IN THE SUPREME COURT
STATE OF GEORGIA

THE MEDICAL CENTER, INC.,

Petitioner,

v.

DANIELLE BOWDEN, JACQUELINE PEARCE, KARLA JASPER, and CHRISTIAN SPROUSE, individually and on behalf of all others similarly situated,

Respondents.

CASE NO.
Court of Appeals No. A18A1249

BRIEF OF GEORGIA HOSPITAL ASSOCIATION, INC. and GEORGIA ALLIANCE OF COMMUNITY HOSPITALS, INC., as AMICI CURIAE, IN SUPPORT OF THE MEDICAL CENTER, INC.'S PETITION FOR CERTIORARI

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Pursuant to Georgia Supreme Court Rule 23, the Georgia Hospital Association, Inc. and the Georgia Alliance of Community Hospitals, Inc. file this amici curiae brief in support of the petition for certiorari review filed by The Medical Center, Inc. ("TMC" or the "Petitioner") seeking review and partial reversal of the Court of Appeals' November 1, 2018 opinion (the "Opinion").

I. STATEMENT OF INTEREST

A. Amicus Curiae – The Georgia Hospital Association.

The Georgia Hospital Association, Inc. ("GHA") is a nonprofit trade association made up of member health systems, hospitals, and individuals in administrative and decision-making positions within those institutions. Founded in 1929, GHA serves 168 hospitals in Georgia, which in turn employ thousands of physicians and even more nurses and other healthcare providers. GHA's purpose is to promote the health and welfare of the public through the development of better hospital care for all of Georgia's citizens. GHA represents its members in legislative matters, as well as in filing *amicus curiae* briefs on matters of great gravity and importance to both the public and to health care providers serving Georgia citizens.

B. Amicus Curiae – The Georgia Alliance Of Community Hospitals.

The Georgia Alliance of Community Hospitals (the "Alliance"), a Georgia nonprofit corporation, is an industry association comprised of approximately 75 nonprofit community hospitals and health systems, urban and rural, large and

small, located throughout the State of Georgia. The Alliance is dedicated to furthering the ability of community hospitals to fulfill their primary mission of serving their local communities. To that end, the Alliance represents its members in efforts to promote sound health care policy, laws, and regulations affecting Georgia's community hospitals.

C. Interest of Amici Curiae.

GHA and the Alliance submit this amici curiae brief in the interest of carrying out their missions for their member hospitals and in furtherance of the overall health and welfare of the citizens of this State. The Opinion calls into question whether GHA and Alliance members may file hospital liens based on established charges that have been reported to and, in many cases, approved by the government. GHA and the Alliance submit this brief because their member hospitals, and the communities and patients they serve, will suffer great harm if the Opinion stands. Indeed, hospitals that have filed liens consistent with the respective chargemaster rates will face unnecessary and unwarranted liability exposure. Furthermore, because the determination of what constitutes a "reasonable charge" for a particular service will always be subject to debate, the Opinion will likely have a chilling effect on hospitals' continued use of Georgia's hospital lien statute, which will be financially harmful to both hospitals and patients, and erode the General Assembly's purposes of enacting the hospital lien

statute in the first place. This case, therefore, presents issues of critical importance to hospitals and patients throughout Georgia.

II. INTRODUCTION

When last before this Court, this seedling of a case involved a simple discovery dispute between two parties concerning what documents and information should be produced in discovery to test the reasonableness of the amount of a single hospital lien sought to be enforced by TMC against Danielle Bowden in the amount of $21,409.59. Because TMC sought a declaratory judgment that the amount of its lien was reasonable, and Bowden conversely claimed that the lien amount was excessive and did not reflect the reasonable value of her treatment, the actual value of the medical services provided to Bowden was at issue. Accordingly, this Court held that "where the subject matter of a lawsuit includes the validity and amount of a hospital lien for the reasonable charges for a patient's care, how much the hospital charged other patients, insured or uninsured, for the same type of care during the same time period is relevant for discovery purposes." Bowden v. The Medical Center, Inc., 297 Ga. 285, 286 (2015) ("Bowden II"). Much has changed in this case since the Court issued its opinion in 2015.

This case has since mushroomed and now presents the much broader issue of whether a hospital may be held liable for damages on a classwide basis for filing

hospital liens consistent with its publically available chargemaster rates, or at any rate that ultimately is determined to be in excess of "reasonable charges."

