IN THE SUPREME COURT
FOR THE STATE OF GEORGIA

SUPREME COURT CASE NO. S21A0143

WALTER JACKSON "JAKE" HARVEY, JR. and CAROLE ALLYN HILL HARVEY,

Appellants,

v.

JOY CAROLINE HARVEY MERCHAN,

Appellee.

AMICUS BRIEF OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF APPELLANTS WALTER JACKSON "JAKE" HARVEY, JR. and CAROLE ALLYN HILL

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I. INTRODUCTION

No one disputes that childhood sexual assault can have lasting emotional implications on the alleged victim. However, the mere fact that emotional distress may prevail as one moves from state to state (or country to country) does not automatically trigger a new injury, and a new tort, and thus a new cause of action under each sovereign's law. An interpretation such as this would vitiate longstanding Georgia law, undercut recent decisions by this Court, and render the doctrine of *lex lox delicti* useless. Here—assuming the statute is constitutional—the plain language of O.C.G.A. § 9-3-33.1 makes clear that the statute of limitation is ***only*** revived for tort claims based on conduct that violates the specifically enumerated crimes. Appellee is not permitted to flout the language of the statute and circumvent established Georgia law by simply contending that some independent distress and alleged emotional injury may have occurred in Georgia years down the line.

Taking Appellee's contentions as true, the only conduct that might constitute a violation of the crimes enumerated in O.C.G.A. § 9-3-33.1 (if that conduct had happened in this State) occurred in Canada—as did the alleged injuries resulting therefrom. Appellee does not have a viable claim in Georgia merely because a last-minute, self-serving affidavit contains allegations that some separate humiliating situations—that undisputedly do not rise to a criminal violation listed in O.C.G.A. §

9-3-33.1[1]—may have occurred in Georgia. Drawing some conclusory connection between these occurrences and the alleged sexual assaults in Canada highlights Appellee's tenuous argument. This is not a single "transitory" tort, but are allegations of separate, independent torts occurring in another country. The entire alleged tortious conduct occurred in Canada, including the injury that resulted therefrom; therefore, O.C.G.A. § 9-3-33.1 is inapplicable in this case.

This Court should reject the arguments advanced by Amicus GTLA and Appellee and hold that O.C.G.A. § 9-3-33.1 does not apply to Appellee's claims; the alleged torts and the injuries occurred in Canada—separate, independent intentional torts—which are all barred by the statute of limitations. Any contrary finding would be akin to the judiciary rewriting O.C.G.A. § 9-3-33.1 and would trigger the slippery slope of permitting any person injured by a tort in any state or country to move to Georgia to seek recovery. This Court should reject such an interpretation and should rule in favor of Appellants.

[1] These claims would likely not even be recoverable torts *at all* as there was no physical conduct or injury—let alone under O.C.G.A. § 9-3-33.1.

II. STATEMENT OF INTEREST

In 1967, the Georgia Defense Lawyers Association ("GDLA") was founded by a group of civil defense attorneys to create a forum to network, make improvements, and share ideas. Today, among other things, the GDLA focuses on advocating and working to improve the justice system by eliminating court congestion and delays in civil litigation, promoting justice, and increasing the quantity and quality of the service and contribution that the legal profession provides the community, State, and nation.

As such, GDLA is especially well-suited to discuss the importance of the issue currently before this Court and can provide keen insight about its implications for the State of Georgia and its residents. Amicus Curiae GDLA respectfully submits this brief in support of Appellants' position.

III. ARGUMENT AND CITATION OF AUTHORITY

A. No Violation of O.C.G.A. § 9-3-33.1 Occurred in Georgia.

In 2015, the General Assembly substantially altered the language of O.C.G.A. § 9-3-33.1. First, it limited the definition of "childhood sexual abuse" and therefore the actions that subjected potential defendants to civil liability. Second, it revived, for a limited two-year period, certain claims for childhood sexual abuse that had been time-barred by the statute of limitations. When a legislature chooses to amend previous statutes, particularly when amendments affect the statute of limitations, and therefore have a retroactive effect, courts must look at the plain terms of the statute and strictly construe their meaning. The plain language of this statute makes clear that it is to encompass actions in which a defendant is ***in violation of*** an enumerated crime in the State of Georgia and not such action that occurred in an extraterritorial jurisdiction as advanced by Appellee and Amicus GTLA. In fact, "Georgia statutes have a presumption against extraterritorial application." *Glock v. Glock*, 247 FSupp.3d 1307, 1318 (N.D. Ga. 2017). Here, it is undisputed that no violation of a crime enumerated in O.C.G.A. § 9-3-33.1 occurred in Georgia, thus Appellee and Amicus GTLA's arguments that O.C.G.A. § 9-3-33.1 applies must be rejected.

