In The

Supreme Court of Virginia

RECORD NO. 150666

NANCY HAYNES,

Appellant,

v.

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

Appellee.

BRIEF OF APPELLEE

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STATEMENT OF THE CASE

On April 28, 2014, Nancy Haynes ("Haynes") filed a complaint seeking damages for personal injuries, which she alleges resulted from sexual abuse by Sean Arthur Haggerty, f/k/a Susan A. Haggerty ("Haggerty") between 1971 and 1975. J.A. 1–2. On May 19, 2014, Haggerty filed a Plea in Bar of the Statute of Limitations, which challenged the validity of the Complaint on factual ("Part I") and legal grounds ("Part II"). J.A. 14–17.

On November 3, 2014, oral arguments were heard in the Circuit Court for the County of Spotsylvania in relation to Part II of Haggerty's Plea in Bar, which claimed that Virginia Code Section 8.01-249(6) was unconstitutional when applied to the facts of this case. J.A. 23. The Honorable Judge Joseph J. Ellis took the matter under advisement and requested briefs. J.A. 68–70. On January 15, 2015, the Circuit Court issued its letter opinion (the "Letter Opinion") sustaining Haggerty's Plea in Bar. J.A. 120–126.

On February 2, 2015, Haynes filed a Motion for Reconsideration, and Haggerty submitted his Opposition to Haynes's Motion for Reconsideration on February 5, 2015. J.A. 127, 147. On February 6, 2015, the Circuit Court denied Haynes's Motion for Reconsideration, and the Court issued its

Order Granting Plea of the Statute of Limitations (the "Final Order"), which dismissed the claim with prejudice. J.A. 160–165. On September 30, 2015, the Supreme Court of Virginia awarded an appeal to consider her assignments of error Nos. 2, 3, 4, and 6. *See* Cert. of App. Sep. 30, 2015.

STATEMENT OF FACTS

Haynes was born in March of 1957. J.A. 1. Haynes turned eighteen in March of 1975. *See* J.A. 1 (providing a date of birth for Haynes). Haynes's Complaint seeks damages for personal injuries, which she alleges resulted from sexual abuse by Haggerty between 1971 and 1975. J.A. 1–2. Pursuant to the statute of limitations in place at the time of the alleged abuse, Haynes's claims were time-barred after March of 1977. *See* Va. Code § 8-24.

Haynes claims that a therapist diagnosed her as suffering from Dysthymic Disorder, a type of depression, on May 14, 2012. J.A. 8. The therapist allegedly linked this diagnosis to lingering stress related to childhood sexual abuse. J.A. 8. Haynes claims that Virginia Code § 8.01-249(6) created a new accrual date when that diagnosis was made on May 14, 2012, approximately forty-one years after the first alleged sexual encounter. J.A. 1, 8.

The compliance of the May 14, 2012 diagnosis with the technical requirements of Virginia Code § 8.01-249(6) were challenged in Part I of Haggerty's Plea in Bar. J.A. 15. That portion of Haggerty's Plea in Bar did not come before the court. Part II of Haggerty's Plea in Bar, which was considered by the trial court, asserted that Virginia Code § 8.01-249(6) did not apply to extend the statute of limitations under the facts alleged in this case. J.A. 14 ("Based upon Virginia law in effect at the time, the statute of limitations for such civil action would have accrued at the time of the injury, and would have expired two years from Haynes's eighteenth birthday."). The Plea also challenged the retroactive application of Virginia Code § 8.01-249(6) in light of the due process protections contained within the Fifth and Fourteenth Amendments to the United States Constitution. J.A. 15–16, 122. Though this Court awarded review upon four assignments of error, the matter is being reviewed de novo on the question of "whether or not the Plaintiff's claims are barred by the statute of limitations." *See* Cert. of App. Sep. 30, 2015; *see also* J.A. 121.

STANDARD OF REVIEW

Standard for Reviewing a Circuit Court Decision to Sustain a Plea in Bar

Virginia law provides that such a plea "shortens the litigation by reducing it to a distinct issue of fact, which, if proven, creates a bar to the

plaintiff's right of recovery." *See Tomlin v. McKenzie*, 251 Va. 478, 480, 468 S.E.2d 882 (1996). If the court is not presented with evidence in support of the plea, it must "rely solely upon the pleadings in resolving the issue presented." *See id.* at 480 (citing *Weichert Company of Va., Inc. v. First Commercial Bank*, 246 Va. 108, 109, 431 S.E.2d 308, 309 (1993)). If the court relies upon the pleadings, then the facts alleged with the plaintiff's complaint are deemed true. *See Glascock v. Laserna*, 247 Va. 108, 109, 439 S.E.2d 380 (1994).

