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.

REPLY BRIEF OF APPELLANT

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I. Appellee's Argument I fails because it is not germane to the assignments of error.

The Award and Certificate of Appeal expressly stated: "[I]t is ordered that the parts of the record to be printed or reproduced in the appendix are to be limited to those parts of the record germane to assignments of error Nos. 2, 3, 4, and 6 and the briefs to be filed shall be limited to such discussion as is relevant to those assignments of error."

Appellee Haggerty's entire discussion in argument I, pages 9 to 13 are not "germane to assignments of error Nos. 2, 3, 4, and 6."

"'The purpose of assignments of error is to point out the errors with reasonable certainty in order to direct this court and opposing counsel to the points on which appellant intends to ask a reversal of the judgment, and **to limit discussion to these points**.'" *Yeatts v. Murray,* 249 Va. 285, 290, 455 S.E.2d 18, ___ (1995) , quoting *Harlow v. Commonwealth* , 195 Va. 269, 271-72, 77 S.E.2d 851, 853 (1953).

II. Reply Argument Regarding 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.

Appellee Haggerty devotes a large portion of the Brief of Appellee to the analysis used in *Johnston v. Gill* 68 Va. (27 Gratt.) 587 (1876) and *Starnes v. Cayouette*, 244 Va. 202, 419 S.E.2d 669 (1992) as to the constitutionality of the retroactive application of civil statutes. (*Johnston v. Gill* is discussed in the Brief of Appellee at p. 5; *Starnes*, at pp. 5, 6, 15, 16, 17, and 25).

Haggerty entirely failed to discuss or mention that the cited propositions of *Johnston v. Gill* and *Starnes v. Cayouette* regarding a person's property interest or substantive right to rely upon limitations period were clearly overturned, as to a natural person defendant, in *Kopalchick v. Catholic Diocese of Richmond,* 274 Va. 332, 337, 338-339, 645 S.E.2d 439, ___ (2007), bold added for emphasis:

> In the wake of *Starnes*, the General Assembly in the next two successive years, Acts 1993, ch. 892 and Acts 1994, chs. 405 and 818, approved and submitted to a vote of the people [a] proposed constitutional amendment … **The purpose of the constitutional amendment is clear: To empower the General Assembly to make a retroactive change in the accrual date of the right of action for childhood sexual abuse, extending it from the date the injury was sustained to the date the injured person was made aware by a licensed professional of the fact of the injury and that the childhood sexual abuse was its cause**. Under our holding in

> *Starnes*, that was a power the General Assembly lacked before the effective date of the constitutional amendment. As with any grant of power made by the people to their government, the people have the rig ht to limit or circumscribe the grant as they may see fit. In this case, the people of Virginia limited the grant in two ways: the circumstances to which it was to apply and the type of defendant who would be affected.

Virginia thus recognizes that the General Assembly has the power to implement a retroactive extension of a civil statute of limitations from the date the injury was sustained to the date the injured person was made aware by a licensed professional of the fact of the injury and that the Childhood Sexual Abuse was its cause.

Appellee Haggerty's Brief at page 16 says, "[T]he Fifth and Fourteenth Amendments to the U.S. Constitution, [] also protect the same 'property rights' mentioned in *Starnes*."

First, as mentioned earlier above, the language in *Starnes v. Cayouette* regarding a person's property interest or substantive right to rely upon limitations period was clearly overturned as to a natural person defendant in *Kopalchick v. Catholic Diocese of Richmond,* 274 Va. 332, 337 and 338-339, 645 S.E.2d 439, ___ (2007).

Next, the federal cases also do not grant Haggerty the "property right" to be exempt from the retroactive application of a civil statute of limitations.

The Supreme Court of Connecticut in July of 2015 issued an opinion on this same qu estion of law, and accurately reported the controlling law on this subject as given to us by the United States Supreme Court, stating:

> Specifically, the two leading decisions from the United States Supreme Court, *Campbell v. Holt*, *supra*, 115 U.S. 620, 6 S. Ct. 209, and *Chase Securities Corp. v. Donaldson*, *supra*, 325 U.S. 304, 65 S.Ct. 1137, hold that **a defendant does not have a vested property right** in a statute of limitations defense such that a legislative change reviving an otherwise time barred cause of action violates the defendant's rights under the due process clause of the fourteenth amendment to the United States constitution.

Doe v. Hartford Roman Catholic Diocesan Corp., 317 Conn. 357, 412 (2015), bold added for emphasis.