If this Court were to read the General Assembly's alterations under the reasoning advanced by Appellees and Amicus GTLA, any potential plaintiff could

bring claims for emotional distress resulting from childhood sexual abuse regardless of where this abuse occurred. It would effectively vitiate the statute of limitations and the doctrine of *lex lox delicti* and would result in an avalanche of previously foreclosed civil liability for potential defendants. Under the reasoning of the opposition, all a plaintiff would need to do would be to move to Georgia, in order to take advantage of the statute of limitations revival. It is almost axiomatic that childhood sexual abuse carries certain emotional consequences for the victim. Amicus GDLA does not dispute that general notion, and certainly does not dispute that here. However, the emotional consequence of extraterritorial childhood sexual abuse is not a separate injury that can subject citizens in the state of Georgia to potential civil liability.

Rather, the General Assembly made clear that such liability does not turn on where the residual harm of such an action might later be felt but would only arise in circumstances where the actions of a potential defendant would be "in violation of" the crimes specifically enumerated in O.C.G.A. § 9-3-33.1. These crimes necessarily include some sort of physical harm or injury that would constitute a crime in Georgia. Given that Appellee does not argue that any such crime or physical "touching" occurred in Georgia, the claims facially fail. Even taking the supplemental affidavit filed by Appellee in the underlying action as true and as

evidence that certain humiliation or verbal harassment continued while Appellee resided in Georgia, the actions described do not violate the clearly enumerated crimes in O.C.G.A. § 9-3-33.1. Had "intimidation" or "humiliation" been enumerated in O.C.G.A. § 9-3-33.1, Appellee might have an actionable cause of action, and could have overcome the motion to dismiss or a motion for summary judgment. However, such is not the case here. As it stands, Appellee has facially failed to plead facts sufficient to create a genuine issue of material fact that Appellants acted in such a manner, while in Georgia, that would be "in violation of" any of the crimes listed in O.C.G.A. § 9-3-33.1.

B. No Injury Occurred in Georgia that would Trigger the Application of O.C.G.A. § 9-3-33.1—the Alleged Tortious Conduct *and Injury* Occurred in Canada.

Recognizing that the claims are not rescued by O.C.G.A. § 9-3-33.1, Appellee—supported by the brief of Amicus GTLA—endeavors to create some sort of new injury argument or an argument that improperly combines the separate alleged intentional torts into one continuous tort. But because no separate injury occurred in Georgia that would trigger the application of O.C.G.A. § 9-3-33.1, and all the alleged tortious conduct—*as well as the injury*—occurred in Canada, these arguments must be rejected.

Appellee and Amicus GTLA attempt to use *Bullard v. MRA Holding, LLC*, 292 Ga. 748 (2013) to support their argument, but *Bullard* precisely illustrates why O.C.G.A. § 9-3-33.1 would not control in this case. In *Bullard*, a fourteen-year-old girl was filmed topless in Florida—seemingly with her consent. 292 Ga. 748. That film, and a still from that videotape, were used for advertising and distributed nationwide, including in Georgia where the minor lived and went to school. *Id*. at 748-749. The minor brought suit in Georgia for the *distribution* of the video and image. *Id*. at 749. A disagreement about where the injury occurred and what state's law should apply ensued. *Id*. at 750-751. This Court granted certiorari and held that *any injury* to the young girl from the distribution occurred in Georgia where the girl lived and went to school when the images and videos were distributed. *Id*. at 751.