The Supreme Court of Virginia applies a "de novo standard of review when '[t]here are no disputed facts relevant to the plea in bar and it presents a pure question of law.'" *See Shevlin Smith v. McLaughlin*, 289 Va. 241, 251, 769 S.E.2d 7 (2015) (quoting *David White Crane Serv. v. Howell*, 282 Va. 323, 327, 714 S.E.2d 572, 575 (2011)). This appeal deals with the "purely legal" matters of "constitutional interpretation and statutory construction." *See VMRC v. Chincoteague Inn*, 287 Va. 371, 757 S.E.2d 1 (2014) (citing *L.F. v. Breit*, 285 Va. 163, 176, 736 S.E.2d 711, 718 (2013)). Specifically, the sole question presented before the trial court was whether or not Haynes's claims were barred by the statute of limitations. J.A. 121. Since evidence was not presented or contested during the Circuit Court

hearing, this appeal should be reviewed de novo. J.A. 23; *see also Shevlin Smith*, 289 Va. at 251.

Virginia Standard for Reviewing the Constitutionality of a Retroactive Extension of a Civil Statute of Limitations

In *Johnston v. Gill*, 68 Va. (27 Gratt.) 587 (1876), the Virginia Supreme Court held that the legislature could only extend a statute of limitations that had not already expired. In *Kesterson v. Hill*, 101 Va. 739, 743-44, 45 S.E. 288, 289 (1903), this Court held:

> "[T]he right to set up the bar of a statute of limitations as a defence to a cause of action after the statute has run is a vested right, and cannot be taken away by legislation . . . and . . . it is immaterial whether the action is for the recovery of real or personal property, or for the recovery of a money demand, or for the recovery of damages for a tort."

Once a cause of action has been barred by a statute of limitations, the General Assembly "cannot remove the bar by retrospective legislation." *See id.* at 595.

In *Starnes v. Cayouette*, 244 Va. 202, 211, 419 S.E.2d 669 (1992), this Court reaffirmed the earlier line of cases stating "that a defense created by a statute" is a "valuable property interest, and such rights are substantive in nature." *See id.* at 211. The *Starnes* Court further held "that substantive as well as vested rights are entitled to due process protection." *See id.* at 212.

In 1993 and 1994, after the *Starnes* decision, the General Assembly proposed an amendment to the Constitution of Virginia that gave the General Assembly the power to provide for a retroactive application of a change in the accrual date for civil actions based upon intentional torts committed against minors. *See* Acts 1993, c. 892; Acts 1994, cc. 405, 818. The amendment provided that no person shall have a constitutionally protected property right to bar a cause of action for such torts based upon the ground that the change in accrual date was applied retroactively. *See* Va. Const. art. IV, § 14; *see also* Acts 1993, c. 892; Acts 1994, cc. 405, 818. The amendment was ratified on November 8, 1994, and it became effective January 1, 1995. *See Kopalchick v. Catholic Diocese of Richmond*, 274 Va. 332, 337, 645 S.E.2d 439 (2007).

Even after the constitutional amendment, this Court has continued to reference a defendant's vested property right in a defense based upon an expired statute of limitations. *See*, *e.g.*, *Nunnally v. Artis*, 254 Va. 247, 255, 492 S.E.2d 126 (1997) (distinguishing between an extension of an unexpired statute of limitations and a revival of a previously time-barred claim); *Pulliam v. Coastal Emergency Services*, 257 Va. 1, 509 S.E.2d 307 (1999) (distinguishing between vested rights and those that had not yet accrued during its due process analysis of the U.S. Constitution) (citing

Hess v. Snyder Hunt Corp., 240 Va. 49, 392 S.E.2d 817 (1990)). As a result, even after the Virginia constitutional amendment, this Court has continued to draw some distinction in rights that had attached and those that are simply expected. Furthermore, even if the Constitutional Amendment resolved certain due process concerns under the Virginia Constitution, it did not alter Virginia's analysis of such due process concerns under the Federal Constitution. *See DiGiacinto v. Rector and Visitors of GMU*, 281 Va. 127, 134, 704 S.E.2d 365 (2011) (noting this Court's co-extensive analysis of due process protections afforded by the Constitution of Virginia and the United States Constitution) (citations omitted).

