances is to allow the plaintiff to claim the benefit of the grace period with respect to both theories of liability. If the plaintiff cannot claim the benefit of the grace period on the contract theory, then as a practical matter the plaintiff must delay filing a complaint until an affidavit can be secured, allowing the limitations period on the tort theory to expire, or must devise some pleading stratagem that has the effect of asserting the tort theory with the protection of the grace period, but deferring assertion of the contract theory until an affidavit can be secured. And it is far from clear that such a stratagem would comport with subsection 9-11-9.1(a), which includes no obvious warrant for applying the statute separately to distinct theories of liability within a single professional malpractice action.

The decision of the court of appeals in *Coleman v. Hicks*[225] might have been read to foreclose the sensible approach of allowing a plaintiff the benefit of the grace period on multiple theories of liability when the limitations period is about to expire on one of them. In *Coleman*, the plaintiff filed her legal malpractice complaint without an expert's affidavit, claiming the benefit of the grace period.[226] The court of appeals ruled first of all that the

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[222] The framers, perhaps, chose what might be characterized as some unfortunate language to accomplish this. A court conceivably could conclude that a party who honestly believes the statute of limitations is about to expire nevertheless has no "good faith *basis*" to believe this if in the court's view a reasonable person would not have made the mistake. That is to say, the term "good faith basis" comes close to incorporating an objective element that the framers probably did not mean to include. A reviewing court ought to excuse the inartful wording and make the grace period available to any party invoking it in good faith.

[223] Coleman v. Hicks, 433 S.E.2d 621, 622 (Ga. Ct. App. 1993).

[224] *Id.*

[225] 433 S.E.2d 621 (Ga. Ct. App. 1993).

[226] *Id.* at 622.

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tort elements of the complaint were barred because the plaintiff had failed to file the complaint within the applicable limitations period.[227] The court of appeals also ruled that the contract elements of the complaint were barred by the operation of section 9-11-9.1, because the limitations period for the contract elements was not within ten days of expiring when the complaint was filed, and the plaintiff therefore was not entitled to the benefit of the grace period with respect to the contract elements of the complaint.[228]

The 1997 legislation neutralizes *Coleman* by excusing contemporary filing and making the grace period available when "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 and, because of such time constraints, the plaintiff has alleged that an affidavit of an expert could not be prepared."[229]

The 1997 legislation makes no changes in the mechanics of invoking the grace period—a process that until very recently might have been described as both simple and treacherous because of the decisions of the state court of appeals in *Works v. Aupont*[230] and *Keefe v. Northside Hospital, Inc.*[231] The *Works* decision, as interpreted in *Keefe*, stands for the proposition that a trial judge must accept as true a party's allegation that time constraints prevented the party from securing an affidavit in time to file it before the expiration of the limitations period. The allegation is conclusively presumed to have factual support.[232] So long as the plaintiff then files an affidavit within the grace period, a trial court may not look behind the allegation to determine whether the initial failure to file an affidavit really was attributable to time constraints.[233] And in *Keefe*, the court of appeals held that a plaintiff may not claim the benefit of the grace period unless the complaint includes specific

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[227] *Id.* at 623.

[228] *Id.*

[229] Act of Apr. 21, 1997, sec. 1(b), 1997 Ga. Laws 916, 917 (to be codified at O.C.G.A. § 9-11-9.1(b)) (emphasis added).

[230] 465 S.E.2d 717 (Ga. Ct. App. 1995).

[231] 467 S.E.2d 9 (Ga. Ct. App. 1996).

[232] *Works*, 465 S.E.2d at 718-19.

[233] *Id.*

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language alleging that time constraints prevented the preparation of an affidavit.[234] It is not enough for a complaint generally to invoke the aid of the subsection without referring to time constraints.[235]

The *Keefe* court's perverse insistence on talismanic language should be condemned as a departure from the overall judicial willingness to read an affidavit's language generously, and fortunately the court of appeals now has drawn much of *Keefe*'s sting. In *Glisson v. Hospital Authority*,[236] a majority of the full court of appeals concluded that a party who fails to include the talismanic language in a pleading may add it by amendment.[237]

On the other hand, the *Works* court's conclusive presumption makes a good deal of practical sense as a way of sidestepping what might be described as a logical flaw in subsection 9-11-9.1(b). The subsection's drafters apparently overlooked an important point about how statutes of limitations and other deadlines work. The nearness of a deadline by itself never prevents anything from being done before the deadline. There is always at least one other factor besides the deadline itself that makes the deadline difficult or impossible to meet. Thus, strictly speaking, the failure to have an affidavit prepared in time for filing before the expiration of the relevant limitations period never can be blamed entirely on "time constraints."

If, for example, a person who wishes to press a professional malpractice claim employs counsel only on the day before the expiration of the applicable statute of limitations, it is not the impending expiration of the limitations period by itself that prevents the lawyer from securing an affidavit in time but the failure of the client to secure legal assistance sooner, and the client's failure might be the product of the client's own lack of

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[234] 467 S.E.2d at 10.

[235] *Id.* at 9 (holding inadequate an allegation in a complaint that "pursuant to OCGA § 9-11-9.1, the Plaintiffs are filing this cause of action within ten (10) days of the statute of limitations, and the Plaintiffs by law shall supplement and amend to this Complaint within forty-five (45) days a pertinent Affidavit of an expert competent to testify pursuant to the above-captioned statute, and as to the breach of Defendant's standard of care").

[236] 481 S.E.2d 612 (Ga. Ct. App. 1997).

[237] *Id.* at 615 (noting that plaintiff complied with statute and with case law by amending body of pleading to include specific language required by *Keefe* to claim benefit of grace period).

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diligence or of the client's inability to persuade other lawyers to take the case. Conversely, if a person with a professional malpractice claim employs counsel promptly, but the lawyer then does nothing with the case until the day before the expiration of the applicable statute of limitations, the looming deadline by itself is not the cause of any inability to secure an affidavit in time. And if client and counsel both are diligent, but the person who has agreed to execute the affidavit cannot complete the task because some emergency has intervened, it is the emergency and not merely the approaching deadline that is the problem. The *Works* presumption saves the courts from the formidable task of determining how subsection 9-11-9.1(b) should be applied in such cases.