Based on allegations that TMC's chargemaster rates are excessive and per se unreasonable, on November 1, 2018, the Court of Appeals affirmed the trial court's certification of a class of plaintiffs who received medical care from TMC for injuries resulting from the tortious conduct of others and whose potential tort recoveries were subjected to hospital liens. Additionally, the Court of Appeals affirmed the denial of TMC's motion for summary judgment on Respondents' claims for unjust enrichment or breach of contract, fraud, negligent misrepresentation, attorneys' fees, and punitive damages.[1]

In affirming, the Court of Appeals erroneously concluded that Georgia's hospital lien statute, O.C.G.A. § 44-14-470 et seq., "permits the hospital to place a lien on any recovery for only the *reasonable* amount of charges." (Opinion at 7) (emphasis in original.) The Court of Appeals furthered erred by assuming that if the amount of a particular hospital lien ultimately is determined to be unreasonable or otherwise subject to reduction, such finding necessarily would mean that TMC violated Georgia's hospital lien statute, thereby subjecting TMC to potential liability based on claims for unjust enrichment or breach of contract, fraud, and

[1] The Court of Appeals correctly reversed the trial court's denial of TMC's summary judgment motion on Respondents' claims for alleged violations of Georgia's Racketeering Influenced Corrupt Organization Act ("RICO"), O.C.G.A. § 16-14-4, and Georgia's Uniform Deceptive Trade Practices Act (UDTPA), O.C.G.A. § 10-1-372.

negligent misrepresentation. (Opinion at 23.)[2] These errors misconstrue the plain language of Georgia's hospital lien statute, ignore binding precedent from this Court making clear that the lien amount need not be exact on the date it is filed, see Kight v. MCG Health, Inc., 296 Ga. 687, 689 (2015), and misinterpret the reach of this Court's prior decision in this case. (See Opinion at 39) ("The Supreme Court's decision in *Bowden II* implies that the Plaintiffs' claims, particularly her contract claim, remain viable causes of action.").

If the Opinion stands, Georgia's hospitals will have no benchmark by which they can safely file liens without risking liability exposure because determination of what constitutes a "reasonable charge" for a particular service or group of services will always be subject to debate. And, if the amount set forth in the lien notice is later reduced, under Respondents' theory of the case, hospitals would be subject to near unlimited liability, including possible punitive damages.

The Georgia General Assembly never intended to expose hospitals and other care providers to such liability exposure when it enacted Georgia's hospital lien statute in 1953. Indeed, the hospital lien statute creates no private right of action against hospitals, either express or implied, for alleged violations of the statute. Nor is there any basis to conclude that the General Assembly intended that the

[2] Specifically, in the Court of Appeals' Opinion, Judge Miller wrote: "[D]eciding whether there has been a violation of the lien statute inevitably requires the courts to determine the reasonableness of the chargemaster rates that are used as the basis for the lien amount in the first place." (Opinion at 23.)

hospital lien statute should give rise to ancillary causes of action against hospitals based on such alleged violations. See Best Jewelry Mfg. Co., Inc. v. Reed Elsevier Inc., 334 Ga. App. 826, 835 (2015) (making clear that common law causes of action, which are simply recast as torts and based entirely on alleged violations of a statute that provides no private right of action, are subject to dismissal as a matter of law).

Of course, this does not mean that patients or other interested parties have no recourse to contest the amount of a lien claimed to be due for the hospital. Georgia courts have long recognized that such challenges are appropriate, for example, in an action to enforce or invalidate the lien. But the fact that the amount and/or validity of a particular hospital lien may be contested in a collection action does not mean, as the Court of Appeals' Opinion incorrectly assumes, that causes of action, including claims for, *inter alia*, fraud and negligent misrepresentation, may accrue to patients based on a hospital's mere act of filing a lien consistent with its established charges, i.e., chargemaster rates, if those charges are later reduced or otherwise determined to be in excess of a "reasonable charge."

The need for clarity on this issue cannot be overstated. The Court of Appeals erroneously determined that Respondents alleged misrepresentations sufficient to support claims for both fraud and negligent misrepresentation. Because the Opinion authored by Judge Miller is not joined by the other members of the Panel,

however, this holding constitutes physical precedent only and is not binding on the lower courts in addressing identical claims which are now pending in other courts. Respondents' counsel has filed at least four other similar lawsuits around the state implicating Georgia's hospital lien statute.[3] Like Respondents in this case, plaintiffs in those lawsuits seek class certification and assert a host of fraud-based claims. Thus far, at least three trial judges in those cases have reached the question at the heart of TMC's motion for summary judgment – namely, whether representations included in hospital liens are sufficient to support claims for fraud, negligent misrepresentation, and/or violations of Georgia's RICO statute – and all three have resolved the question differently. Presently, there is no binding precedent to guide trial court judges in these similar pending lawsuits.

For each of these reasons, this case presents questions of great concern, gravity, and importance to the public. The Amici therefore support the Petitioner and urge this to Court grant certiorari to review the Court of Appeals' Opinion.

[3] See Aguila v. Kennestone Hospital, Inc., State Court of Cobb County, Civil Action File No. 18-A-522 (Nov. 14, 2018); Brewer, and John Does 1-5 v. Paulding Medical Center, Inc., State Court of Cobb County, Civil Action File No. 18-A-689 (Oct. 16, 2018); Clouthier v. The Medical Center of Central Georgia, Inc., State Court of Bibb County, Civil Action File No.88220 (Aug. 13, 2018); Lim v. Grady Memorial Hospital Corporation, Superior Court of Fulton County, Civil Action No. 2017CV298255 (Nov. 22, 2017).

