Mercer Law Review

Volume 73
Number 5 *MLR Online Companion*

Article 7

5-2022

No More "Heads Defendants Win, Tails Plaintiffs Lose": How the Georgia Supreme Court's Relation Back Decision in *Cannon* Rebalances Pleading Power

Jordan Lipp

No More "Heads Defendants Win, Tails Plaintiffs Lose": How the Georgia Supreme Court's Relation Back Decision in *Cannon* Rebalances Pleading Power

Jordan Lipp*

I. INTRODUCTION

Imagine your daughter dying in a high-speed police chase—when she was not even the driver that evaded police or caused the crash. You want to hold someone accountable, but you do not know who the right person is if you sue: the deputy, the sheriff in his personal capacity, the sheriff in his official capacity, the county, the sheriff's office, the county commissioners, the insurer of the police car? You sue the wrong one, and it is too late. Now what?

Thankfully for you, Georgia has forgiving pleading standards.[1] Relation back is a legal fiction that assumes a claim was brought before

*Thank you, Professor Longan, for your constant writing advice, editing tips, and encouragement. I would also like to thank my dad and mom, Shane and Renee Lipp, for encouraging me to go to law school in the first place. Finally, and most importantly, thank you to my fiancée (and, just after the time of this publication, wife!) Sam Thompson for your support and love. I am so thankful God led me to you.

1. Many times, Georgia courts will allow a plaintiff to add a new defendant to the lawsuit. *See* O.C.G.A. § 9-11-21 (2021) (governing amendments to pleadings before the statute of limitations expires); *Cf.* Atlanta Women's Specialists, LLC v. Trabue, 310 Ga. 331, 333, 850 S.E.2d 748, 752 (2020) (noting that Georgia "advances liberality of pleading"). Moreover, even after the expiration of the statute of limitations, Georgia's Civil Practice Act provides a solution to get the right defendant in court by substituting out one defendant for another unnamed one. Plainly, if a party knows about the lawsuit, statutes of limitations would unfairly and "mechanically" prevent a plaintiff from obtaining relief when the defendant otherwise receives notice. Sam Finley, Inc. v. Interstate Fire Ins. Co., 135 Ga. App. 14, 16, 217 S.E.2d 358, 360 (1975).

the statute of limitations[2] expired, circumventing those statutory requirements.[3] But courts must also consider fairness to the new defendant who believed that claim, for which the new defendant now faces liability, was time-barred and void.[4]

Indeed, as Georgia courts made decisions balancing those interests, they started to reach unpredictable results because they employed different analytical frameworks. After fifty years of Georgia Court of Appeals decisions, the Georgia Supreme Court weighed in for the first time. The court held that relation back applies when a proposed defendant knew or should have known it would have been a party defendant, had the plaintiff not made a legal or factual mistake.[5]

II. FACTUAL BACKGROUND

Jessica Cannon was a passenger in a car that fled police in a high-speed chase.[6] On September 14, 2015, she was riding in a Jeep when its driver tried to escape deputy Golden Sanders, who initiated a pursuit, eventually ending in a fiery crash with a tractor-trailer which killed Jessica and the driver.[7]

Jessica's parents presented[8] their claim via a required "ante litem" notice to Oconee County (County), the sheriff's office, and other government entities.[9] On January 17, 2017, the Cannons sued the County for wrongful death.[10] They alleged in the complaint that Oconee

---

2. "A law that bars claims after a specified period; a statute establishing a time limit for suing in a civil case, based on the date when the claim accrued[.]" *Statute of Limitations*, BLACK'S LAW DICTIONARY (11th ed. 2019).

3. "The doctrine that an act done at a later time is, under certain circumstances, treated as though it occurred at an earlier time." *Relation Back*, BLACK'S LAW DICTIONARY (11th ed. 2019).

4. *Sam Finley, Inc.*, 135 Ga. App. at 18, 217 S.E.2d at 361 (discussing the protections that statutes of limitations offer but concluding that when a person otherwise has notice of a claim, it is fair to bring her into court and make her defend against it). Generally, Georgia courts seek to resolve claims on the merits, not to allow a party to win by "tak[ing] advantage of [a] plaintiff's pleading mistakes." *Id.*

5. Oconee Cnty. v. Cannon, 310 Ga. 728, 734, 854 S.E.2d 531, 537 (2021).

6. *Id.* at 729, 854 S.E.2d at 533.

7. *Id.*

8. *See* O.C.G.A. § 36-11-1 (2021) (requiring plaintiffs who seek to sue a county to present their claim to the county, via an ante litem notice, within twelve months of the claim accruing, or the statute bars the claim).

9. *Cannon*, 310 Ga. at 729, 854 S.E.2d at 533.

10. Cannon v. Oconee Cnty., 353 Ga. App. 296, 297, 835 S.E.2d 753, 755 (2019), *vacated and remanded*, 310 Ga. 728, 854 S.E.2d 531 (2021). For background, individuals sometimes recover damages for the homicide of another person. *See, e.g.*, O.C.G.A. § 51-4-1 (2021). For example, wrongful death includes the "death of a human being [which] results from a crime,

County was liable, via respondeat superior,[11] for deputy Sanders's actions. In the answer, Oconee County generally denied[12] the complaint's paragraph that alleged the County was liable for the deputy's actions in continuing the chase in an unsafe manner[13] but did not further reveal who employed him. In fact, however, Sheriff Scott Berry, in his official capacity, was the deputy's employer and the correct defendant.[14]

During discovery, the County did the Cannons no favors. First, it surreptitiously collaborated with the sheriff's office to respond to discovery requests in misleading ways.[15] For instance, the Cannons sent requests to the County regarding "your employees" but which only requested information on deputies, to which the County responded but never explained that the deputies were not its employees.[16] Second, the County appointed Sheriff Scott Berry as its Rule 30(b)(6)[17] deponent: Sheriff Berry and Oconee County were one in the same for purposes of that deposition.[18] Third, in a letter concerning an open records request[19]

---

from criminal or other negligence, or from property which has been defectively manufactured, whether or not as the result of negligence." *Id.* Specifically, section 51-4-4 of the Official Code of Georgia Annotated allows parents to recover for the wrongful death of their child. O.C.G.A. § 51-4-4 (2021); *see also* O.C.G.A. § 19-7-1 (2021) (specifying that "[t]he intent of [the wrongful death cause of action] is to provide a right of recovery [for parents] in every case of the homicide of a child who does not leave a spouse or child").

