IN THE SUPREME COURT

STATE OF GEORGIA

WALTER JACKSON "JAKE" HARVEY, JR.and CAROLE ALLYN HILL HARVEY,	:	DOCKET NO. S21A0143
Appellants,	:	from the Superior Court of Carroll County
vs.	:	Civil Action File No.17-CV-712-J026
JOY CAROLINE HARVEY MERCHAN,	:	
Appellee.	:	

APPELLANTS' BRIEF

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PART I.
INTRODUCTION

This case involves an action for damages filed by the Appellee under the authority of O.C.G.A. § 9-3-33.1 against her own parents, the Appellants. Appellee is seeking damages for alleged sexual abuse by the Appellants she claims she suffered as a child in Canada between twenty-eight to forty-three years before the filing of this case. At the trial court, the Appellants moved to dismiss the Appellee's case and moved for summary judgment. Appellants now appeal the trial court's Order Denying Defendants' Motion to Dismiss and now appeal the trial court's Order Denying Defendants' Motion for Summary Judgment. This appeal centers on the validity and interpretation of O.C.G.A. § 9-3-33.1(d)(1).

STATEMENT OF THE CASE

The Appellee has filed a cause of action in tort in Georgia against the Appellants, her own parents. The Appellee alleges that she suffered damages from alleged childhood sexual abuse she claims was committed by the Appellants. (R.-868-881) She claims she suffered this abuse as a child in Canada between twenty-eight to forty-three years before the filing of this case. The Appellee contends she is authorized to bring this action pursuant to O.C.G.A. § 9-3-33.1(d)(1) because this statute revived her otherwise lapsed or expired claim for childhood sexual abuse. Appellants contend that O.C.G.A. § 9-3-33.1 as

amended by the 2015 Hidden Predator Act is unconstitutional. In addition, Appellants contend that, on its face, O.C.G.A. § 9-3-33.1 does not apply to claims based upon acts of abuse occurring outside of the State of Georgia. Therefore, the Appellee's claims were not revived by O.C.G.A. § 9-3-33.1(d)(1) and Appellee's action is barred by the applicable statute of limitations.

The Appellants filed Defendants' Motion to Dismiss and Defendants' Motion for Summary Judgment on June 18, 2019. (R.-469-521). The Appellee filed written responses to both motions on July 18, 2019. (R.812-842) On August 27, 2019, both sides presented oral argument before the trial court. The Appellants then filed Defendants' Supplemental Brief in Support of Defendants' Motion to Dismiss. The trial court entered its Order on Defendants' Motion to Dismiss and an Order Denying Defendants' Motion for Summary Judgment on November 4, 2019. (R.-1273-1291). Upon request by the Appellants, the trial court entered a Certificate of Immediate of Review for each order on November 12, 2019.

The Appellants filed an Application for Interlocutory Appeal on November 25, 2019. This Court granted said application on January 9, 2020. This Court asked that three questions be addressed: 1. What choice of law applies to tort claims brought in Georgia courts regarding torts allegedly committed in Canada between then-Canadian residents now residing in Georgia? 2. If Georgia law

applies as to the statute of limitations, did the trial court err when it determined that a plaintiff may pursue a cause of action pursuant to OCGA § 9-3-33.1 (d) (1) (2015) for acts of child sexual abuse that did not occur in Georgia? and 3. If a plaintiff may pursue a cause of action pursuant to OCGA § 9-3-33.1 (d) (1) (2015) for acts of child sexual abuse that did not occur in Georgia, does the statute nevertheless violate the defendant's rights to due process and equal protection under the state and federal constitutions?

Accordingly, Appellants filed their Notice of Appeal on January 10, 2020. The case was docketed on September 3, 2020. This Court granted Appellants an extension of time to file the brief of appellants until October 13, 2020.

PART II.

