IN THE SUPREME COURT

STATE OF GEORGIA

WALTER JACKSON "JAKE" HARVEY, JR.and CAROLE ALLYN HILL HARVEY,	:	DOCKET NO. S21A0143
Appellants,	:	from the Superior Court of Carroll County
vs.	:	Civil Action File No.17-CV-712-J026
JOY CAROLINE HARVEY MERCHAN,	:	
Appellee.	:	

APPELLANTS' REPLY BRIEF

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SUPPLEMENTAL ARGUMENT AND CITATION TO AUTHORITY

A. The Appellee's arguments in support of her contention that the Appellee's claims were revived by O.C.G.A. §9-3-33.1 (d)(1) are flawed.

1. The Appellee's claims for childhood sexual abuse are not transitory in nature.

The Appellee asserts in her brief that the acts that give rise to liability in this action were "transitory in nature", occurring continuously and repeated in Quebec, Canada and continuing after the parties moved to Georgia. Applying Georgia law, Appellee asserts that the alleged tortious conduct committed by the Appellants must be considered as a whole by the trier of fact, including any act that occurred in Quebec. Thus, Appellee seems to imply her claims would be revived by O.C.G.A. §9-3-33.1 (d)(1) even if the Court agrees that the claims defined by O.C.G.A. §9-3-33.1 do not include acts occurring outside of Georgia. This reasoning is in error.

Under Georgia law, the lex loci delicti determines the substantive rights of the parties. Risdon Enterprises, Inc. v. Colemill Enterprises, Inc., 172 Ga. App. 902, 903 (1984); Ohio Southern Express Co. v. Beeler, 110 Ga. App. 867, 868(1) (1965). Where a tort is transitory in nature, the general rule is that the place of the wrong or the lex loci delicti is the place where the last event necessary to make an

actor liable for an alleged tort. Risdon at 903; Wardell v. Richmond Screw Anchor Co., 133 Ga. App. 378 (1974). For example, in Risdon, the plaintiff alleged that the defendants' negligent conduct in Georgia (including negligent inspection and testing) caused the plaintiff's employee to be killed in a South Carolina airplane crash. The Risdon court held that the last event necessary to make the defendants liable for the alleged tort, the airplane crash, occurred in South Carolina the substantive law of South Carolina is controlling. Risdon at 904.

A similar situation was found in Auld v. Forbes, 2020 WL 5753317 (2020). In Auld, the mother of a student who drowned on a school trip to Belize filed suit against the county school district and the wildlife sanctuary, where the student drowned. Auld at 1. This Court found that despite the allegations of negligent planning against the school district and school personnel the last event necessary to make the defendants liable (the drowning) occurred in Belize and therefore the substantive law of Belize occurred. Auld at 2.

Unfortunately for the Appellee, the Risdon decision does not support the Appellee's claim that the alleged actions of the Appellants occurring in Canada would be revived by O.C.G.A. §9-3-33.1 (d)(1). The Appellee's argument hinges on the conclusion that the last event necessary to make the Appellants liable occurred in Georgia. This conclusion is clearly flawed. The Appellee claims that

she was sexually abused as child in Quebec, Canada, on numerous occasions. What she describes is a series of independent torts all of which were completed as they occurred. Assuming, the truth of her allegations, each action would be actionable by the Appellee on its own. Thus, the last event necessary to make the Appellants liable occurred in Quebec, Canada, as she suffered the injury as each act of sexual abuse occurred. The facts differ immensely from the circumstances of Rison and Auld where but for the plane crash and the drowning there would be no cause of action. Thus, the events in Canada, if they occurred, are independent torts which must be considered separately.