Federal Standard for Reviewing the Constitutionality of a Retroactive Extension of a Civil Statute of Limitations

The Fourteenth Amendment to the United States Constitution provides that no State may "deprive any person of life, liberty, or property, without due process of law . . . " *See* U.S. Const. amend. XIV, § 1. Through this amendment, the U.S. Constitution places due process restrictions on the Virginia legislature when it acts to deprive a citizen of certain rights. *See United States v. Carolene Products Co.*, 304 U.S. 144 at f.n. 4, 58 S. Ct. 778 (1934) (creating different levels of scrutiny for due process challenges to federal and state actions).

According to the United States Court of Appeals for the Fourth Circuit, federal analysis of the constitutionality of retroactive removals of a civil time bar no longer rely on the substance versus procedure distinction. *See Shadburne-Vinton v. Dalkon Shield Claimants Trust*, 60 F.3d 1071, 1075 (4th Cir. 1995) (preferring the rational basis test). In *General Motors Corp. v. Romein*, 503 U.S. 181, 112 S. Ct. 1105 (1992), the Court determined that the constitutionality of state laws were measured by whether or not they served a "legitimate legislative purpose that is furthered by rational means." *See Romein*, 503 U.S. at 191 (referring to the "Rational Basis Test"). These cases stand for the "proposition that the Due Process Clause of the Fifth Amendment [Fourteenth Amendment as applied to states] allows retroactive application of either federal or state statutes as long as the statute serves a legitimate legislative purpose that is furthered by rational means." *See Shadburne-Vinton*, 60 F.3d at 1076.

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." *See id*. at 1075. 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." *See Willis v. Mullett*, 263 Va. 653, 559, 561

S.E.2d 705 (2002) (quoting *Pulliam v. Coastal Emergency Servs., Inc.*, 257 Va. 1, 21, 509 S.E.2d 307, 318 (1999)).

ARGUMENT

The Circuit Court correctly sustained the Defendant's Plea in Bar of the Statute of Limitations, and the Plaintiff's claims should be dismissed with prejudice. J.A. 161.

I. Due to the Prospective Nature of Chapter 4 of Title 8.01 of the Code of Virginia, and Specifically Code § 8.01-256, Code § 8.01-249(6) Does Not Apply to the Haynes's Causes of Action.

Haynes's claims should be barred by the statute of limitations in place at the time of the alleged abuse due to the prospective nature of Chapter 4, "Limitations of Actions," of Title 8.01 of the Code of Virginia ("Chapter 4"). As stated in Paragraph 2 of Appellee's Plea in Bar, "[b]ased upon Virginia law in effect at the time, the statute of limitations for such civil action would have accrued at the time of the injury, and would have expired two years from Haynes's eighteenth birthday." J.A. 14.

A. Virginia Code § 8.01-256 Clearly Restricts the Retroactive Application of Chapter 4 to Causes of Action that Existed Before October 1, 1977.

The General Assembly has codified a preference for prospective application of statutory rules, which is articulated in the first section of Title 8.01 of the Virginia Code: "the applicable law in effect on the day before the

effective date of the particular provisions shall apply [to any existing cause of action] if in the opinion of the court any particular provision . . . may materially change the substantive rights of a party." *See* Va. Code § 8.01-1. The prospective nature of Chapter 4 is guided by Code § 8.01-256, which states in pertinent part:

> **If a cause of action**, as to which no action, suit, scire facias, or other proceeding is pending, **exists before October 1, 1977**, **then this chapter shall not apply and the limitation as to such cause of action shall be the same, if any, as would apply had this chapter not been enacted.** Any new limitation period imposed by this chapter, where no limitation previously existed or which is different from the limitation existing before this chapter was enacted, shall apply only to causes or rights of action accruing on or after October 1, 1977.

See Va. Code § 8.01-256 (emphasis added). To avoid reviving claims previously barred by a statute of limitation defense, the General Assembly decided that Chapter 4 should only apply prospectively. *See id.*

In *Strickland v. Simpkins*, 221 Va. 730, 735, 273 S.E.2d 539 (1981), this Court determined that "causes of action which existed or were pending prior to October 1, 1977, would be treated as if Chapter 4 had not been enacted." *See Strickland*, 221 Va. at 735 (refusing to apply new Chapter 4 tolling provisions to pre-1977 causes of action) (emphasis added); *accord Wood v. Holcombe*, 221 Va. 691, 273 S.E.2d 541 (1981) (affirming the holding in *Strickland*). Virginia Code § 8.01-249(6), upon which Haynes

relies for a new accrual date, also falls within Chapter 4. *See* Va. Code § 8.01-228, et seq.