11. O.C.G.A. § 51-2-2 (2021) ("Every person shall be liable for torts committed by his . . . servant by his command or in the prosecution and within the scope of his business, whether the same are committed by negligence or voluntarily.").

12. O.C.G.A. § 9-11-8(b) (2021) (allowing a defendant to deny all allegations in a pleading, except the specific paragraphs or assertions that the defendant expressly admits).

13. Law enforcement cannot start or continue to chase a fleeing suspect when that pursuit recklessly disregards police procedures and causes property damage, injury, or, as here, death. O.C.G.A. § 40-6-6(d)(2) (2021).

14. *Cannon*, 310 Ga. at 728–29, 854 S.E.2d at 533–34.

15. *Id.* at 729, 854 S.E.2d at 534 (noting that representatives of the Oconee County Sheriff's Office "were involved in gathering the information to answer Plaintiffs' discovery requests"). Parties must answer all discovery requests fully and truthfully. O.C.G.A. § 9-11-37(d)(1) (2021).

16. *Cannon*, 310 Ga. at 729, 854 S.E.2d at 534. The County would later argue that those same deputies were not its employees.

17. *See* O.C.G.A. § 9-11-30(b)(6) (2021) (allowing a plaintiff to name an entity in a deposition notice, and, in turn, requiring the defendant entity to appoint any individual it chooses to testify "as to matters known or reasonably available to the organization[,]" such that the appointed deponent's testimony is the binding testimony of the defendant entity).

18. *Cannon*, 310 Ga. at 729, 854 S.E.2d at 534.

19. The Open Records Act allows citizens to request inspection of many types of public records. However, the statute excepts attorney-client privileged communications between the governmental agency and its counsel. O.C.G.A. § 50-18-72(a)(41) (specifying that "[r]ecords containing communications subject to the attorney-client privilege recognized by state law" are not subject to inspection requests).

that the Cannons sent, Sheriff Berry claimed that those communications between the sheriff's office and the County's attorney were privileged because Terry Williams, the County's counsel, represented Sheriff Berry, too. [20] Last, the Cannons served an interrogatory asking the County to specify any other potential parties to the lawsuit, to which the County objected and only listed the driver of the Jeep during the chase.[21] At no point during discovery did Oconee County specify or suggest that Sheriff Berry was the only proper defendant.[22]

The statute of limitations expired September 14, 2017, two years after the crash.[23] Eleven months later, Oconee County moved for summary judgment, arguing that it did not employ deputies and could not be liable.[24] The Cannons jointly filed a response to the motion for summary judgment and their own motion for leave to substitute Sheriff Berry, in his official capacity, as the defendant. The Oconee County Superior Court granted the County's and denied the Cannons' motions for two reasons. First, the trial court granted summary judgment to Oconee County because it ruled that Deputy Sanders was an employee of the sheriff, not the County; the County could not be liable through respondeat superior for a non-employee's acts.[25] Second, it denied the Cannons' motion to substitute because the Cannons were factually aware that Sheriff Berry existed;[26] thus, the plaintiffs could not have made a mistake concerning

---

20. *Cannon*, 310 Ga. at 729–30, 854 S.E.2d at 534.

21. *Cannon*, 353 Ga. App. at 297, 835 S.E.2d at 755.

22. Brief of Respondents at 1–2, Oconee Cnty. v. Cannon, 310 Ga. 728, 854 S.E.2d 531 (2021) (No. S20G0584).

23. *See* O.C.G.A. § 9-3-33 (2021) (allowing two years from the time a personal injury claim accrues to bring a lawsuit).

24. *Cannon*, 310 Ga. at 730, 854 S.E.2d at 534. Summary judgment allows a court to adjudicate a claim, before it reaches a factfinder, when the record "show[s,] [1] that there is no genuine issue as to any material fact and [2] that the moving party is entitled to a judgment as a matter of law." O.C.G.A. § 9-11-56(c) (2021).

25. *Cannon*, 310 Ga. at 730, 854 S.E.2d at 534.

26. Under section 36-92-3(b) of the Official Code of Georgia Annotated, a county is not liable for the acts of a deputy sheriff because a county does not employ the sheriff's deputies. O.C.G.A. § 36-92-3(b) (2021); Gilbert v. Richardson, 264 Ga. 744, 753–54, 452 S.E.2d 476, 483–84 (1994) (holding that deputies are employees of the sheriff, acting in her official capacity, such that the sheriff is responsible for torts deputies commit, not the county); Green v. Baldwin Cnty. Bd. of Comm'rs, 355 Ga. App. 120, 121, 842 S.E.2d 916, 917 (2020) ("[D]eputy sheriffs are employees of the sheriff, not the county, and the county cannot be held vicariously liable as their principal.") (citations omitted). Indeed, a county is an improper defendant: a plaintiff can only sue the local sheriff in his official capacity for the acts of a deputy. *See id.*; Brown v. Dorsey, 276 Ga. App. 851, 856, 625 S.E.2d 16, 21 (2005) (citing Lowe v. Jones Cnty., 231 Ga. App. 372, 373, 499 S.E.2d 348, 350 (1998)); Brown v. Jackson, 221 Ga. App. 200, 201, 470 S.E.2d 786, 787 (1996).

the proper defendant's identity. Likewise, no evidence supported that Sheriff Berry knew or should have known about the litigation.[27]

On direct appeal,[28] the Court of Appeals of Georgia affirmed the summary judgment ruling but reversed the denial of the Cannons' motion to substitute.[29] The court of appeals analogized the case to past cases that allowed plaintiffs to substitute closely related corporations for one another in a lawsuit. In turn, it attempted to distinguish cases in which a plaintiff sought to add an individual as a defendant, which the court contended was a separate line of cases.[30]

The Georgia Supreme Court granted certiorari and affirmed both court of appeals's rulings but, instead of reversing and rendering a decision, it remanded the case back to the trial court for further consideration in light of its decision.[31] The court held that the relation back doctrine applies when the proper defendant—here, Sheriff Berry—knew or should have known the plaintiff would have sued it before the statute of limitations expired, had the plaintiff not made a mistake concerning the identity of the proper party.[32] The Court disapproved of cases that (1) analyzed the plaintiff's knowledge or (2) rejected relation back because a plaintiff made a mistake of law.[33]

III. LEGAL BACKGROUND

When a plaintiff seeks to substitute a new defendant into a lawsuit after the statute of limitations expires, the plaintiff must satisfy section 9-11-15(c) of the Official Code of Georgia Annotated.[34] Relation back acts as a pressure release valve when harsh statutes of limitation prevent

---

27. *Cannon*, 310 Ga. at 730, 854 S.E.2d at 534.

