IN THE COURT OF APPEALS
FOR THE STATE OF GEORGIA

CASE NO. A11_____

BARRY GREEN, ***Appellant***

v.

JOHANNA FLANAGAN f/k/a JOHANNA BRUCE, ***Appellee***

APPLICATION FOR INTERLOCUTORY REVIEW

Of Court's Denial of Motion to Dismiss
State Court of Cherokee County, C.A.F.N. 10-SC-2568CJ

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ISSUE PRESENTED

Georgia's renewal statute, O.C.G.A. § 9-2-61, allows a case commenced in a *state or federal court* but later dismissed to be re-filed within the statute of limitations, or within six months after dismissal, whichever is later. In this case, Flanagan filed suit in Fulton County, Green removed to federal court, and the federal court ordered the case to arbitration and closed the matter. After the statute of limitations expired, the arbitration was administratively terminated. Six months later, Flanagan filed a renewal action in Cherokee County. Green filed a motion to dismiss based on the statute of limitations, which the trial court denied. Does Georgia's renewal statute – which only addresses cases dismissed from state or federal court – apply to cases dismissed from arbitration?

STATEMENT OF THE CASE

This case presents an important, specific question about the applicability of Georgia's renewal statute to actions dismissed/terminated, not by a state or federal court, but by an arbitration company after the statute of limitations has expired.

This case first began four years ago when Flanagan filed suit against Green, their mutual former employer (PharmaCentra), and others alleging sexual harassment and retaliation. Green was an officer of PharmaCentra and Flanagan's boss.

(Renewed Ver. Compl. ¶ 7.) Flanagan based her Complaint on conduct she alleges occurred in 2006 while she was employed by PharmaCentra. (*Id.* at ¶ 18, 78.) The statute of limitations for these alleged torts expired no later than August 2008, two years after the last day Flanagan alleges Green harassed her. (*Id.* at ¶ 78.) O.C.G.A. § 9-3-33.

Flanagan filed her initial complaint on November 7, 2007 in the Superior Court of Fulton County. (Renewed Ver. Compl. ¶ 3.) Defendants removed to federal court on December 10, 2007, and the case was sent to arbitration after the court granted Defendants' Motion to Compel Arbitration on April 24, 2008. (Mot. to Dismiss, Ex. 2.) Flanagan filed a demand for arbitration with the American Arbitration Association (the "AAA") and arbitrated this dispute with Green and his co-defendants for about a year. In arbitration, she settled with all defendants except Green.

On August 31, 2009, Judge Thrash of the District Court for the Northern District of Georgia directed the clerk to administratively terminate the action. On November 5, 2009, Flanagan filed a "Motion to Reopen and Remand," which Judge Thrash denied as untimely on December 16, 2009. (Mot. to Dismiss, Ex. 5.)

Judge Trash upheld his denial on Flanagan's Motion to Reconsider on February 18, 2010. (Resp. Mot. to Dismiss, Ex. B.)

Thereafter, the AAA entered an order finding that neither Flanagan nor Green had an obligation to pay the $15,600 deposit required to continue in arbitration. (Resp. Mot. to Dismiss, Ex. I.) The obligation to pay the AAA's fee fell upon the employer Flanagan previously dismissed pursuant to their settlement. (*Id.*) But the AAA's order required voluntary payment from someone within fourteen days to avoid administrative termination. (*Id.*)

With neither Green nor Flanagan obligated to or interested in paying the fee, the AAA terminated the arbitration on April 8, 2010 as promised. (Resp. Mot. to Dismiss, Ex. J.)

Within six months of the AAA's termination of the arbitration, Flanagan filed a renewal complaint in the State Court of Cherokee County on September 7, 2010. Green moved to dismiss the Complaint because the statute of limitations expired two years prior. After oral argument on Green's motion, Judge C.J. Gober held that Georgia's renewal statute applied to non-meritorious termination from arbitration just as it does to non-meritorious dismissals from state and federal courts and denied Green's motion on that basis. Because the statute does not apply

to arbitration on its face, and because there are no appellate cases interpreting Georgia's renewal statute in the context of a case terminated by an arbitration company, the trial court's order was erroneous and the establishment of precedent is desirable.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Article VI, Section V, Paragraph III of the Georgia Constitution, as jurisdiction is not reserved to the Supreme Court of Georgia or any other court. This Application is before the Court under O.C.G.A. § 5-6-34(b) because the trial court certified within ten days of the entry of its order denying Green's motion to dismiss that the order was of such importance that immediate review should be had and this Application was timely filed within ten days of the certification. Indeed, a reversal of the trial court on Green's motion to dismiss would be dispositive of the entire case. Under Rule 30 of this Court, leave to appeal this interlocutory order is warranted because the issue to be decided would be dispositive of the case and the establishment of precedent on this discrete issue is desirable.