ENUMERATION OF ERRORS

1. The trial erred in denying Appellants' Motion for Summary Judgment as the plain language of O.C.G.A. §9-3-33.1 does not apply to claims for childhood sexual abuse arising from acts that occurred outside the State of Georgia and therefore Appellee's Complaint for Damages is barred by the statute of limitations.

2. The trial erred in denying Appellants' Motion to Dismiss challenging the constitutionality of O.C.G.A. § 9-3-33.1.

JURISDICTIONAL STATEMENT

The Supreme Court of Georgia has jurisdiction, as the Appellants challenge the constitutionality of O.C.G.A. § 9-3-33.1, and therefore this case involves a case for which exclusive jurisdiction is reserved to the Georgia Supreme Court. Georgia Constitution Art. 6, § 6, Para. II.

ARGUMENT AND CITATION TO AUTHORITY

I. The Court must apply Georgia law in determining the applicable statute of limitations and when interpreting O.C.G.A. § 9-3-33.1.

This Court should apply Georgia law in deciding the issues presented on appeal. Georgia courts apply the law of the forum where the action is brought in determining the applicable statute of limitations. In addition, the Appellee has brought her tort claims under a specific Georgia statute. Therefore, the Court should apply Georgia law.

"For over 100 years, the State of Georgia has followed the doctrine of lex loci delicti in tort cases, pursuant to which a tort action is governed by the substantive law of the state or country where the tort was committed. Auld v. Forbes, 2020 WL 5753317 (2020) at 2, quoting, Bullard v. MRA Holding, LLC, 292 Ga. 748, 750, quoting Dowis v. Mud Slingersm Inc., 279 Ga. 808, 809 (2005) . However, this Court has held that statutes of limitations are generally procedural in nature and are therefore governed by the "lex fori" or the law of the forum state.

Auld at 2; Hunter v. Johnson, 259 Ga. 21 (1989); Taylor v. Murray, 231 Ga. 852, 853 (1974).

In the instant case, the Appellee seeks recovery in a Georgia court for damages she alleges she suffered due to actions of childhood sexual abuse committed in the country of Canada. ((R.- 571-572, 575, 577, 560, 592-593, 596, 634-635 and 639)). However, the Appellee has specifically brought her case under the "authority of O.C.G.A. § 9-3-33.1". (R. 869). Accordingly, she relies on the revival language of O.C.G.A. § 9-3-33.1(d)(1) to support her assertion that her claim has been timely brought before the court and the statute of limitations has not expired. The Appellants challenge the Appellee's interpretation of the statute and urge this court to find that the Appellee's Third Amended Complaint for Damages is barred by the applicable statute of limitations. Thus, the only issues for consideration involve issues pertaining to the applicable statute of limitations. Under the principle of "lex fori", the Court should apply the law of the state of Georgia in deciding the issues presented on appeal.

II. The trial erred in denying Appellants' Motion for Summary Judgment as the plain language of O.C.G.A. §9-3-33.1 does not apply to claims for childhood sexual abuse arising from acts that occurred outside the State of Georgia.

The trial erred in denying Appellants' Motion for Summary Judgment. As an action for childhood sexual abuse, the timeliness of the Appellee's cause of action

is governed by O.C.G.A. § 9-3-33.1. The definition of "childhood sexual abuse" set forth in O.C.G.A. § 9-3-33.1(a)(1) does not encompass claims arising from acts occurring outside the State of Georgia. Consequently, the Appellee's claims were not revived by O.C.G.A. § 9-3-33.1(d)(1). Therefore, the Appellants are entitled to judgment as a matter of law.

