**5 YEAR RULE - EPISODE NOTES**

Hello everyone and welcome back to the Good Judge-Ment Podcast. I am Wade Padgett

*And I am Tain Kell.*

Loyal listeners know that we always ask for topic suggestions for future episodes in every episode we record.

*We listen closely to your requests and ideas and really appreciate them a great deal.*

Today’s episode comes from the mind of a loyal listener. Shout out to Betty Banks for the idea for today’s episode.

*That’s right! Shout out to Betty Banks for the great idea. Today we are going to discuss THE FIVE YEAR RULE*

I asked Ms. Banks for the back story on why she thought it would be a good idea for us to record an episode on the 5 Year Rule – have not heard back just yet.

*Yeah, the 5 Year Rule is frequently an administrative thing that clerks and others use to clean up a docket – it would be interesting to hear how it impacted Ms. Banks. To quote the great philosopher Arsenio Hall – “Things that make you go, hmmm?”*

Anyway, let’s get to today’s episode on the 5 Year Rule.

O.C.G.A. §§ 9-2-60 or 9-11-41(e) are not one of the provisions of the Civil Practice Act that just roll off the tongue of lawyers or judges (or clerks)

But it is a provision we all know well – we know it by the name of the “5 Year Rule”

You might ask yourself why we felt the need for an episode on what is usually an administrative task for clerks and courts

Frankly, when we received this idea for an episode topic, I thought we would have difficulty making this topic into an episode – there is a 5 Year Rule that operates as an automatic dismissal. Roll the credits. But in getting into this, we realized there is more to this topic than initially meets the eye

While these statutes may been viewed as administrative, docket management statutes, there are some details that deserve our consideration – the ramifications of a dismissal under the 5 Year Rule can be pretty dramatic

And, as we will discuss, a dismissal under the 5 Year Rule is automatic – even without a motion by a party or action by the court – and it cannot be waived

And such a dismissal can significantly impact litigation (and may impact how lawyers approach certain issues in the litigation)

***TWO STATUTES – SAME LANGUAGE***

Essentially the same language found in O.C.G.A. § 9-2-60 can be found in O.C.G.A. § 9-11-41(e)

§ 9-11-41(e) simply makes all of the same points of the separate statute in a single sentence

“OCGA §§ 9–2–60(b) and 9–11–41(e) are the statutory embodiment of the ‘five-year rule.’”[[1]](#endnote-1)

***STATUTORY LANGUAGE***

If we had drafted §9-2-60, we would have changed the order of the paragraphs (but nobody asked us)

O.C.G.A. § 9-2-60 provides:

(a) For the purposes of this Code section, an order of continuance will be deemed an order and the word “proceedings” shall be held to include, but shall not be limited to, an appeal from an award of assessors or a special master in a condemnation proceeding.

(b) Any action or other proceeding filed in any of the courts of this state in which no ***written*** order is taken for a period of five years shall automatically stand dismissed with costs to be taxed against the party plaintiff.

(c) When an action is dismissed under this Code section, if the plaintiff recommences the action ***within six months*** following the dismissal then the renewed action shall stand upon the same footing, as to limitation, with the original action.

§ 9-11-41(e) contains virtually the same language – but all in a single sentence.[[2]](#endnote-2)

 Much more our style….

You may ask yourself why there are two statutory provisions that contain virtually the same language.

And you are going to answer that question yourself because we do not know the answer!

***STATUTORY INTERPRETATION***

In prior episodes, we have discussed statutory interpretation and there is a principle that applies here that bears repeating.

Statutes which are “in derogation of common law” must be strictly construed.

“Statute providing that any action in which no written order was taken for five years should automatically be dismissed was forfeiture statute in derogation of common law and had to be strictly construed.”[[3]](#endnote-3)

***DUE PROCESS***

Some litigants have argued that these 5 Year Rule statutes violate due process and the extreme sanctions for inactivity in a civil case are unfair.