III. ARGUMENT AND CITATION OF AUTHORITIES

A. The Court Of Appeals' Opinion Fundamentally Misconstrues Georgia's Hospital Lien Statute And Places An Impossible Burden On Hospitals That Is Not Contained In The Lien Statute.

Focusing solely on the language of Section 470(b), the Georgia Court of Appeals erroneously concluded that Georgia's hospital lien statute "permits the hospital to place a lien on any recovery for only the *reasonable* amount of charges." (Opinion at 7) (emphasis in original.) This conclusion is at odds with the plain language of the statute and ignores the provisions of Section 471. As explained below, while the hospital lien statute entitles hospitals to *recover* only their reasonable charges, the statute does not preclude hospitals from perfecting their liens consistent with their standard, undiscounted charges, nor does the statute require hospitals to subjectively determine what some third party may ultimately determine constitutes a "reasonable charge" for the services provided.

1. Sections 470 And 471 Evince A Common Legislative Intent To Grant Lien Rights To The Hospital, And In Turn Provide For Perfection Of The Lien In The Amount Claimed To Be Due For The Hospital.

Section 470 governs the *creation* and *attachment* of the lien and provides that hospitals "s*hall have a lien* for the reasonable charges." O.C.G.A. § 44-14-470(b) (emphasis added). The "lien attache[s] at the moment [the patient] receive[s] treatment . . . ." Macon-Bibb County Hosp. Auth. v. National Union Fire

Ins. Co., 793 F. Supp. 321, 323 (M.D. Ga. 1992); Thomas v. McClure, 236 Ga. App. 622, 624 (1999).

"The method for *perfecting* such an existing lien is set forth in O.C.G.A. § 44–14–471." Thomas, 236 Ga. App. at 625 (emphasis added); Macon-Bibb County Hosp. Auth., 793 F. Supp. at 323 ("O.C.G.A. § 44–14–471 governs the method for perfecting a hospital lien"). To perfect a lien, a hospital files a verified statement with the clerk of superior court, including among other things, "*the amount claimed to be due for the hospital*." O.C.G.A. § 44-14-471(a)(2) (emphasis added). Similarly, the clerk must then record the hospital's statement in a hospital lien book and enter "*the amount claimed*." O.C.G.A. § 44-14-472 (emphasis added). The hospital is required to file its lien statement "within 75 days after the person has been discharged from the facility." O.C.G.A. § 44-14-471(a)(2)(B). And, the hospital is required to provide written notice of the lien to the patient at least "15 days prior to the date of filing [that lien] statement." O.C.G.A. § 44-14-471 (a)(1).

Thus, when read *in para materia*, Sections 470 and 471 evince a common legislative intent to grant lien rights to the hospital, and in turn provide for the perfection of the lien in the amount claimed to be due for the hospital. The hospital lien statute does not purport to establish the amount, in any given case, of the actual "reasonable charges" that ultimately may be recovered by the hospital in a subsequent collection or declaratory judgment action.

2. The Purpose Of The Hospital Lien Filing Is To Provide Notice To Those Who May Be Liable; It Need Not Be Exact.

"The filing of the claim or lien shall be notice thereof to all persons, firms, or corporations liable for the damages . . . ." O.C.G.A. 44-14-471(b); see also Macon-Bibb County Hosp. Auth., 793 F. Supp. at 323 ("the purpose of the perfection statute" is to provide notice to all liable parties of the amount claimed to be due for the hospital).

The Legislature's use of the phrase "amount claimed to be due for the hospital" is consistent with the purpose of the verified statement—to give actual and constructive notice of the existence and amount of the lien claimed by the hospital. To the extent that there may be, in some circumstances, a difference between "reasonable charges" and "the amount claimed to be due for the hospital," no one reading the verified statement and familiar with the requirements of Section 471 has any reason to be confused. The purpose of the verified statement is to identify "the amount claimed to be due for the hospital" and nothing else. Patients receive notice at least 15 days before the lien is filed and can challenge the "amount claimed to be due for the hospital" at any time thereafter (or even before), either through negotiation or through court action. Similarly, any tortfeasor should be aware that the verified statement reflects the "amount claimed to be due for the hospital" and can similarly attempt to make the case that this amount exceeds "reasonable charges." But, contrary to the Court of Appeals' Opinion, simply

because the patient or tortfeasor ultimately may, in a given case, obtain a ruling that the amount claimed to be due for the hospital is in excess of "reasonable charges," does not mean that the hospital violated the hospital lien statute.

Indeed, this Court has recognized that the information in the lien does not need to "be exact on the date it was filed." Kight, 296 Ga. at 689. As this Court has explained, "[t]here is nothing in O.C.G.A. § 44-14-470 et seq. imposing such a requirement and we will not judicially legislate one." Id. Thus, this Court in Kight upheld the hospital lien and affirmed the ruling that the award of attorneys' fees against the hospital pursuant to O.C.G.A. § 13-6-11 was improper, even when the lien was later modified to reflect a reduced amount based on a partial payment. Kight, 296 Ga. at 690-91.