A. The General Assembly made significant changes to O.C.G.A. §9-3-33.1 (2015) in 2015.

In 2015, the Georgia General Assembly made significant changes to O.C.G.A. § 9-3-33.1 (See 2015 Georgia Laws Act 97 (H.B. 17) See also GA. Legis 95 (2015). First and foremost, the legislature changed the definition of "childhood sexual abuse". Prior to the 2015 revision, "childhood sexual abuse" was defined in O.C.G.A. § 9-3-33.1(a) as

> any act committed by the defendant against the plaintiff which occurred when the plaintiff was under the age of 18 years and which act would have been proscribed by Code Section 16–6–1, relating to rape; Code Section 16–6–2, relating to sodomy and aggravated sodomy; Code Section 16–6–3, relating to statutory rape; Code Section 16–6–4, relating to child molestation and aggravated child molestation; Code Section 16–6–5, relating to enticing a child for indecent purposes; Code Section 16–6–12, relating to pandering; Code Section 16–6–14, relating to pandering by compulsion; Code Section 16–6–15, relating to solicitation of sodomy; Code Section 16–6–22, relating to incest; Code Section 16–6–22.1, relating to sexual battery; or Code Section 16–6–22.2, relating to aggravated sexual battery, or any

> prior laws of this state of similar effect which were in effect at the time the act was committed.
> O.C.G.A. § 9-3-33.1 (2014)

In the 2015 amendment, the General Assembly changed the definition of "childhood sexual abuse" occurring before July 1, 2015[1] to

> any act committed by the defendant against the plaintiff which occurred when the plaintiff was under 18 years of age and which would be **in violation** [emphasis added] of:
> (A) Rape, as prohibited in Code Section 16-6-1;
> (B) Sodomy or aggravated sodomy, as prohibited in Code Section 16-6-2;
> (C) Statutory rape, as prohibited in Code Section 16-6-3;
> (D) Child molestation or aggravated child molestation, as prohibited in Code Section 16-6-4;
> (E) Enticing a child for indecent purposes, as prohibited in Code Section 16-6-5;
> (F) Pandering, as prohibited in Code Section 16-6-12;
> (G) Pandering by compulsion, as prohibited in Code Section 16-6-14;
> (H) Solicitation of sodomy, as prohibited in Code Section 16-6-15;
> (I) Incest, as prohibited in Code Section 16-6-22;
> (J) Sexual battery, as prohibited in Code Section 16-6-22.1; or
> (K) Aggravated sexual battery, as prohibited in Code Section 16-6-22.2.
> O.C.G.A. § 9-3-33.1(a)(1)(a)(2) (2015)

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[1]O.C.G.A. § 9-3-33.1(a)(1)(a)(2). Subsection(a)(2) limits application of the definition in subsection (a)(1) to childhood sexual abuse committed before July 1, 2015. The amendment also created a different definition for "childhood sexual abuse" occurring on or after July 1, 2015 but that change is not relevant to this case as Plaintiff's claims all concern actions which allegedly occurred before July 1, 2015.

The General Assembly narrowed the definition. Previously the definition included acts merely "proscribed" by the eleven specific criminal statutes listed. Now the definition only includes such acts as which would be **in violation** of the eleven specific statutes listed. Particular actions may theoretically be proscribed by Georgia criminal statute but those same actions may only violate that Georgia statute if the actions occur in Georgia.

In addition, the General Assembly enacted the extreme measure of reviving for a limited period of time certain claims for childhood sexual abuse that had expired prior to enactment of the new longer statute of limitations. Specifically, O.C.G.A. § 9-3-33.1 (d)(1) provides,

> (d)(l) For a period of two years following July l, 2015, plaintiffs of any age who were time barred from filing a civil action for injuries resulting from childhood sexual abuse due to the expiration of the statute of limitations in effect on June 30, 2015, shall be permitted to file such actions against the individual alleged to have committed such abuse before July l, 2017, thereby reviving those civil actions which had lapsed or technically expired under the law in effect on June 30, 2015.

Only claims arising prior to July 1, 2015 could have expired prior to enactment of the 2015 amended version of O.C.G.A. § 9-3-33.1. Thus, claims revived under § 9-3-33.1(d)(1) must be claims for "childhood sexual abuse," as newly defined under O.C.G.A. § 9-3-33.1(a)(1).