V. NONCOMPLIANCE

The 1997 legislation makes an important contribution to the law governing the filing of a defective affidavit,[238] but contributes nothing positive to the law governing a complete failure to file an affidavit.[239] To understand the impact of the legislation in these areas, one must understand the subsections of the previous version of section 9-11-9.1 with the most potential to do injustice—subsection 9-11-9.1(e)[240] and its near twin, subsection 9-11-9.1(f).[241]

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[238] *See infra* note 268 and accompanying text (describing right to cure defective affidavit through amendment).

[239] *See infra* notes 307-309 and accompanying text (discussing statute's rules regarding the failure to file an affidavit).

[240] Except as allowed under subsection (b) of this Code section, if a plaintiff fails to file an affidavit as required by this Code section contemporaneously with a complaint alleging professional malpractice and the defendant raises the failure to file such an affidavit in its initial responsive pleading, such complaint is subject to dismissal for failure to state a claim and cannot be cured by amendment pursuant to Code Section 9-11-15 unless a court determines that the plaintiff had the requisite affidavit available prior to filing the complaint and the failure to file the affidavit was the result of a mistake.

O.C.G.A. § 9-11-9.1(e) (1993) (amended 1997).

[241] 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 in 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 available prior to filing the complaint and the failure

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These provisions were added to the statute to make clear that the penalty for a failure to comply with the statute is dismissal with prejudice for failure to state a claim,[242] but the provisions went further. Subsection 9-11-9.1(e) restricted the right of a plaintiff who had not complied with the statute initially to add a sufficient affidavit to the record by amendment,[243] and subsection 9-11-9.1(f) similarly restricted the right of such a plaintiff to dismiss an action voluntarily and then refile with a sufficient affidavit, under

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to file the affidavit was the result of a mistake.

O.C.G.A. § 9-11-9.1(f) (1993) (amended 1997).

[242] Special Judge Brannen, concurring specially in *Bell v. Figueredo*, 381 S.E.2d 29, 30 (Ga. 1989), characterized subsections 9-11-9.1(e) and (f) as having been added by the legislature because § 9-11-9.1, as originally enacted, provided "no specific penalty for failure to comply with [the expert's affidavit] requirement."

A dismissal for failure to comply with § 9-11-9.1 is a dismissal on the merits and therefore has preclusive effect. Centrust Mortgage Corp. v. Smith & Jenkins, P.C., 469 S.E.2d 466, 468-69 (Ga. Ct. App. 1996). Thus, a defendant who secures a dismissal under § 9-11-9.1 may rely on res judicata if the plaintiff subsequently brings a second action asserting a distinct claim for professional malpractice arising from the same factual setting. *Id.* Similarly, a § 9-11-9.1 dismissal in an action brought by a guardian for an injured person bars the guardian from suing for the same injuries after the injured person's death as representative of the decedent's estate. Waldroup v. Greene County Hosp. Auth., 463 S.E.2d 5, 7 (Ga. 1995). On the other hand, the guardian may pursue an action for the decedent's wrongful death. There is no claim preclusion, because the wrongful death action is "separate and distinct" from the earlier action. *Id.* at 8. There is no issue preclusion, because the dismissal of the previous action under § 9-11-9.1 did not amount to the actual litigation of any of the issues in the wrongful death action. *Id.*

If a professional's employer, sued under the doctrine of respondeat superior, secures a dismissal for failure to comply with § 9-11-9.1, and the plaintiff then brings an action against the professional arising from the same factual circumstances, res judicata bars the second action. Hodo v. Basa, 449 S.E.2d 523, 525-26 (Ga. Ct. App. 1994); *see also* McNeal v. Paine, Webber, Jackson & Curtis, Inc., 293 S.E.2d 331, 332-35 (Ga. 1982) (after judgment for employer in action against employer on theory of respondeat superior, action against employee based on same facts is barred by res judicata unless defenses were available to employer in first action that are not available to employee in subsequent action).

Absurdly, if a defendant moves to dismiss under § 9-11-9.1, alleging the insufficiency of the expert's affidavit, but the trial court denies the motion and allows the action to proceed to a trial at which the plaintiff wins a jury verdict, the action apparently remains vulnerable to dismissal with prejudice if an appellate court agrees with the defendant that the affidavit was insufficient. *See* Riggins v. Wyatt, 452 S.E.2d 577 (Ga. Ct. App. 1994) (reversing judgment on jury verdict for plaintiff in medical malpractice action against orthopedic surgeon because professor of applied biomechanics at medical school, who lacked license to practice medicine, was not competent to execute expert's affidavit on matter within his specialized knowledge).

[243] *See infra* note 269 and accompanying text (describing "available" and "mistake" requirements).

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the aegis of Georgia's renewal statute, after the expiration of the limitations period.[244] The range of operation of these subsections, and therefore their potential to do injustice, depended on the answers to at least two interpretive questions. First, did the subsections completely foreclose resort to the amendment process and the renewal statute in order to repair any initial failure to comply with the statute, no matter how minor the shortcoming? And second, were there avenues of redemption, other than the amendment process and the renewal statute, left open by the language of the subsections?

A. FILING AN INADEQUATE AFFIDAVIT

To resolve the first question, an interpreter had to confront an ambiguity in language shared by the subsections. Neither of the subsections applied unless "a plaintiff fails to file an affidavit as required by [section 9-11-9.1] . . . ."[245] One plausible interpretation of this language was that the subsections allowed a curative amendment or resort to the renewal statute so long as the original complaint was accompanied by a document that counted as "an affidavit" in some general sense, even if it failed to satisfy all of the requirements of section 9-11-9.1. On the other hand, the language reasonably might have been read as an insistence on the filing initially not just of "an affidavit," but of an affidavit that complied with the statute. A powerful argument in favor of this second interpretation was that if the subsections were not read in this way, then there was no language anywhere in the statute that specified the consequences of filing a document that counted as an affidavit but that failed to meet all of the requirements of the statute.

In *Cheeley v. Henderson*,[246] the state supreme court seemed to adopt the second interpretation, thus maximizing the capacity of the subsections to do injustice by denying a plaintiff the right to repair through amendment or resort to the renewal statute for even

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[244] *Id.*

[245] O.C.G.A. §§ 9-11-9.1(e), (f) (1993) (amended 1997).

[246] 405 S.E.2d 865 (Ga. 1991), *overruled in part by* Hewett v. Kalish, 442 S.E.2d 233 (Ga. 1994).