In Virginia, back at the start of the Depression era, the Rockingham Circuit Court in 1929 ordered J.S. Eaton to p ay $50.00 per month alimony to his wife, Henrietta. In 1938 the General Assembly passed an amendment that J.S. Eaton said gave him the right to have the decree reopened and reduce the alimony based upon his worsened financial condition. Henrietta disagreed and demurred, stating that their divorce decree gave her vested property rights that could not be taken from her by this new action of the General Assembly.[1]

"Our conclusion," the *Eaton v. Davis* opinion held, "is that alimony to accrue in future monthly instalments, though fixed by a final decree, is not a vested property right." *Eaton v. Davis*, at 342.

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[1] *Eaton v. Davis*, 176 Va. 330, 332-333,10 S.E.2d 893 (1940)

If the entitlement under a final decree to receive a fixed amount of alimony is not a vested property right, then the ability to not be sued for an admitted sexual abuse is certainly not a vested property right, either.

Appellee Haggerty's Brief then claims that "The Effect of Multiple Revisions to Virginia Code § 8.01 -249(6) is an Arbitrary Accrual Provision that is No Longer Linked to a Plaintiff's Lack of Prior Knowledge of a Causal Relationship Between the Injury and the Abuse."

This Court, however, fully recognized, acknowledg ed and cited multiple revisions of the statute in *Kopalchick v. Catholic Diocese of Richmond,* 274 Va. 332, 337, 645 S.E.2d 439, ___ (2007) : "Pursuant to the constitutional amendment, the General Assembly amended and reenacted Code § 8.01-249(6) in 1995, in 1996, and again in 1997."

This Court found no constitutional problem with the multiple revisions to the statute, and no such problem exists.

In support of the proposition that Virginia's amended civil sexual abuse statute of limitations does not furth er the rational reasons for the statute, Appellee Haggerty offers only an older circuit court case [2] that was written ten years before *Kopalchick v. Catholic Diocese of Richmond* and a

[2] *Ackerman v. Ackerman*, 19 Cir. L154176, 42 Va. Cir. 103 (1997).

criminal case[3] discussing an *ex post facto* criminal statute of limitations which permitted prosecution for sex-related child abuse where the prior limitations period has expired.

Neither of the two cases, *Ackerman* and *Stogner*, are precedent for this case and they do not assist with a discussion as to the current state of the law relating to the retroactive application of a civil sexual abuse statute of limitations.

A helpful, though still dissimilar, case is *Kansas v. Hendricks*, 521 U.S. 346, 138 L.Ed.2d 501 (1997). In that case, the U.S. Supreme Court held that the retroactive application of a sexual offender commitment hearing was constitutional because it was a civil proceeding, even though, as Justice Kennedy noted in his concurrence, "Notwithstanding its civil attributes, the practical effect of the Kansas law may be to impose confinement for life." *Kansas v. Hendricks*, 521 U.S. 346, 372, 138 L.Ed.2d 501 (1997), J. Kennedy, concurring.

Justice Kennedy later wrote the opinion in *Smith v. Doe*, 538 U.S. 84, 155 L.Ed.2d 164 (2003), which ruled that the retroactive application of Alaska's sexual offender registry was constitutional even though, "It must be acknowledged that notice of a criminal conviction subjects the offender

[3] *Stogner v. California*, 539 U.S. 607 (2003).

to public shame, the humiliation increasing in proportion to the extent of the publicity." *Smith v. Doe*, at 99.

The rational basis for the General Assembly's amendments to Virginia Code § 8.01-249(6) is that, "It is widely accepted that the victims of child sexual assault do not discover the extent of their injuries until much later in life, after the actual abuse." Hamilton, Marci A. "The Time Has Come for a Restatement of Child Sex Abuse." *BROOKLYN LAW REVIEW* 79: 2, p. 404.

That law review article quoted clinician Marci Hunter:

> Some of the effects of sexual abuse do not become apparent until the victim is an adult and a major life event, such as marriage or birth of a child, takes place. Therefore, a child who seemed unharmed by childhood abuse can develop crippling symptoms years later.

Hamilton, p. 405.

The author suggests that perhaps the most important rational basis for the retroactive laws is that by opening the window to past sexual abuse those civil cases can help to prevent future abuse:

> The lawsuits filed under window legislation have led to the public identification of previously unknown child predators, which reduces the odds that children will be abused in the future. For example, the 2003 window in California led to the public identification of over 300 previously unidentified perpetrators. Delaware's window has led to the public identification of dozens of previously hidden perpetrators.

Hamilton, p. 405.

III. Reply Argument Regarding 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 Vi rginia Code § 8.01-249.

Appellee Haggerty Apparently Concedes Error #3.