3. The Hospital Lien Statute Does Not Impose Upon Hospitals The Impossible Task Of Predicting What A Plaintiff Or A Jury May Later Insist Is A "Reasonable Charge".

Respondents' theory is premised on the notion that there is a prohibition against using a hospital's established charges (i.e., chargemaster rates) as the "amount claimed to be due for the hospital." But, as explained above, the hospital lien statute includes no such prohibition.

While the Legislature could have chosen to require hospitals to give notice of "reasonable charges," it chose instead to require notice of the "amount claimed to be due for the hospital." The Legislature's use of this language is only logical—to do otherwise would impose upon hospitals the impossible task of presuming

(under the potential penalty of losing its lien or facing a claim for damages) what someone else may later argue are the "reasonable charges" for the services provided. Indeed, after a hospital perfects its lien, the amount which is eventually paid, not charged, is often subject to numerous adjustments related to, *inter alia*, the nature of the payer, various financial considerations, and even the gross amount available from the tort recovery.

Moreover, the hospital lien statute does not define the term "reasonable charges." Nor does the statute contain any methodology or ascertainable standards by which hospitals are directed to calculate or otherwise determine "reasonable charges." In the absence of such guidance or directives, there is no basis to support an alleged violation of the statute based on a hospitals' practice of filing liens consistent with its established, undiscounted charges.[4]

[4] Although the Court of Appeals did not directly address the issue, Respondents contend in their separate petition for certiorari that TMC committed actionable fraud sufficient to support its RICO claim (and necessarily its fraud and negligent misrepresentation claims) by including language within its verified statements that the amount claimed to be due (as required by Section 471 to give notice to parties and potential claimants) was "fair and reasonable for the services rendered." Respondents' argument fails to appreciate that Sections 470 and 471 must be read together and construed to give meaning to both provisions. See Sikes v. State, 268 Ga. 19, 21 (1997) ("[I]n construing language in any one part of a statute, a court should consider the entire scheme of the statute and attempt to gather the legislative intent from the statute as a whole.") Moreover, Sections 470 and 471 do not purport to establish the actual amount that ultimately may be recovered by the hospital. Thus, any averment in the verified statements that the amount claimed to be due by the hospital is "reasonable" is consistent with the statutory requirements of the statute and cannot, as a matter of law, be actionable as a false statement.

B. The Court of Appeals' Opinion Incorrectly Assumes That A Violation of The Hospital Lien Statute May Support Ancillary Causes of Action For Fraud and Negligent Misrepresentation Against Hospitals.

The hospital lien statute creates no private right of action against hospitals, either express or implied, for alleged violations of the statute. See Best Jewelry Mfg. Co., Inc. v. Reed Elsevier Inc., 334 Ga. App. 826, 833 (2015) ("it is well settled that violating statutes and regulations does not automatically give rise to a civil cause of action by an individual claiming to have been injured from a violation thereof. Rather, the statutory text must expressly provide a private cause of action.") (internal citations and quotations omitted); see also Bellsouth Telecomm., LLC v. Cobb Cnty., 342 Ga. App. 323, 326 (2017) ("Georgia has 'longstanding precedential authority rejecting the creation of implied private rights of action.'"), citing Somerville v. White, 337 Ga. App. 414, 417 (2016).

Nor does the hospital lien statute impose any duty on hospitals for the benefit of injured patients. At most, the hospital lien statute merely requires hospitals to comply with certain notice provisions to perfect the lien, as outlined above. But even if the hospital fails to comply with a particular notice requirement (which is not the basis of Respondents' alleged harm), there is no statutory basis to conclude that such failure gives rise to liability on the part of the hospital to the patient (or otherwise obligates the hospital to perform some act for the benefit of the patient). In such a case, the lien is simply rendered unenforceable as a matter of law. See O.C.G.A. § 44-14-471(b); Kennestone Hosp., Inc. v. Travelers Home and

Marine Ins. Co., 330 Ga. App. 541 (2015). Had the General Assembly intended otherwise, it could have made its intention clear.

Ironically, Section 477 (in conjunction with Section 473) is the only provision in the hospital lien statute that arguably could support an ancillary cause of action for its violation, and that cause of action would exist against the injured party, not the hospital. Section 473 relates to instances where, for purposes of resolving his or her claims, an injured party provides an affidavit confirming that all hospital bills for treatment of the injuries for which a settlement is made have been fully paid. See O.C.G.A. § 44-14-473 ("any person, firm, or corporation which consummates a settlement, release, or covenant not to bring an action with the person to whom hospital … services were furnished and which first procures ***from the injured party an affidavit*** as prescribed in subsection (c) of this Code section shall not be bound or otherwise affected by the lien….") (emphasis added). Section 477 then makes clear that an injured party who provides a false affidavit commits the offense of a false swearing. O.C.G.A. § 44-14-477 ("Any person who gives any false affidavit as provided by Code Section 44-14-473 commits the offense of false swearing.").

