

IN THE SUPREME COURT

STATE OF GEORGIA

AMANDA COON,

Appellant,

v.

THE MEDICAL CENTER, INC.,

Appellee.

Civil Action

File No.: S16G0695

AMICUS CURIAE BRIEF OF
GEORGIA DEFENSE LAWYERS ASSOCIATION

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COMES NOW Georgia Defense Lawyers Association (“GDLA”) and submits this amicus curiae brief, showing the Court the following:

I. INTRODUCTION

Appellant Amanda Coon (“Ms. Coon”) filed suit against Appellee The Medical Center, Inc. (“The Medical Center”) relating to the mishandling of the remains of her stillborn baby, seeking to recover damages for emotional distress. The undisputed evidence before the trial court showed Ms. Coon neither suffered a physical impact causing her emotional distress nor incurred a pecuniary loss flowing from her emotional distress. The Medical Center filed for summary judgment based on the impact rule, and the trial court granted summary judgment, finding that Georgia law did not recognize a theory of recovery for Ms. Coon’s claim. On appeal, the Georgia Court of Appeals affirmed the trial court’s grant of summary judgment.

On Certiorari to this Court, this Court must decide whether the trial court correctly applied Georgia law to Ms. Coon's claims. As is set forth in more detail below, the Court of Appeals correctly applied Georgia law, making the grant of summary judgment to The Medical Center appropriate. First, based on the public policy exception to the rule of *lex loci delicti*, if the trial court applied the law of Alabama on negligent infliction of emotional distress claims, this would offend the public policy of Georgia. Second, as reasoned by Judge McMillian in her special concurrence, because Alabama was created from part of Georgia, which was one of the original 13 colonies, the trial court should presume the common law of Alabama is the same as Georgia's common law. Accordingly, because the trial court correctly applied the impact rule to Ms. Coon's claims, this Court should affirm the judgment from the Court of Appeals.

II. STATEMENT OF THE INTEREST OF THE AMICUS CURIAE

GDLA has more than 900 members, ranging from sole practitioners to lawyers in large firms. The GDLA is dedicated to, among other purposes, supporting and improving the civil defense bar, improving the adversary system of jurisprudence in our courts, eliminating court congestion and delay in litigation, and otherwise promoting improvements in the administration of justice. Though its members are diverse, they share a common interest in ensuring that well-reasoned, longstanding principles of Georgia law, such as the "impact rule" that applies to personal injury

tort cases, are applied consistently. The GDLA respectfully submits this amicus curiae brief to show why the Court of Appeals correctly affirmed the grant of summary judgment to the Appellee on Ms. Coon's claims for negligent mishandling of the remains of her stillborn child.

III ARGUMENT AND CITATION TO AUTHORITIES

The court of appeals correctly affirmed the trial court's grant of summary judgment to The Medical Center, because Georgia law bars recovery for Ms. Coon because none of the exceptions to the impact rule apply. Moreover, this Court should not create a new exception to the impact rule.

A. The Court Of Appeals Properly Applied Georgia Law.

In tort cases, Georgia courts apply the rule of *lex loci delicti* when determining which state's substantive law applies to a cause of action. Dowis v. Mud Slingers, Inc., 279 Ga. 808, 816, 621 S.E.2d 413, 419 (2005). Such a rule provides "certainty, predictability, and ease of the application . . . , even though sometimes leading to results which may appear harsh." Id. Under this rule, courts apply the substantive law of the place where the tort occurred. Int'l Bus. Machines Corp. v. Kemp, 244 Ga. App. 638, 640, 536 S.E.2d 303, 306 (2000).

The place where the tort was committed, or, the locus delicti, is the place where the injury sustained was suffered rather than the place where the act was committed, or, as it is sometimes more generally put, it is the place where the last event necessary to make an actor liable for an alleged tort takes place.

Bullard v. MRA Holding, LLC, 292 Ga. 748, 750–51, 740 S.E.2d 622, 625 (2013).

In some cases, it is easy to determine where the alleged injury occurred, while at other times, this inquiry is more complex. If the place of injury is fortuitous, a court deciding the place of injury should give greater weight to the application of Georgia law. See Baltimore Football Club, Inc. v. Lockheed Corp., 525 F. Supp. 1206, 1208 (N.D. Ga. 1981).