B. The trial court misinterpreted O.C.G.A. §§ 9-3-33.1 (a)(1) and (d)(1) as the plain and unambiguous language of O.C.G.A. §§ 9-3-33.1 (a)(1) and (d)(1) states that the statute does not apply to claims for childhood sexual abuse arising from acts that occurred outside the State of Georgia.

The trial court ignored the plain meaning of the language of O.C.G.A. §§ 9-3-33.1 (a)(1) and (d)(1). The definition of "childhood sexual abuse" set forth in O.C.G.A. § 9-3-33.1(a)(1) does not encompass claims arising from acts occurring outside the State of Georgia. Therefore, the statute of limitations set forth in O.C.G.A. § 9-3-33.1(a)(1) does not apply to such acts and such acts may not be revived by O.C.G.A. § 9-3-33.1(d)(1). As an initial matter, statutes of limitation are to be strictly construed. Mullis v. Southern Co. Services, Inc., 250 Ga. 90, 93, 296 S.E.2d 579 (1982). "[C]ourts cannot engraft on such statutes [of limitation] exceptions not contained therein, however inequitable the enforcement of the statute, without such exceptions, may be." Harrison v. Holsenbeck, 208 Ga. 410, 412, 67 S.E.2d 311 (1951). Moreover, it is a fundamental rule of statutory construction that a statute is to be read as written. Magnun Communications Ltd v. Samoluk, 275 Ga. App. 177, 179, 620 S.E.2d 439 (2005) ("It is a fundamental principle of statutory construction that we must give words their plain and ordinary meaning."), Thompson v. Georgia Power Co., 73 Ga. App. 587, 597, 37 S.E.2d 622 (1946) ("If a statute is plain and susceptible of but one construction, the courts

have no authority to place a different construction on it, but must apply it according to its terms.").

The Legislature's intent in drafting § 9-3-33.1 may be easily discerned and applied under these circumstances as well. Where a legislative body provides a list of defined terms within a statute, the only possible inference that can be drawn by the interpreter of that statute is that the legislature intended to limit the statute's scope. Berryhill v. Georgia Community Support & Solutions, Inc., 281 Ga. 439, 440-41, 638 S.E.2d 278 (2006) (when a statute does not expressly enumerate a particular item, that item "falls outside of the definition").

That is precisely the situation in the instant case; the Legislature indisputably defines, without offering room for supplemental definition, the potential wrongful conduct actionable under O.C.G.A. § 9-3-33.1(a)(1). Thus, the Legislature has made clear that claims for "childhood sexual abuse" granted the benefit of the extended statute of limitations set forth in O.C.G.A. § 9-3-33.1(a)(2) must arise from acts **in violation** of the list of criminal violations listed in § 9-3-33.1(a)(1). The previous version of O.C.G.A. § 9-3-33.1(a)(1) applied to acts "proscribed" by the list of criminal violations listed in § 9-3-33.1(a)(1).

Thus, the question is controlled by the difference between the old use of "proscribed" and the new use of the words "in violation." Proscribe is defined as

"to outlaw or prohibit." Proscribe, *Black's Law Dictionary* (11th ed. 2019). Violation is defined as "an infraction or breach of the law." Violation, *Black's Law dictionary* (11th ed. 2019). It is one tenet to describe acts as being prohibited by a criminal statute; it is another for those acts to actually be breaches of the statute. The use of the word "in" prior to the word "violation in the new version makes it clear the General Assembly is intending to define acts of childhood sexual abuse worthy of the new extended statute of limitations and revival as acts which would be actual violations of the Georgia criminal statutes. As only acts committed in Georgia may violate the criminal statutes listed in § 9-3-33.1(a)(1), the extended statute of limitations only applies to claims arising from actions committed in Georgia.

It follows that claims arising from actions occurring outside the State of Georgia are incapable of being revived by O.C.G.A. § 9-3-33.1(d)(1). Only claims arising prior to July 1, 2015, in Georgia, could have expired prior to enactment of the 2015 amended version of O.C.G.A. § 9-3-33.1. Thus, all claims revived under § 9-3-33.1(d)(1) must be claims for "childhood sexual abuse," as newly defined under O.C.G.A. § 9-3-33.1(a)(1) which limits claims for childhood sexual abuse to claims arising from actions committed in the state of Georgia before July 1, 2015.

