In the

Supreme Court of Virginia

At Richmond

Record No. 150666

NANCY HAYNES,

Appellant,

– v. –

SEAN ARTHUR HAGGERTY, f/k/a SUSAN A. HAGGERTY,

Appellee.

OPENING BRIEF OF APPELLANT

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STATEMENT OF THE CASE:

On April 25, 2014, Nancy Haynes , a victim of Childhood Sexual Abuse (hereinafter referred to as "Nancy"), filed her Complaint in this matter against the perpetrator, Sean Arthur Haggerty, formerly Susan A. Haggerty (hereinafter referred to as "Haggerty"). (Appendix, p. 1.)

Haggerty's only responsive pleading was the "Plea In Bar of the Statute of Limitations" which was filed on May 19, 2014. (Appendix, p. 14.)

The statute of limitations, Code § 8.01 -249(6), was amended i n 2013 and became effective July 1, 2013. Nancy's Complaint alleged that her therapist advised her of the causal connection between her Childhood Sexual Abuse and her injury on May 14, 2012. (Appendix, p. 8, Complaint ¶ 35, and Appendix, p. 1, Complaint, file stamp.)

On November 3, 2014, Haggerty's Plea in Bar of the Statute of Limitations was heard in the Circuit Court by the Honorable Judge Joseph J. Ellis. (Appendix, p. 20, Transcript, Cover page, line 11.)

At the conclusion of the hearing the Circuit Court took the matter under advisement and reques ted the parties to provide the c ourt with briefs. After receiving the written memoranda , the Circuit Court on January 15, 2015 issued its letter opinion granting the Defendant's Plea in Bar. (Appendix, p.120.)

On February 2, 2015, Nancy filed her Motion for Reconsideration. (Appendix, p.127.)

On February 6, 2015, the Circuit Court entered its final order, incorporating its January 15, 2015 letter opinion, granting the Defendant's Plea in Bar of the Statute of Limitations and dismissing Nancy's suit with prejudice, even though Nancy filed her suit with over 18 years still remaining before her statute of limitations ran out. (Appendix, p.161.)

Also on February 6, 2015, without further comment, the Circuit Court entered its order denying Nancy's Motion for Reconsideration. (Appendix, p.160.)

Nancy filed her Notice of Appeal in the Circuit Court on March 3, 2015.

ASSIGNMENTS OF ERROR FOR WHICH THE APPEAL WAS AWARDED:

Error #2. The trial court erred in ruling that retroactive application of Virginia Code § 8.01-249 to Plaintiff Haynes' childhood sexual abuse injury was unconstitutional. (Error preserved in Plaintiff's Objections #4, 5, 6 and 9, attached to the Order Granting Plea of Statute of Limitations. Appendix, pp. 161-165.)

Error #3. The trial court erred in dismissing the Plaintiff's suit when the Defendant failed to carry the burden of persuasion that the Virginia General Assembly acted in an arbitrary and irrational fashion in passing Virginia Code § 8.01-249. (Error preserved in Plaintiff's Objections #5, 6 and 12 attached to the Order Granting Plea of Statute of Limitations. Appendix, pp. 161-165.)

Error #4 . The trial court erred in ruling that this retroactive statute of limitations had a rational basis yet was unconstitutional. (Error preserved in Plaintiff's Objections #5, 6 and 12 attached to the Order Granting Plea of Statute of Limitations. Appendix, pp. 161-165.)

Error #6. The trial court erred in using an unclear and arbitrary standard, stating that the amount of time from the sexual abuse injury itself was too "protracted", rather than upon the objective statutory criteria under Virginia Code § 8.01 -249(6) of a specific date of a professional's opinion of the abuse/injury causal connection being communicated to the Childhood Sexual Abuse victim. (Error preserved in Plaintiff's Objections #11 attached to the Order Granting Plea of Statute of Limitations. Appendix, pp. 161-165.)

STATEMENT OF THE FACTS:

The Circuit Court's letter opinion recognized that, "the basic underlying facts of this case are largely uncontested: a sexual relationship existed between the Plaintiff and the Defendant during the years of 1971 through 1975 when the Plaintiff, Nancy Haynes, was a minor and the Defendant, Sean Haggerty, was an adult. Mr. Haggerty is now a transgender male who, at the time of the parties' alleged sexual relationship, was a biological female named Susan Arthur Haggerty." (Appendix, pp.120 -121, Letter Opinion.)