2. There is no evidence in the record to support the Appellee's assertion that she was abused in Georgia.

Under Georgia law, in considering a motion for summary judgment, all the evidence is normally construed in favor of the nonmoving party, but testimony by the nonmoving party which contradicts other testimony given by the nonmoving party will be construed against that party, unless a reasonable explanation for the contradiction is offered. Joe Enterprise, LLC v. Kane, 341 Ga. App. 12, 14 (2017); Hall v. Norfolk Southern R. Co., 258 Ga. App. 712, 715, 574 S.E.2d 902 (2002); Pickney v. Covington Athlectic Club and Fitness Center, 288 Ga. App. 891(2007); Prophecy Corp. v. Charles Rossignol, Inc., 256 Ga. 27, 30 (1), 343 S.E.2d 680

(1986). In other words, when a party acts as his own witness, a trial judge considering a motion for summary is not to consider any of that witness' testimony that is self-contradictory, unless a reasonable explanation for the contradiction is given. Progressive Mountain Insurance Company v. Bishop, 338 Ga. App. 115, 122 (2016); Thompson v. Ezor, 272 Ga. 849, 851, 536 S.E.2d 749 (2000). Progressive Mountain Insurance Company v. Bishop, 338 Ga. App. 115, 122 (2016).

In Pickney, the plaintiff in a slip and fall case initially testified in her deposition that she had no idea what made her fall. However, when faced with a motion for summary judgment, the same plaintiff, in an effort to place liability upon the defendant, claimed for the first time by affidavit that before her fall, she could feel that the wetness was not merely water but it had an abnormally slippery wet film, such as slime. Pickney at 892. The plaintiff argued that despite the obvious contradiction the court should consider her new affidavit because she, "never had the opportunity to explain this fully when her deposition was taken." Pickney at 892. The Court of Appeals held that the this explanation for the contradiction was not reasonable as the plaintiff had ample opportunity to explain what she observed at her deposition and declined to make any changes to her deposition although she had reserved the opportunity to read and to sign the

deposition. Pickney at 892. Thus, the Court of Appeals refused to consider the new contradictory affidavit.

Until the filing of her last affidavit, the Appellee consistently maintained that the Appellants continually sexually abused her until she was approximately fifteen years old. (R. 341-354)(R.560, 595-596). She also has continually stated she lived with her parents in Canada until she was 15 years old. (R.560, 595-596). In her deposition testimony all of the incidents of childhood sexual abuse she described occurred in Canada. (R. 571-572, 575, 577, 580, 592-593, 596, 634-635 and 639). Despite thorough questioning and ample opportunity, the Appellee did not describe a single act of sexual abuse taking place in Georgia. In addition, at numerous points in their depositions, the Appellee and her sister describe being sexually abused as children in Canada. (R. 571-572, 575, 577, 580, 592-593, 596, 634-635 and 639)(R. 749-751, 602,604). Both testified they moved from Canada to an address on Kensington Avenue in Savannah, Georgia. (R. 560-561). Neither the Appellee or her sister stated that they were sexually abused in Georgia. For example, in one of the key portions of the Appellee's deposition she admits there was no sexual conduct in Georgia:

> Q. Okay. And when you moved to Kensington Street none of this happened?
> A. The nudity continued but we weren't showering together.

> Q. And there was no sexual conduct at the Kensington Street?
> A. Verbal, and whenever – whenever we went out Dad always analyzed our clothing and he would tell us if we needed new bras and we only ever went to buy – this sounds crazy, but he – he micro-managed when we could buy bras and he wanted to be there to approve or disapprove the bras that we were wearing. We had to go into the dressing room and put on a bra and Dad's approval as to whether we could wear it or not, so even though a lot of physical things died down there was still so much emotional woundedness [sic] – and constant comment about our sexual bodies, and so I don't know.
> R. 594-595.

However, in her Third Amended Verified Complaint, the Appellee avers she was abused until she was 22 years old. (R-868-881). This new evidence is in clear contradiction of her previous testimony. Thus, the Appellant's actions in the instant case strikingly resemble those of the plaintiff in the Pickney case. Thus, like the plaintiff in Pickney the Appellant in the case before the Court, had ample opportunity during her deposition to state that she had been sexually abused in Georgia. She did not describe a single incident. Furthermore, she likewise chose to read and to sign her deposition. After choosing to read and to sign her deposition, Appellee made no changes to any of her deposition testimony. (R. 529). Finally, in her Amended Verified Complaint for Damages filed on January 23, 2019, Appellee again affirmed that the Defendants sexually abused her until she was fifteen (15)

years old. (R. 341-354). The Plaintiff was born in March of 1974 and moved to Georgia in November of 1989. (R. 530 (ll.12-14), 533 (ll. 8-9) 530-531).