28. The Cannons also sought review of the trial court's denial of their motion for discovery sanctions. *Id.* at 737 n.9, 854 S.E.2d at 539. This Casenote will focus on the relation back issue because the court of appeals and supreme court did not address discovery sanctions. *Id.*

29. *Cannon*, 353 Ga. App. at 299–301, 835 S.E.2d at 756–57.

30. This Casenote disputes the Georgia Court of Appeals's assertion that its rulings are reconcilable in that way. Courts often allowed relation back, even when the party to be substituted was an individual.

31. *Cannon*, 310 Ga. at 737, 854 S.E.2d at 539.

32. *Id.* at 734, 854 S.E.2d at 537 (holding that "the proper question in determining whether the third condition of relation-back is met is not whether the *plaintiff* knew or should have known the identity of the proper defendant, but whether the proper *defendant* knew or should have known that the action would have been brought against him but for the plaintiff's mistake") (emphases in original).

33. *Id.* at 736, 854 S.E.2d at 538.

34. *E.g.,* Fontaine v. Home Depot, Inc., 250 Ga. App. 123, 124, 550 S.E.2d 691, 694 (2001) (applying a relation back statute when the plaintiff sought to add the defendant to the suit after the statute of limitations had passed).

resolutions of claims on the merits.[35] But courts do not apply relation back carte blanche because that would "render statutes of limitation completely toothless."[36] The relevant Code section has three elements:[37]

> Whenever the claim or defense asserted in the amended pleading [1] arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back to the date of the original pleadings if the foregoing provisions are satisfied, and if within the period provided by law for commencing the action against him the party to be brought in by amendment [2] has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and [3] knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.[38]

A. Early Cases Focus on Proposed Defendants' Knowledge

Early cases applying § 9-11-15(c)[39] focused on proposed defendants when applying the statutory relation back doctrine.[40] As a matter of first

---

35. Tenet Healthsystem GB, Inc. v. Thomas, 304 Ga. 86, 89–90, 816 S.E.2d 627, 630 (2018) (quoting Mayle v. Felix, 545 U.S. 644, 662 (2005)); Cartwright v. Fuji Photo Film, U.S.A., Inc., 312 Ga. App. 890, 894, 720 S.E.2d 200, 205 (2011) (explaining that the relation back statute "should be liberally construed to effect its purpose of ameliorating the impact of the statute of limitation"); Rich's, Inc. v. Snyder, 134 Ga. App. 889, 892, 216 S.E.2d 648, 651 (1975); Block v. Voyager Life Ins. Co., 251 Ga. 162, 163, 303 S.E.2d 742, 743 (1983) (explaining that relation back "provides for liberal amendments and . . . is consistent with our holdings that the pleadings are not an end in themselves but only a method to assist in reaching the merits of the case.").

36. Speer, Inc. v. Manis, 164 Ga. App. 460, 461, 297 S.E.2d 374, 375 (1982); *see* Shirley v. Hosp. Auth. of Valdosta/Lowndes Cnty., 263 Ga. App. 408, 410, 587 S.E.2d 873, 875 (2003), *overruled on other grounds by* Chandler v. Opensided MRI of Atlanta, LLC, 299 Ga. App. 145, 682 S.E.2d 165 (2009) (holding plaintiff's claim was time-barred where allowing relation back "would render the two-year statute of limitation . . . meaningless.").

37. Relation back has an elemental test: if the plaintiff does not meet even one condition, the claim does not relate back. *Cobb v. Stephens,* 186 Ga. App. 648, 650, 368 S.E.2d 341, 342 (1988) (holding that "*all* three elements" require satisfaction) (emphasis in original); Doyle Dickerson Tile Co. v. King, 210 Ga. App. 326, 327, 436 S.E.2d 63, 65 (1993).

38. O.C.G.A. § 9-11-15(c) (2021). The statute itself only labels two requirements, but caselaw recognizes the first, implicit "same transaction or occurrence" requirement. *See* Crane v. State Farm Ins. Co., 278 Ga. App. 655, 656–57, 629 S.E.2d 424, 426 (2006).

39. The General Assembly enacted the current version of O.C.G.A. § 9-11-15(c) in 1972. *Cannon*, 310 Ga. at 732, 854 S.E.2d at 536.

40. For a prestatute example of the relation back doctrine, see McDougald v. Dougherty, 11 Ga. 570, 593–94 (1852), which held that a claim against a newly added party

impression, *Sims v. American Casualty Co.*,[41] a 1974 Georgia Court of Appeals case, decided that a claim does not relate back when the plaintiff originally names "John Does" as unknown defendants and seeks to substitute new parties—who know nothing about the lawsuit—after the statute of limitations passes.[42]

In that case, Mrs. Sims, as administratix of her son's estate, sued eighteen insurance companies for negligence after alcohol-based products ignited at her son's worksite, causing a fire that consumed and killed him.[43] The court held that the claim did not relate back, on two alternative grounds.[44] First, there was no evidence that the proposed defendants knew about the institution of the action, so they faced prejudice in defending themselves.[45] Second, no evidence showed that they knew about the plaintiff's mistake or knew that they would have been named as a defendant but for that mistake.[46] The court did not consider the plaintiff's knowledge when deciding whether she made a mistake.[47] Instead, only the defendant's knowledge mattered.[48]

In the 1980s, courts expanded the defendant-knowledge analysis past the "John Doe" context.[49] Over and over, courts held a claim did not relate

---

to a lawsuit will not relate back to the date of the original complaint when the proposed defendant faces prejudice.