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the most technical failure to meet the statute's requirements. *Cheeley* was a legal malpractice case.[247] The plaintiff's affiant held a license to practice law in Georgia and was an associate professor of law specializing in legal ethics.[248] In his affidavit, the law professor offered his opinion, based on his examination of the pleadings and other documents and on discussions with the plaintiff, that the defendant's representation of the plaintiff had fallen "below the required standard of skill, care, and diligence,"[249] and had constituted "legal malpractice."[250] The affidavit itself, however, failed to identify specifically any particular "negligent act or omission claimed to exist" and "the factual basis" for it,[251] as required by section 9-11-9.1.[252] This shortcoming was one that counsel for the plaintiff could have avoided quite simply by "[copying] that information from paragraph 19 of his complaint to paragraph 7 of [the professor's] affidavit."[253] Counsel failed to understand, however, that it was not sufficient for the affiant to address the alleged professional malpractice only in general terms, relying on the complaint to set out particular acts or omissions. The state supreme court in *Cheeley* ruled nonetheless that the plaintiff had failed to comply with section 9-11-9.1 and stated flatly that "cure by amendment is prohibited under these facts"[254] because the professor's affidavit was not "the requisite affidavit . . . ."[255]

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[247] Cheeley v. Henderson, 398 S.E.2d 787 (Ga. Ct. App. 1990), *rev'd*, 405 S.E.2d 865 (Ga. 1991), *overruled in part by* Hewett v. Kalish, 442 S.E.2d 233 (Ga. 1994). The citation is to the court of appeals opinion, because the facts of the case were set out more thoroughly in that opinion.

[248] *Cheeley*, 398 S.E.2d at 789.

[249] *Id.*

[250] *Id.*

[251] *Id.*

[252] Act of Apr. 21, 1997, sec. 1(a), 1997 Ga. Laws 916, 917 (to be codified at § 9-11-9.1(a)).

[253] *Cheeley*, 398 S.E.2d at 790.

[254] Cheeley v. Henderson, 405 S.E.2d 865, 866 (Ga. 1991), *overruled in part by* Hewett v. Kalish, 442 S.E.2d 233 (Ga. 1994).

[255] *Id.*; *see also* Fidelity Enters., Inc. v. Beltran, 447 S.E.2d 150, 151 (Ga. Ct. App. 1994) (indicating that court must judge compliance with § 9-11-9.1 on basis of first affidavit filed rather than looking to subsequent affidavits added by amendment and through renewal process); Rogers v. Coronet Ins. Co., 424 S.E.2d 338, 343-44 (Ga. Ct. App. 1992) (holding that failure of initially filed affidavits adequately to specify negligent act could not be cured by amendment).

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Because the document filed with the complaint in *Cheeley* undoubtedly qualified as "an affidavit" in a general sense, the supreme court in *Cheeley* apparently embraced the proposition that the subsections required the initial filing not just of such a document, but of an affidavit that met all the requirements of the statute, thus putting an enormous and unjustified premium on getting everything right the first time. *Cheeley*, however, was not the state supreme court's last word on the subject. In *Hewett v. Kalish*,[256] the court issued the sweeping pronouncement that subsection 9-11-9.1(e) "is only designed to preclude amendment under § 9-11-15 when the plaintiff completely fails to file an affidavit."[257] Moreover, the *Hewett* court explicitly overruled *Cheeley* "[t]o the extent [that *Cheeley*] is in conflict with [the *Hewett* court's] interpretation of § 9-11-9.1(e)."[258] The *Hewett* court's use of the term "completely" and its reference to *Cheeley* suggested that the court had repudiated the *Cheeley* approach and had adopted instead the view that a plaintiff could repair, through the amendment process or the renewal statute, a failure to comply with section 9-11-9.1, so long as the plaintiff filed with the initial complaint a document that counted as "an affidavit" in some general sense.

Despite *Hewett*'s sweeping language and its negative reference to *Cheeley*, it was far from clear in *Hewett*'s immediate aftermath that the decision should be interpreted as a general repudiation of the *Cheeley* approach to the meaning of the subsections. The first reason to be skeptical was that *Hewett* did not involve either of the subsections directly. It was not a case in which a plaintiff sought to add a sufficient affidavit to the record through a curative amendment, or to start over with a sufficient affidavit through the renewal statute. *Hewett* was a medical malpractice action against a podiatrist.[259] The plaintiff filed with her complaint the affidavit of an orthopedic surgeon.[260] The appeals court affirmed the trial court's dismissal of the complaint because the affidavit failed to state specifically that there is an overlap in the way podiatrists and orthopedic surgeons treat the condition for which the plaintiff

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[256] 442 S.E.2d 233 (Ga. 1994).
[257] *Id.* at 235.
[258] *Id.* at 235-36.
[259] *Id.* at 234.
[260] *Id.*

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consulted the podiatrist.[261] The supreme court ruled that because section 9-11-9.1 constitutes a pleading requirement rather than an evidentiary requirement, there was no need for the affidavit to be so specific in addressing the issue of overlapping expertise.[262] It was enough that the affidavit recited in general terms that the affiant was competent to testify regarding the podiatrist's treatment of the plaintiff.[263]

The *Hewett* court recognized, however, that section 9-11-9.1 ultimately demands more than an assertion in an affidavit that an affiant is competent to testify as an expert in the case. The statute requires competence-in-fact. Thus, the court outlined a procedure for a pre-trial hearing at which both the plaintiff and the defendant might present evidence on the competence-in-fact of the plaintiff's affiant. It was in connection with the *Hewett* court's elaboration of this pre-trial hearing procedure that the court discussed subsection 9-11-9.1(e). The point of the discussion seemed to be that the subsection did not prevent a plaintiff from presenting evidence at such a pre-trial hearing to show the competence of the affiant.[264] The court might have explained the inapplicability of the subsection with the simple observation that the issue in such a pre-trial hearing is not the wording of the affidavit, but the competence-in-fact of the affiant, so that the question of whether or not the plaintiff may amend the affidavit is irrelevant. Instead, however, the court issued its sweeping pronouncement that the subsection applied only when there had been a complete failure to file an affidavit.[265]

Moreover, the *Hewett* court's Delphic overruling of *Cheeley* "to the extent" that *Cheeley* conflicted with the *Hewett* court's reading of subsection 9-11-9.1(e) need not have been interpreted as a repudiation of the *Cheeley* court's holding or as an endorsement of the general proposition that a plaintiff could avoid the strictures of subsections 9-11-9.1(e) and (f) by filing initially a document that counted as an affidavit in some general sense. The reference to *Cheeley* might have been interpreted to mean only that nothing in the *Cheeley* opinion should stand in the way of the pre-trial hearing

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[261] *Id.*
[262] *Id.* at 236.
[263] *Id.*
[264] *Id.* at 235-36.
[265] *Id.* at 235.