Here, each of Respondents' claims is based on an alleged violation of the hospital lien statute. That is, absent a violation of the statute, each of Respondents' claims necessarily fails. But even assuming *arguendo* that a hospital's practice of

filing liens consistent with its standard, undiscounted charges could somehow qualify as a violation of the hospital lien statute, there is no basis to conclude that the General Assembly intended that any such violation should give rise to ancillary causes of action, including claims for fraud and negligent misrepresentation. See Best Jewelry Mfg. Co., Inc., 334 Ga. App. at 835 (affirming dismissal of common law torts of conversion, money had and received, and civil conspiracy based on alleged statutory violations that provided no private right of action for damages arising from such alleged violations; "a party cannot survive a motion to dismiss merely by recasting alleged statutory or constitutional violations as torts."); cf. Bellsouth Telecomm., 342 Ga. App. at 329 (holding that two Georgia counties could pursue claims for damages against telecommunications providers based on alleged violations of statute that provided no private right of action because the statute nevertheless imposed specific duties on the telecommunications providers owing to the counties). The Court of Appeals' denial of TMC's motion for summary judgment on Respondents' claims for fraud and negligent misrepresentation was error for this reason as well.

C. Filing Liens Consistent With Chargemaster Rates Cannot, As A Matter Of Law, Qualify As A False Statement.

1. The Court Of Appeals' Fractured Opinion As To Whether The Hospital Liens At Issue Are Sufficient To Support Fraud-Based Claims Misconstrues The Reach Of This Court's Prior Holding In Bowden II.

The Court of Appeals correctly ruled that Respondents' UDTPA and RICO claims are deficient as a matter of law. (See Opinion at 37-38, holding with respect to the UDTPA claim: "The fact that the lien statute requires the amount to be reasonable does not mean that TMC has engaged in deceptive practices. Nor does the use of the chargemaster rate as the lien amount constitute any misleading statement or create confusion[;]" and holding with respect to the RICO claim: "[a]ssuming TMC's lien amounts were unreasonable, such does not render the practice of filing liens, as permitted by statute, one of the RICO predicate offenses."). The Court of Appeals nevertheless denied Petitioner's motion for summary judgment on Respondents' remaining claims, all of which require a showing of a false statement,[5] based, at least in part, on an incorrect interpretation of this Court's prior holding in Bowden II. (Id. at 39, "The Supreme Court's decision in *Bowden II* implies that the Plaintiff's claims . . . remain viable causes of action."). At least one other trial court has similarly misconstrued the reach of this Court's holding. See Brewer, and John Does 1-5 v. Paulding Medical Center, Inc., State Court of Cobb County, Civil Action File No. 18-A-689 (Oct. 16, 2018) ("*Bowden* dealt with whether amounts paid by insurance companies and Medicaid

[5] See Wylie v. Denton, 323 Ga. App. 161, 165 (2013) (to state a claim for violation of the RICO statute, a plaintiff "must show that the defendants violated or conspired to violate [the RICO statute]" through one of seven predicate acts, six of which require a false statement); Middleton v. Troy Young Realty, Inc., 257 Ga. App. 771, 772 (2002) (to state a claim for fraud, a plaintiff must show a false representation made by the defendant); Marquis Towers, Inv. V. Highland Group, 265 Ga. App. 343, 346 (2004) (to state a claim for negligent misrepresentation, a plaintiff must show the defendant's negligent supply of false information).

were relevant and discoverable ***in a case challenging hospital liens as knowingly unreasonable***.") (emphasis added).[6]

TMC's petition for certiorari presents an opportunity for this Court to clarify its prior decision in Bowden II and make clear that Georgia law permits hospitals to perfect liens in the amount "claimed to be due," especially where the amount claimed to be due is consistent with the hospital established charges.

2. Chargemaster Rates Provide A Reliable And Consistent Benchmark By Which Hospitals Perfect Their Liens.

In addition to ignoring the text of the hospital lien statute allowing hospitals to file statements for the "amounts claimed to be due," Respondents' contention that filing liens consistent with chargemaster rates constitutes an actionable false statement is belied for several reasons. First, under established Georgia law, hospitals may bill for and collect their standard, undiscounted charges separate and apart from the hospital lien statute. Second, patients, like the Respondents in this case, are allowed to recover the hospital's standard, undiscounted charges in their causes of action against the tortfeasors who caused their injuries. Third, Respondents' challenge to hospitals' use of chargemaster rates as grossly excessive of what hospitals typically receive in payment from various payers reflects a fundamental misunderstanding of hospital economics. Hospitals' use of

[6] This Court's prior decision in Bowden II addressed whether TMC's lien was collectable in the amount filed, not whether filing a lien consistent with TMC's standard charges was knowingly false.

chargemasters originated from federal laws and policies that require hospitals to charge the same amount for the same service to all patients, regardless of their financial status or enrollment in various payer programs, and hospitals are required by state and federal law to publish their established charges.