It was undisputed that on May 14, 2012, Nancy's therapist diagnosed her with Dysthymic Disorder and the therapist stated that her injury was "a result of the 'lingering stress [the Plaintiff] has experienced over the years due to the Childhood Sexual Abuse inflicted upon her by [the Defendant]. '"

(Appendix, p.121, Letter Opinion, quoting the Complaint at ¶ 35, bracketed material in the original.)

Finally, it has not been disputed that Nancy's filing of her suit on April 25, 2014 came within the parameters of the applicable statute of limitations, Code § 8.01-249(6).

ARGUMENT AND AUTHORITIES:

Standard of Review:

The trial court's application of law to the stipulated facts are questions of law which are also reviewed *de novo*. *Johnson v. Hart,* 279 Va. 617, 623, 692 S.E.2d 239, ___ (2010).

An issue of statutory interpretation is a pure question of law on which the standard of review is *de novo* . When the language of a statute is unambiguous, courts are bound by the plain meaning of that language. *Conyers v. Martial Arts World of Richmond, Inc.,* 273 Va. 96, 104, 639 S.E.2d 174, 178 (2007).

Principal among the rules of statutory construction is that the reviewing court determine, and adhere to, the intent of the legislature reflected in or by the statute being construed. "As an initial and primary proposition, that intent is to be determined by the words in the statute." *Va.*

Society for Human Life v. Caldwell, 256 Va. 151, 156, 500 S.E.2d 814, ___ (1998).

"On appeal, the constitutional arguments are questions of law that we review de novo." *Shivaee v. Commonwealth,* 270 Va. 112, 119, 613 S.E.2d 570, ___ (2005).

"Additionally, when, as here, the constitutionality of a statute is challenged, our determination of legislative intent is guided by the recognition that "[a]ll actions of the General Assembly are presumed to be constitutional." *Va. Society for Human Life v. Caldwell,* 256 Va. 151, 156 - 157, 500 S.E.2d 814, ___ (1998), quoting *Hess v. Snyder Hunt Corp.*, 240 Va. 49, 52, 392 S.E.2d 817, 820 (1990).

"The party challenging the enactment has the burden of proving its unconstitutionality, and if a reasonable doubt exists as to its constitutionality, the doubt must be resolved in favor of its validity." *Hess v. Snyder Hunt Corporation,* 240 Va. 49, 52-53, 392 S.E.2d 817, ___ (1990).

I. Argument on Assignment of Errors 2 and 4. Retroactive application of Virginia Code § 8.01-249 to Plaintiff Haynes' childhood sexual abuse injury is not unconstitutional under the Fourteenth Amendment of the United States Constitution. This retroactive statute of limitations with a rational basis is constitutional.

The applicable statute of limitations, Code § 8.01-249(6), was amended in 2013 and became effective July 1, 2013.

With the additions in italics and the deletions with double strikethroughs, here is § 8.01-249(6) of the Code of Virginia, as amended:

> **Virginia Code § 8.01-249 [as amended, effective July 1, 2013].** When cause of action shall be deemed to accrue in certain personal actions. — The cause of action in the actions herein listed shall be deemed to accrue as follows:
>
> 6. In actions for injury to the person, whatever the theory of recovery, resulting from sexual abuse occurring during the infancy or incapacity of the person, upon *the later of the* removal of the disability of infancy or incapacity as provided in § 8.01-229 or ~~, if the fact of the injury and its causal connection to the sexual abuse is not then known,~~ when the fact of the injury and its causal connection to the sexual abuse is first communicated to the person by a licensed physician, psychologist, or clinical psychologist. As used in this subdivision, "sexual abuse" means sexual abuse as defined in subdivision 6 of § 18.2-67.10 and acts constituting rape, sodomy, object sexual penetration or sexual battery as defined in Article 7 (§ 18.2-61 et seq.) of Chapter 4 of Title 18.2.

Thus amended, Code § 8.01-249(6) gave Nancy 20 years from May 14, 2012 in which to file her suit, yet she filed less than two years later, on April 25, 2014. (Appendix, p.121, Letter Opinion, quoting the Complaint at ¶ 35.)

The Circuit Court dismissed Nancy's case on due process grounds, stating that, "Plaintiff's extremely protracted failure to act though being fully aware of Defendant's sexual misconduct - even in the absence of a specific causal connection to her current psychological diagnosis - so egregiously undermined the Defendant's constitutional rights to due process and deprivation of property as to require this Court to sustain Defendant's Plea in Bar." (Appendix, p. 126, Letter Opinion, incorporated within Order Granting Plea of Statute of Limitations at Appendix, p.161.)

