

COURT OF APPEALS OF GEORGIA

RETURN NOTICE

November 23, 2015

To: Allen W. Johnson, Esq., Post Office Box 1162, Augusta, Georgia 30903

Case Number: _____ Lower Court: _____ County Superior Court _____

Court of Appeals Case Number and Style: A15A1048. Ellen M. Stone v. S&H Motors, Inc.

Your document(s) is (are) being returned for the following reason(s).

- There is no case pending in the Court of Appeals of Georgia under your name.**
- A Notice of Appeal is filed with the clerk of the trial court and not with the Court of Appeals of Georgia. See OCGA §5-6-37.** Once the trial court clerk has received and filed the Notice of Appeal, the trial court clerk will prepare a copy of the record and transcripts as designated by the Notice of Appeal and transmit them to this Court. Once the Notice of Appeal is docketed in the Court of Appeals of Georgia, a Docketing Notice with the Briefing Schedule and other important information is mailed to counsel for the parties or directly to the parties, if the parties are representing themselves. You do not need to provide this Court with a copy of the Notice of Appeal you filed with the superior court.
- The Notice of Appeal must include a proper Certificate of Service.** A Certificate of Service must show service to the opposing counsel and contain the counsel's full name and complete mailing address. The opposing counsel must actually be served with a copy of your filing.
- An Application for Writ of Habeas Corpus should be filed in the superior court of the county in which you claim you are illegally detained.** An appeal from a denial of an Application for Writ of Habeas Corpus is to the Supreme Court and not the Court of Appeals.
- An Application for Writ of Mandamus should be filed in the superior court of the county official whose conduct you intend to mandate.** An appeal from a denial of an Application for Writ of Mandamus is to the Supreme Court and not the Court of Appeals.
- Your appeal was disposed by opinion (order) on _____.** The Court of Appeals _____
_____ The remittitur issued on _____
divesting this Court of jurisdiction. The case decision is therefore final.
- Your _____, is also enclosed.**
- Electronic filing is mandatory in this Court. The following Rule 46 became effective January 1, 2015.**

XXII. ELECTRONIC FILING OF DOCUMENTS

Rule 46. Electronic Filing of Documents.

Counsel is required to use the Court's electronic filing system and to follow the policies and procedures governing electronic filing as set forth in the Court's electronic filing instructions. The Clerk of Court may grant a request for exemption from mandatory electronic filing for good cause shown. An adverse decision by the Clerk of Court may be appealed by motion to the Court via a paper filing.

Rule passed October 21, 2014 - effective January 1, 2015

You will need to e-file the Motion for Reconsideration.

**IN THE COURT OF APPEALS FOR THE
STATE OF GEORGIA**

ELLEN M. STONE,

Appellant,

v.

S&H MOTORS, INC., D/B/A
KIA OF AUGUSTA,

Appellee.

* CASE NO A15A1048
*
* Court of Appeals
* Application No. A15A1048
*
* Richmond County State Court
* CA No.: 2014-RCSC-373
*

**ON APPEAL FROM THE
STATE COURT OF RICHMOND COUNTY**

**MOTION FOR RECONSIDERATION
OF APPELLANT**

Allen W. Johnson
Attorney for Appellant
P.O. Box 1162
Augusta, Georgia 30903
(706) 722-3496 - Telephone
(706) 724-0330 - Facsimile
Georgia Bar No.: 392200

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2015 NOV 20 PM 12:14
COURT OF APPEALS OF GA

**IN THE COURT OF APPEALS FOR THE
STATE OF GEORGIA
CASE NO. A15A1084**

ELLEN M. STONE,

Appellant,

v.

S&H MOTORS, INC., D/B/A
KIA OF AUGUSTA,

Appellee.

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MOTION FOR RECONSIDERATION OF APPELLANT

**THE RULE THAT THE COURT CITES AS CONTROLLING
WAS MISAPPLIED**

O.C.G.A. § 9-11-52 (c) applies whereas here there was an issue of fact. The fact was that there were now three separate and conflicting arbitration clauses and a motion for new trial is the proper means of seeking reexamination. This is different from a motion for summary judgment which involve only issues of law.

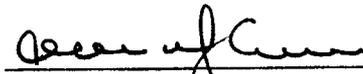
Appellant did not have even a discretionary appeal unless the trial judge provided a certificate of immediate review under O.C.G.A. § 5-6-34 (b) which he refused to do. The error complained of in this proceeding was that of awarding attorney's fees against Plaintiff for filing a motion for new trial which was clearly authorized.

FACTS THAT THE COURT MAY HAVE OVERLOOKED

In Stone's Motion to Strike Defenses in the State Court, it included new facts (R34-36) that were discovered in the sale documents subsequent to the Superior Court Order. The State Court

made its ruling ordering arbitration then subsequently during the discovery period two additional arbitration clauses were discovered (R-5) that conflicted with each other establishing that there was no meeting of the minds. The Court's ruling was made prior to the discovery of the new documents and consequently should have considered the new facts which established new arbitration clauses and in particular the one that recited that the arbitration was subject to the Georgia Uniform Arbitration Act which exempts consumer sales. (R-20 & 67).