"A legislative body should always be presumed to mean something by the passage of an Act." Hardison v. Booker, 179 Ga. App. 693(1986). Furthermore, "in arriving at the intention of the legislature, it is appropriate to look at the old law and evil which the legislature sought to correct in enacting the new law and the remedy provided therefor." State v. Mulkey, 252 Ga. 201, 204 (1984). Georgia statutes have a presumption against extraterritorial application. Auld at 3; Glock v. Glock, 247 F. Supp. 3d 1307, 1318 (2017).

The trial court ignored the change in the statute and violated the maxims set forth above. Although the trial court initially acknowledged the Appellants argument concerning the change in the language, the trial court's order failed to offer any explanation for the change in the language. In addition, the court adopted the Appellee's reasoning that the language only requires that a possible defendant act with the same "mens rea" and "actus rea" elements required by one of the underlying criminal statutes. This argument has superficial appeal but the trial court cites no law or other basis for this interpretation. It is more reasonable that the General Assembly sought to balance the longer statute of limitations and revival of expired claims with the new language limiting the statute to situations where the alleged childhood sexual abuse actually occurred in Georgia. This

interpretation is consistent with the plain meaning of the new language used in the 2015 amendment.

C. The overwhelming evidence in the record indicates the Appellee's claim arises from action which allegedly occurred outside the state of Georgia.

The undisputed evidence indicates that the acts of which Appellee complains occurred in Canada. Summary judgment pursuant to O.C.G.A. § 9-11-56 is proper when "there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law." Sadlowski v. Beacon Management Services, Inc., 348 Ga. App. 585, 588 (2019); Navy Fed. Credit Union v. McCrea, 337 Ga. App. 103, 105(2016). In other words, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." O.C.G.A. § 9-11-56(c); Lucas v. Beckman Coulter, Inc., 348 Ga. App. 505, 507 (2019). For purposes of summary judgment the court must assume that evidence of the non-moving party is true. National Life Assur. Co. Of Canada v. Massey-Ferguson Credit Corp., 136 Ga. App. 311, 316 (1975).

Both the Appellee and her sister were deposed at length. The undisputed evidence in the record shows that these claims of the Appellee did not arise from

actions in Georgia. The Appellee was born on March 7, 1974 in Fort Lauderdale, Florida. (R. -530 ll.12-14) (R.- 557 ll. 8-9.) Shortly after her birth, the Appellee and the Petitioner moved to Canada when the Appellee was three months old. (R. - 557 l. 24).Appellee contends that she was sexually abused by the Appellees on numerous occasions while the family lived in Canada. (R.- 571-572, 575, 577, 560, 592-593, 596, 634-635 and 639). In fact, Appellee claims that the Appellants continually sexually abused her until she was approximately fifteen years old. (R.- 342, 595-596).

In addition, Appellee acknowledges that the family resided in Canada near Montreal, Quebec Canada until the Appellee was approximately 15 years of age. (R. -557-558). The Appellee and the Appellants moved to Savannah, Georgia when the Appellee was fifteen. (R.- 557-560). More importantly, the Appellee admits that the abuse stopped after the family moved to Georgia. (R.- 590, 595-596). The Appellee's sister also stated in her deposition that neither she nor the Appellee were sexually abused once the family moved to Georgia. (R. - 762, 779-780 and 854). As the Appellee's own evidence shows her claims arose in Canada, Appellee's claims are not governed by the terms of O.C.G.A. § 9-3-33.1 as a matter of law.