The due process clause of the United States Constitution provides that no person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amend. XIV.

"[L]egislation passes constitutional muster under procedural due process requirements if it 'guarantees a litigant the right to reasonable notice and a meaningful opportunity to be heard.'" *Willis v. Mullett,* 263 Va. 653, 659, 561 S.E.2d 705, ___ (2002), quoting *Etheridge v. Medical Center Hospitals,* 237 Va. 87, 97, 376 S.E.2d 525, ___ (1989).

"By comparison, substantive due process tests the reasonableness of a statute vis-a-vis the legislature's power to enact the law. Ordinarily, substantive due process is satisfied if the legislation has a 'reasonable relation to a proper purpose and [is] neither arbitrary nor discriminatory.'"

Etheridge v. Medical Center Hospitals, 237 Va. 87, 97, 376 S.E.2d 525, ___ (1989), quoting *Duke v. County of Pulaski*, 219 Va. 428, 437-38, 247 S.E.2d 824, 829 (1978).

In deciding whether or not a statute is constitutional, this Court has held that, "[W]e have a duty to construe statutes subject to a constitutional challenge in a manner that 'avoid[s] any conflict with the Constitution.'" *Copeland v. Todd,* 282 Va. 183, 193, 715 S.E.2d 11, ___ (2011), quoting *Commonwealth v. Doe*, 278 Va. 223, 229, 682 S.E.2d 906, 908 (2009) (citations omitted).

The question of whether the retroactive application of a state statute can survive scrutiny under the United States Constitution was first raised only eight years after the last state (Rhode Island) voted on May 29, 1790 to ratify the Constitution.

In *Calder et Wife v. Bull et Wife*, 3 U.S. 386, 3 Dall. 386, 1 L.Ed. 648 (1798), the United States Supreme Court ruled that the U.S. Constitution's *ex post facto* clause does not apply to civil cases. The opinion by Justice Chase stated it applied only to criminal cases.

The concurrence by Justice Iredell directly stated, "The policy, the reason and humanity, of the prohibition, do not, I repeat, extend to civil

cases, to cases that merely affect the private property of citizens." *Calder*, at 3 U.S. 399-400.[1]

That foundational truth of our constitutional jurisprudence has not changed with time or with the addition of the Fourteenth Amendment. In fact, it has become the established black letter law: "[O]ur cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations." *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 16 (1976).

As long as a civil statute of limitations has a rational basis, it is constitutional even though it is applied retroactively:

> The Fourteenth Amendment does not make an act of state legislation void merely because it has some retrospective operation. What it does forbid is taking of life, liberty or property without due process of law. Some rules of law probably could not be changed retroactively without hardship and oppression, and this whether wise or unwise in their origin. Assuming that statutes of limitation like other types of legislation could be so manipulated that their retroactive effects would offend the Constitution, **certainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is per se an offense against the Fourteenth Amendment.** Nor has the appellant pointed out special hardships or oppressive effects which result from lifting the bar in this class of cases with retrospective force. **This is not a case where appellant's conduct would have been**

[1] For modern era Virginia cases using *Calder v. Bull* as binding precedent, see *Carpenter v. Commonwealth*, 51 Va. App. 84, 654 S.E.2d 345 (2007), and *Pilcher v. Commonwealth*, 41 Va. App. 158, 583 S.E.2d 70 (2003).

> **different if the present rule had been known and t he change foreseen.** … The nature of the defenses shows that no course of action was undertaken by appellant on the assumption that the old rule would be continued. … [T]he existence of the policy at the time the action was commenced did not, under the circ umstances, given the appellant a constitutional right against change of policy before final adjudication. Whatever grievance appellant may have at the change of policy to its disadvantage, it had acquired no immunity from this suit that has become a federa l constitutional right.

Chase Securities Corporation v. Donaldson , 325 U.S. 304, 315 -316, 65 S.Ct. 1137, 89 L.Ed. 1628 (1945), bold added for emphasis.