Statute pursuant to which action shall automatically stand dismissed if no written order is taken in action for five years did not violate due process;  statute was reasonable procedural rule in that it furthered dual purpose of preventing court records from becoming cluttered with inactive litigation and protecting litigants from dilatory counsel;  moreover, statute afforded litigants opportunity to litigate their claims and required only minimal activity to avoid dismissal, and gave litigants right to renew action within six months of dismissal.[[4]](#endnote-4)

***WHEN DOES 5 YEAR RULE BEGIN TO RUN***

When calculating time limitations, it always helps to know when the time period begins to run.

“time begins to run on the date the complaint is filed regardless of when the answer is filed.”[[5]](#endnote-5)

***REQUIRES “WRITTEN ORDER”***

The appellate cases that have been decided concerning the 5 Year Rule are pretty clear on a couple of points.

First, both statutory provisions reference a “written order” – it is insufficient to avoid the automatic dismissal provisions for the judge to verbally grant a continuance in the case

It is pretty common for a judge to conduct a calendar call – and at that calendar call for one or both parties to verbally request a continuance. Even if granted, those verbal pronouncements would NOT reset the clock on the 5 year rule

And it must be an “order” – a filing by a party ***does not*** reset the 5 year clock

“In order to satisfy the statute, an order must be written, signed by the trial judge, and properly entered in the records of the trial court by filing it with the clerk.”[[6]](#endnote-6)

Even where the party, “made ‘continued efforts ... via both letter, jury demand, and [a] myriad of telephone calls to the [trial court] attempting to be placed on the trial calendar’” – none of those actions toll the clock on the 5 Year Rule – they are not “written orders, signed by the trial judge and entered in the docket”[[7]](#endnote-7)

The question is not whether a party/lawyer has been diligent or dilatory – the “litigation efforts” of the parties is irrelevant. A written order by the trial judge must be signed and entered in the court’s records to toll the 5 Year rule.[[8]](#endnote-8)

“The five year rule places upon a plaintiff who wishes to avoid an automatic dismissal of his case by operation of law a duty to obtain a written order of continuance or other written order at some time during a five year period and to make sure the same is entered in the record.”[[9]](#endnote-9)

***THE WRITTEN ORDER DOES NOT HAVE TO BE AN “IMPORTANT ORDER”***

“A written, signed, and properly-filed order need not advance or resolve the litigation, grant or deny affirmative relief, or have been obtained by the party seeking to use it to toll the running of the five-year rule in order to qualify as a tolling order.”[[10]](#endnote-10)

There were older cases that have been overruled which suggested that the written order – if to be considered to have tolled the 5 Year Rule – had to be an order that was entered in response to a party’s motion.[[11]](#endnote-11)

That older law has been expressly overruled.[[12]](#endnote-12)

The older law seemed to suggest that orders to draw jurors, orders for the parties to enter into a pretrial order, or similar “housekeeping orders” would not toll the 5 Year Rule. ALL OF THAT LAW HAS BEEN OVERRULED.[[13]](#endnote-13)

Under existing law, if the order is in writing, signed by the judge and filed in the records of the trial court,[[14]](#endnote-14) the 5 Year Rule is tolled (and starts running again the next day).[[15]](#endnote-15)

***DISMISSAL IS BY OPERATION OF LAW***

“The provisions of these Code sections are mandatory, and dismissal occurs by operation of law.”[[16]](#endnote-16)

The parties cannot waive the 5 year rule[[17]](#endnote-17) – “In order to satisfy the statute, an order must be written, signed by the trial judge, and properly entered in the records of the trial court by filing it with the clerk. No party can waive this requirement.”[[18]](#endnote-18)

Any further action in a case where 5 years has passed since the date of that last order entered in the case by the trial judge – even a trial and verdict – is a mere nullity.[[19]](#endnote-19)

Even an agreement between the parties to continue a case cannot avoid the implications of the 5 Year Rule.[[20]](#endnote-20)

***SERVICEMEMBERS CIVIL RELIEF ACT***

There have been cases which suggested that the Servicemembers Civil Relief Act[[21]](#endnote-21) could be used to thwart the 5 Year Rule. Those arguments have been directly rejected.