The Brief of Appellee makes this concession as to the law applicable to Error #3:

> *Page 8, internal citations omitted*:
> Pursuant to federal precedent, Haggerty acknowledges 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." In sum, Virginia legislation complies with substantive due process requirements only if it "has a reasonable relation to a proper purpose and is not arbitrary or discriminatory."

The Brief of Appellee Haggerty does have a section titled "Argument on Assignments of Error #2 and #3," but nowhere in the ten pages of that section (pp.14–24) is found even the words "burden", "carry", "carried", or "persuasion", much less any argument that Haggerty had, in fact, carried the burden of persuasion . Likewise, the Brief of Appellee provides no citation to the Joint Appendix or Record pointing to any place or places where Haggerty had done so.

IV. Reply Argument Regarding Assignment of Error #4: The trial court erred in ruling that this retroactive statute of limitations had a rational basis yet was unconstitutional.

Appellant Nancy Haynes agrees that appellate review of this case should be *de novo*.

When this Court conducts that *de novo* review, Nancy contends that it will be clear that the trial court's finding -- that this retroactive statute of limitations had a rational basis yet was unconstitutional -- was an incorrect application of law to the stipulated facts.

Notably, the Brief of Appellee does not challenge the accuracy of the statements made in the Appellant's Opening Brief on pages 3 to 4 that:

> 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).

The constitutionality of statutory provisions on economic and property right matters such as those presented here will be sustained under the "the lenient standard of rationality" if the legislature could have reasonably concluded that the challenged classification would promote a legitimate state purpose. See, e.g., *Exxon Corp. v. Eagerton,* 462 U.S. 176, 195-196 (1983).

"[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *Advanced Towing Co. v. Fairfax County Board,* 280 Va. 187, 191, 694 S.E.2d 621, ___ (2010), quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313-15 (1993).

V. Reply Argument on Assignment of 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.

The Brief of the Appellee admits the "clarity of Virginia's statutory language and the transparency of the General Assembly's intent" (p.26) as well as "the General Assembly's preference for a bright-line rule" (p.27).

Despite those admissions, the Brief of the Appellee alleges at pages 23 to 24 that, "After some period of time, if not ten years, then certainly after thirty-nine, the law transitions from rationally providing a remedy to a victim of child abuse into an arbitrary, substantive due process violation."

Appellee Haggerty does not, however, cite any case that has so held.

Sometimes the obvious needs to be stated, and just as the United States Supreme Court told Jimmy Hoffa, "There is no constitutional right to be arrested,"[4] it is just as obvious that there is no constitutional right to be sued.

Haggerty has benefitted by the "gross passage of time" which stretches back to the 1970s when the admitted sexual abuses occurred.

In a state such as Virginia which has no statute of limitations for the felonious sexual crimes that were committed, [5] Haggerty cannot credibly argue that a perpetrator who benefits from a long period of time with no financial consequences for confessed crimes has suffered a constitutional deprivation of rights.

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[4] *Hoffa v. United States,* 385 U.S. 293, 310 (1966).

[5] *Anderson v. Commonwealth,* 48 Va. App. 704, 711, 634 S.E.2 d 372, ___ (2006), internal citations omitted: "The common law imposed no time limitation on the state's initiation of felony prosecutions. The imposition of a specific preindictment time limit on such prosecutions remains solely a matter of 'legislative grace.' Consistent with the common law, Virginia has no general statute of limitation on felonies."

The United States Supreme Court has said , even "[a]ssuming that statutes of limitation, like other types of legislation, could be so manipulated that their retroactive effect s 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." *Electrical Workers v. Robbins & M yers, Inc.*, 429 U.S. 229, 243-44, 97 S.Ct. 441, 450 (1976).

Even when arguing delay and "stale charges" in the criminal context, where the stakes are potentially much greater for the defendant:

> Due process principles bar a prosecution for preindictment delay only when the "defendant incurred actual prejudice as a result of the delay" and the "prosecutor intentionally delayed indicting the defendant to gain a tactical advantage." *Morrisette*, 264 Va. at 393, 569 S.E.2d at 52 (citations and brackets omitted). "The defendant bears the burden of proving both actual prejudice and improper purpose." *Id.* (citations omitted)

Anderson v. Commonwealth, 48 Va. App. 704, 712, 634 S.E.2d 372, ___ (2006).

In the trial court below, Haggerty proved neither actual prejudice nor improper purpose, and has not attempted to argue the point in this appeal.

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 December 15, 2015, the Reply Brief was filed electronically via the VACES system with the Supreme Court of Virginia and that ten copies of the brief were hand delivered to the clerk's office. This same date, a copy of the Reply Brief was sent via email to all counsel of record, at the email addresses below:

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