As stated in the Complaint, the alleged abuse took place from 1971 to 1975, prior to enactment of Title 8.01, which did not occur until October 1, 1977. J.A. 1–2 (identifying alleged abuse between 1971 and 1975); *see also* Acts 1977, c. 617. Haynes's Complaint contains three causes of action. J.A. 8–10. For the time period identified in the Complaint, all three causes of action would have accrued at the time the abuse took place, not when the damage was discovered. *See Hawks v. DeHart*, 206 Va. 810, 813, 146 S.E.2d 187 (1966) ("We are committed in Virginia to the rule that in personal injury actions the limitation on the right to sue begins to run when the wrong is done and not when the plaintiff discovers that he has been damaged.").

In 1975, the statute of limitations governing Haynes's causes of action was governed by Virginia Code § 8-24, which provided a two-year window for personal injury actions. *See* Va. Code § 8-24 (providing a catch-all limitation period for personal injury claims). The limitation period would have begun to run when Haynes reached the age of majority in March of 1975. *See* Va. Code § 8-30 (tolling the statute of limitations to allow "infants" to bring claims after reaching "full age"); *see also Mahony v.*

Becker, 246 Va. 209, 213, 435 S.E.2d 139 (1993) (identifying the accrual dates for assault and battery as well as for intentional infliction of emotional distress).

In *Strickland*, this Court determined that a plaintiff could not utilize a tolling provision contained within Chapter 4, as the General Assembly had quite clearly intended for the new limitation rules to apply prospectively. *See Strickland*, 221 Va. at 734. Since this claim revolves around causes of action that originally accrued prior to October 1, 1977, and because Haynes relies upon a statutory accrual provision within Chapter 4, this claim is barred by the two-year statute of limitations in place as of March of 1975. *See* Va. Code § 8-24.

B. The Trial Court's Ruling Should Be Affirmed Based upon Code § 8.01-256 Pursuant to the "Right Result for the Wrong Reasons" Doctrine.

Whether or not this Court determines that the trial court erred in its reasoning and regardless of Haggerty not arguing specifically about the application of Virginia Code § 8.01-256 in its written or oral arguments in the trial court, this Court should still affirm the right result based upon the arguments in the preceding section of this brief. *See Perry v. Commonwealth*, 280 Va. 572, 578-82, 701 S.E.2d 431 (2010) (applying the right result for the wrong reason doctrine). Under the right result for the

wrong reason doctrine, "it is the settled rule that how[ever] erroneous . . . may be the reasons of the court for its judgment upon the face of the judgment itself, if the judgment be right, it will not be disturbed on account of the reasons." *See Schultz v. Shultz*, 51 Va. (10 Gratt.) 358, 384 (1853). The right result for the wrong reason doctrine only applies to claims "when [1] the evidence in the record supports the new argument on appeal, and [2] the development of additional facts is not necessary." *See Perry*, 280 Va. at 579 (citing *Whitehead v. Commonwealth*, 278 Va. 105, 115, 677 S.E.2d 265, 270 (2009)). First, the factual allegations in the Complaint, which must be taken as true, prove that Chapter 4 would not apply to Haynes's causes of action, which existed prior to the enactment of Title 8.01. J.A. 1 (asserting claims that existed between 1971 and 1975); *see also* Va. Code § 8.01-256 (restricting the application of Chapter 4 to claims arising after October 1, 1977). Second, the development of additional facts is not necessary because this new argument is based solely upon statutory grounds and the facts pleaded by Haynes within the Complaint. *See Blackman v. Commonwealth*, 45 Va. App. 633, 642, 613 S.E.2d 460, 465 (2005) ("an appellee may argue for the first time on appeal any legal ground in support of a judgment so long as it does not require new factual determinations"). There are simply no new facts that could be developed

by Haynes during discovery or at a later hearing or trial that would transport the alleged abuse to a date after October 1, 1977.

II. Argument on Assignments of Error #2 and #3: The Circuit Court Correctly Determined that a Retroactive Application of Virginia Code § 8.01-249(6) Would Constitute a Violation of Haggerty's Due Process Rights Afforded by the United States Constitution.

Haggerty was divested of substantive rights without due process of law when the Virginia General Assembly retroactively removed the long-standing bar to Haynes's recovery in an arbitrary manner. The code provision currently provides for accrual of a cause of action as follows:

> 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 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.

See Va. Code § 8.01-249(6). For the following four reasons, this accrual provision is constitutionally defective when applied to Haggerty under the facts of this case.

A. The 1994 Amendment to the Virginia Constitution Did Nothing to Alleviate the Due Process Concerns of the 14th Amendment to the U.S. Constitution.