Georgia courts are not required to rigidly apply the other state's law; instead, Georgia courts apply the other state's law only as a matter of courtesy and comity. Bailey v. Cottrell, Inc., 313 Ga. App. 371, 373 (2011) (applying Georgia law in products liability case, considering that Indiana law and Georgia law differ on burdens necessary to prove products claims: i.e., strict liability with risk-utility test versus negligence based claim). Thus, if the other state's law would contravene the public policy of Georgia, then Georgia courts will not apply the other state's law. Carroll Fulmer Logistics Corp. v. Hines, 309 Ga. App. 695, 696, (2011) (applying Georgia law in wrongful death case where Florida law measures damages from the perspective of the survivors' loss versus Georgia law measures damages from the perspective of the lost value of the decedent's life).

In Smith v. Graham Const. Co., Inc., 327 Ga. App. 823, 824 (2014), for example, applying the public policy exception, the Georgia Court of Appeals held that the trial court correctly applied the law of Georgia even though the plaintiff was

injured in North Carolina. There, the plaintiff was injured on a construction site in North Carolina and filed suit in Georgia against the general contractor. Id., 327 Ga. App. at 823. The court of appeals attempted to reconcile North Carolina and Georgia law on the issue of when a principal contractor qualifies as a statutory employer, which would entitle that contractor to a tort defense based on the exclusive remedy of the workers compensation doctrine. Id. In doing so, the court of appeals determined that North Carolina law is more restrictive for determining whether a contractor is considered a statutory employer. Id., at 824. Specifically, under North Carolina law, a principal contractor cannot qualify as a statutory employer if the subcontractor has workers compensation insurance. Georgia law, by contrast, would allow the principal contractor to be considered a statutory employer even if the subcontractor had workers compensation insurance. Accordingly, Georgia law would entitle the contractor to a tort defense, whereas if North Carolina law was applied, then the contractor would have no tort defense. Based on this difference, the Georgia Court of Appeals reasoned that the application of North Carolina law would offend Georgia public policy, and, thus, the Court of Appeals affirmed the trial court's order applying Georgia law. Id.

This Court has likewise applied the public policy exception where another state's law did not recognize a claim of strict products liability, whereas Georgia law did recognize such a claim. Alexander v. Gen. Motors Corp., 267 Ga. 339, 340

(1996). There, the plaintiff was injured in Virginia when the driver's seat of his vehicle failed during a car crash. Id. at 339. The plaintiff filed suit in Georgia, alleging a count for strict liability, and the trial court granted a partial motion for summary judgment. The court of appeals affirmed, holding that Georgia law and Virginia law are not radically dissimilar, because both laws allow recovery, just by different methods (negligence versus strict liability).

This Court reversed, reasoning that the application of Virginia law would interfere with the public policy supporting the Georgia products liability statute. Id. at 340. This Court noted that differences between Virginia and Georgia law in products liability actions claims include the fact that Virginia requires an injured plaintiff to notify the manufacturer within a reasonable time, whereas Georgia does not have such a requirement, and Georgia law eliminates questions of negligence and negligence-based defenses. Based on those differences, this Court held that the application of Virginia law would violate Georgia's public policy.

In the present appeal, this Court should affirm the court of appeals' judgment by applying Georgia law to Ms. Coon's claims. First, by applying the rule of *lex loci delicti*, Georgia law should be given greater weight because the location of where Ms. Coon learned about the mishandling of her stillborn child was fortuitous. Although Ms. Coon learned about the unfortunate event in Alabama, she could have just as easily learned about this event in Georgia or other states. For example, if this

Court rigidly applied the rule of *lex loci delicti*, then if Ms. Coon had been traveling when she received the news, some other state's law could easily apply.

Similarly, if The Medical Center had sent an email rather than making a telephone call, the inquiry under a strict *lex loci delicti* test would be when and where Ms. Coon happened to read the email. Clearly, requiring the trial court to engage in such an analysis would be inefficient and could also lend itself to fraud. Plaintiffs could strategically attempt to take advantage of other state's laws regarding when the alleged injury manifests itself. Accordingly, because the location of where Ms. Coon learned the news of the mishandling of her child's remains was fortuitous, this Court should give Georgia law greater weight.