STATEMENT OF FACTS

Because the issue before the Court on this Application is entirely procedural, the relevant facts are brief and best understood in time-line format:

- **June – September 2006:** Flanagan alleges that Green sexually harassed her, resulting in injuries to her person. (Renewed Ver. Compl. ¶¶ 18, 78.)
- **February 7, 2007:** Flanagan sued Green, their mutual former employer (PharmaCentra), and others alleging sexual harassment and retaliation in the Superior Court of Fulton County. (*See generally* Renewed Ver. Compl. ¶ 3 *et seq.*)
- **December 10, 2007:** Defendants remove the case to the U.S. District Court for the Northern District of Georgia. (Resp. Mot. to Dismiss, Ex. B.)
- **April 25, 2008:** Judge Thrash of the Northern District grants Defendants' Motion to Compel Arbitration. (Mot. to Dismiss, Ex. 1.)
- **August 31, 2009 (more than six months prior to filing her complaint in Cherokee County):** Judge Thrash directs the Clerk to administratively close the action. (Mot. to Dismiss, Ex. 2.)
- **November 5, 2009:** Flanagan files a Motion to Reopen and Remand in the Northern District. (Mot. to Dismiss, Ex. 3.)

- **November 14, 2009:** The AAA stays the arbitration pending the court's ruling on Flanagan's Motion to Reopen and Remand. (Mot. to Dismiss, Ex. 4.)
- **December 16, 2009 (more than six months prior to filing her complaint in Cherokee County):** Judge Thrash denies Flanagan's Motion to Reopen as untimely. (Mot. to Dismiss, Ex. 5.)
- **February 18, 2010 (more than six months prior to filing her complaint in Cherokee County):** Judge Trash upheld his denial on Flanagan's Motion to Reconsider. (Resp. Mot. to Dismiss, Ex. B.)
- **March 19, 2010:** The AAA enters an Order finding that neither Green nor Flanagan is obligated to pay the AAA deposit of $15,600 because that obligation fell upon the employer Flanagan dismissed under the settlement; but the AAA also ordered that if neither party voluntary paid the fee within fourteen days, the arbitration would be terminated and the case administratively closed. (Resp. Mot. to Dismiss, Ex. I.)
- **April 8, 2010:** Arbitration is terminated for non-payment. (Resp. Mot. to Dismiss, Ex. J.)
- **September 7, 2010:** Flanagan's current Renewed Verified Complaint is filed in the State Court of Cherokee County. (Renewed Ver. Compl.)

- Six months prior to September 7, 2010, the date Flanagan filed her complaint in Cherokee County, is March 7, 2010.

SUMMARY OF ARGUMENT

In Georgia, a plaintiff may renew a dismissed case commenced in state or federal court within the statute of limitations or within six months after dismissal, whichever is longer, so long as the case was not dismissed on its merits. This renewal statute makes no mention of arbitration. Here Flanagan's lawsuit was terminated by the federal court more than six months before she filed her renewal complaint. But Flanagan argues the six-month period under Georgia's renewal statute should be measured from time her *arbitration* was terminated. Georgia's renewal statute, however, applies only to *cases* commenced and subsequently dismissed from *federal or state court*. Georgia's renewal statute does not toll the statute of limitations following termination of an *arbitration*. Because the statute of limitations had long since expired, and because the renewal statute is inapplicable here, the trial court erred in denying Green's Motion to Dismiss.

ARGUMENT

A. The only dismissal within the six-month period prior to Plaintiff filing this case was the dismissal from arbitration, which is not a case "commenced in federal or state court" under the renewal statute.

Georgia's renewal statute applies only to cases commenced in federal or state courts and dismissed from the same:

> When any case has been commenced in either a *state or federal court* within the applicable statute of limitations and the plaintiff discontinues or dismisses *the same*, it may be recommenced in a court of this state or in a federal court either within the original applicable period of limitations or within six months after the discontinuance or dismissal, whichever is later....

O.C.G.A. § 9-2-61(a) (emphasis added). It is beyond dispute that the two-year statute of limitations for Flanagan's tort claims has expired. O.C.G.A. § 9-3-33. Flanagan alleges Green caused injuries to her person between June and September of 2006. The statute of limitations for these claims expired no later than September of 2008, two years after the last interaction she alleges she had with Green. O.C.G.A. § 9-3-33.