Virginia Code Section 8.01-249 was enacted in the 1991 legislature, and for the first time added subsection (6), which dealt with the accrual of

causes of action for sexual abuse of a minor. Acts 1991, c. 674. It then permitted a cause of action for sexual abuse to accrue when a licensed health provider first communicated to a victim of child sexual assault: (1) the fact of the injury *and* (2) its causal connection to the abuse. *See id.*

In *Starnes v. Cayouette*, 244 Va. 202, 419 S.E.2d 669 (1992), the Virginia Supreme Court considered the retroactive application of § 8.01-249(6) to causes of action which had already accrued before the statute was passed in 1991. *See Starnes*, 244 Va. at 207 ("Stated more succinctly, the issue framed on this appeal is whether, upon the lapse of the time fixed in the statute of limitations and the tolling statute, the defendant acquired a right protected by due process guarantees."). The *Starnes* Court determined that a "defendant's right to a defense created by a statute" was a "valuable property interest, and such rights are substantive in nature." *See id.* at 211. Accordingly, the *Starnes* Court held that the accrual provision in Virginia Code Section 8.01-249(6) offended the due process guarantees of Article I, Section 11 of the Virginia Constitution. *See id.* at 212.

In 1993 and 1994, after the *Starnes* decision, the General Assembly proposed the following amendment to the Constitution of Virginia:

> The General Assembly's power to define the accrual date for a civil action based on an intentional tort committed by a natural

> person against a person who, at the time of the intentional tort, was a minor shall include the power to provide for the retroactive application of a change in the accrual date. No natural person shall have a constitutionally protected property right to bar a cause of action based on intentional torts as described herein on the ground that a change in the accrual date for the action has been applied retroactively or that a statute of limitations or statute of repose has expired.

See Va. Const. art. IV, § 14; *see also* Acts 1993, c. 892; Acts 1994, cc. 405, 818. The amendment was ratified on November 8, 1994 and became effective January 1, 1995. *See Kopalchick v. Catholic Diocese of Richmond*, 274 Va. 332, 337, 645 S.E.2d 439 (2007). Even if that Amendment resolved the due process concerns relating to the Virginia Constitution, it did nothing to diminish Haggerty's due process rights under the Fifth and Fourteenth Amendments to the U.S. Constitution, which also protect the same "property rights" mentioned in *Starnes*. J.A. 16–17.

The due process protections afforded by the Virginia Constitution have typically been interpreted as "co-extensive with those of the federal constitution." *See Shivaee v. Commonwealth*, 270 Va. 112, 119, 613 S.E.2d 570 (2005) (citing *Morrisette v. Commonwealth*, 264 Va. 286, 394, 569 S.E.2d 47, 53 (2002); *Willis v. Mullett*, 263 Va. 653, 657, 561 S.E.2d 705, 708 (2002)). The due process rights contained in the Virginia Constitution "are virtually the same as those of the United States Constitution." *See Willis*, 263 Va. at 657; *compare* Va. Const. art. I, § 11;

with U.S. Const. amend. XIV, § 1. When provisions in the Constitution of Virginia "are substantively similar to those in the United States Constitution," then they will be afforded the same meaning. *See DiGiacinto v. Rector and Visitors of GMU*, 281 Va. 127, 134, 704 S.E.2d 365 (2011) (citing *Shivaee*, 270 Va. at 119, 613 S.E.2d at 574; *Habel v. Industrial Development Authority*, 241 Va. 96, 100, 400 S.E.2d 516, 518 (1991)).

If the Virginia and federal due process protections are co-extensive and the *Starnes* Court determined that the retroactive application of Virginia Code Section 8.01-249(6) offended the due process guarantees of the Virginia Constitution, then this Court should similarly hold that the retroactive application of § 8.01-249(6) violates the due process protections of the United States Constitution. *See Kelly v. Trehy*, 133 Va. 160, 169, 112 S.E. 757, 760 (1922) (stating the important and essential role of stare decisis in Virginia).

B. 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.

Several revisions have been made to Virginia Code § 8.01-249 since its original enactment in 1991, which have broadened the section's effect and resulted in an irrational and arbitrary accrual date.

The first revision came in 1995, when the legislature voted to strike a ten-year absolute limitation period. *See* Acts 1995, c. 268. In 1997, the General Assembly amended the accrual statute by adding the following *italicized* language:

> In actions for injury to the person, whatever the theory of recovery, resulting from sexual abuse occurring during the infancy or incompetency of the person, *upon removal of the disability of infancy or incompetency 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.