For each of these reasons, hospitals reasonably consider these rates in determining "the amount claimed to be due for the hospital."

a) **Georgia Courts Allow Hospitals To Charge And Collect Rates Consistent With Their Established Charges.**

Georgia law allows hospitals to bill for and collect their respective chargemaster rates. Indeed, where a patient agrees to pay for medical care, but the parties' agreement does not specify the prices for such care, Georgia courts have consistently held that hospitals may collect amounts consistent with the hospital's published rate structure, i.e., chargemaster rates. See Morrell v. Wellstar Health System, Inc., 280 Ga. App. 1, 5 (2006) (affirming dismissal of patients' breach of contract and other claims where patient agreed to pay "all charges" and hospital subsequently billed patients at full chargemaster rates); Cox v. Athens Regional Medical Center, Inc., 279 Ga. App. 586, 590-91 (2006) (affirming dismissal of patients' breach of contract and other claims where hospital charged patients at higher "uninsured" rates based on admission forms that required payment but did not specify price for services).

Thus, for purposes of setting forth the "amount claimed to be due for the hospital," hospitals reasonably rely on their established rates. Indeed, it would be a strange and illogical result if a hospital could recover its chargemaster rates in a contract action where the contract contains no specific price terms, yet be held to have committed fraud for perfecting a lien—which merely provides notice of the amount claimed to be due for the hospital—in the same amount.[7]

b) **Georgia Courts Routinely Allow Patients To Recover Hospital Charges As Reasonable Damages In Their Personal Injury Claims.**

Georgia courts have long held that, for a tort action seeking recovery of medical expenses, "'[t]he law requires proof that the medical expenses arose from the injury sustained, and that they are reasonable and necessary before they are recoverable." Allen v. Spiker, 301 Ga. App. 893, 896 (2009) (quoting Barnes v. Cornett, 134 Ga. App. 120 (1975)); Johnson v. Cook, 123 Ga. App. 302 (1971). Pertinently, the Georgia Court of Appeals has found that an injured plaintiff's "cause of action against [a] tortfeasor for injuries and economic damages . . . [is] not limited to seeking economic damages represented by the discounted amounts paid on the [h]ospital's billed charges under the contract with [the insurance

[7] Although this Court distinguished the Court of Appeals' Cox line of cases in its prior decision on the grounds that "the contract price for goods and services does not necessarily equal their reasonable value," Bowden, 297 Ga. at 294, this Court expressed no opinion on the validity or invalidity of TMC's then-existing lien against Bowden's cause of action. Id. at 293. Moreover, this statement suggests that the Court recognized TMC's standard, undiscounted charges *may* be reasonable. Where the amount of a particular lien is subject to valid debate, there is no credible basis to support a finding of fraud.

provider]." MCG Health, Inc. v. Perry, 326 Ga. App. 833, 837 (2014). "Rather, [a plaintiff is] entitled to recover medical expenses arising from his injuries, including hospital charges, that [are] 'reasonable and necessary.'" Id. at 837-38. Thus, in the context of tort claims, the Georgia Court of Appeals has already recognized that there is no equivalency between an insurer's discounted payment rate and the full reasonable and necessary medical expenses.

In seeking to recover medical charges, a plaintiff-patient (or a family member responsible for his or her care), "shall be a competent witness to identify bills for expenses incurred in the treatment of the patient upon a showing by such a witness that the expenses were incurred in connection with the treatment of the injury . . . involved in the subject of the litigation at trial. . . ." O.C.G.A. § 24-9-921(a). And "it shall not be necessary for an expert witness to testify that the charges were reasonable and necessary." Id. at § 24-9-921(b) (noting further that the defendant may challenge such testimony on cross examination); see also Emory Healthcare, Inc. v. Pardue, 328 Ga. App. 664, 673 (2014) ("[A]ll that is required is 'that it be shown that medical expenses were incurred in connection with the treatment of the injury, disease or disability involved in the subject of litigation at the trial, which may be done by lay testimony.'").

The hospital lien statute allows a hospital to "step into the shoes" of the personal injury plaintiff. O.C.G.A. § 44-14-473; Southern General Ins. Co. v.

WellStar Health System, Inc., 315 Ga. App. 26 (2012). Thus, the hospital must be permitted to recover the same amount as the plaintiff. Personal injury patients are permitted to, and typically do, pursue the hospital's charges as the basis for their personal injury damages (even in cases where the hospital actually accepted less because of a discount negotiated with a health insurer). In this effort to obtain damages, a personal injury plaintiff does not challenge, but rather endorses and adopts, the reasonableness of charges for the services provided by a hospital. It is typically only when it is time to satisfy a hospital lien that a personal injury plaintiff challenges the reasonableness of a hospital's charges.