Second, even if Ms. Coon's injury had instead occurred in Alabama, this Court should apply the public policy exception, because application of Alabama law would offend Georgia's public policy. As the Georgia Court of Appeals reasoned in this case, Alabama law does not apply an impact rule to claims for negligent infliction of emotional distress. Coon v. Med. Ctr., Inc., 335 Ga. App. 278, 282 (2015). In contrast, under Georgia law, subject to limited exceptions, a plaintiff can recover for emotional distress only where there is some type of impact, the impact causes a physical injury, and the physical injury causes the plaintiff emotional distress. Lee v. State Farm Mut. Ins. Co., 272 Ga. 583, 584(2000). "The benefits of an impact rule are plain in that it provides a brighter line of liability and a clear relationship between

the plaintiff's being a victim of the breach of duty and compensability to the plaintiff.” Bruscato v. O'Brien, 307 Ga. App. 452, 457 (2010).

This Court has explained that Georgia’s impact rule furthers three public policies: 1) concerns about a flood of claims for emotional distress; 2) concerns about fraudulent claims; and 3) concerns about establishing causation connection between negligent conduct and claimed damages. Id., at 272 Ga. at 587. In Lee, the plaintiff and the plaintiff’s daughter were involved in an auto accident, and during the accident, both the plaintiff and her daughter suffered physical injuries. Id., 272 Ga. at 583. The plaintiff witnessed her daughter suffer due to her injuries, and the plaintiff’s daughter died an hour after the accident. Based on witnessing her daughter die, the plaintiff suffered emotional distress and filed suit to recover for this injury.

The trial court in Lee granted summary judgment based on the impact rule, which was affirmed by the Court of Appeals, but this Court reversed the court of appeals’ judgment, reasoning that the public policy concerns were not present in that very restricted situation. Id. at 588. This Court carved out a limited exception to the impact rule, authorizing a cause of action to a parent where the parent also suffered a physical impact, that impact caused a physical injury to the parent, but where the emotional distress occurred due to watching the parent’s child die. Id. In reaching its decision, this Court explicitly “decline[d] to adopt any rule which might, in effect,

create a separate tort allowing recovery of damages for the negligent infliction of emotional distress.” Id.

Two other limited exceptions to the impact rule exist where the defendant’s conduct is willful, malicious, and wanton behavior, and where the plaintiff suffers a pecuniary loss resulting from a non-physical injury to the person. Clarke v. Freeman, 302 Ga. App. 831, 836 (2010); Phillips v. Marquis at Mt. Zion-Morrow, LLC, 305 Ga. App. 74, 77 (2010). To establish the former exception, the defendant’s conduct must be directed toward the plaintiff. Pike Nurseries, Inc. v. Allen, 253 Ga. App. 312, 313 (2002). This Court has reasoned that the willful/wanton exception is the logical corollary to the impact rule. Ryckley v. Callaway, 261 Ga. 828, 829 (1992). An example of where the pecuniary loss rule would apply is a plaintiff who incurs medical bills for treating depression caused by the defendant’s actions. Oliver v. McDade, 328 Ga. App. 368, 370 (2014).

As a threshold issue, the pecuniary loss rule would be inapplicable in the present appeal. The only monetary loss suffered by Ms. Coon was the expense associated with the disinterment and the burial costs, and those costs were not caused by Ms. Coon’s emotional distress. Therefore, the pecuniary loss exception would not apply.

Likewise, the willful, wanton behavior exception does not apply. There is no evidence that any action by The Medical Center was willful, wanton, or malicious.

Because neither of these exceptions to the impact rule applies, Ms. Coon could recover under Georgia law only if she could satisfy the impact rule. Applying that rule to Ms. Coon's claims, she has no recovery under Georgia law. By contrast, Ms. Coon would have a cause of action for recovery under Alabama law notwithstanding the lack of an impact. Since Alabama's law radically differs from Georgia law, application of Alabama law would offend public policy, and Georgia law must be applied.