The Circuit Court recognized that the amended and expanded statute of limitations in Virginia Code § 8. 01-249(6) had a rational basis but still dismissed the case, admitting it was doing so "notwithstanding the rationale and/or constitutionality of the statute itself":

> There can be no question that the statute of limitation that existed when the Plaintiff r eached the age of majority expired long ago. Similarly, there can be no question that the General Assembly in its wisdom resuscitated the right of individuals to sue for sexual molestations that occurred when they were minors, and as such the statute as dr afted and enacted by the General Assembly serves an entirely rational purpose. However, regardless of how reprehensible and opprobrious an individual's conduct may be, courts may not blindly adhere to well-intentioned statutes without consideration of pot ential constitutional ramifications. If giving effect to a statute of this Commonwealth would deprive a defendant of due process of law and deprivation of property rights under the United States Constitution, **the suit cannot stand notwithstanding the rationale and/or constitutionality of the statute itself**.

(Appendix, p. 124, Letter Opinion, incorporated within Order Granting Plea of Statute of Limitations at Appendix, p.161 , bold added for emphasis.)

The *Roberts v. Caton* [2] case from Connecticut provides a good explanation of the rational basis for retroactive application of the Childhood Sexual Abuse civil statutes of limitation: "Although statutes of limitation generally operate to prevent the unexpected enforcement of stale claims; one object of [the stat ute] is to afford a plaintiff sufficient time to recall and come to terms with traumatic childhood events before he or she must take action."

The Circuit Court in *Haynes v. Haggerty* understood and accepted that precise rationale for the legislative amendm ent of Virginia Code § 8.01 - 249(6):

> The General Assembly, in deleting the portion of the statute which previously limited causes of action to the lesser of ten years or discovery of a causal connection, clearly recognized that the psychological injury to a victim may not become apparent for a significant period after the last such incident of sexual misconduct. Indeed, awareness of the sexual assault itself does not necessarily mean that its effects are simultaneously apparent, or will become so within any particular period of time. Thus, **the foundation for the statute is clearly rational, designed to address the insidious long term effects of the type of opprobrious misconduct often suppressed by a victim under layers of shame and denial.**

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[2] *Roberts v. Caton*, 224 Conn. 483, 619 A.2d 844, 845, 849 (Conn., 1993) . Internal citations omitted.

(Appendix, p. 123, Letter Opinion, incorporated within Order Granting Plea of Statute of Limitations at Appendix, p.161 , bold added for emphasis.)

Therefore, with that finding of the rational basis of the amendment, any remaining doubt as to the constitutionality of Code § 8.01-249(6) must be resolved in favor of Nancy Haynes.

Even in the context of a criminal sentencing, the Virginia Supreme Court has held that the retroactive application of a new sexual offender registry law did not violate the offender's constitutional rights.

In *Kitze v. Commonwealth,* the defendant was convicted of rape and malicious wounding. As part of his sentence, he was ordered to register as a sex offender pursuant to Code § 19.2 -298.1. Acknowledging that the statute had been enacted after the offe nses occurred, the Supreme Court of Virginia held that the defendant's federal and state constitutional rights were not violated even though the statute was applied retroactively. "We hold that the sex offender registration requirement is *not* penal and that the General Assembly 'intended to facilitate law enforcement and protection of children. There was no intent to inflict greater punishment [on the convicted sex offender].' Protecting the public and preventing crimes are regulatory, not punitive, purposes." *Kitze v. Commonwealth,* 23 Va. App. 213, 217, 475 S.E.2d 830, ___ (1996), internal citations omitted.

The same logic would certainly apply with even greater force to our purely civil proceeding.

Defendant Haggerty has no serious legal argument, rather Haggerty "is merely dissatisfied with the legislature's decision and seeks a judicial reconsideration of the issue." *Fairfax Fire and Rescue Services v. Newman,* 222 Va. 535, 540-541, 281 S.E.2d 897, ___ (1981).

The Circuit Court's ruling is directly contrary to the binding and controlling precedents of the Supreme Court of Virginia and the Supreme Court of the United States. It is, therefore, in error.

II. Argument on Assignment of Error 3. The Defendant failed to carry the burden of persuasion that the Virginia General Assembly acted in an arbitrary and irrational fashion in passing Virginia Code Section 8.01-249.

"To be sure," U.S. Supreme Court rulings say, "retroactive legislation does have to meet a burden not faced by legislation that has only future effects. . . . 'The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former' . . . . But **that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose**." *United States v. Carlton,* 512 U.S. 26, 31 (1994), quoting *Pension Benefit*

Guaranty Corporation v. R. A. Gray & Co. , 467 U.S. 717, 729 - 730 (1984), bold added for emphasis.