If this Court allows a patient to use one standard for the reasonableness of charges in her personal injury claim, but another in her dealings with the hospital, the patient will gain a windfall while the hospital will suffer a loss (or, as Respondents propose in this case, multiples of damages). As this Court has already cautioned, the statute would be frustrated if the patient could obtain payment directly from his insurer for "the full amount of an outstanding hospital lien and then turn around and negotiate a compromise settlement with the hospital and *pocket the change*." State Farm Mt. Auto. Ins. Co. v. Adams, 288 Ga. 315, 319 (2010) (emphasis in original).

In any event, the ability of a tort plaintiff to use a hospital's established charges (even when a lesser amount was accepted by the hospital as payment in

full) establishes that a hospital may reasonably claim this same amount as "the amount claimed to be due for the hospital" in giving notice of its claimed lien rights.

c) **Chargemaster Rates Provide A Reliable And Consistent Benchmark By Which Hospitals Perfect Their Liens.**

Respondents' challenge to TMC's use of chargemaster rates when perfecting its liens reflects a fundamental misunderstanding or misstatement of hospital economics that, if accepted, would be ruinous for Georgia hospitals. Hospitals uniformly use the chargemaster rates for all patients and, therefore, reasonably consider these rates in determining "the amount claimed to be due for the hospital."

Hospitals' use of chargemasters originated from federal laws and policies that require hospitals to charge the same amount for the same service to all patients, regardless of their financial status or enrollment in various payer programs. [8] What a hospital actually receives in payment, however, varies significantly based on the payer. The existing hospital reimbursement structure

[8] For example, the Centers for Medicare and Medicaid Services ("CMS"), which oversees the Medicare program, requires hospitals to maintain an established charge structure and to supply a copy of the most current chargemaster to federal and state entities upon request. 42 C.F.R. § 413.20(d)(3). CMS then requires its contractors to evaluate each hospital's charging structure on a routine basis to confirm that the hospital's charges are appropriate for determining program payment. Id. And, CMS may reduce a hospital's customary charges for payment purposes if a hospital does "not actually impose charges on most of the patients liable for payment for its services on a charge basis" or if it "failed to make reasonable effort to collect those charges." 42 C.F.R. § 413.13(e).

includes legislatively determined payments rates for services to Medicare and Medicaid beneficiaries and contractually negotiated discounted rates with private insurance carriers. What Respondents are effectively arguing is that they did not receive the same discounts as other payers, not that the hospital did not apply charges uniformly to all patients.[9]

The role of chargemasters has come under increased scrutiny over the last several years in the wake of demands for increased pricing transparency. But such scrutiny, or a desire to curtail health care costs, does not alter the fact that hospital chargemasters continue to play a key role in health care delivery and reimbursement systems. And, as noted above, hospitals are required to charge the

[9] Any discrepancies between the chargemaster rates and the amounts paid by government payers and health insurers are the results of those payments being too low and are not an indication that the chargemaster rates are unreasonable. For twelve consecutive years, Medicare payments have fallen well below the cost of the hospital care provided to seniors and disabled Americans. Thus, hospitals are operating at a financial loss even after they receive payment. The Medicare Payment Advisory Commission ("MedPAC"), a nonpartisan legislative branch agency that provides Congress with analysis and policy advice on the Medicare program, reported that hospitals' aggregate Medicare margin was a *negative* 9.6 percent in 2016, and that the losses were projected to increase to 10 percent by 2017. REPORT TO THE CONGRESS: MEDICARE PAYMENT POLICY, Chapter 3, Hospital Inpatient and Outpatient Services, p. 66 (March 2018) (available at http://medpac.gov/-documents-/reports). In 2016, for Medicare and Medicaid, hospitals received payment of only 87 cents and 88 cents, respectively, for every dollar spent caring for Medicare and Medicaid patients in 2016. See American Hospital Association, "*Underpayment by Medicare and Medicaid Fact Sheet*" (Dec. 2017) (available at https://www.aha.org/system/files/2018-01/medicaremedicaid underpmt%202017.pdf). In 2016, Georgia hospitals absorbed more than $1.8 billion in costs for care that was provided but not paid. See Georgia Hospitals' Economic Impact (April 3, 2018) (available at https://www.gha.org/Newsroom/Economic-Impact). In the same year, Georgia's uninsured rate was twelve percent, the third highest in the nation. Id. The most recent Georgia Department of Community Health Hospital Financial Survey shows that, in 2016, forty percent of all hospitals in Georgia had negative total margins, and sixty-three percent of rural hospitals in the state lost money. Id.

same amount for the same services, whether the patient has the best commercial insurance coverage available or is uninsured and below the federal poverty level.