Acts 1997, cc. 565, 801. The summary provided for Senate Bill 970 states that it "[c]larifies that the 'discovery' accrual rule applicable to actions arising out of childhood sexual abuse applies only where the fact of the injury and its causal connection to the abuse is not known to the plaintiff within the otherwise applicable limitations period." *See* SB 970 Statutes of limitations for childhood sexual abuse, VIRGINIA LEGISLATIVE INFORMATION SYSTEM, *available at* http://leg1.state.va.us/cgi-bin/legp504.exe?971+sum+SB970 (last visited November 13, 2015). The 1997 revision restricted the application of the accrual provision to cases where the plaintiff lacked prior knowledge of the injury and its relation to the abuse. *See JMB v. Cave*, 12 Va. S. Ct.

UNP 120248 (2012) (restricting utilization of the "discovery" accrual rule because of a plaintiff's pre-existing knowledge of a causal link between injury and abuse). After this revision, the statute clearly articulated an accrual date for plaintiffs who were previously unaware of a causal link between an injury and their childhood abuse.

Section 8.01-249(6) was amended again in 2013, when the General Assembly voted to modify the provision's language by *adding* and ~~deleting~~ the following language:

> 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.

Acts 2013, c. 292. The 2013 removal of "if the fact of the injury and its causal connection to the sexual abuse is not then known" nullified the 1997 revision and created an irrational, arbitrary, and easily manipulated accrual statute.

Without the 1997 language, the current provision no longer requires a plaintiff to lack previous knowledge of the link between the injury and the abuse. *See Id.* Instead of creating a new window of recovery for a victim

with repressed memories, the provision instead focuses on the communication of that injury by a medical professional. *See Ackerman v. Ackerman*, 19 Cir. L154176, 42 Va. Cir. 103 (1997) (pointing out the arbitrary nature of creating an accrual date based solely upon a physician's communication without reference to the plaintiff's knowledge). It is the plaintiff's knowledge of the injury that should be important. *See Kopalchick v. Catholic Diocese of Richmond*, 274 Va. 332, 338-339, 645 S.E.2d 439 (2007). Arbitrary can be defined as "depending upon individual discretion . . . rather than by fixed rules, procedure, or law." *See* Black's Law Dictionary 44 (4th Pocket Ed. 211). The date that a physician articulates an injury would be arbitrary if the alleged victim was already aware of the causal connection. In that circumstance, a potential plaintiff could use his or her own discretion to schedule an appointment so that he or she could first hear about an injury from a medical care provider.

C. The Revised Virginia Code Section 8.01-249(6) Does Not Further the Rational Basis Associated with its Original Enactment.

In addition to creating an arbitrary accrual date, the current Section 8.01-249(6) no longer furthers any of the rational reasons identified for its existence in both Federal cases and Virginia cases. For example, the following two cases considered and identified the rational bases for this

type of legislation, and all of the rationales are linked to a plaintiff first gaining knowledge of the causal link between the injury and the abuse.

First, a similar extension was considered in *Stogner v. California*, 539 U.S. 607 (2003). Though that case deals with the extension of a criminal statute and it relies upon the *Ex Post Facto* clause, the dissenting Justices identify what they saw as the primary rationale for extending statutes of limitations having to do with child sexual abuse: providing a new period of recovery beginning when the victim has "overcome shame and the desire to repress these painful memories." *See id*. at 652 (Kennedy, J., dissenting) (internal punctuation omitted).

Second, the rational basis for the law was considered in *Ackerman v. Ackerman*, 19 Cir. L154176, 42 Va. Cir. 103 (1997). In that case, a Virginia Circuit Court determined that the original enactment "envisioned a remedy for victims who had suppressed memories revealed as a result of professional counseling." *See id.*

As currently worded, adult victims of prior sexual abuse, even those who have long since come to grips with and acknowledged past abuses, are able to seek out additional diagnoses to revive long-barred causes of action. In the *Ackerman* case above, the Circuit Court determined that

"[t]his statute was not meant to revive time-barred actions in which victims had knowledge of the abuse and their injury but chose not to act." *See id.*

Without the phrase that was removed in 2013, the accrual provision does not serve a legitimate legislative purpose relating to the rational bases identified in prior case law.