Ms. Coon argues that although there are some differences between Georgia and Alabama law regarding negligent infliction of emotional distress claims, those differences allegedly are not radically dissimilar. Despite her contention, Georgia law is radically dissimilar from Alabama law on emotional distress claims because Alabama law does not contain an impact rule.

The differences between Alabama law and Georgia law on emotional distress damages make the current case analogous to the issues in prior Georgia cases, such as where the foreign state law differed as to burdens of proof, Bailey, 313 Ga. App at 373 (strict liability with risk utility test versus negligence based claim); damages measurements, Hines, 309 Ga. App. at 696 (applying Georgia law in wrongful death case where Florida law measures damages from the perspective of the survivors' loss versus Georgia law measures damages from the perspective of the lost value of the

decedent's life); and tort defenses, Smith, 327 Ga. App. at 824 (whether defendant contractor entitled to tort immunity).

For example, in Smith, if Georgia law were applied, then the defendant contractor would be entitled to tort immunity because the law would treat the defendant as a statutory employer, whereas if the foreign state's law were applied, then the Defendant would have no such immunity. Similarly, the Georgia courts have applied an impact rule to emotional distress damages, which is subject only to very limited exceptions. The impact rule is analogous to the tort defense in Smith. Accordingly, under the reasoning in the Smith case, this Court should decline to apply Alabama law because it is radically different from Georgia law on emotional distress damages.

Moreover, if this Court were to hold that Alabama law should be applied, it would offend the public policies set forth in Lee. Similar to the case before this Court, under Georgia law, a plaintiff cannot recover for negligent infliction of emotional distress damages unless she can satisfy the impact rule (subject to limited exceptions). This Court created a modified impact rule in Lee because such a result did not offend the public policies underlying the impact rule. The mother in Lee had a claim for relief under Georgia law where she suffered an impact, the impact caused physical injury, and the mother experienced emotional distress from watching her child die following the accident. Such a rule did not offend the public policy concerns

supporting the impact rule. In contrast, if this Court creates a new cause of action for Ms. Coon, such a claim would offend Georgia public policy.

As this Court has recognized previously, creating a new exception to the impact rule would increase the potential opportunity for fraud. For example, where Ms. Coon learned the news about the mishandling of her child's remains was fortuitous. She could have easily received the call while traveling in another State. If this Court creates a new exception to the impact rule, then plaintiffs on these types of claims could clearly engage in forum shopping and attempt to take advantage of more favorable laws. Accordingly, the public policy concern of fraud is clearly present in this case.

The public policy concern of a flood of new claims also should guide this Court from recognizing a claim under the present circumstances. If this Court were to create a new exception to the impact rule, then a large number of other plaintiffs would likely bring claims to recover in similar situations.

Even assuming, *arguendo*, that the public policy exception were inapplicable, Georgia law nevertheless would apply. As Judge McMillian noted in her special concurrence below, since the threshold issue is whether the plaintiff's claim for relief is based on some statutory provision, this Court shall presume that Georgia common law is applicable. See Trustees of Jesse Parker Williams Hosp. v. Nisbet, 189 Ga. 807, 811 741 (1940). If a plaintiff's claim is based on a statute from a foreign state,

then Georgia courts must apply the law from the highest court in the foreign state. However, where the plaintiff's claim is based on the common law, then if the foreign state is one of the original thirteen colonies, or its lands are comprised of land from the original thirteen colonies, then Georgia courts should presume that the foreign state has the same common law as Georgia. See Slaton v. Hall, 168 Ga. 710, 148 S.E. 741, 743 (1929).

Accordingly, as Judge McMillian correctly reasoned, because Alabama was made from land from Georgia, which was one of the original thirteen colonies, then the trial court can presume that Georgia common law and Alabama common law are the same. Accordingly, the trial court correctly applied the impact rule to Ms. Coon's claims.