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procedure endorsed by the *Hewett* court for resolving disputes about the competence of an affiant to testify in the particular case. And it is at least worth noting that the *Hewett* court did not suggest that the *Hewett* plaintiff could have resolved the section 9-11-9.1 problem in the case by amending the record to include an affidavit executed by a podiatrist, yet this tactic should have been open to the plaintiff under a broad reading of the court's opinion. Finally, the *Hewett* court did not confront the problem that unless the subsections were given their broadest range of operation, there was no language anywhere in the statute specifying the consequences when a plaintiff filed a document that counted as an affidavit, but that failed to meet all of the requirements of the statute.

Notwithstanding these reasons to be skeptical about a broad reading of *Hewett*, Georgia's court of appeals recently confirmed that *Hewett*'s sweeping language should be taken at face value. In *Washington v. Georgia Baptist Medical Center*, the court ruled that a medical malpractice plaintiff could use the amendment process to cure an affidavit's initial failure to set forth any specific acts or omissions committed by the individual defendants.[266] The court invoked *Hewett*:

> Although the ruling in *Hewett* allowed additional evidence to be presented regarding the expert's competency, we do not see the holding as being limited to that particular challenge to the affidavit's sufficiency, and find that when an affidavit has been filed with the complaint, it can be amended to respond to challenges to its sufficiency.[267]

The 1997 legislation ratifies the *Hewett-Washington* doctrine by providing explicitly in a refashioned subsection 9-11-9.1(d) 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."[268]

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[266] 478 S.E.2d 892, 895 (Ga. Ct. App. 1996).

[267] *Id.*

[268] Act of Apr. 21, 1997, sec. 1(d), 1997 Ga. Laws 916, 917 (to be codified at O.C.G.A. § 9-11-9.1(d)). It is worth noting that the legislation includes no parallel provision allowing a party to cure a defective affidavit through dismissal and refiling under the renewal statute.

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B. FAILURE TO FILE AN AFFIDAVIT

Although the cure-through-amendment provision of the 1997 legislation should reduce dramatically the capacity of section 9-11-9.1 to do injustice, it is not a panacea. It is of no help to a party with a potentially meritorious action who fails completely to file an affidavit, perhaps because of a good faith, but mistaken, belief that the action is not one for professional malpractice. Moreover, the 1997 legislation might not offer haven to a party who files as an affidavit a document that was not prepared in strict accordance with the affidavit ritual. A document without notarization or sworn to over the telephone might be regarded, even under the revised statute, as something less than an affidavit and therefore beyond redemption.

Under the pre-1997 version of section 9-11-9.1, if a party failed entirely to submit an affidavit, so that *Hewett-Washington* did not offer salvation, but the party could show that an affidavit was "available" prior to filing the claim and that the failure to submit it was the result of a "mistake," then subsections 9-11-9.1(e) and (f) permitted the party to cure the failure using the amendment process or the renewal statute.[269] Similarly, the 1997 legislation provides in a refashioned subsection 9-11-9.1(e) that a party may repair through renewal a complete failure to submit an affidavit if "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."[270] Remarkably, however, and probably through a simple oversight, the framers of the legislation did not carry forward the appropriate language from the previous subsection 9-11-9.1(e) allowing a cure in these circumstances through amendment.

Although the critical terms "available" and "mistake" were linked in the pre-1997 subsections 9-11-9.1(e) and (f) with the conjunctive "and," suggesting independent requirements, a plausible interpreta-

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[269] Both subsections permitted resort to the amendment process or the renewal statute if "a court determines that the plaintiff had the requisite affidavit available prior to filing the complaint and the failure to file the affidavit was the result of a mistake." O.C.G.A. §§ 9-11-9.1(e), (f) (1993) (amended 1997).

[270] Act of Apr. 21, 1997, sec. 1(e), 1997 Ga. Laws 916, 197 (to be codified at O.C.G.A. § 9-11-9.1(e)).

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tion of the subsections and of the similar language in the 1997 legislation is that the much more important requirement is the requirement that the party "had" the affidavit. Any unplanned failure to submit an available affidavit arguably should count as a "mistake." In *Saint Joseph's Hospital, Inc. v. Nease*, the state supreme court seemed to adopt this reading.[271] *Nease* involved medical malpractice litigation that had originated years before the enactment of section 9-11-9.1. The Neases brought their first action in 1982 in a state court, but voluntarily dismissed it in 1987 and refiled under the renewal statute in a superior court. The Neases' second complaint was filed in June of 1987, before the July 1 effective date of section 9-11-9.1. In the second action, the defendants moved for summary judgment, and the Neases responded by submitting an expert's affidavit. They then voluntarily dismissed the second action and filed a third action in November 1987, after the effective date of section 9-11-9.1, but failed to submit an affidavit with the complaint. When the defendants invoked section 9-11-9.1, the Neases invoked the amendment process, adding to the record the affidavit they had used to oppose summary judgment in the second action.[272]

The state supreme court ruled in *Nease* that the amendment was permissible:

> There is no doubt that the Neases had obtained the affidavit before filing suit. They simply neglected to file it with their complaint. Under the statute, failure to obtain the affidavit might be a fatal defect. Failure to file it with the complaint is an amendable defect because "Is not the chief object of amendment the correction of mistakes?"[273]

The *Nease* court did not rely specifically on subsection 9-11-9.1(e) because the subsection was added after the Neases amended their complaint, but the court concluded in a footnote that subsections 9-

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[271] 377 S.E.2d 847, 849 (Ga. 1989).

[272] *Id.* at 848.

[273] *Id.* at 849 (footnotes omitted) (quoting Ellison v. Georgia R.R. & Banking Co., 13 S.E. 809, 817 (Ga. 1891)).