D. The trial erred by failing to hold that Appellee's claims are barred as a matter of law.

As the Appellee's claims are not governed by O.C.G.A. § 9-3-33.1 the general statute of limitations for injuries to the person should be applied. O.C.G.A. § 9-3-33 provides,

> Except as otherwise provided in this article, actions for injuries to the person shall be brought within two years after the right of action accrues, except for injuries to the reputation, which shall be brought within one year after the right of action accrues, and except for actions for injuries to the person involving loss of consortium, which shall be brought within four years after the right of action accrues.

Respondent was forty three years old at the time she filed this action.(R.-342) (R.-530, ll.12-14). (R. -557, ll. 8-9)(R. 23, 2019. ¶ 15).Appellee has sworn under oath that she was abused until she was fifteen years old in 1989. Under the two year statute of limitations, Appellee's cause of action should have been filed no later 1991. The trial court failed to apply the correct statute of limitations. This Court should reverse the trial court and determine that the Appellee's claims are barred as matter of law.

III. The trial erred in denying Appellants' Motion to Dismiss challenging the constitutionality of O.C.G.A. § 9-3-33.1.

In 2015, the Georgia Legislature enacted significant changes to O.C.G.A. § 9-3-33.1. These changes are unconstitutional as they violate due process and equal protection. Therefore, the trial court erred in denying the Appellants' Motion to Dismiss.

A. In 2015, the General Assembly made significant changes to O.C.G.A. §9-3-33.1.

Prior to 2015, civil actions for recovery of damages as a result of childhood sexual abuse committed before July 1, 2015, were required to be brought within five years of the date the Plaintiff attained the age of majority. O.C.G.A. § 9-3-33.1 (1992) See also GA. Legis 95 (2015), 2015 Georgia Laws Act 95(S.B. 8). In 2015, the General Assembly amended the statute and extended the statute of limitations. In addition, the statute was also amended so as to revive all claims for childhood sexual abuse, as defined by the statute, that had expired prior to the enactment of the statute for a two year window from July 1, 2015. O.C.G.A. § 9-3-33.1(d)(1)(2015) See also Ga Legis 97 (2015), 2015 Georgia Laws Act 97 (H.B. 17). The General Assembly also substantively changed the requirements for actions for childhood sexual abuse alleged to have been committed before and after July 1, 2015. Subsection (a) applies to conduct occurring before July 1, 2015:

> (a)(2) Notwithstanding Code Section 9-3-33 and except as provided in subsection (d) of this Code section, any civil action for recovery of damages suffered as a result of childhood sexual abuse committed before July 1, 2015, shall be commenced on or before the date the Plaintiff attains the age of 23 years.

Subsection (b) refers to conduct occurring on or after July 1, 2015:

> (b)(2)(A)(i)-(ii) Notwithstanding Code Section 9-3-33, any civil action for recovery of damages suffered as a result of childhood sexual abuse committed on or after July 1, 2015, shall be commenced:
> (i) on or before the date the plaintiff attains the age of 23 years, or
> (ii) within two years from the date that the plaintiff knew or had reason to know of such abuse and that such abuse resulted in injury to the plaintiff as established by competent medical or psychological evidence.

Furthermore, where a plaintiff proceeds under subsection (b)(2)(A)(ii) (for conduct occurring after July 1, 2015), "the court shall determine from admissible evidence in a pretrial finding when the discovery of the alleged childhood sexual abuse occurred." In other words, the Judge now acts as a type of "gatekeeper" in cases filed pursuant to subsection (b). O.C.G.A. § 9-3-33.1(b)(2)(B).

The Defendants contend that O.C.G.A. §9-3-33.1 violates the United States Constitution, to-wit: Amendment V (due process of law) and Amendment XIV (due process and equal protection of law). Defendants also contend that O.C.G.A. § 9-3-33.1 likewise violates Art. I, § I, ¶ I (due process of law); Art. I, § I, ¶ 2

(equal protection of the law) and Art. I, § I, ¶ X (prohibiting ex post facto and retroactive laws) of the Georgia Constitution.