As noted in the Argument above, the Circuit Court recognized that the amendment to Virginia Code § 8.01 -249(6) does indeed have a rational basis.[3]

The burden was on Defendant Haggerty to prove that the passage of the statute of limitations am endment was an arbitrary and irrational legislative act, but as is shown by the Circuit Court's finding that the statute was indeed rational, Haggerty obviously failed to carry that burden.

Nancy's resuscitated cause of action which created for Haggerty a new risk of financial loss is not presumed to be unconstitutional , rather it comes with a presumption of constitutionality. The U.S. Supreme Court has ruled on that exact issue and stated:

> "It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that **the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way**."

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 14 (1976) , emphasis added.

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[3] "…the foundation for the statute is clearly rational…," Appendix, p. 123, Letter Opinion, incorporated within Order Granting Plea of Statute of Limitations at Appendix, p.161.

The burden on Haggerty is the heavy one of a "reasonable doubt": "The party challenging an enactment has the burden of proving that the statute is unconstitutional, and every reasonable doubt regarding the constitutionality of a legislative enactment must be resolved in favor of its validity." *Marshall v. Northern Va. Transp. Authority,* 275 Va. 419, 428, 657 S.E.2d 71, ___ (2008).

In *Hess v. Snyder Hunt Corporation* [4], the plaintiffs sued Snyder Hunt claiming its negligence caused the balcony to collapse underneath them. Snyder Hunt filed a plea in bar stating that the plaintiffs' time to file had expired under the applicable statute, Virginia Code § 8.01-250. The plaintiffs contended that Code § 8.01-250 was unconstitutional, as applied, because it violated their constitutional guarantee of due process.

In its ruling, the Virginia Supreme Court has described the very heavy burden that must be overcome when one challenges the constitutionality of a statute: "All actions of the General Assembly are presumed to be constitutional. Thus, courts will declare an enactment unconstitutional only when it clearly is repugnant to some provision of either the state or federal constitution. The party challenging the enactment has the burden of proving its unconstitutionality, and **if a reasonable doubt exists as to its**

[4] *Hess v. Snyder Hunt Corporation,* 240 Va. 49, 52, 392 S.E.2d 817, ___ (1990).

constitutionality, the doubt must be resolved in favor of its validity ."

Hess v. Snyder Hunt Corporation, 240 Va. 49, 52-53, 392 S.E.2d 817, ___ (1990), bold added.

It does not suffice for Haggerty to show that Code § 8.01-249(6) is merely arbitrary; in the context of retroactive application of statutes of limitation, the Supreme Court of the United States has said that statutes of limitation are by their very nature arbitrary:

> Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. **They are by definition arbitrary**, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a 'fundamental' right or what used to be called a 'natural' right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.

Chase Securities Corporation v. Donaldson, 325 U.S. 304, 314, 65 S.Ct. 1137, 89 L.Ed. 1628 (1945), internal citations omitted, bold added.

The nature of any statute of limitations is that one day the person has a right, the next they do not. At 11:59 p.m. the right exists, at 12:01 a.m. it is extinguished. A statute of limitations is by definition arbitrary. And that,

the United States Supreme Court has said, is a perfectly constitutional exercise of a state's legislative authority, even when the date for the cutoff is changed retroactively.

The challenger must show that the statute is not only arbitrary, but that it is irrational. "The relevant inquiry is whether or not the legislation serves a legitimate legislative purpose that is furthered by rational means." *Shadburne-Vinton v. Dalkon Shield Claimants Trust,* 60 F.3d 1071, 1076 (4th Cir. 1995). As to Code § 8.01-249(6), it simply cannot be said that our legislature acted irrationally in choosing to extend the Childhood Sexual Abuse statute of limitations.

Defense counsel conceded that point in their trial court brief: "Federal and state case law identify several rational bases upon which this provision and other similar provisions were passed around the country." (Appendix, p. 79, Memorandum in Support of Defendant's Plea in Bar of the Statute of Limitations.)

Minnesota's legislature passed a retroactive change to the statute of limitations for childhood sexual abuse. The issue of whether that change could be considered to have a rational basis was discussed in *K.E. v. Hoffman*, 452 N.W.2d 509, 514 (Minn. App., 1990). The court there said, "[T]he distinction between victims of sexual abuse and victims of other torts

is not arbitrary or fanciful … Because we are not in the position to judge the wisdom of the legislation, where, as here, the statute has a reasonable relation to the state's legitimate purpose of affording sexual abuse victims a remedy, we reject respondents' due process claims."