Respectfully submitted, this the 18th day of November 2015.



Allen W. Johnson
Attorney for Appellant
Georgia Bar No. 392200

P.O. Box 1162
Augusta, Georgia 30903
(706) 722-3496

IN THE COURT OF APPEALS
STATE OF GEORGIA
CASE NO. A15A1084

ELLEN M. STONE,

Appellant,

v.

S&H MOTORS, INC., D/B/A
KIA OF AUGUSTA,

Appellee.

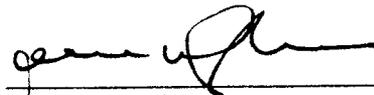
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CERTIFICATE OF SERVICE

I CERTIFY that a copy of the *Motion for Reconsideration* was served by me on the Defendants' counsel by delivering a copy by United States Mail, postage prepaid, and properly addressed as follows:

Mr. George R. Hall
Attorney at Law
P.O. Box 1564
Augusta, Georgia 30903-1564

This 17th day of November 2015.



Allen W. Johnson
Attorney for Appellant

ALLEN W. JOHNSON
Attorney-at-Law
440 Greene St. (30901)
P.O. Box 1162
Augusta, Georgia 30903
P: (706) 722-3496
GA Bar No.: 392200

**SECOND DIVISION
ANDREWS, P. J., MILLER
and BRANCH, JJ.**

**NOTICE: Motions for reconsideration must be *physically*
received in our clerk's office within ten days of the date
of decision to be deemed timely filed.
<http://www.gaappeals.us/rules>**

November 13, 2015

**NOT TO BE OFFICIALLY
REPORTED**

In the Court of Appeals of Georgia

A15A1084. STONE v. S & H MOTORS, INC. D/B/A KIA OF AUGUSTA.

MILLER, Judge.

Ellen Stone filed suit against S & H Motors, Inc., d/b/a Kia of Augusta ("S & H Motors"), alleging that a vehicle she purchased was defective. The trial court granted S & H Motors's motion to compel arbitration. Thereafter, Stone filed a motion for new trial. The trial court denied Stone's motion, and awarded attorney fees to S & H Motors pursuant to OCGA § 9-15-14 (b). We granted Stone's discretionary application appealing the award of attorney fees. On appeal, Stone contends that the trial court erred in compelling arbitration and in awarding attorney fees. For the reasons that follow, we lack jurisdiction to consider Stone's contentions

concerning the trial court's order compelling arbitration, and affirm the trial court's award of attorney fees.

The record shows that Stone first filed suit against S & H Motors in superior court, and the superior court granted S & H Motors's motion to compel arbitration in February 2014. Stone voluntarily dismissed her complaint, and then filed the instant suit in state court. S & H Motors again moved to compel arbitration, and the state court granted that motion on July 11, 2014. Several days later, Stone filed a motion for new trial. On September 3, 2014, the state court denied her motion for new trial and awarded attorney fees, although it did not set the amount of the fee award until

November 3, 2014. We granted Stone's discretionary application on December 11, 2014, and Stone filed her notice of appeal on December 16, 2014.

1. In three enumerations of error, Stone challenges the state court's order granting the motion to compel arbitration. We lack jurisdiction to consider these claims.

"It is our duty to inquire on our own motion into the issue of this Court's jurisdiction." (Citations omitted.) *Southwest Health & Wellness, LLC v. Work*, 282 Ga. App. 619, 622 (1) (a) (639 SE2d 570) (2006).

As shown above, Stone filed her appeal in December 2014, while the state court entered its order compelling arbitration in July 2014. Thus, Stone did not file

a notice of appeal within 30 days of the state court's order compelling arbitration. See OCGA § 5-6-38 (a) (requiring that a notice of appeal be filed within 30 days after entry of the appealable decision). While a motion for new trial generally tolls this time period, see *id.*, for reasons discussed in more detail below, Stone's motion for new trial was not the proper vehicle to address the state court's legal determination that her complaint was subject to arbitration. Additionally, even construing Stone's motion for new trial as a motion for reconsideration, a motion for reconsideration does not toll the 30-day period for filing a notice of appeal. See *Blackwell v. Sutton*,

261 Ga. 284 (404 SE2d 114) (1991). Consequently, Stone's notice of appeal, filed on December 16, 2014, was untimely to challenge the state court's July 11, 2014 order compelling arbitration. See *Kappelmeier v. HSBC USA, Inc.*, 280 Ga. App. 349, 350 (634 SE2d 133) (2006) ("It is well established that the proper and timely filing of a notice of appeal is an absolute requirement to confer jurisdiction upon the appellate court.") (punctuation and footnote omitted); *Parker v. Bellamy-Lunda-Dawson*, 192

Ga. App. 764, 764-765 (1) (386 SE2d 527) (1989) (a motion for new trial challenging only a trial court's legal conclusions has no validity and does not extend period for filing of notice of appeal).