We do not want to get too far into the weeds on the Servicemembers Civil Relief Act – just understand that Georgia’s appellate courts have found that a stay under the act does not go into effect by operation of law or upon the filing of a motion under the act – the stay requires a hearing with findings and the statute has specifically been found not to preempt the 5 Year Rule[[22]](#endnote-22)

***ANY ACTION TAKEN AFTER 5 YEARS LAPSE IS “VOID”***

A motion to reconsider the automatic dismissal does not revive a case that is dismissed under the 5 Year Rule by operation of law. At the time the 5 Year Rule becomes effective, the underlying case is “completely lifeless for all purposes” and any filing in that case is a nullity.[[23]](#endnote-23)

“any subsequent order after the automatic dismissal of the case is null and void, because the trial court has lost jurisdiction over the case, which no longer is pending before it.”[[24]](#endnote-24)

“[O]nce dismissed by operation of law, a trial court is without authority to order the action reinstated.”[[25]](#endnote-25) The same applies to appellate courts.[[26]](#endnote-26)

***EXCEPTIONS***

In our outline, we entitled this next section as “exceptions”

But that really is a misnomer – these cases we are about to discuss are not truly “exceptions” – they are merely “clarifications” or “other provisions” of the law which, when applied, render the 5 Year Rule inapplicable

There is no time limit for a court to enter a judgment following a jury’s verdict[[27]](#endnote-27) The same is true when the court makes a verbal pronouncement following a bench trial and all that remains to be completed is the entry of the judgment memorializing the pronouncement.[[28]](#endnote-28)

“a court of record, in the exercise of its inherent power, has continuing jurisdiction to enter judgment on a jury verdict at any time.”[[29]](#endnote-29)

Where only act remaining to be performed by the trial court is entry of judgment on the parties’ settlement agreement, the 5 Year Rule has no application.[[30]](#endnote-30)

entry of default judgment for liquidated damages not subject to five-year rule[[31]](#endnote-31)

***APPLICATION TO CERTAIN TYPES OF CASES***

The cases cited in the outline (available on goodjudgepod.com) and which we have discussed today involve all sorts of different types of underlying civil cases.

But we found a couple of examples of cases which lawyers and judges need to pay particular attention to

The 5 Year Rule applies to “consent agreements” involving debt collection

You are likely familiar with these types of cases – the plaintiff files suit on a debt and the parties enter into a “consent agreement” under which the defendant agrees to make certain payments and, upon default, the plaintiff can seek a judgment in the full amount of the debt then outstanding

Under the 5 Year Rule, once 5 years have passed since the “consent agreement” was filed – and no other order was entered in the case, the case stands dismissed by operation of law.[[32]](#endnote-32)

***RENEWAL***

As noted previously, a case dismissed under the 5 Year Rule can be renewed – but the renewal action must be filed within 6 months of the date of the dismissal under the 5 Year Rule became effective – in order for the renewal action to “related back” under the statute of limitations

 That statement is a mouthful so let’s break it down a bit

The action we are discussing here is subject to some statute of limitations.

And the case has been ~~laying around~~ pending for at least 5 years

Before we even get to the renewal, realize that the dismissal under the 5 Year Rule is automatic and happens by operation of law. There is NO requirement that the trial court enter a dismissal order – it just happens.

So this situation assumes that the court has entered a dismissal order or something else has happened to bring the automatic dismissal to the attention of the plaintiff – and that occurred within 6 months of the date the 5 Year Rule became applicable!