41. 131 Ga. App. 461, 206 S.E.2d 121 (1974), *aff'd sub nom.* Providence Wash. Ins. Co. v. Sims, 232 Ga. 787, 209 S.E.2d 61 (1974).

42. *Sims,* 131 Ga. App. at 483–84, 206 S.E.2d at 135–36. A line of cases, focused on the proposed defendant's knowledge, would continue to hold that naming a "John Doe" defendant and seeking to substitute a party, after the statute of limitations expires, fails the relation back requirements. McNeil v. McCollum, 276 Ga. App. 882, 885, 625 S.E.2d 10, 13 (2005) (quoting Harper v. Savannah, 190 Ga. App. 637, 638, 380 S.E.2d 78, 79–80 (1989)); Bishop v. Farhat, 227 Ga. App. 201, 202, 489 S.E.2d 323, 325–26 (1997).

43. *Sims*, 131 Ga. App. at 463, 206 S.E.2d at 124.

44. *Id.* at 483, 206 S.E.2d at 136.

45. *Id.*

46. *Id.*

47. *See id.* (making no mention, in outlining its reasoning, whether the plaintiff knew the insurance companies existed).

48. Moulden Supply Co. v. Rojas, 135 Ga. App. 229, 231–32, 217 S.E.2d 468, 469 (1975) (citing *Sims* for the proposition that a claim seeking to substitute a defendant, of whom the plaintiff was aware existed but (a) did not know their identity and (b) did not serve them with process until after the statute of limitations passed, does not relate back because (1) the defendant would face prejudice and, alternatively, (2) the defendant did not know that the action would have been brought against them, had the plaintiff not made a mistake).

49. *E.g.*, Foster & Kleiser, Inc. v. Coe & Payne Co., 185 Ga. App. 284, 285–86, 363 S.E.2d 818, 820 (1987), *overruled on other grounds*, 258 Ga. 161, 366 S.E.2d 292 (1988) (applying relation back precedent to an action to enforce a lien and noting that "[relation back analysis] appears in a variety of contexts"); *see* Horne v. Carswell, 167 Ga. App. 229, 231, 306 S.E.2d 94, 96 (1983) (allowing a claim to relate back when the plaintiff-buyer

back because "there is no evidence that *the party sought to be added* was aware of the institution of [plaintiff's] action during the period of limitation."[50]

On the other hand, *Watkins v. Laser/Print-Atlanta, Inc.*,[51] held that an amended complaint did relate back when a proposed defendant—an individual person—accepted service of process on behalf of the original defendant.[52] Because the putative defendant accepted service in what was originally a timely filed action, the person knew or should have known about the lawsuit.[53] As a whole, this line of early cases set precedent for courts to consider the proposed defendant's knowledge about the lawsuit when deciding relation back issues.[54]

B. Later Cases Flip to Examining Plaintiffs' Knowledge

Over time, courts began to analyze plaintiffs' states of mind, not what the proposed defendants knew.[55] Courts first began chipping away at the established analysis of defendants' knowledge in *Collins v. Byrd*,[56] a short opinion in which the Georgia Court of Appeals—more focused on clarifying sovereign immunity issues—cursorily concluded that the plaintiff's claim did not relate back because she knew when she filed her original complaint that the proposed defendants could have been parties.[57] During the early 1990s, most cases still analyzed the putative

---

discovered the item in sale giving rise to claim, was sold by seller's corporation, not the seller personally); Bil-Jax, Inc. v. Scott, 183 Ga. App. 516, 517, 359 S.E.2d 362, 363 (1987) (allowing a claim to relate back when the plaintiff, who suffered electric shocks and burns from scaffolding on which he was working, touched power lines, named the manufacturer of scaffolding as the defendant after the statute of limitations passed).

50. Rose v. Kosilla, 185 Ga. App. 217, 218, 363 S.E.2d 623, 625 (1987) (emphasis added). In fact, the proposed defendant in *Rose* did not even know about the appeal the plaintiff brought. *Id.*

51. 183 Ga. App. 172, 358 S.E.2d 477 (1987).

52. *Id.* at 174, 358 S.E.2d at 479.

53. *Id.* at 175, 358 S.E.2d at 479–80.

54. *See* Larson v. C.W. Matthews Contractor Co., 182 Ga. App. 356, 357, 356 S.E.2d 35, 37 (1987) (holding that the claim did not relate back when proposed defendant did not receive notice of the action until four months after the statute of limitations expired); Bailey v. Kemper Grp., 182 Ga. App. 604, 607, 356 S.E.2d 695, 698 (1987) (holding that claim did not relate back because the proposed defendant "was not on notice of a suit prior to the expiration of the two-year period of limitation.").

55. *See* Swan v. Johnson, 219 Ga. App. 450, 451, 465 S.E.2d 684, 686 (1995) (reasoning the plaintiff could not have been mistaken about identity of proper lifeguard defendant where only one lifeguard was on duty when plaintiff's deceased drowned and holding, as a result, that amended complaint's claim did not relate back).

56. 204 Ga. App. 893, 420 S.E.2d 785 (1992).

57. *Id.* at 895, 420 S.E.2d at 788.

defendant's knowledge, but other courts jumbled the doctrine and shifted to the plaintiff-knowledge framework.[58] Thus, separate lines of cases began to emerge as courts ricocheted between the differing analyses. Chief Justice Nahmias pointed out during a recent oral argument that "half of the court of appeals opinions never even talk about the defendant's knowledge. They only discuss the plaintiff's knowledge. Some of them talk about the defendant's knowledge, and some of them *claim to distinguish each other*."[59]

Indeed, the three-judge panel in *Stephens v. McDonald's Corp.*,[60] implicitly recognized the conflicting caselaw and thus equivocated by exploring both lines of analysis.[61] There, the Georgia Court of Appeals ultimately denied relation back because (1) there was no evidence the proposed defendant knew about the pending lawsuit *and because* (2) the plaintiff could not have made a mistake about who controlled the property, under a premises liability theory, when the business's signs were prominent throughout the restaurant.[62] The law was in disarray.