While some have questioned our federal reimbursement scheme and its use of the chargemaster system, the Court of Appeals seems to have endorsed the idea of Georgia courts policing hospitals' chargemasters. Judge Miller wrote: "[D]eciding whether there has been a violation of the lien statute inevitably *requires the courts to determine the reasonableness of the chargemaster rates* that are used as the basis for the lien amount in the first place." (Opinion at 23, emphasis added.) The Court of Appeals' approach, however, runs counter to our federal health care reimbursement system, which requires hospitals, not courts, to adopt individual chargemaster rates for each hospital's respective services and deliverables. Indeed, in recognition of the fact that hospitals' charges may vary greatly, the federal government, as of January 1, 2019, requires every hospital in the country to post its chargemaster online so that consumers may compare rates. See 83 FED. REG. 41144 at 41686 (Aug. 17, 2018) (requiring hospitals "to make available a list of their current standard charges via the Internet in a machine readable format and to update this information at least annually, or more often as appropriate"). Thus, the federal government recognizes that charges are not uniform across hospitals. The posting requirements "enable patients to compare charges for similar services across hospitals" (id.), but those regulations do not

embrace a system of state courts arbitrating the reasonableness of chargemasters across various hospital systems, a result that would effectively remove any variability of charges among hospitals.

In short, any determination that liens filed consistent with a hospital's full chargemaster rates may qualify as a false statement will resonate throughout the complex hospital financing system and have wide-spread, unintended consequences. It will also disrupt established pricing models that government and private payers have reviewed and approved, and it may threaten the viability of many of Georgia's hospitals. Our Georgia hospitals are already in a precarious financial state, with nine hospitals having closed within the last seven years. The financial strain on Georgia hospitals has increased exponentially over the past seven years as a result of dramatic cuts in Medicare payments, beginning with enactment of the Patient Protection and Affordable Care Act of 2010, 42 U.S.C. § 18001 (2010) and continuing with subsequent legislative and regulatory changes to further reduce Medicare payments. Georgia hospitals already have experienced an estimated $3 billion in Medicare payment reductions since 2010, and many enacted cuts have not yet been fully implemented.

While some of the payment cuts in the ACA were intended to pay for the expansion of coverage for millions of uninsured patients, Georgia has not yet implemented a program to bridge the coverage gap. Georgia hospitals are therefore

experiencing dramatic payment reductions while still serving high numbers of uninsured patients. Moreover, the number of uninsured patients differs from hospital to hospital, based on many factors, including the hospital's location and the services it provides. Hospitals that provide trauma services typically file more hospital liens than other hospitals. If Respondents prevail, these safety-net hospitals will suffer disproportionate harm.

In sum, Georgia hospitals have for decades perfected liens using their chargemaster rates as the amounts claimed to be due. The General Assembly has made no attempt to restrict this widespread practice, or otherwise provide guidance as to how hospitals should determine the amount of "reasonable charges," despite having amended the law six times to address perceived concerns, including most recently in 2006. If the Court of Appeals' Opinion is allowed to stand, hospitals will lack any safe harbor from which to determine how much to "claim to be due" when perfecting a lien.

D. Liability Exposure Under Georgia's Hospital Lien Statute May Prompt Unintended Consequences For Courts, Providers, And Patients.

Georgia's hospital lien statute affords benefits and protections to providers and patients alike. One such purpose is to reduce the amount of litigation that otherwise would be necessary for hospitals to secure payment of health care debts. The statute similarly protects patients by attaching the lien only to the patient's cause of action against the third-party tortfeasor, rather than to the patient's

property or to the patient personally. See O.C.G.A. § 44-14-470(b) ("only a lien against such cause of action and shall not be a lien against such injured person … or any other property or assets of such person and shall not be evidence of such person's failure to pay a debt"); see also O.C.G.A. § 44-14-471(a)(1) (hospital must include in its written notice of the lien "a statement that the lien is not a lien against the patient or any other property or assets of the patient and is not evidence of the patient's failure to pay a debt").

The purpose of Georgia's hospital lien statute is to cut down on litigation while protecting hospitals' ability to collect payment for services rendered to patients when another source of insurance covers these services. By attaching the lien to the patient's cause of action and not directly against the patient, the lien statute also protects patients, in that the hospital asserting the lien does not pursue traditional debt collection activities against the patient, including immediate collection efforts, personal judgments, reports to credit agencies, and personal litigation. Any judicial ruling that subjects hospitals to potential liability simply for utilizing chargemaster rates will likely erode these important policies, further jeopardize the financial stability of Georgia's safety-net hospitals, and encourage hospitals to proceed immediately with traditional debt collection.

IV. CONCLUSION

For the reasons set forth above, GHA and the Alliance urge this Court to grant TMC's Petition for Certiorari to correct the errors in the November 1, 2018 Opinion.

Respectfully submitted this 18th day of January, 2019.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day caused the foregoing Brief of Georgia Hospital Association and Georgia Alliance of Community Hospitals as Amici Curiae to be served upon counsel for Petitioner and counsel for Respondents by depositing a copy of same in the United States Mail, with sufficient postage affixed thereto to ensure deliver, addressed to the following:

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