A South Dakota Court's decision contained this powerful illustration of the rational basis for retroactive application of a statute of limitations for survivors of childhood sexual abuse:

> Imagine being pricked on the arm with a pin. At first, such an intrusion would be disturbing, but with time might seem uneventful. Now imagine the pin carried a dreaded affliction, only discoverable after years of incubation. Such is often the nature of childhood sexual abuse. Many children only realize years later the true significance of the abuse they endured, especially in cases where the molestation occurred at the hands of family members or other trusted individuals.

Stratmeyer v. Stratmeyer, 1997 SD 97, 567 NW2d 220, 223 (S.D., 1997).

A Connecticut court rejected a similarly postured defendant in this way: "The defendant's assertion that he is now unexpectedly exposed to liability was an express purpose of the statute. We see no injustice in retroactively applying [the statute] as amended so as to effect that purpose." *Roberts v. Caton*, 224 Conn. 483, 619 A.2d 844, 845, 849 (Conn., 1993). Internal citations omitted.

Haggerty can hardly be heard to complain about the delay of the possible sanctions for the sexual abuse which Defendant Haggerty admits occurred. (Appendix, p. 28, Transcript 9:10-18.)

The Supreme Court of Virginia has repeatedly held that, "'We will not invalidate a statute unless that statute clearly violates a provision of the United States or Virginia Constitutions.'" *FFW Enterprises v. Fairfax County,* 280 Va. 583, 590, 701 S.E.2d 795, ___ (2010), quoting *Marshall v. Northern Virginia Transportation Authority*, 275 Va. 419, 427, 657 S.E.2d 71, 75 (2008).

Haggerty has not shown that the statute clearly violates a provision of the United States Constitution[5] and therefore Defendant Haggerty has failed to carry the burden of persuasion necessary to successfully challenge the constitutionality of Virginia Code § 8.01-249(6).

[5] Defendant has conceded that the new amendment to the Constitution of Virginia found in Article IV, § 14, paragraph 4 resolves the due process concerns relating to Virginia's own State Constitution. (Appendix, p. 75, Memorandum in Support of Defendant's Plea in Bar of the Statute of Limitations.)

III. Argument on Assignment of Error 6.

A Childhood Sexual Abuse survivor's cause of action accrues under Virginia Code § 8.01-249(6) upon the objective and easily proven criteria of a specific date of a professional's opinion of the abuse/injury causal connection being communicated to the survivor, and not upon an unclear and arbitrary standard decided on a case-by-case basis of whether the amount of time in a particular case is too "protracted".

Nine years ago, Justice Kelsey wrote an article on procedural defaults that contained this jurisprudential principle which is all too often forgotten or overlooked:

> Truly neutral procedural rules allow courts to set limits and mark off boundaries without regard to which side stands to gain or lose. At whatever time the official clock stops, it does so at the appointed moment no matter which side has the higher score. And at whatever place the out-of-bounds lines have been marked, they remain fixed no matter who steps over them.

Kelsey, D. Arthur, "The Adversarial Model & The Imperative of Neutrality", VIRGINIA LAWYER, Oct. 2006, p. 39-40.

The official clock continues to run until its appointed end no matter which side benefits. The out-of-bounds lines remain fixed no matter how much the players or the referees may wish that the lines were placed elsewhere.

The boundary lines of Virginia's method within § 8.01-249(6) for determining accrual is now a clearly marked, purely objective test. With its amendment of the statute in 2013, the General Assembly has removed any possible ambiguity or subjectivity and established a measurable bright line for the limitation of actions for Childhood Sexual Abuse.

In Virginia, a survivor's cause of action for an injury from their Childhood Sexual Abuse accrues upon the later of these two dates: the victim's 18th birthday or the date when the fact of the injury and its causal connection to the sexual abuse is first communicated to the survivor by a licensed physician, psychologist, or clinical psychologist.[6]

The survivor of Childhood Sexual Abuse then has twenty (20) years from whichever of those two dates is later to file their cause of action for that injury.[7]

Contrary to that legislative clarity, the standard the Circuit Court used to measure when Nancy's cause of action should have accrued was subjective, arbitrary and capricious.