This case is nothing like the situation presented in *Bullard.* Here, the alleged sexual assaults and the immediate injury occurred in Canada, and only residual emotional distress and humiliation occurred in Georgia. Arguing that conduct that indisputably does not rise to a violation of any crime in O.C.G.A. § 9-3-33.1 may have occurred in Georgia years down the line does not change this fact. Nor does the ongoing emotional distress suffered by Appellee in Georgia create some new cause of action that would permit recovery under O.C.G.A. § 9-3-33.1. Perhaps an even better comparison than *Bullard* is a case decided by this Court just a few months

ago: *Auld v. Forbes*, 848 S.E.2d 876 (Ga. 2020). In *Auld*, a mother filed suit in Georgia for the wrongful death of her son, who drowned while on a school trip to Belize. *Id*. at 878. Like in *Bullard*, the case turned on whether Georgia law should apply to the mother's claims. *Id*. This Court properly held that the injury at issue—the death of the mother's son—occurred outside of the country; therefore, Belize law would control. *Id*. at 880. The result in *Auld* would have been the same if the child had not died in Belize but suffered some anoxic brain injury. If the child was returned to Georgia, where his condition continued to deteriorate, that would not supplant the injury that occurred in Belize. There is no rationale that would support permitting Georgia law to control simply by bringing an already injured party into the state, especially when it would subject Georgia citizens to stale claims.

Amicus GTLA and Appellee attempt to distinguish *Auld* by classifying the alleged torts at issue in this case as continuing or "transitory torts." But importantly, this is not an instance of a transitory tort. Transitory torts are usually ones for fraud, or arise out of a breach of contract, where a *single action* causes recurring *independent* financial harm or loss of opportunity. *See, e.g., IBM v. Kemp*, 244 Ga. App. 638 (2000) (IMB's alleged fraudulent denial of benefits was a transitory tort, because although the injuries all related to a single breach of contract, they were suffered separately and distinctly each time payment was required and no

reimbursement was offered by IBM). The most well-known example of a transitory tort is when an injury happens while traveling across state lines. *See, e.g. Korn v. Tamiami Trail Tours, Inc*., 108 Ga. App. 510 (1963). If the plaintiff falls and breaks a leg while at a gas station in Florida during a bus ride up the east coast, and the bus driver promises to take the plaintiff to the hospital but continues to drive past every hospital in Florida and Georgia, that is a transitory tort. The claim is not for the initial injury, but for the failure to provide the promised medical care—which occurred in both Florida *and* Georgia. This is in sharp contrast to recurring intentional torts, which is exactly what is alleged in the case at hand. The alleged sexual assaults, battery, molestation, etc. all occurred in Canada. These independent intentional torts caused injury the moment they were purported to have been committed. The fact that the emotional distress persisted when Appellee moved to Georgia does not trigger O.C.G.A. § 9-3-33.1.

Allowing the instant case to proceed creates an unacceptably slippery slope in both related sexual abuse claims, as well as unrelated actions that can be brought under other statutes. If the Court allows claims for torts committed outside the State of Georgia to be revived past their statute of limitations due to the ongoing emotional consequence of the physical impact giving rise to those torts, then plaintiffs would have nearly unlimited access to Georgia courts to bring tort actions. For example, it would be undisputed that a medical malpractice action brought by a plaintiff who

suffered from ongoing physical injuries that limited his/her daily life would suffer from similar ongoing emotional injuries stemming from the physical injuries. In other words, a physically disabled plaintiff might have ongoing emotional distress due to the limitations in their daily life regardless of what state to which they might relocate. However, Georgia courts have never held that the emotional distress that is the direct result of those physical injuries caused by medical malpractice result in an ongoing tort or "transitory tort" that would, in essence, toll the statute of limitation as long as the emotional consequences continue. If this Court were to adopt such an interpretation, statutes of limitation would be essentially nullified, and all defendants would be subjected to liability in perpetuity.

IV. CONCLUSION

Accordingly, Amicus GDLA respectfully requests that this Court reject the arguments advanced by Amicus GTLA and Appellee and hold that O.C.G.A. § 9-3-33.1 does not apply to Appellee's claims. This will protect longstanding Georgia law, align with this Court's ruling in *Auld*, and ensure that alleged torts and injuries suffered extraterritorially cannot be improperly brought in this State.

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Respectfully submitted, this 12th day of January, 2021.

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