Harding v. Godwin,[63] is a good example. A widow sued a healthcare corporation when her husband died about thirty minutes after leaving the corporation's hospital with chest pains.[64] Just before leaving the facility, Mrs. Harding had stopped Dr. Godwin and asked her to check Mr. Harding's chest: Mrs. Harding was nervous to take him home. Dr. Godwin told Mr. Harding to return home and take some antacids for the pain, but Mr. Harding died shortly after. Mrs. Harding originally sued a different doctor but, after the statute of limitations expired, sought to add Dr. Godwin as defendant.[65] The Brooks County Superior Court granted the motion for leave to add Dr. Godwin, but the Georgia Court of Appeals reversed.[66] The Georgia Court of Appeals reasoned that Mrs. Harding

58. *Compare Doyle*, 210 Ga. App. at 328, 436 S.E.2d at 66 (denying relation back because "[b]oth additional defendants filed affidavits stating they were not aware of and had absolutely no notice of the action until they were served with the amended complaint"), *with Swan*, 219 Ga. App. at 451, 465 S.E.2d at 686 (denying relation back because the plaintiff only knew of one possible party to sue and, thus, could not have made a mistake).

59. Oral Argument at 13:20, Oconee Cnty. v. Cannon, 310 Ga. 728, 854 S.E.2d 531 (2021) (No. S20G0584), https://www.gasupreme.us/oral-arguments-november-5-2020 (emphasis added).

60. 245 Ga. App. 109, 536 S.E.2d 566 (2000).

61. *Id.* at 111, 536 S.E.2d at 569.

62. *Id.* (recounting the proposed defendant's knowledge in one paragraph and, two paragraphs later, considering the plaintiff's knowledge).

63. 238 Ga. App. 432, 518 S.E.2d 910 (1999), *disapproved of by* Oconee Cnty. v. Cannon, 310 Ga. 728, 854 S.E.2d 531 (2021).

64. *Harding,* 238 Ga. App. at 432–33, 518 S.E.2d at 911.

65. *Id.* at 433, 518 S.E.2d at 911.

66. *Id.*

could not have made a mistake about which doctor to sue because she talked to Dr. Godwin.[67] But the court did not discuss what Dr. Godwin knew or should have known.[68]

Afterward, cases began to follow *Harding*. In the 2000 case of *Deleo v. Mid-Towne Home Infusion, Inc.*,[69] the Deleos's malpractice and loss of consortium claims did not relate back against a group of nurses after a hip replacement surgery because no evidence showed the plaintiffs made a mistake about the factual identity of the nurses.[70] The Deleos' complaint included an affidavit that named the proposed defendants more than six times; furthermore, the plaintiffs' expert's affidavit also enumerated negligent acts each proposed defendant allegedly committed.[71] There was no mistake because "Wendy Deleo was present and fully aware of the nursing services she obtained."[72] Again, the Georgia Court of Appeals did not consider whether the nurses, based on these same allegations, knew or should have known they would have been sued but for a mistake.[73]

Dean v. Hunt,[74] provides another example of the *Harding* analysis. Even though the proposed defendant stipulated to the first two relation back elements, it argued that the third was not met.[75] Because the plaintiff referenced the proposed defendant in its original complaint, the Georgia Court of Appeals held relation back did not apply.[76] As the court reasoned,

> [t]he plaintiff's own complaint identified Groover as a possible defendant. This alone satisfied Groover's initial burden of showing that there was no mistake concerning identity because the opposite party may rely upon factual admissions made in the other party's pleadings so long as they remain in his pleadings, and no further proof thereof is needed.[77]

---

67. *Id.* at 434, 518 S.E.2d at 912.

68. *See id.* at 434–35, 518 S.E.2d at 912 (excluding analysis of the proposed defendant's knowledge).

69. 244 Ga. App. 683, 684, 536 S.E.2d 569, 571 (2000), *disapproved of by* Oconee Cnty. v. Cannon, 310 Ga. 728, 854 S.E.2d 531 (2021).

70. *Deleo*, 244 Ga. App. at 684, 536 S.E.2d at 571.

71. *Id.* at 685, 536 S.E.2d at 571.

72. *Id.*

73. *See id.* (omitting analysis of whether the complaint and the expert's affidavit meant that proposed defendants expected or should have expected to become defendants).

74. 273 Ga. App. 552, 615 S.E.2d 620 (2005).

75. *Id.* at 553, 615 S.E.2d at 622.

76. *Id.* at 554, 615 S.E.2d at 623.

77. *Id.*

C. Nature of the Mistake Matters: Mistake of Law Not Allowed

Georgia cases added a second layer to the analysis that further limited the relation back doctrine: plaintiffs could only make factual mistakes, not legal ones.[78]

Valentino v. Matara,[79] held that the relation back statute did not allow mistakes of law.[80] Valentino suffered injuries in a car accident with another driver who was borrowing a friend's vehicle. But Valentino did not dispute that the owner of the car was not operating the vehicle—the friend was.[81] The plaintiff knew that the owner was not the driver but still alleged that the owner was liable for the other driver's conduct.[82] Valentino made a mistake of law.[83] Indeed, the Georgia Court of Appeals noted that Valentino did not allege any claim that could hold Matara liable as the vehicle owner.[84] The court held that the amended claim against the driver did not relate back and rejected the argument that a plaintiff can cure a mistake of law by using relation back.[85]

Likewise, *Wallick v. Lamb*,[86] focused on the plaintiff and held that a claim did not relate back because the plaintiff was factually aware of the proposed defendant's involvement in the breached contract that gave rise to the claim.[87] The plaintiff spoke with the proposed defendant about the breached transaction before the limitations period expired.[88] Thus, the Georgia Court of Appeals concluded that the plaintiff simply failed to realize that the proposed defendant might be liable—a legal mistake—and waited too long before moving to amend.[89] In any event, the plaintiff's mistake was not factual because he knew the proposed defendant existed

78. *See Cannon*, 310 Ga. at 728, 854 S.E.2d at 533; *Fontaine*, 250 Ga. App. at 126, 550 S.E.2d at 695 (discussing the types of mistakes in previous cases that allowed and denied relation back). A mistake of fact means a person holds a belief that is not in accord with the facts of a given situation. *Mistake of Fact*, BLACK'S LAW DICTIONARY (11th ed. 2019). A mistake of law means a person does not comprehend the legal significance of an act, situation, or fact. *Mistake of Law*, BLACK'S LAW DICTIONARY (11th ed. 2019).