The Circuit Court stated that, "**the rather exceptional length of time** between action and injury in this case [] compels the Court's consideration of the Constitutional concerns expressed by the Defendant."[8]

But the Circuit Court essentially argued against itself by acknowledging that, "the psychological injury to a victim may not become apparent for **a significant period** after the last such incident of sexual misconduct. Indeed, awareness of the sexual assault itself does not necessarily mean

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[6] Code of Virginia § 8.01-249(6)
[7] Code of Virginia § 8.01-243(D)
[8] Appendix, p. 123, Letter Opinion, incorporated within Order Granting Plea of Statute of Limitations at Appendix, p.161.

that its effects are simultaneously apparent, or will become so **within any particular period of time.**"[9]

When the language of a statute is unambiguous, courts are bound by the plain meaning of that language. *Conyers v. Martial Arts World of Richmond, Inc.,* 273 Va. 96, 104, 639 S.E.2d 174, 178 (2007). Further, the courts must give effect to the legislature's intention as expressed by the language used unless a literal interpretation of the language would result in a manifest absurdity. *Department of Corrections v. Surovell,* 290 Va. ___ 141780, ___ S.E.2d ___ (2015).

"Absurdity" in this interpretive context describes situations in which the law would be internally inconsistent or otherwise incapable of operation. *Payne v. Fairfax County School Bd.,* 288 Va. 432, 436, 764 S.E.2d 40, ___ (2014).

The plain meaning of the new language of § 8.01-249 makes clear that the 20-year limiting period begins to run upon "the later of" either the victim attaining their majority or the clinician's communication to the victim of the fact of the injury and its causal connection to the sexual abuse. The new statutory language totally deleted any other reference as to what the victim may or may not have known about the injury. There is nothing in the

[9] Appendix, p. 123, Letter Opinion, incorporated within Order Granting Plea of Statute of Limitations at Appendix, p.161.

amended statute that is internally inconsistent or otherwise makes the statutory framework incapable of operation.

Contrary to the language and intent of the amended statute, the Circuit Court struck Plaintiff Nancy Haynes' case based upon the court's conclusion that: "Plaintiff's **extremely protracted** failure to act through being fully aware of Defendant's sexual misconduct - even in the absence of a specific causal connection to her current psychological diagnosis - so egregiously undermined the Defendant's constitutional rights to due process and deprivation of property as to require this Court to sustain Defendant's Plea in Bar." (Appendix, p. 126, Letter Opinion, incorporated within Order Granting Plea of Statute of Limitations at Appendix, p.161, bold added for emphasis.)

The Circuit Court's decision inexplicably deprives Nancy of the right given to her by the General Assembly.

The General Assembly said she had a right to sue her molester for up to twenty years after the later of the two objective, clearly defined, easily ascertained dates.

The Circuit Court, on the other hand, said that though her injury may not become apparent for a "significant period,"[10] and not necessarily "within any particular period of time,"[11] her case should be dismissed because of her "protracted failure to act."[12]

Under the Circuit Court's standard, how could any Childhood Sexual Abuse survivor (or the attorney advising them) know when they have moved from the permissible "significant period" and into the impermissible "protracted" time zone when the effects of the injury may not become apparent "within any particular period of time?"

"[W]hen courts apply procedural rules neutrally to every litigant, to every lawyer, to every case -without partiality- everyone else knows exactly what is expected of them." Kelsey, D. Arthur, "The Adversarial Model & The Imperative of Neutrality", VIRGINIA LAWYER, Oct. 2006, p. 39-40.

The dismissal of Nancy's case was error.

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[10] Appendix, p. 123, Letter Opinion, incorporated within Order Granting Plea of Statute of Limitations at Appendix, p.161.
[11] Appendix, p. 123, Letter Opinion, incorporated within Order Granting Plea of Statute of Limitations at Appendix, p.161.
[12] Appendix, p. 126, Letter Opinion, incorporated within Order Granting Plea of Statute of Limitations at Appendix, p.161.

CONCLUSION AND STATEMENT AS TO RELIEF SOUGHT:

Plaintiff Nancy Haynes prays that this Court would reverse the ruling of the trial court which granted the plea in bar of Defendant Haggerty and remand the case to the trial court for a jury trial on liability and damages.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this November 9, 2015, the Opening Brief and Appendix were filed electronically via the VACES system with the Supreme Court of Virginia and that ten copies of the brief and three of the appendix were hand delivered to the clerk's office. This same date, a copy of the Opening Brief and Appendix was sent via email to all counsel of record, at the email addresses below:

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