Assuming all of that is true, if a party wants to renew the action and avoid summary judgment/motion to dismiss based upon the running of the statute of limitations, a new action must be filed that is essentially identical both as to the parties and theories of liability

Any action filed within 6 months of the 5 Year Rule expiring must “be substantially the same both as to the cause of action and as to the essential parties – a defendant’s liability cannot be enlarged beyond that indicated by the pleadings in the first case.”[[33]](#endnote-33)

Even if the prior complaint alleged facts that could constitute “battery” but the first complaint did not specifically allege a cause of action for “battery,” the renewal action cannot allege a cause of action for “battery” and that additional claim does not relate back for purposes of statute of limitations. Summary judgment in the renewed action would be appropriate.[[34]](#endnote-34)

***TAKE AWAY***

There are a couple of take aways from this episode dealing with the 5 Year Rule – some for lawyers and some for judges

*First, if the case is being actively pursued, GET AN ORDER SIGNED. Even if it is not a dispositive order or an “important order,” get an order signed to avoid real issues in the future*

For judges, SIGN orders presented by lawyers – assume there is a reason why they are asking you to sign a continuance order or an order for mediation. They know they do not need those orders to be signed – assume they are requesting the order to be signed for a reason – maybe even for a reason you are not aware of!

*In my experience, judges have no issues if the lawyers are working on the case and letting the judge know that the case is active and is being pursued is really all that you need to do as a lawyer*

So, that is all for this episode dealing with the 5 Year Rule in civil cases. Shout out to Ms. Betty Banks for the idea!

*If you would like to hear your idea discussed by 2 numbskulls, reach out to us at goodjudgepod@gmail.com*

This outline that is full of citations to authority can be found on our website, goodjudgepod.com

*You all know the artist Madonna. She has had A BUNCH of Top 10 hits. Specifically, she has had 71 top 40 singles and 63 of those went top 10. Today’s trivia question is, “What was Madonna’s* ***first*** *top 10 hit?” [wait for answers] All of you who answered “Like a Virgin,” you are wrong. “Crazy for You” or “Material Girl?” Nope. Madonna’s first top 10 hit was “Holiday.” Aren’t you glad you listen to this podcast?*