79. 294 Ga. App. 776, 670 S.E.2d 480 (2008), *disapproved of by* Oconee Cnty. v. Cannon, 310 Ga. 728, 854 S.E.2d 531 (2021).

80. *Valentino*, 294 Ga. App. at 778, 670 S.E.2d at 483.

81. *Id.* at 776–77, 670 S.E.2d at 481–82.

82. *Id.* at 777, 670 S.E.2d at 482.

83. *Id.* at 776, 670 S.E.2d at 482 (rejecting the contention that the owner of a vehicle can be liable under a negligence *per se* theory of recovery when the owner is not driving the vehicle, but allowed someone else who caused the wreck, to borrow it).

84. *Id.* at 777 n.1, 670 S.E.2d at 482.

85. *Id.* at 778, 670 S.E.2d at 483.

86. 289 Ga. App. 25, 656 S.E.2d 164 (2007).

87. *Id.* at 26, 656 S.E.2d at 165.

88. *Id.*

89. *Id.* at 27, 656 S.E.2d at 165.

and was involved in the contract dispute.[90] In contrast to *Wallick*, other cases that allowed relation back involved mistakes of fact, what courts termed "identity" mistakes.[91]

D. Georgia and Federal Standards Diverge

For the last eleven years, federal and Georgia law on relation back have differed by focusing on different parties' knowledge and allowing different types of mistakes to qualify.[92] In *Krupski v. Costa Crociere S.p.A.*,[93] the Supreme Court of the United States allowed a trip-and-fall plaintiff to substitute the actual owner of a cruise ship as defendant for the travel agency she originally sued because she believed the agency owned the ship.[94] Interpreting Federal Rule of Civil Procedure 15(c), the Court course-corrected federal circuits that followed a similar analysis to the *Harding* progeny in Georgia.[95]

The Supreme Court of the United States held that relation back depends on what the party to be brought in by amendment knew or should have known about the plaintiff's mistake, not on the plaintiff's knowledge.[96] That ruling separated federal and Georgia law. First, federal law focuses on the putative defendant, whereas Georgia law—at least sometimes—focused on the plaintiff.[97] The Federal Rules ask whether the proposed defendant knew or should have known it would have been named as a defendant had the plaintiff not made an error; it was of no import in federal court (unlike in Georgia) whether the plaintiff knew or should have known about the factual existence of the

90. *Id.*

91. *E.g.*, *Fontaine*, 250 Ga. App. at 126, 550 S.E.2d at 695 (allowing relation back when the plaintiff made a factual mistake as to which similarly named entity controlled the premises upon which the plaintiff suffered an injury); *Rich's, Inc.*, 134 Ga. App. at 891–92, 216 S.E.2d at 650; Tanner's Rome, Inc. v. Ingram, 236 Ga. App. 275, 276, 511 S.E.2d 617, 618 (1999) (service and notice of action upon sister corporation, who did not own or control premises upon which the plaintiff was injured, sufficient to allow substitution of proposed defendant, where the plaintiff was factually mistaken as to which entity owned the restaurant); Rasheed v. Klopp Enters., 276 Ga. App. 91, 94, 622 S.E.2d 442, 445 (2005) (holding that a claim related back where the plaintiff got into wreck with an employee of the proposed defendant, but mistakenly sued a related corporation that was listed as an additional insured on the insurance policy that the proper defendant held).

92. *See Cannon*, 310 Ga. at 731, 854 S.E.2d at 535 (adopting *Krupski*'s federal standard as Georgia's state benchmark for relation back jurisprudence).

93. 560 U.S. 538 (2010).

94. *Id.* at 541–44, 554.

95. *Id.* at 546.

96. *Id.* at 548.

97. *Id.*; *see Cannon*, 310 Ga. at 734, 854 S.E.2d at 537.

defendant.[98] Second, in federal court, legal and factual mistakes qualified for relation back; Georgia allowed relief for factual mistakes only.[99] Misunderstanding the legal significance of a prospective defendant qualified as a mistake in federal court but never did in Georgia courts.[100] These differences between state and federal court were significant. The plaintiff might not realize until after the statute of limitations expires that the law holds the proposed defendant liable, but the plaintiff's ability to join that party depended on the forum.

In 2019, after nearly fifty years of rulings, the Georgia Court of Appeals attempted to reconcile its conflicting decisions by holding that plaintiffs' claims related back when they sought to add corporate defendants but not when they sought to add individual persons.[101] The analysis of conflicting cases[102] above disputes that conclusion because some cases allowed relation back for claims adding individuals. So too, cases that denied relation back when an individual was the party to be added said nothing of the party's status as a natural person versus an entity. At least one justice of the Georgia Supreme Court later derided that attempt to reconcile the cases.[103]

As Georgia law stood in January 2021, O.C.G.A § 9-11-15(c)'s applicability depended upon (1) which party's knowledge the court analyzed and (2) whether the plaintiff made a mistake factually or legally. The Georgia Supreme Court changed that on February 1, 2021.

IV. COURT'S RATIONALE

In *Oconee County v. Cannon*, the Georgia Supreme Court considered the proper interpretation of O.C.G.A. § 9-11-15(c). Until 2021, the supreme court had never weighed in on the statute. The court clarified that (1) the third element of the relation back doctrine depends upon the proposed defendant's knowledge of the plaintiff's mistake and (2) that the plaintiff's mistake can be factual or legal.[104] Writing for the unanimous supreme court,[105] Justice Peterson analyzed the text of § 9-11-15(c).[106]

98. *Krupski*, 560 U.S. at 550.

99. *Id.* at 550; *see Cannon*, 310 Ga. at 735, 854 S.E.2d at 537.

100. *Krupski*, 560 U.S. at 550–51; *Cannon*, 310 Ga. at 735, 854 S.E.2d at 537.

101. *Cannon*, 353 Ga. App. at 303, 835 S.E.2d at 758.

102. More recent cases tend to flip-flop between which analysis they followed. Many still focused on the putative defendant. *E.g.*, LAZ Parking/Georgia, Inc. v. Jones, 294 Ga. App. 122, 123, 668 S.E.2d 547, 549 (2008).

103. Oral Argument, *supra* note 59, at 8:14.

104. *Cannon*, 310 Ga. at 728, 854 S.E.2d at 533.