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11-9.1(e) and (f) amounted to a codification of the *Nease* approach and that the application of subsection 9-11-9.1(e) therefore would have produced the same result on the *Nease* facts.[274] The Neases, according to the court, "had the requisite affidavit prior to filing the complaint and the failure to file the affidavit was the result of a mistake."[275]

Although the court couched its point in the conjunctive—the Neases had the affidavit *and* the failure to file it was the result of a mistake—the court did not say what the mistake was. The most sensible inference, given the filing of the Neases' third complaint so soon after the effective date of section 9-11-9.1, is that the Neases' lawyer was unaware of the statute, so that the mistake was a mistake about what the law required of the Neases at the time their complaint was filed. The court, however, did not confirm this in its opinion, much less explain why ignorance of the enactment of section 9-11-9.1 should count as a "mistake" within the meaning of the subsections. The very absence from the *Nease* opinion of any specific discussion of the character of the mistake is strong evidence that, in the court's view, the reason for the Neases' failure initially to submit an affidavit was irrelevant, at least so long as it was an unintentional failure. What mattered most was that the Neases had obtained an affidavit prior to filing the complaint.

This reading of *Nease* would not frustrate in any obvious way the purpose of section 9-11-9.1, because a party who has secured an affidavit substantiating the party's professional malpractice claim has done the up-front preparation that the statute requires as a deterrent to the filing of baseless claims, whatever the reason for the party's unintentional failure actually to submit the affidavit along with the claim. The failure to submit the affidavit puts the parties and the court to some additional bother in straightening the matter out, but that hardly justifies a rule denying a party his or her day in court on the merits. Moreover, extending the definition of "mistake" to any unintentional failure to file an affidavit would save the state's courts from the busywork of having to craft a potentially complex body of artificial distinctions to determine

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[274] *Id.* at 849 n.3.

[275] *Id.*

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whether particular slips by parties or their lawyers count as mistakes within the meaning of the statute. Should the term "mistake" be confined to clerical errors? If, as probably was the case in *Nease*, counsel simply is unaware of section 9-11-9.1 and files without an affidavit because of the ignorance, is that the right sort of mistake? Suppose counsel is aware of the statute, but believes erroneously that the statute is inapplicable. Is that the right sort of mistake?

Unfortunately, Georgia's court of appeals seems bent on asking and answering these questions. In the absence of further guidance from the state supreme court after *Nease*, and given the Delphic character of the *Nease* opinion itself, the court of appeals apparently has embarked on the mission of delineating the contours of a substantial mistake requirement. In *Dozier v. Clayton County Hospital Authority*, for example, a panel of the court of appeals apparently took the view that a plaintiff who possessed an adequate affidavit, but failed to file it because of some mistake about the applicability of section 9-11-9.1, could not resort to subsections 9-11-9.1(e) and (f) because a mistake of law did not count as a "mistake" within the meaning of the subsections.[276] The *Dozier* plaintiffs had filed an affidavit but had failed to attach to the affidavit the medical records on which the affiant had relied.[277] Although the court of appeals ruled that section 9-11-9.1 did not require the attachment of the records,[278] the court also indicated in passing that if the plaintiffs had been required to attach the records and had failed to attach them because of a misunderstanding about what section 9-11-9.1 required, the misunderstanding would not have counted as a "mistake" within the meaning of subsections 9-11-9.1(e) and (f).[279] The court cited the state supreme court's decision in *Cheeley v. Henderson*[280] as authority for the proposition,[281] but did not elaborate on the point or quote specific language from *Cheeley*.

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[276] 424 S.E.2d 632, 636 (Ga. Ct. App. 1992).

[277] *Id.* at 633.

[278] *Id.* at 638.

[279] *Id.* at 636.

[280] 405 S.E.2d 865 (Ga. 1991), *overruled in part on other grounds by* Hewett v. Kalish, 442 S.E.2d 233, 235-36 (Ga. 1994).

[281] 424 S.E.2d at 636.

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The *Dozier* court almost certainly misread *Cheeley*. It is very unlikely that the *Cheeley* court relied at all on the "mistake" language in subsections 9-11-9.1(e) and (f). On the contrary, the most straightforward reading of the decision is that the court concluded that no affidavit was "available" within the meaning of the subsections at the time the plaintiff filed his complaint, because the only putative affidavit was the document actually filed by the plaintiff along with the complaint. That document, in the *Cheeley* court's view, did not count as an affidavit under section 9-11-9.1 because of a flaw in its content.[282] Moreover, the *Dozier* dictum arguably is in tension with *Nease*, because the excused "mistake" in *Nease* almost certainly was a mistake of law—counsel's unawareness of section 9-11-9.1. Nonetheless, *Dozier* is evidence that the court of appeals is prepared to enforce a substantial mistake requirement.

In *Brown v. Middle Georgia Hospital, Inc.*, a panel of the court of appeals held that a medical malpractice plaintiff who initially had filed a facsimile of an affidavit could not add an original affidavit to the record by amendment, because subsection 9-11-9.1(f) applied and the plaintiff's failure to submit an original affidavit with the complaint had not been the result of a "mistake" within the meaning of the subsection.[283] According to the plaintiff's lawyer, the chain of events leading to the filing of the facsimile of the affidavit had begun with a hospital emergency. The emergency had prevented the plaintiff's first expert from mailing her affidavit personally to the plaintiff's lawyer, and the expert therefore had asked her mother to mail the affidavit. The plaintiff's lawyer, believing that the affidavit had not been mailed in time by the expert's mother, turned to a second expert and asked the second expert to transmit a facsimile of her affidavit for filing with the complaint.[284] The court rejected the proposition that the failure of the first expert's mother to mail the affidavit in time qualified as a "mistake," concluding that the proposition "stretches the meaning of 'mistake' beyond the intention of the statute."[285] The court,

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[282] *See also supra* notes 246-255 and accompanying text (analyzing *Cheeley*).
[283] 440 S.E.2d 687, 688-89 (Ga. Ct. App. 1994).
[284] *Id.* at 689.
[285] *Id.*

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however, offered no reason why the logistical breakdown leading to the filing of the facsimile of the affidavit could not be characterized under the statute as somebody's mistake.