D. The Gross Passage of Time in this Case Should Preclude the Retroactive Extension of Haynes's Statute of Limitations.

Haynes alleges that abuse took place between 1971 and 1975. J.A. 1. Prior to 1991, all causes of action for personal injuries resulting from sexual abuse accrued on the date the last injury occurred. *See* Va. Code § 8.01-230. So, the accrual dates would have been concurrent with the alleged abuse occurring between 1971 and 1975. *See Hawks v. DeHart*, 206 Va. 810, 813, 146 S.E.2d 187 (1966). The statute of limitations would have begun running when Haynes reached the age of eighteen in March of 1975, and the actions would have been barred in March of 1977. *See* Va. Code §§ 8-24, 30; *see also* Va. Code §§ 230, 243. Haynes now asserts that her accrual date has been redefined to 2012 by Virginia Code Section 8.01-249. J.A. 8. That is a difference of thirty-seven years. In *Chase Sec. Corp v. Donaldson*, 325 U.S. 304 (1995), the Supreme Court acknowledged that it would consider whether certain civil extensions might

qualify as an infringement upon a vested right if a defendant could show "special hardship" or "oppressive effect." *See Chase Sec. Corp. v. Donaldson*, 325 U.S. at 316. After nearly four decades in possession of an absolute bar to recovery for this type of claim, Haggerty is now seventy-two (72) years old, and the extreme passage of time should qualify as a special hardship.

Other policy concerns also work against the retroactive extension of Code § 8.01-249 to the facts of this case. In *Stogner*, the Supreme Court noted that after only twenty-two (22) years several factors should be considered: (1) a defendant would lack notice regarding the need to preserve exculpatory evidence; (2) memories fade and recovered memories may be faulty; and (3) necessary and important witnesses may die. *See Stogner v. California*, 539 U.S. 607, 631 (2003). Without some outer temporal limit (which no longer exist due to the legislative amendments in 1995), Code § 8.01-249 allows for an endless time limitations on the civil prosecution of defendants, thus depriving them of a valuable property right, without a fair opportunity to defend themselves. The original code provision contained a ten-year absolute time bar to civil claims of this nature, which acknowledged the problems associated with the extreme passage of time. *See* Acts 1995, c. 298. 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.

III. Argument on Assignment of Error #4: The Standard of Review Requires this Court to Review Statutory Interpretation and Constitutional Questions De Novo. As such, if this Court Determines that Haynes's Claims are Barred by the Statute of Limitations, then the Trial Court's Rationale Should not Affect the Outcome of this Appeal.

As noted in the Standard of Review section above, the merits of Haggerty's Plea in Bar of the Statute of Limitations should be evaluated de novo. *See Shevlin Smith v. McLaughlin*, 289 Va. 241, 251, 769 S.E.2d 7 (2015) (quoting *David White Crane Serv. v. Howell*, 282 Va. 323, 327, 714 S.E.2d 572, 575 (2011)). As such, the trial court's rationale is not controlling, and the lower court's final result should be the primary issue for review.

The Circuit Court correctly understood that the Plea in Bar asserted due process violations emanating from the Fifth and Fourteenth Amendments of the United States Constitution. J.A. 122. The trial court also identified the Rational Basis Test, which requires that state laws "serve a legitimate purpose that is furthered by rational means." *See id.* As a result, the trial court framed the question and analytic standard correctly.

It is true that the Letter Opinion states that the accrual provision had a rational "foundation." J.A. 124. Despite that finding, the trial court evaluated the Virginia case law that deals with Haggerty's vested and substantive rights in a statute of limitations defense, and the trial court ultimately determined that the *Starnes* analysis must also apply to the federal constitution. J.A. 124–26. Additionally, the trial court determined that Haynes's "extremely protracted failure to act" qualified as a "special hardship" or "oppressive effect," which in this circumstance would act to infringe upon Haggerty's due process rights. *See id.*; *see also Chase Sec. Corp v. Donaldson*, 325 U.S. 304, 316 (1995).

Despite Haynes's repeated assertions otherwise, the Circuit Court's ruling is not "directly contrary to the binding and controlling precedents" found in federal case law. *See* Opening Brief of Appellant at 9, 13. For justification, Haynes relies upon the *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), which states that retrospective laws are not "unlawful *solely* because it upsets otherwise settled expectations." *See id.* at 16 (emphasis added). In that case, the Supreme Court of the United States goes on to state the following:

> It does not follow, however, that what Congress can legislate prospectively it can legislate retrospectively. The retrospective 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.

See Usery, 428 U.S. at 16-17. When viewing the entirety of the *Usery* Court's analysis, it becomes clear that the Circuit Court understood that precedent and ultimately determined that this legislation failed to "meet the test of due process." J.A. 124–26. Regardless of the specific rationale, this Court is charged with a de novo review of the trial court's decision to sustain Haggerty's Plea in Bar of the Statute of Limitations. J.A. 161.