In relying on the renewal statute to toll the statute of limitations, Flanagan calculated six months after her *arbitration* was terminated. There are no other dismissals or even orders that fall within the six-month period prior to Flanagan filing this case on September 7, 2010. The federal court terminated the prior case on August 31, 2009, and the last order entered by the federal court denying Flanagan's motion to reconsider was entered on February 18, 2010. Because the date of the only relevant dismissal-like action within the six-month period prior to when Flanagan filed this case is the date of the termination of the arbitration for non-payment, it is the only relevant date by which the six-month period for renewal under O.C.G.A. § 9-2-61(a) may be measured.

But the renewal statute does not apply to dismissals from arbitration; thus this case was filed after the statute of limitations expired and outside of the timeframe allowed by the renewal statute.

B. The renewal statute is plain on its face, and the trial court erred in its interpretation; more importantly, the trial court erred in adding language to the statute – a function best left for the legislature.

Despite the plain language of O.C.G.A. § 9-2-61, the trial court added its own judicial gloss to the statute by reading in the word "arbitration" to the language indicating its applicability to cases commenced in state or federal courts.

The statutory language is unambiguous: it applies only to cases "commenced in either a *state or federal court*." O.C.G.A. § 9-2-61(a) (emphasis added). The words "arbitration" or "alternative dispute resolution" are markedly absent.

The word "commenced" is defined as "filing a complaint with the *court*." O.C.G.A. § 9-11-3 (emphasis added). Arbitration is not included in this definition either.

Furthermore, the renewal statute applies only if the *case* that was *commenced* in the *federal or state court* is dismissed. This is evident from the language, "discontinues or dismisses *same*." Hence, the statute only applies when it is the actual case commenced in court that the plaintiff is dismissing or discontinuing.

In construing the renewal statute, the trial court erred by not following the "golden rule" of statutory construction, which requires a court to follow the literal language of the statute unless doing so produces contradiction, absurdity, or such an inconvenience as to ensure the legislature meant something else. *WMW, Inc. v. Am. Honda Motor Co., Inc.*, A11A0251, 2011 WL 2716266 (Ga. Ct. App. July 14, 2011). "It is also a fundamental rule of statutory construction that where the language of a statute is plain and unambiguous, the terms used therein should be given their common and ordinary meaning." *Id.* Indeed, "[w]here the language of a

statute is plain and unambiguous, judicial construction is not only unnecessary but forbidden." *Six Flags Over Georgia v. Kull*, 276 Ga. 210, 211 (2003). The plain and ordinary meaning of "commenced in either a state or federal court" ought to lead to the conclusion that before a case is subject to renewal after the statute of limitations, it must first be commenced before the expiration of the statute of limitations in a state or federal court – not in an alternative-dispute-resolution forum – and then be dismissed or discontinued from such state or federal court. The statute is unambiguous, and the trial court's judicial construction was unnecessary and unauthorized.

Two principles of statutory construction known as "*expressio unius est exclusio alterius*" (the expression of one thing implies the exclusion of another) and "*expressum facit cessare tacitum*" (if some things are expressly mentioned, the inference is stronger that those not mentioned were intended to be excluded) are also applicable here. The absence of the words "arbitration" or "alternative dispute resolution" from the statute compels a court to assume the deliberate omission of those terms from O.C.G.A. § 9-2-61(a) by the General Assembly. *See Gwinnett County Sch. Dist. v. Cox*, 289 Ga. 265 (2011), *reconsideration denied* (June 13, 2011). Because the General Assembly is presumed to act with full knowledge of

existing law, application of the principles of statutory construction can lead to only one result: the legislature intended O.C.G.A. § 9-2-61 to apply only to cases dismissed from actual state or federal courts of law. *See Flores v. Exprezit! Stores 98-Georgia, LLC*, S10G1652, 2011 WL 2610393 (Ga. July 5, 2011) ("it is presumed that all statutes are enacted by the General Assembly with full knowledge of the existing law, including decisions of the courts").

Under our system of separation of powers, a court does not have the authority to rewrite statutes. *State v. Fielden*, 280 Ga. 444, 448 (2006). "Under that doctrine, statutory construction belongs to the courts, legislation to the legislature." *Id.* Courts "cannot add a line to the law." *Id.*

Though the renewal statute is remedial in nature and thus should be liberally construed, a liberal construction of the statute does not authorize a trial court to read such a radical change into a statute. *See Hobbs v. Arthur*, 264 Ga. 359, 360 (1994) (renewal statute is remedial in nature and construed liberally). The fact remains that it does not apply to alternative-dispute-resolution proceedings. The General Assembly is presumably aware that cases may be dismissed from arbitration proceedings after the expiration of the statute of limitations. Thus Flanagan's

arguments that the privilege of renewal should apply equally upon dismissal from arbitration are properly directed to the General Assembly, not to this Court.