1. *Zepp v. Brannen*, 283 Ga. 395, 396 (2008). [↑](#endnote-ref-1)
2. (e) **Dismissal for want of prosecution; recommencement.**Any action in which no written order is taken for a period of five years shall automatically stand dismissed, with costs to be taxed against the party plaintiff. For the purposes of this Code section, an order of continuance will be deemed an order. When an action is dismissed under this subsection, if the plaintiff recommences the action within six months following the dismissal then the renewed action shall stand upon the same footing, as to limitation, with the original action. [↑](#endnote-ref-2)
3. *Republic Claims Service Co. v. Hoyal*, 210 Ga.App. 88, reversed on other grounds *Republic Claims Service Co. v. Hoyal*, 264 Ga. 127 (1994). [↑](#endnote-ref-3)
4. *Ga. Dept. of Medial Assistance v. Columbia Convalescent Center*, 265 Ga. 638 (1995); *Garibay v. Terry*, 299 Ga. 701 (2016). [↑](#endnote-ref-4)
5. *McCallister v. Knowles*, 302 Ga.App. 392, 392-393 (2010). [↑](#endnote-ref-5)
6. *Republic Claims Service Co. v. Hoyal*, 264 Ga. 127 (1994); *Roberts v. Eayrs*, 297 Ga.App. 821, n. 7 (2009). [↑](#endnote-ref-6)
7. *Roberts v. Eayrs*, 297 Ga.App. 821, 822 (2009). [↑](#endnote-ref-7)
8. *Baldwin v. Gay*, 358 Ga.App. 213, 215-216 (2021). [↑](#endnote-ref-8)
9. *Miller v. Lomax*, 333 Ga.App. 402 (2015). [↑](#endnote-ref-9)
10. *Zepp v. Brannen*, 283 Ga. 395, 397 (2008). [↑](#endnote-ref-10)
11. *Dept. of Transp. v. Tillett Bros. Constr. Co.,* 264 Ga. 219 (1994). [↑](#endnote-ref-11)
12. *Zepp v. Brannen*, 283 Ga. 395, 397 (2008). [↑](#endnote-ref-12)
13. See discussion in *Zepp*, at 398. [↑](#endnote-ref-13)
14. *Prosser v. Grant*, 224 Ga.App. 6, 6-7 (1996). See *Pilz v. Thibiodeau*, 295 Ga.App. 532 (2008) where an order to draw jurors was signed by court but was not filed with the clerk – 5 Year Rule not tolled). [↑](#endnote-ref-14)
15. *Zepp v. Brannen*, 283 Ga. 395, 398 (2008). [↑](#endnote-ref-15)
16. *Roberts v. Eayrs*, 297 Ga.App. 821, 822 (2009). [↑](#endnote-ref-16)
17. *Thompson v. Branch Banking & Trust Company*, 357 Ga.App. 898 (2020); *Willis v. Columbus Med. Ctr.*, 306 Ga.App. 331, 333 (2009). [↑](#endnote-ref-17)
18. *Roberts v. Eayrs*, 297 Ga.App. 821, 822 (2009), citing *Clark v. Clark*, 293 Ga.App. 309, 311 (2008). [↑](#endnote-ref-18)
19. *Nixson v. Chris Leasing, Inc.*, 185 Ga.App. 548 (1988). [↑](#endnote-ref-19)
20. *Tate v. Dept. of Trans.*, 261 Ga.App. 192 (2003). [↑](#endnote-ref-20)
21. 50 USC Appx. § 522. This statute was formerly referred to as the Soldiers, and Sailors’ Civil Relief Act but was changed in 2003 to the Servicemembers Civil Relief Act. [↑](#endnote-ref-21)
22. *Cornelius v. Morris Brown College*, 299 Ga.App. 83, 85 (2009). [↑](#endnote-ref-22)
23. *Cornelius v. Morris Brown College*, 299 Ga.App. 83, 85 (2009). [↑](#endnote-ref-23)
24. *Cornelius v. Morris Brown College*, 299 Ga.App. 83, 85 (2009), citing *Brown v. Kroger Co.,* 278 Ga. 65, 69 (2004); *Montgomery v. Morris*, 322 Ga.App. 558, 560 (2013). [↑](#endnote-ref-24)
25. *Republic Claims Service Co. v. Hoyal*, 264 Ga. 127 (1994). [↑](#endnote-ref-25)
26. *Thompson v. Branch Banking & Trust Company*, 357 Ga.App. 898, 899 (2020). [↑](#endnote-ref-26)
27. *Jefferson v. Ross*, 250 Ga. 817, 818 (1983), cited in *Garibay v. Terry*, 299 Ga. 701, 702 (2016). [↑](#endnote-ref-27)
28. *Garibay v. Terry*, 299 Ga. 701, 702 (2016). [↑](#endnote-ref-28)
29. *Jefferson v. Ross*, 250 Ga. 817, 818 (1983). [↑](#endnote-ref-29)
30. *Ga. Dept. of Human Services v. Patton*, 322 Ga.App. 333, 335 (2013). [↑](#endnote-ref-30)
31. *Faircloth v. Cox Broadcasting Corp.,* 169 Ga.App. 914 (1984). [↑](#endnote-ref-31)
32. *Thompson v. Branch Banking & Trust Company*, 357 Ga.App. 898, 899 (2020). [↑](#endnote-ref-32)
33. *Carter v. VistaCare, LLC,* 335 Ga.App. 616, 618-619 (2016). [↑](#endnote-ref-33)
34. *Carter v. VistaCare, LLC,* 335 Ga.App. 616, 618-619 (2016). [↑](#endnote-ref-34)