105. "All the Justices concur." *Id.* at 737, 854 S.E.2d at 539.

106. *Id.* at 732, 854 S.E.2d at 535.

The court then remanded the case back to the trial court to examine whether Sheriff Berry in his official capacity knew or should have known he would have been sued, had the Cannons not made a mistake about who might be legally responsible for Jessica's death.[107]

A. Relation Back Depends on the Proper Defendant's Knowledge, and a Plaintiff Can Make a Mistake of Law or Fact

The court began by analyzing the statute's text, considering the plain, ordinary meaning of its words in context.[108] First, the court looked to *Krupski*'s interpretation of Rule 15(c) because Georgia's Civil Practice Act follows the Federal Rules and because the language is almost identical.[109] The Federal Rules focus on the defendant—not the plaintiff, as Georgia had.[110] Second, the operative word in the phrase "mistake concerning the identity of the proper party" was "proper," which contained factual as well as legal components.[111] A factual mistake, for example, could be "I don't know who the right party is; I don't even know that a proper party exists that I should be suing."[112] By contrast, an example of a legal mistake would be "I know that there are [multiple potential] parties that exist, . . . [but] I am confused about who I should sue."[113] For the statute to only include factual dimensions (as the word "identity" normally does in law), the court reasoned, it would not have included "proper," which carried legal connotations.[114] Indeed, a plaintiff may know full-well that a potential (and proper) party exists but fail to name that party in the complaint, not realizing the law holds that person liable.[115]

After clarifying what qualifies as a mistake, the court noted what does not.[116] Relation back does not apply when a plaintiff makes a strategic

---

107. *Id.* at 737, 854 S.E.2d at 539.

108. *Id.* at 732, 854 S.E.2d at 535.

109. *Id.* at 733, 854 S.E.2d at 536.

110. *Id.* at 734, 854 S.E.2d at 536.

111. *Id.* at 734, 854 S.E.2d at 537.

112. Oral Argument, *supra* note 59, at 8:14.

113. *Id.* at 8:21.

114. *Cannon*, 310 Ga. at 734–35, 854 S.E.2d at 537.

115. *Id.* at 735, 854 S.E.2d at 537 (rejecting that "any time a plaintiff is aware of the existence of two parties and [deliberately] chooses to sue the wrong one, the proper defendant could reasonably believe that the plaintiff made no mistake") (punctuation omitted, alteration in original).

116. *Id.* at 735, 854 S.E.2d at 538 (holding that a plaintiff makes no mistake when it fully understands the factual and legal implications of its decision not to sue a potential party).

decision to sue one party instead of another or not to sue one party, among a range of possible defendants, and then changes its mind.[117]

B. Courts Should Consider the Constructive Knowledge of the Proper Defendant

Penultimately, the opinion clarified that the proposed defendant may have either actual or constructive notice of the lawsuit.[118] Trial courts should consider whether the defendant "actually knew" about the lawsuit and mistake.[119] Additionally, the defendant might have constructive knowledge, such as government officials who have knowledge of the law imputed to them.[120] Officials with constructive knowledge of the law should know that plaintiffs made a legal mistake by not naming them in the original complaint.[121] The court clarified the law but did not decide how it applied to the Cannons' case.[122] Because the trial court had not grounded its analysis in the new framework that the supreme court announced, the court remanded the case back to the trial court for further findings of fact concerning Sheriff Berry's knowledge.[123]

In conclusion, *Cannon* held that relation back analysis considers (1) whether the plaintiff made a mistake—factual or legal—as to the identity of the proper party and then, if so, (2) whether the proposed defendant knew or should have known about that mistake.[124]

---

117. *Id.*

118. *Id.* at 737 n.7, 854 S.E.2d at 539. The defendant must have notice of the lawsuit itself, not the claim or events that gave rise to the lawsuit. Harrison v. Golden, 219 Ga. App. 772, 773, 466 S.E.2d 890, 892 (1995) ("By the plain wording of the statute, the required notice is notice of the institution of the action (i.e., notice of the lawsuit itself) and not merely notice of the incidents giving rise to such action. Notice of the incidents giving rise to the litigation did not satisfy the . . . requirement that the party sought to be added must have notice of the institution of the action."); Green v. Cent. State Hosp., 275 Ga. App. 569, 573, 621 S.E.2d 491, 495 (2005); *Sims*, 131 Ga. App. at 482, 206 S.E.2d at 135.

119. *Id.* at 737 n.7, 854 S.E.2d at 539.

120. *Id.*

121. *See id.*

122. *Id.* at 737, 854 S.E.2d at 538–39.

123. *Id.* at 737, 854 S.E.2d at 539 (directing the court of appeals to vacate the trial court's decision and to remand the case to the trial court to remake its findings of fact consistent with the new analysis).

124. *Id.* at 728, 854 S.E.2d at 533.

V. IMPLICATIONS

After *Cannon*, it will be harder for a person to run out the clock on a claim that the person knows should have been brought against it.[125] Going forward, plaintiffs can take refuge in *Cannon*'s test on the third element of relation back, and shifty defendants face the prospect of defending themselves long after a statute of limitation expires. No more "heads defendants win, tails plaintiffs lose."

Cannon has three major implications. First, it resettles relation back within the doctrine's purpose. Second, it prevents forum shopping. Third, while courts smooth out the clarified analysis, *Cannon* raises questions about the overlap and contest between appellate and trial court power.

A. Interpretation Once Again Comports with the Statute's Policy (and Text)

Cannon's interpretation situates § 9-11-15(c) back within its purpose. Broadly, *Cannon*'s interpretation strikes a balance between notice and the right to repose. Specifically, the *Cannon* scenario is exactly the situation Rule 15(c) is intended to prevent. In the committee notes to the Federal Rule, the drafters comment that relation back responds to problems when private citizens try to sue the government or government officers.[126] Plaintiffs tended to make legal errors about who they could hold responsible: naming heads of agencies instead of the agency, the wrong agency, the wrong government official, the agency instead of its head, and other combinations.[127] Put another way, *Cannon* keeps plaintiffs from losing a claim against the government when they know they have one and when the government knows they are pursuing it.