The court of appeals returned to the context of the filing of a facsimile of an affidavit, rather than an original document, in *Sisk v. Patel*.[286] In *Sisk*, a 1995 decision of the full court, the affiant had provided the plaintiff with a facsimile of his affidavit and had assured the plaintiff that the original would be forwarded in the mail.[287] The plaintiff filed the facsimile of the affidavit[288] and later was denied permission by the trial court to add the original affidavit to the record.[289] Notwithstanding the panel decision in *Brown*, the full court ruled for the plaintiff, voting "to allow the filing of a facsimile of a properly executed affidavit with a complaint in a professional malpractice action"[290] and then "[to allow] the original . . . to be filed as a supplemental pleading . . . ."[291]

What is crucial to appreciate about *Sisk* is that the court's ruling did not flow from a straightforward application of subsection 9-11-9.1(e). In fact, the precise rationale for the ruling is difficult to isolate. First of all, the court did not state, and must not have meant, that the filing of the facsimile of the affidavit was enough by itself to satisfy section 9-11-9.1, or the court would not have provided for the filing of the original affidavit as a supplemental pleading. If the facsimile of the affidavit did not count as a sufficient affidavit under the statute, then the plaintiff had the right to cure the initial failure to comply with the statute only if (1) the facsimile of the affidavit was an "affidavit" in some general sense, so that the *Hewett-Washington* approach was available, or (2) the facsimile of the affidavit did not qualify as an affidavit, but under subsection 9-11-9.1(e) the plaintiff had the right to add the original affidavit to the record, or (3) the facsimile of the affidavit did not qualify as an affidavit, but the plaintiff had the right to add the original affidavit to the record on some legal basis other than subsection 9-11-9.1(e).

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[286] 456 S.E.2d 718 (Ga. Ct. App. 1995).
[287] *Id.* at 718-19.
[288] *Id.* at 719.
[289] *Id.*
[290] *Id.* at 720.
[291] *Id.*

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There are at least three reasons to conclude that the *Sisk* majority was not applying the *Hewett-Washington* approach in allowing the initial filing of a facsimile of an affidavit, followed by the filing of the original affidavit, to count as compliance with section 9-11-9.1. First, the majority did not cite *Hewett*. Second, the majority did not invoke the distinction on which *Hewett* turned—the distinction between an affidavit that fails to meet all of the requirements of section 9-11-9.1 and a document that fails to qualify as an affidavit. Third, the majority offered no rebuttal to Chief Judge Beasley's insistence in dissent that a facsimile of an affidavit "does not bear original signatures and thus it does not suffice to constitute an affidavit."[292]

There is language in the majority opinion suggesting that the *Sisk* court was relying on subsection 9-11-9.1(e) in holding for the plaintiff. In particular, the court explicitly embraced the plaintiff's argument that under the *Sisk* facts, the original affidavit was "available" within the meaning of the subsection. The court rejected the proposition that physical possession of an affidavit was necessary to meet the availability requirement, concluding that an affidavit counted as "available" within the meaning of the subsection "when it is in existence and acquirable by plaintiff, even though not physically in the plaintiff's possession."[293] Moreover, the court agreed with the plaintiff that "the existence of a facsimile of [an] affidavit establishes its existence and shows it is 'available,' within the meaning and purpose of the statute."[294] In a puzzling sentence, however, that might be thought flatly at odds with the court's approach to the availability requirement, the court then refused to classify the initial filing of a facsimile of an affidavit as an "amendable defect," because under that approach "the original affidavit would have had to have been in the physical possession of counsel at the time of filing, and the facsimile filed as the result of a mistake."[295] Having just rejected any "physical possession" test for availability, the court seemed almost in the next sentence to embrace it.

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[292] *Id.* at 721 (Beasley, C.J., dissenting).
[293] *Id.* at 719.
[294] *Id.*
[295] *Id.* at 720.

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Whatever else might be said about the court's refusal to rely on an "amendable defect" rationale for its ruling, this much seems clear: The court was not applying subsection 9-11-9.1(e), with its "available" and "mistake" elements, in holding for the plaintiff. And it is a fair conjecture that the court avoided subsection 9-11-9.1(e) primarily because the court agreed tacitly with Chief Judge Beasley, who in dissent read the subsection to include a distinct mistake requirement that was not satisfied on the *Sisk* facts. According to Chief Judge Beasley, "the failure to file the original affidavit contemporaneously with the complaint was not due to any mistake but rather to the fact that it was not physically in plaintiff's possession when the complaint was filed."[296]

Of all of the imaginable interpretations of the *Sisk* decision, the one that comes closest to making sense is that the court relied neither on the *Hewett-Washington* doctrine nor on subsection 9-11-9.1(e), but on a notion that when a party's effort to meet the requirements of section 9-11-9.1 satisfies the purpose of the statute, substantial compliance with the statute is enough. The court first emphasized that the filing of a facsimile of an affidavit satisfies the statute's purpose: "[A facsimile of an affidavit] is evidence that an expert deems the action to have factual merit, and [the defendant] has made no challenge to the genuineness of the affidavit."[297] The court then noted that in another context besides the application of section 9-11-9.1, the state supreme court "recently declined to require letter-perfect compliance with procedural requirements in a medical malpractice case."[298] And finally, the court all but conceded Chief Judge Beasley's point that its approach could not be squared with subsection 9-11-9.1(e) if letter-perfect compliance with the subsection was necessary, and that the decision was the product of some judicial hostility to the strictures of the statute:

> The dissent argues that the legislature specified the requirements and procedures applicable to OCGA § 9-11-9.1 affidavits and we are precluded from taking judicial exception thereto. However, the history

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[296] *Id.* at 722 (Beasley, C.J., dissenting).
[297] *Id.* at 719.
[298] *Id.*

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> of OCGA § 9-11-9.1 in the appellate courts has shown beyond a reasonable doubt that it is only with great difficulty made workable in the practical arena of litigation, and has largely failed to achieve its purpose of reducing frivolous litigation. Rather, it has created an added layer of motions regarding the sufficiency of affidavits preceding the motions for summary judgment on the merits. Rather than continuing to interpret and reconcile subsection after subsection added to the statute by the legislature in attempts to fix what is fundamentally broken, the better approach is to construe pleadings liberally to do substantial justice in accordance with OCGA § 9-11-8(f).[299]

Perhaps the *Sisk* court's expansive interpretation of the term "available" in subsection 9-11-9.1(e) will stick, despite the subsequent sentence in the majority opinion apparently taking back the interpretation. It remains to be seen, as well, whether the court's substantial compliance approach will have any impact beyond the realm of the facsimile cases. The 1997 legislation certainly does not include any language embracing it explicitly. One context in which the decision might have been helpful was the initial filing of a document lacking the formality necessary to qualify as an affidavit. There is little doubt that a writing bearing the signature of an expert and reciting that there was a departure from a professional standard of conduct is almost certainly genuine and therefore satisfies the purpose of the statute, even if the writing lacks notarization or was sworn to over the telephone rather than in person. In *Allen v. Caldwell*,[300] however, the full court of appeals decided that *Sisk* is inapplicable when what is filed initially is a facsimile of an unnotarized "affidavit," noting that "in the absence of a valid jurat, a writing in the form of an affidavit has no force, no validity, amounts to nothing . . . ."[301] Finally, in light of

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[299] *Id.* at 720.