The Appellee offers no explanation for the change in her testimony. The new information is self-serving and too convenient for consideration. Clearly, like the plaintiff's new affidavit in Pickney, the Court should disregard the Appellee's allegations from her Third Amended Verified Complaint for Damages and grant summary judgment to the Appellants.

The Appellants are at the very least entitled to partial summary judgment. The plain language of O.C.G.A. § 9-3-33.1(a)(1) limits the definition of "childhood sexual abuse" allegedly occurring before July 1, 2015 to only those acts which occurred when the plaintiff was under 18 years of age and which would be in **violation** of one or more of the eleven Georgia criminal statutes specifically set forth in the statute. Clearly, the vast majority of Plaintiff's claims arose in Canada. Only actions she can prove occurred in Georgia would be revived by O.C.G.A. § 9-3-33.1.

3. The plain meaning of O.C.G.A. §9-3-33.1 limits the application of the statute to acts occurring in Georgia without imposing a venue requirement.

The Appellee argues that the Appellants' reading of O.C.G.A. §9-3-33.1 requires the Court to impose a venue requirement upon claims for childhood sexual

abuse. In addition, the Appellee argues that Appellants fail to cite any law or precedent to support their argument. Appellee's argument misconstrues the nature of the Appellants' interpretation and is erroneous.

As stated in Appellant's Brief, where a legislative body provides a list of defined terms within a statute, the only possible inference that can be drawn by the interpreter of that statute is that the legislature intended to limit the statute's scope. Berryhill v. Georgia Community Support & Solutions, Inc., 281 Ga. 439, 440-41, 638 S.E.2d 278 (2006) (when a statute does not expressly enumerate a particular item, that item "falls outside of the definition"). Clearly, the list of definitions set forth in the statute is present to limit the types of claims which may be presented under the authority of O.C.G.A. §9-3-33.1. The statute makes no mention of venue it simply limits the types of claims by some degree of geographic fashion. It is logical that the Legislature determined that extending the statute of limitations for claims for childhood sexual abuse no matter where they arose (i.e. the world) would be unreasonable.

Furthermore, if the Court were to consider the classification of claims as a venue requirement, the Appellee's reading in no way interferes with a defendant's constitutional right to be sued in the county where the defendant resides. Ga. Const. Art. 6, § 2 ¶ VI. Plaintiffs have no constitutional right to bring suit in a

particular location under the Georgia Constitution. Under Appellants' reading of O.C.G.A. §9-3-33.1, defendants must still be sued in the county where they reside. Only the types of claims which may be brought against them is limited. Ironically, venue is correct in the instant case. Unfortunately for the Appellee her claims are stale.

In addition, the Appellee ignores the change in language in the statute. The previous version of O.C.G.A. § 9-3-33.1(a)(1) applied to acts "proscribed" by the list of criminal violations listed in § 9-3-33.1(a)(1). The current version now requires that the claims for "childhood sexual abuse" granted the benefit of the extended statute of limitations set forth in O.C.G.A. § 9-3-33.1(a)(2) must arise from acts **in violation** of the list of criminal violations listed in § 9-3-33.1(a)(1).

The Appellee has provided no explanation for the change to the language defining the claims revived by O.C.G.A. §9-3-33.1 (d)(1). "A legislative body should always be presumed to mean something by the passage of an Act." Hardison v. Booker, 179 Ga. App. 693(1986). Furthermore, "in arriving at the intention of the legislature, it is appropriate to look at the old law and evil which the legislature sought to correct in enacting the new law and the remedy provided therefor." State v. Mulkey, 252 Ga. 201, 204 (1984). Therefore, the Appellants are entitled to judgment as a matter of law.

CONCLUSION

For all the foregoing reasons, Appellants ask that the Court reverse the trial court's Order Denying Defendants' Motion to Dismiss dated November 4, 2019 and reverse the trial court's Order Denying Defendants' Motion for Summary Judgment dated November 4, 2019.

Respectfully submitted, this the 9th day of November, 2020.

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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served a copy of the above and foregoing APPELLANTS' REPLY BRIEF, upon the opposing party by regular mail with proper postage attached, to-wit:

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This the 9th day of November, 2020.

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