Under the trial court's decision, commencing arbitration, a matter of private contract, can indefinitely toll the statute of limitations for claims later brought in courts of law. The ramifications are daunting. If arbitration tolls the statute of limitations in Georgia, what about mediation? If mediation, what about negotiation? There must be some distinction between the solemn act of filing a complaint in a state or federal court, perfecting service, and bringing a defendant within the jurisdiction of a court, from simply filing a petition for arbitration with a private company.

C. Because other alternative-dispute-resolution methods do not toll the statute of limitations, an arbitration proceeding likewise does not toll the statute of limitations, and the renewal statute does not apply.

The trial court's order finding the renewal statute to apply to arbitration is inconsistent with Georgia case law interpreting the renewal statute, and tolling in general, in the context of other forms of alternative dispute resolution. Georgia's renewal statute does not apply to a claim filed under the Worker's Compensation Act that is dismissed and re-filed after the expiration of the statute of limitations. *Gordy v. Callaway Mills Co.*, 111 Ga. App. 798, 800 (1965). In *Jahannes v.*

Mitchell, 220 Ga. App. 102, 105 (1996), this Court found that a grievance procedure initiated by a professor against his employer did not toll the one-year statute of limitations for his libel and slander claims. Similarly, using a county grievance and appeal procedure to appeal an employment-termination decision does not toll the statute of limitations. *Ivey v. DeKalb County Dept. of Pub. Safety*, 668 F. Supp. 1579, 1581 (N.D. Ga. 1987) (interpreting Georgia law on the tolling of O.C.G.A. § 9-3-33).

If the renewal statute does not apply to a worker's-compensation claim, why would it apply to arbitration? The Worker's Compensation Act is a mandatory alternative-dispute-resolution procedure. Arbitration is a matter of contract. Parties are free to enter into tolling agreements to toll the statute of limitations, but such tolling does not happen by operation of law by instigating arbitration, nor does the renewal statute operate to extend the statute of limitations for six months after arbitration is discontinued.

Finally, notwithstanding the pending arbitration and the pending action in federal court, Flanagan was never prevented from filing her action in Cherokee County before the expiration of the statute of limitations to preserve her rights (after which she could have perhaps stayed the action pending the outcome of

arbitration). *Huff v. Valentine*, 217 Ga. App. 310, 311 (1995) (The pendency of a prior suit in federal court is not a bar to a suit in a state court between the same parties and for the same cause of action). Similarly, Georgia's prior-pending-action statute and Georgia's abatement statute apply only to the *courts* of this state, and have no applicability to arbitration proceedings. O.C.G.A. §§ 9-2-5(a); 9-2-44(a). Flanagan had ample opportunity to file her complaint against Green in the courts of this state. It is too late now.

CONCLUSION

The procedural posture of litigation between the parties is complex, but the issue before this Court is not: does Georgia's renewal statute allow a plaintiff to refile a complaint after the expiration of the statute of limitations six months after her case was dismissed, not from court, but from arbitration? The trial court erred when it rewrote the statute to allow just that.

For Georgians, this case has a tremendous impact on every arbitration agreement in this state. The precedent set by the Court's opinion in this case will provide guidance to every litigant in this state engaged in or contemplating arbitration. Green asks the Court to grant this Application for review, reverse the trial court's radical expansion of Georgia's renewal statute, and dismiss this case.

Respectfully submitted this 4th day of August, 2011.

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CERTIFICATE OF SERVICE

This is to certify that I have this date served a true and correct copy of the foregoing ***Application for Interlocutory Review*** upon counsel of record in this matter, by depositing same in the U.S. Mail with sufficient postage thereon, addressed as follows:

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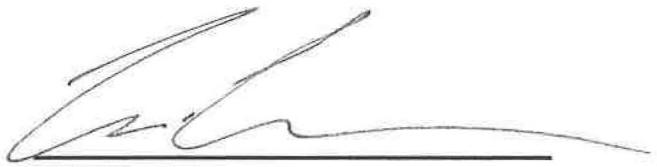
This 4th day of August, 2011.

WINTER CAPRIOLA ZENNER, LLC



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