[300] 470 S.E.2d 696 (Ga. Ct. App. 1996).

[301] *Id.* at 697 (quoting Harvey v. Kidney Ctr. of Cent. Ga., 444 S.E.2d 590, 591 (Ga. Ct. App. 1994)).

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the *Sisk* majority's unwillingness to challenge Chief Judge Beasley's approach to the "mistake" language in subsection 9-11-9.1(e), there seems to be little hope for persuading the court of appeals that any unintentional failure to submit an available affidavit could count as a mistake.

C. THE *MORITZ* MANEUVER

Remarkably, a party who failed to satisfy the requirements of the pre-1997 version of section 9-11-9.1 and who was prohibited by subsections 9-11-9.1(e) and (f) from curing the shortcoming through the amendment process or resort to the renewal statute sometimes could secure redemption because of the decision of the state court of appeals in *Moritz v. Orkin Exterminating Co.*[302] The *Moritz* panel held unanimously that a plaintiff who had failed entirely to file an affidavit in a professional malpractice action against a pest exterminating company could cure the failure by voluntarily dismissing the action and then refiling it with affidavits before the expiration of the limitations period.[303] This maneuver, the court held, was not foreclosed by subsection 9-11-9.1(e) or (f).[304] Subsection 9-11-9.1(e) did not bar the maneuver because the plaintiff did not offer the affidavits as amendments in the original proceeding. Subsection 9-11-9.1(f) did not bar the maneuver because the plaintiff did not seek the aid of the renewal statute after the expiration of the limitations period.

The defendant in *Moritz* argued sensibly that section 9-11-9.1(e) should be interpreted as foreclosing the maneuver, even though the subsection did not prohibit it expressly, because the maneuver allowed a party to "sidestep" the subsection's restrictions on curative amendments.[305] The *Moritz* court concluded, however, that reading subsection 9-11-9.1(e) in this way "would render meaningless"[306] subsection 9-11-9.1(f). Although the court did not expand much on this point, the court apparently meant that under the defendant's reading of subsection 9-11-9.1(e), a party implicitly

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[302] 450 S.E.2d 233 (Ga. Ct. App. 1994).
[303] *Id.* at 234.
[304] *Id.*
[305] *Id.*
[306] *Id.*

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would be prohibited by that subsection from resorting to the renewal statute after the expiration of the limitations period, and the legislature therefore would have had no need to foreclose that avenue of redemption explicitly in subsection 9-11-9.1(f).

If the court's objective, however, was to make the most sense of what the legislature did in enacting the two subsections, it is far from clear that the court accomplished its objective. No defensible legislative policy is served by prohibiting a party from adding an affidavit to the record through the simple mechanism of an amendment, but allowing the party to accomplish the same result through the Rube Goldberg device of voluntarily dismissing the original claim and then refiling with an affidavit within the limitations period. Relegating a party to the *Moritz* maneuver is not merely inefficient; it is unfair, because of the way it parcels out redemption. A party cannot employ the maneuver without knowing about it, and the statutory language itself nowhere makes clear that the maneuver is available. Moreover, a party presumably must be nimble enough to secure a voluntary dismissal of the initial claim before the trial court rules on the defendant's motion to dismiss for failure to comply with section 9-11-9.1. The fate of a claim should not be made to turn on such nimbleness. And a party who waits, as many do, until the last moment before the expiration of the limitations period to file a claim cannot take advantage of the maneuver. The most that can be said in favor of the *Moritz* decision is that some savvy or fortunate parties with potentially meritorious claims, who otherwise would be denied a day in court because of the formalism of section 9-11-9.1, may have their day in court because of the *Moritz* maneuver.

By its silence on the point, the 1997 legislation invites the conclusion that the *Moritz* maneuver remains available under the revised statute, thus completing the disappointing picture of the 1997 legislation's impact on the law governing a complete failure to file an affidavit: Under pre-1997 law, a party who failed entirely to submit an affidavit and who could not take advantage of the statute's grace period could cure the failure in any of three ways. The first and second mechanisms were the statute's twin subsections (e) and (f), which permitted adding a sufficient affidavit to the record by amendment or dismissing the claim and then refiling it with an affidavit under the renewal statute, if the party "had the

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requisite affidavit available prior to filing the complaint and the failure to file the affidavit was the result of a mistake."[307] The third mechanism was the *Moritz* maneuver. The 1997 legislation inexplicably omits the cure-by-amendment option that had been conferred by subsection 9-11-9.1(e),[308] but preserves the cure-through-renewal option of the former subsection 9-11-9.1(f)[309] and apparently preserves the *Moritz* maneuver. The legislation, therefore, actually increases the disarray of the law governing a complete failure to file an affidavit. The framers of the legislation should have seized their opportunity to bring some coherence to this doctrine by (1) deciding what circumstances justify permitting a party to cure a complete failure to file an affidavit, (2) spelling out these circumstances in section 9-11-9.1, and (3) allowing a party to add an affidavit to the record through the straightforward mechanism of an amendment when these circumstances are present in a case.

VI. CONCLUSION

In light of the ten-year history of section 9-11-9.1, and given the serious remaining flaws in the statute, one might ask whether the legislature should repeal it altogether the next time around. Some of Georgia's appellate judges have suggested repeal, as have commentators.[310] The statute certainly should be repealed unless

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[307] *See supra* notes 269-301 and accompanying text (discussing in detail the meaning of these subsections).

[308] *See supra* note 270 and accompanying text (discussing cure of failure to submit affidavit).

