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

IN RESPONSE TO APPELLEE'S SUPPLEMENTAL BRIEF

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I. The Court is not limited to consideration of the pleadings, as the Appellants filed a Motion for Summary Judgment concerning the application of O.C.G.A. § 9-3-33.1(d)(1) not a Motion to Dismiss.

Contrary to the assertion made during oral argument, the Appellants actually filed a Motion for Summary Judgment concerning the application of O.C.G.A. § 9-3-33.1(d)(1) to Appellee's claim not a Motion to Dismiss. (R. 501). Thus, the Court is not limited to examination of the Appellant's pleadings in deciding whether the Appellee's claim is barred by the statute of limitations.

Appellants contend that the acts of which the Appellee's complain do not constitute childhood sexual abuse as defined in O.C.G.A. § 9-3-33.1(a)(1) as acts occurring in another country cannot be prosecuted in Georgia and are not violations of Georgia law. Therefore, Appellee's claims were not revived by O.C.G.A. § 9-3-33.1(d)(1) and the general two year statute of limitations pertaining to injuries to the person applies. O.C.G.A. § 9-3-33. As such, Appellee's cause of action is barred as a matter of law and this Court should reverse the trial court's denial of the Appellant's Motion for Summary Judgment.

Summary judgment pursuant to O.C.G.A. § 9-11-56 is proper when "there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law." Sadlowski v. Beacon Management Services, Inc., 348 Ga. App. 585, 588

(2019); Navy Fed. Credit Union v. McCrea, 337 Ga. App. 103, 105(2016). In other words, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." O.C.G.A. § 9-11-56(c); Lucas v. Beckman Coulter, Inc., 348 Ga. App. 505, 507 (2019). In fact, the Court must consider everything in the record that is admissible. Benton Bros. Ford Co., Inc. v. Cotton States Mut. Ins. Co., 157 Ga. App. 448, 278 S.E.2d 40 (1981). The Appellants filed their Motion for Summary to allow their interpretation of the statute to be applied to the record as a whole.

II. The evidence in the record is clear that the Appellee admits the alleged abuse occurred solely in Canada despite her most recent claims.

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).

As previously argued by the Appellants in their previous briefs, the plaintiff in Pickney initially testified in her deposition for her slip and fall claim 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 (R.816) and her Third amended Complaint (R.- 868), 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.

Now, 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. 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 has never offered an explanation for the change in her testimony. No explanation has been offered in any of her briefs or in oral argument. The change in the Appellee's position in response to Appellants' Motion for Summary Judgment 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.

III. Appellee's Transitory Tort argument is irrelevant.

There is no need for the Court to consider the transitory or continuous tort issue. In an effort to save her cause of action, the Appellee has hijacked the Court into a red herring like consideration of continuous tort law and its intersection with the doctrine of lex fori. Appellee argues that her case occurred in Georgia and was therefore revived by O.C.G.A. § 9-3-33.1(d)(1). In addition, the Appellee argues that the acts that give rise to liability in this case were transitory in nature, occurring continuously and repeatedly in Quebec, and continuing after the Appellants moved to Georgia. As shown repeatedly, the evidence in the record definitively refutes this claim. (R. 571-572, 575, 577, 580, 592-593, 596, 634-635 and 639)(R. 749-751,

602,604).

IV. The Court must apply Georgia law.

The Court must apply Georgia law in the instant case. O.C.G.A. § 9–11–43 provides that "[a] party who intends to raise an issue concerning the law of another state or of a foreign country shall give notice in his pleadings or other reasonable written notice." Absent proper introduction and proof of the law of a sister state, however, it is presumed that such foreign law is the same as that of Georgia. Glover v. Sink, 230 Ga. 81, 195 S.E.2d 443 (1973); Abruzzio v. Farmers' & Merchants' Bank, 167 Ga. App. 639 (1983). Failure of a party seeking to rely on foreign law to provide timely notice of their intent to rely on foreign law causes said party to waive their right to rely on foreign law. Kessington Partners, LLC v. Beal Bank Nevada, 311 Ga. App. 196, 198 (2011) (where party waived their right to rely on foreign law by raising for the first time at the hearing on the opposing party's motion for summary judgment.).

The language of § 9–11–43(c) is based on the language of F.R.C.P. 44.1 which provides in pertinent part that, "a party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing." Federal Courts have consistently held that "a party waives its opportunity to rely on non -forum law where it fails to timely provide -typically in its complaint or the first response when choice

of law matters-the sources of non-forum on which it seeks to rely. Sun Life Assurance Co. Of Can. V. Imperial Premium Fin. LLC, 904 F. 3d 1197, 1208 (11th Cir. 2019). (where the plaintiff's initial complaint relied on the law of the forum state of Florida, the court found that the plaintiff waived the opportunity to rely on non-forum law.); Chavarria v. Intergro, Inc., 815 Fed. Appx. 375 (11th Cir. 2020) (where plaintiff waived her right to rely on Honduran law where her complaint specifically stated it was action for negligence and personal injury brought under Florida law and did not raise the question of foreign law until a motion to dismiss was decided.) See also, Whirpool Financial Corp. v. Sevaux, 96 F.3d. 216 (1996)(Borrower waived any objection he had to application of Illinois law in lender's suit to recover on promissory note executed to secure lender's investment in Venezuelan company, by making no effort to argue from Venezuelan law until after summary judgment had been rendered against him.).

During the oral argument, the Court suggested it had unfettered discretion to apply what ever law it saw fit to apply in the case. This is not quite accurate. The discretion provided by both O.C.G.A.§ 9–11–43(c) and F.R.C.P. 44.1 applies only to the determination of the state of foreign law, once it is determined to apply, after being invoked by a party. Both statutes state in determining foreign law, a court "may consider any relevant material or source, including testimony, whether or not

submitted by a party or admissible under the rules of evidence." Whether or not to apply the law is not left to the court's discretion.

In the instant case, the Appellee seeks recovery in a Georgia court for damages she alleges she suffered due to actions of childhood sexual abuse committed in the country of Canada. ((R.- 571-572, 575, 577, 560, 592-593, 596, 634-635 and 639)). However, the Appellee has specifically brought her case under the "authority of O.C.G.A. § 9-3-33.1". (R. 869). This fact has not changed in any of the versions of the Appellee's complaint. The Appellees claim must stand or fall under Georgia 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 15th day of March, 2021.

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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 TO APPELLEE'S SUPPLEMENTAL BRIEF, upon the opposing party by regular mail with proper postage attached, to-wit:

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This the 15th day of March, 2021.

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