For that reason, relation back does not offend statutes of limitations' policies. The drafters explain that the putative defendant still has notice of the action so that it can defend itself.[128] Furthermore, the defendant has no legitimate right to rest easy because it knows that, but for a mistake, it would have been sued on that claim. In short, relation back and statutes of limitation simultaneously ensure that a defendant will have finality (did not know about the lawsuit before limitations expired and cannot be unfairly dragged into court) or predictability (knew about the lawsuit and can properly defend itself).

---

125. Relation back still requires that the proposed defendant know about the lawsuit. Actual reasonable ignorance shields litigation.

126. FED. R. CIV. P. 15 advisory committee's note to 1966 amendment.

127. *See id.*

128. *Id.*

Now, Georgia has recalibrated its relation back doctrine with the purpose of allowing a claim to proceed when the substituted defendant had notice anyway. Inconsistent analyses focusing on the plaintiff's knowledge missed the mark; relation back is a response to the defendant's awareness, not what the plaintiff could have done better. *Cannon*'s interpretation puts Georgia back on track to achieve fairness for plaintiffs when, previously, otherwise unprejudiced defendants have gotten off the hook.

B. Preventing Forum Shopping

Post-*Krupsk*i but pre-*Cannon*, cautious Georgia plaintiffs had reason to forum shop.[129] Georgia's relation back doctrine was narrower and perhaps unpredictable if the court chose to consider the plaintiff's knowledge. Thus, plaintiffs had good reason to file in federal court when uncertain about the proper party.

For example, in government litigation plaintiffs face confusion as to which entity or official to name as a party. As *Cannon* demonstrates, suing the government meant wanting to be in a forum that held proposed defendants responsible, not letting them lurk in the shadows. Plaintiffs who asserted claims against government entities or officials had strong incentive to litigate in federal court, where they could count on a consistent analysis: they just needed to alert the proposed defendant about the action before the Rule 15(c) period expired.[130] Now, however, the same procedural rules apply in both forums. State and federal courts are back to vertical uniformity.

C. Contest Between Trial Court Discretion and Appellate Power

Last, the appellate review process raises questions concerning the balance of power between trial and appellate courts in the interim period as *Cannon* becomes settled law.[131] Will appellate courts reverse and render judgment in cases with which they do not agree, searching the record for evidentiary support, or will they reverse and remand for the trial court to make further findings and try again?

---

129. For the basic arguments opposing differences in the law between federal and state courts, see Erie R.R. Co. v. Tompkins, 304 U.S. 64, 73–77 (1938).

130. Federal courts follow the Federal Rules of Civil Procedure, not state procedural laws, when the two directly conflict. Hanna v. Plumer, 380 U.S. 460, 472 (1965); *see also* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 436 (2010) (Stevens, J., concurring).

131. *Cf. Farhat*, 227 Ga. App. at 202–03, 489 S.E.2d at 326 (remanding the case when the trial court applied the wrong statute to decide whether the claim related back).

One recent panel, *In re Ragas*,[132] has already struggled with this issue, leaving the dissenting judge to expose what he argued was an overstep of appellate court power.[133] Chief Judge Rickman, vehemently dissenting, asserted, "In its zeal to usurp the trial court's role as factfinder, the majority states that it is error to remand for further proceedings. That statement is not accurate."[134] Appellate judges sometimes disagree on their institutional and procedural role to decide a case, and that disagreement counts during *Cannon*'s transition period.[135]

Even in the present case, the Court of Appeals of Georgia, in its review of the Cannons' motion to substitute, decided to overturn the trial court's decision.[136] Conversely, the Georgia Supreme Court was more cautious to decide the issue: the court remanded for the trial court's reconsideration. Indeed, in dicta, the court said that the record did not even allow an appellate court to render a decision; it lacked the power to act.[137] It is uncertain how future appellate courts will navigate this balance of power. The Court of Appeals of Georgia seems willing to reverse decisions, whereas the Georgia Supreme Court wants to tread carefully alongside trial courts.

---

132. 359 Ga. App. 670, 859 S.E.2d 827 (2021).

133. *Id.* at 677, 859 S.E.2d at 833–34 (Rickman, J., dissenting). In 2002, the Georgia Supreme Court considered when to remand and when to render a decision, acknowledging the "inconsistent guidance" appellate courts face when considering whether to dispose of a case or remand for further proceedings after a trial court made a legal error on summary judgment—such as applying the wrong legal standard—but likely ended up at the correct conclusion anyway. City of Gainesville v. Dodd, 275 Ga. 834, 837, 573 S.E.2d 369, 371–72 (2002); *see also* McRae v. Hogan, 317 Ga. App. 813, 818, 732 S.E.2d 853, 858 (2012) ("Under these circumstances—where the trial court relied on an erroneous legal theory—we have discretion either to perform an independent *de novo* review of the record that was properly before the trial court in order to determine whether summary judgment was appropriate for another reason or to return the case to the trial court for further proceedings.") (emphasis added).

134. *Ragas,* 359 Ga. App. at 677, 859 S.E.2d at 833–34 (Rickman, J., dissenting). The dissent goes on to argue that remand is the proper disposition when a trial court misapplies the evidentiary or factfinding standard, whereas the majority concludes that it has the authority to use the existing facts and apply the proper framework of analysis. *Id.* at 678, 859 S.E.2d at 834.

135. Historically, the court of appeals tended to err on the side of caution, and remand. *E.g.*, Benedek v. Bd. of Regents of Univ. Sys. of Georgia, 332 Ga. App. 573, 575, 774 S.E.2d 150, 152 (2015) (remanded for reconsideration where the trial court applied the wrong standard when deciding whether a claim in an amended complaint related back); Callaway v. Quinn, 347 Ga. App. 325, 329–30, 819 S.E.2d 493, 496 (2018). Notably, *Callaway* includes the same two judges who disagreed in *Ragas* over the appellate court's authority in situations like this.

136. *Cannon*, 353 Ga. App. at 296, 835 S.E.2d at 754.

137. *Cannon*, 310 Ga. at 737, 854 S.E.2d at 538–39.

Cannon v. Oconee County tidied up the interpretation and application of Georgia's relation back statute. Now that the supreme court clarified the analysis, litigants can count on more predictable results from Georgia courts. Georgia once again parallels federal procedure on proper pleading practices and realigns its relation back test with the doctrine's text and purposes.