B. This Court Should Not Create A New Exception To Impact Rule

This Court recently dealt with the impact rule in the case of Oliver v. McDade, 297 Ga. 66, 66, 772 S.E.2d 701, 702 (2015), where this Court affirmed the Court of Appeals' judgment affirming denial of the defendant's motion for summary judgment. There, the plaintiff was riding as a passenger in his vehicle, and the plaintiff's vehicle was involved in a tragic accident. During the accident, the force of the impact propelled the plaintiff into the door of the truck, where he sustained various physical and mental injuries, including "headaches, insomnia, flashbacks, anxiety, depression and suicidal thoughts." Id. In addition to the plaintiff being

propelled into the side of the truck, the driver's blood and tissue landed on the plaintiff. After the plaintiff got out of his vehicle, he discovered the driver's body lying in the roadway.

On *certorari* to this Court, the issue was whether the trial court correctly denied the defendant's motion for summary judgment. The defendant in that case contended that the plaintiff's claim was barred due to the impact rule. Based on the evidence in the record, this Court held there was an issue of fact regarding the source of the plaintiff's emotional distress: i.e., whether the plaintiff's emotional distress was due to witnessing his friend's death or due to his own physical injuries. See id. Specifically, this Court cited to the plaintiff's deposition testimony, where he testified that "at least in part, his emotional distress sprang from being hurt, not being at work." Id. at 68. Accordingly, this Court held it could not determine as a matter of law whether the emotional distress occurred solely due to watching the driver's death. When reaching its decision, this Court specifically noted that, under the impact rule, the plaintiff could not recover solely for witnessing his friend's death. Id.

In its decision in Oliver, this Court made clear that the policy reasons which supported Lee's slight modification to the impact rule were not present. This Court's modified impact rule in Lee was narrowly tailored to the specific facts of that case. Hang v. Wages & Sons Funeral Home, Inc., 262 Ga. App. 177, 181 (2003).

This case is analogous to the facts and resulting decision in Hang. In that case, the plaintiffs filed suit against the defendant funeral home, claiming that it had failed to cremate their relatives' body in accordance with Buddhist tradition. The plaintiffs had desired that the cremated remains contain bone fragments, so that they could use the remains for a ceremony. Rather than cremate the body in accordance with Buddhist traditions, the defendant funeral home had processed the remains to the extent that the remains were only powdery. In addition to being upset that the remains were not processed properly, the plaintiffs were concerned whether the remains actually were the remains of their relative (similar to this case). Evidently, the defendant funeral home's employee testified that he was not sure who removed the remains from the crematory, processed them, and then placed them in an urn for storage. Based on this gap in the chain of custody, the plaintiffs questioned whether the remains in the urn actually were their relatives'.

On appeal, the plaintiff argued that this Court in Lee had permitted a recovery even without a physical injury. The Georgia Court of Appeals rejected this argument and interpreted this Court's ruling in Lee as being narrowly tailored to the facts of that case, which were not present in Hang. See id. Because the plaintiffs did not suffer a physical injury and could not establish one of the other exceptions to the impact rule, the court of appeals affirmed that the plaintiffs could not recover emotional distress damages. Id.

Similar to Oliver, Hang, and Lee, the facts of the present case do not support this Court's creation of a new exception to the impact rule. As discussed above, this Court created a limited modification to the impact rule in Lee, for a mother-plaintiff who suffered an impact and physical injury. Although her emotional distress did not arise from her physical injury, she did witness her child's death after having received a physical injury. Unlike Lee, in this case, Ms. Coon did not suffer an impact or a physical injury. She likewise did not experience any emotional distress as a result of a physical injury. Rather, after her delivery of a stillborn child, she experienced emotional distress from the stillbirth, as any mother would. Later, after she found out about the confusion of the mishandling of the child's remains, she arguably experienced additional emotional distress from the alleged mishandling. Although Ms. Coon's situation is unfortunate, it is not comparable to being involved in an accident, receiving her own impact, and actually witnessing one's child pass away. Based on the differences, this Court should not create a new exception to the impact rule.

IV. CONCLUSION

For the reasons set forth above, GDLA respectfully prays that this Court affirm the Court of Appeals' judgment.

This 30th day of December, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on this day I have served a copy of the above and foregoing *AMICUS CURIAE BRIEF OF GEORGIA DEFENSE LAWYERS ASSOCIATION* by depositing a true copy of same in the United States Mail in a properly addressed envelope with adequate postage thereon, and via the eFast system upon the following counsel of record:

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This 30th day of December, 2016.

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