Stone's discretionary appeal, which is now properly before us, does not preserve her ability to challenge the arbitration order. Under OCGA § 5-6-34 (d), where a direct appeal is taken, all prior rulings by the lower court that may affect the proceedings below may be raised on appeal and considered by the appellate court. See *Davis v. Deutsche Bank Nat. Trust Co.*, 285 Ga. 22, 23 (673 SE2d 221) (2009). This appeal, however, was taken pursuant to the discretionary application process pursuant to OCGA § 5-6-35 (a) (10), and OCGA § 5-6-35 does not contain a provision allowing a party to challenge prior rulings. Therefore, Stone is unable to challenge the arbitration order.

2. We do have jurisdiction to consider the denial of Stone's motion for new trial, construed as a motion for reconsideration, which became a final order when the attorney fee award amount was established. See *Northen v. Frolick & Assoc.*, 235 Ga. App. 804, 805-806 (1) (510 SE2d 122) (1998) (although order expressly provided an attorney fee award, the order was not final order until the amount of the fee was determined).

Stone contends that the state court erred in concluding that the motion for new trial was not the proper vehicle to challenge its order compelling arbitration. Specifically, Stone argues that the resolution of S & H Motor's motion to compel arbitration involved questions of fact, and that a motion for new trial is a proper means to seek reexamination of a fact.

“A motion for a new trial is a proper means of seeking a retrial or reexamination, in the same court, of an issue of fact, or of some part or portion thereof, after decision by a jury or a decision by the court thereon.” (Citation and punctuation omitted.) *Kuriatnyk v. Kuriatnyk*, 286 Ga. 589, 591 (2) (690 SE2d 397) (2010). “A motion for new trial cannot be used solely to object to the trial court’s legal conclusions.” (Footnote omitted.) *Turner v. Bynum*, 255 Ga. App. 173, 175 (1) (564 SE2d 784) (2002). It is well-established that the construction of an arbitration agreement, like any other contract, presents a question of law. See *Langfitt v. Jackson*, 284 Ga. App. 628, 629 (644 SE2d 460) (2007).

Here, the state court’s conclusion that Stone’s complaint was subject to arbitration was based on an interpretation of the arbitration provisions, not on a factual determination. Therefore, Stone’s motion for new trial was not the proper means to seek reexamination of the state court’s legal determination. See *Kuriatnyk*, supra, 286 Ga. at 591 (2). Consequently, the state court did not err in denying her motion.

3. In her final enumeration of error, Stone contends that the state court erred in awarding attorney fees under OCGA § 9-15-14 (b), because the state court failed to make express findings of fact specifying upon which conduct the award is made. We disagree.

Under OCGA § 9-15-14 (b), the trial court may award attorney fees if “it finds an attorney or party brought or defended an action, or any part thereof, that lacked substantial justification[.]”

A trial court’s award of fees under OCGA § 9-15-14 (b) is discretionary, and the standard of review on appeal is abuse of discretion. When a trial court exercises its discretion to award such attorney fees and costs, however, it is incumbent upon the court to specify the conduct upon which the award is made. A judgment devoid of such findings must be vacated, and the case must be remanded for reconsideration.

(Punctuation and footnotes omitted.) *Johnston v. Correale*, 285 Ga. App. 870 (1) (648 SE2d 180) (2007).

Here, in finding that attorney fees under OCGA § 9-15-14 (b) were justified, the state court first found that Stone’s motion for new trial was not the proper vehicle to challenge its order compelling arbitration, a ruling we affirm in Division 2 above. The state court also determined that, as to the merits of Stone’s motion, it was not disputed that Stone signed the arbitration agreement, and therefore was bound by it. Additionally, the state court noted that Stone’s other argument raised in her motion for new trial went to a defense that the court had already found inapplicable. The state court concluded that Stone’s motion lacked justification based on these circumstances.¹ In light of evidence that Stone attempted to forestall

¹ The state court concluded that Stone’s motion lacked “potential justification,” rather than substantial justification as required by the statute. Since

arbitration by dismissing her first suit after being ordered to arbitrate her claims, refile that suit in different court, and then filing a motion for new trial after again being ordered to arbitration, we cannot say that the state court abused its discretion in awarding attorney fees for the filing of a motion for new trial that lacked substantial justification. Accordingly, we affirm.

Judgment affirmed. Andrews, P. J., and Branch, J., concur.

Stone does not argue on appeal that the state court applied the wrong standard of review, we do not address this issue. See, e.g., *Harbin v. Roberts*, 305 Ga. App. 107, 109 (2), n.6 (699 SE2d 36) (2010).