IV. Argument on Assignment of Error #6: The Trial Court Determined the Statute's Application Would Violate Haggerty's Due Process Rights after Correctly Identifying the Standard of Review.

The clarity of Virginia's statutory language and the transparency of the General Assembly's intent do not have any effect on this Court's interpretation of the United States' Constitution. *See* U.S. Const. art. VI ("This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."). The judiciary is not required to create a bright-line rule for every constitutional analysis. *See Maryland v. Shatzer*, 559 U.S. 98, 111 (2010) (stating that "clarity and certainty are not goals in themselves" when analyzing Fifth Amendment protections). The trial court's

constitutional analysis was proper and should not have been persuaded by the General Assembly's preference for a bright-line rule.

Code § 8.01-249(6) might provide a bright-line rule for the creation of an accrual date; however, federal and state case law does not lay out an equally clear test for analyzing statutes in light of due process protections. *Compare* Va. Code § 8.01-249(6) *with Willis v. Mullett*, 263 Va. 653, 561 S.E.2d 705 (2002) (requiring statutes to possess "a reasonable relation to a proper purpose" that "is not arbitrary or discriminatory") (citing *Pulliam v. Coastal Emergency Servs., Inc.*, 257 Va. 1, 21, 509 S.E.2d 307, 318 (1999)).

Haggerty's Plea in Bar asked the trial court to evaluate the constitutionality of the accrual provision in light of federal due process protections, and the trial court utilized the correct standard for that analysis. J.A. 122 (noting the Rational Basis test). In *Chase Sec.'s Corp. v. Donaldson*, 325 U.S. 304, 65 S. Ct. 1137 (1945), the Supreme Court determined "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." *See id*. at 316. By qualifying its statement with the term "*per se*," the United States Supreme Court acknowledged that in certain circumstances the retroactive extension

may violate a defendant's due process rights, but it does not *necessarily* do so. *See id.* at 316 (acknowledging that "special hardships or oppressive effects" could act to bar the retroactive extension of a statute of limitations in certain classes of cases).

As noted above, in *Stogner v. California*, 539 U.S. 607 (2003), the United States Supreme Court considered a similar extension of the statute of limitations in the criminal context. *See id.* at 609. While striking down the criminal law as a violation of the *Ex Post Facto* clause, the Court points out, that if they allowed the criminal statute to survive scrutiny, they would go beyond the Court's "prior statements of what is constitutionally permissible even in the analogous civil context." *See id.* at 631-32. For authority, the Supreme Court cites its prior decision in *Chase Sec.'s Corp.*, which acknowledged "that extension of even an expired *civil* limitations period can unconstitutionally infringe upon a vested right." *See id.* at 632 (relying upon *Chase Sec.'s Corp.* and *William Danzer & Co. v. Gulf & Ship Island R. Co.*, 268 U.S. 633, 637 (1925)). As a result, the Supreme Court has acknowledged that in certain circumstances the removal of a statute of limitations, even "in the civil context," could result in a due process violation. *See Stogner*, 539 U.S. at 632 (noting that the Constitution must

grant protection from unfair retroactivity in the criminal context; since in some circumstances, it does so in the civil context).

In the Letter Opinion, the trial court states that Haynes' "extremely protracted failure to act" worked to "egregiously" undermine Haggerty's due process rights. J.A. 126. The trial court properly determined that the extreme passage of time between the original accrual date and the statutory accrual date, in this case thirty-seven years, coupled with Haynes's inaction for all those years, qualified as a "special hardship or oppressive effect*." See Chase Sec.'s Corp*., 325 U.S. at 316.

CONCLUSION

For all of the foregoing reasons, the appellee, Sean Arthur Haggerty, respectfully requests that this Court affirm the decision of the trial court by concluding that Haynes's claims are barred by the applicable statutes of limitations.

Respectfully Submitted,

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CERTIFICATE

Pursuant to Rule 5:26(h) of the Rules of the Supreme Court of Virginia, I hereby certify the following:

1. On December 4, 2015, one electronic copy of the foregoing Brief of Appellee was filed, via VACES, and ten bound copies of the same were hand-filed with the Clerk of this Court.

2. On this same day, one electronic copy of the same was served, via email, upon:

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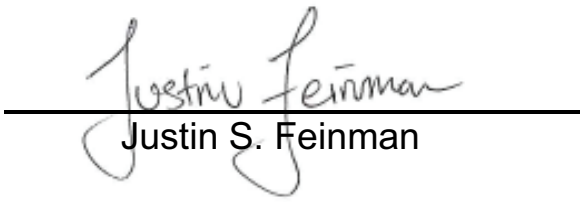

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