[309] *Id.*

[310] Over the past few years, Georgia's judges on a number of occasions have indicated strongly that section 9-11-9.1 should be repealed. Most recently, Judge Johnson wrote for a majority of the full court of appeals in *Sisk v. Patel*, 456 S.E.2d 718 (Ga. Ct. App. 1995), that section 9-11-9.1 is "fundamentally broken . . . ." *Id.* at 720. *See supra* text accompanying note 299 (quoting Judge Johnson more fully). Judge Johnson had expressed his misgivings about the statute earlier:

> Few issues have proved more vexatious to trial lawyers, trial judges, and the appellate courts of this state than the proper application of OCGA § 9-11-9.1. Intended to prevent frivolous litigation and all the costs inherent therein for both litigants and courts, this rule has instead caused more litigation. Rather than dealing at the summary judgment stage with the issues the legislature intended to solve, we have added a new layer of litigation at the motion to dismiss stage.

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it deters the filing of a substantial number of groundless claims. No one can say with any assurance, however, how many groundless claims that would have been filed in the absence of the statute were not filed because an expert could not be found to execute the required affidavit.

Lawyers who specialize in representing professional malpractice plaintiffs will tell you that section 9-11-9.1 has made no difference in the way they prepare cases, because the economics of contingent fee representation dictate that they assure themselves at the outset that there will be expert evidence of liability. Perhaps the statute has influenced the behavior of lawyers inexperienced in professional malpractice litigation who would have been content, in the absence of the statute, to rely initially on their own inflated evaluation of the merits of a claim or who would have filed without adequate preparation in the hope of securing an early and substantial settlement. This assumes, however, that overconfident or settlement-driven lawyers who have been forced by the statute to seek expert substantiation of groundless claims have been unable to secure the substantiation. The assumption rings true, but it is undermined to some extent by the cynical lore in the professional malpractice bar that experts can be found who will substantiate, for an average fee of $1500, even the most dubious claims.

> Since its enactment in 1987, there have been approximately 90 decisions from this court and the Supreme Court wrestling with this rule. Sadly, in the effort to bring some order and predictability to this area of the law, it appears that we have made matters worse. Perhaps it is time for the legislature to reconsider OCGA § 9-11-9.1, and to conclude that it was little more, in the end, than a noble effort which failed miserably to accomplish the goals for which it was enacted.

Tye v. Wilson, 430 S.E.2d 129, 132 (Ga. Ct. App. 1993) (Johnson, J., dissenting).

Also, in *Johnson v. Brueckner*, 453 S.E.2d 76 (Ga. Ct. App. 1994), Judge Blackburn wrote for a panel of the court of appeals that "[p]erhaps the legislature should reconsider the appropriateness of OCGA § 9-11-9.1, in view of its effect on the function of the courts, which is to dispense justice, and the unquestioned ineffectiveness of the statute in reducing litigation." *Id.* at 78.

The authors of the 1995 survey of Georgia trial practice and procedure published in the *Mercer Law Review* called for the repeal of section 9-11-9.1, describing the statute as an "ill-conceived enactment." C. Frederick Overby & Jason Crawford, Survey Article, *Trial Practice and Procedure*, Annual Survey of Georgia Law, 47 MERCER L. REV. 353, 368 (1995).

Repeal of the measure would carry with it the considerable collateral benefit for the federal courts of mooting the thorny problem of whether the statute must be applied in diversity cases in Georgia. *See generally* Robert K. Harris, Case Comment, Brown v. Nichols: *The Eleventh Circuit Refuses to Play the* Erie *Game with Georgia's Expert Affidavit Requirement*, 29 GA. L. REV. 291 (1994).

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Moreover, the pivotal question is not the deterrent value of some previous version of the statute, or even of the current version, but of a version further refined to meet the objections set out in this Article.[311] There is simply no way to predict accurately whether such a statute would prove an effective enough deterrent to justify

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[311] Given the constellation of interests likely to oppose an outright repeal of section 9-11-9.1, the more realistic option might be further revision, perhaps along the lines of the following proposed text:

> (a) Whenever a party may prevail on a claim only by presenting expert evidence of a departure from a professional standard of conduct, the pleading asserting the claim shall be accompanied by an expert's statement that the claim's factual allegations, taken as true, constitute such a departure.
>
> (b) By a motion accompanying the responsive pleading, an opposing party may seek a judicial determination of noncompliance with subsection (a) of this section. If the court determines that a party failed to comply with subsection (a) of this section, then the court shall order the party to file an amended pleading accompanied by an expert's statement within 45 days after the entry of the order. The court may grant additional time to file the amended pleading when justice so requires, including time to conduct whatever discovery is necessary to frame allegations for an expert's review. If the party fails to file the amended pleading within the time provided, then the court shall order dismissal of the claim with prejudice.
>
> (c) If the court determines under subsection (b) of this section that a party failed to comply with subsection (a) of this section, then the court may impose a sanction on the party or counsel or both, unless the failure was justified or excusable. The sanction may include the attorney's fees of the opposing party that are attributable to the failure to comply with subsection (a) of this section. The court may order dismissal of the claim only as provided under subsection (b) of this section.
>
> (d) If a party prevails on the merits of a claim, then the issue of the party's compliance with subsection (a) of this section with respect to the claim shall be treated as moot.

Subsection (a) of the proposed legislation would re-anchor section 9-11-9.1 to the principle that a party may be required to provide up-front expert substantiation of a claim when expert substantiation will be required to prevail on the claim at trial. The subsection also would eliminate the insistence on the legal formality of an affidavit. Subsection (b) would provide a simple, straightforward avenue of redemption without distinguishing between partial and complete failures to comply with the statute. Subsection (c) would create a substantial incentive to comply with the statute initially rather than relying automatically on the bail-out offered by subsection (b). Subsection (d) would embrace the common sense proposition that it is pointless to require a party to jump through the hoop of a substantiation requirement after the party has demonstrated in the best possible way that a claim is substantial.

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the costs to litigants and to the judicial system of administering it. A point in its favor presumably would be that these administrative costs would be lower than the costs imposed over the past decade by section 9-11-9.1, because the simpler and more generous redemptive features of the statute would further reduce the parties' incentive to litigate compliance issues to the hilt.

At an earlier point in its ten-year history, section 9-11-9.1 might have been analogized to a costly drug with unproved therapeutic value and too-often-fatal side effects. Such a drug would be removed from the market by the Food and Drug Administration. The 1997 legislation, in part confirming recent judicial work, has made section 9-11-9.1 much safer, but still potentially fatal to meritorious professional malpractice claims. If the statute can be reformed further to eliminate entirely its most objectionable features, then the worst that might be said of it—in light of its questionable effectiveness—is that it is a relatively inexpensive placebo for the "treatment" of groundless litigation.

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