B. O.C.G.A. § 9-3-33.1(d)(1) is unconstitutional as a retroactive law violating due process.

The Georgia Constitution (Art.1,§I, ¶ X) provides that "[n]o bill of attainder, ex post facto law, retroactive law, or laws impairing the obligation of contract or making irrevocable grant of special privileges or immunities shall be passed." By reviving all claims for childhood sexual abuse, as defined by the statute, that had expired prior the enactment of the statute for a two year window from July 1, 2015, O.C.G.A. §9-3-33.1(d)(1) is on its face a retroactive law, which is forbidden by the Georgia Constitution, Art. I, § I, ¶ X.

Although this prohibition seems absolute and unequivocal, the Georgia Supreme Court has held that "our Constitution forbids the passage of only those retroactive, or rather retrospective, laws which injuriously affect the vested rights of citizens." Deal v. Coleman, 294 Ga. 170, 175, FN 13 (2013) (citing Ballard v. Holman, 184 Ga. 788 (1937). Under the current state of Georgia law, statutes of limitation are deemed procedural in nature and therefore there can be no vested right in a statute of limitation. Hunter v. Johnson, 259 Ga. 21, 21 (1989) (cited with approval by Deal v. Coleman, 294 Ga. at 178); Smith v. Suntrust Bank, 325 Ga.

App. 531, 537, FN 8 (2014). On this basis, the trial court found O.C.G.A. §9-3-33.1(d)(1) constitutional.

However, most courts outside this state have rather consistently held that retroactive revival laws are constitutionally invalid. Waller v. Pittsburgh Corning Corp., 742 F. Supp 581 (1990); See State ex rel. Jackson, 187 Ark. 537, 60 S.W.2d 1020 (1933); Cheswold Volunteer Fire Co. v. Lambertson Constr. Co., 489 A.2d 413 (Del.1984); Mazda Motors of America, Inc. v. S.C. Henderson & Sons, Inc., 364 So. 2d 107 (Fla.Dist.Ct.App.1978), cert. denied, 378 So. 2d 348 (1979); Wilson v. All-Steel, Inc., 87 Ill. 2d 28, 56 Ill.Dec. 897, 428 N.E.2d 489 (1981); Jackson v. Evans, 284 Ky. 748, 145 S.W.2d 1061 (1940); Ayo v. Control Insulation Corp., 477 So. 2d 1258 (La.Ct.App. 1985), cert. denied, 481 So. 2d 1349 (1986); Dobson v. Quinn Freight Lines, 415 A.2d 814 (Me.1980); Zitomer v. State, 21 Md. App. 709, 321 A.2d 328 (1974), rev'd on other grounds, 275 Md. 534, 341 A.2d 789 (1975), cert. denied, 423 U.S. 1076, 96 S. Ct. 862, 47 L. Ed. 2d 87 (1976); Williams v. Wellman-Power Gas, Inc., 174 Mont. 387, 571 P.2d 90 (1977); Grand Island School Dist. No. 2 v. Celotex Corp., 203 Neb. 559, 279 N.W.2d 603 (1979); Colony Hill Condominium I Ass'n v. Colony Co., 70 N.C. App. 390, 320 S.E.2d 273 (1984), cert. denied, 312 N.C. 796, 325 S.E.2d 485 (1985); Cathey v. Weaver, 111 Tex. 515, 242 S.W. 447 (1922); In re Swan's Estate, 95 Utah 408, 79

P.2d 999 (1938); School Bd. of Norfolk v. United States Gypsum Co., 234 Va. 32, 360 S.E.2d 325 (1987); Haase v. Sawicki, 20 Wis.2d 308, 121 N.W.2d 876 (1963).

In addition, several state courts have found revival legislation invalid under specific provisions in their state constitutions which prohibit retroactive legislation. See Tyson v. Johns–Manville Sales Corp., 399 So.2d 263 (Ala.1981); Jefferson County Dept. of Social Services v. D.A.G., 199 Colo. 315, 607 P.2d 1004 (1980); Uber v. Missouri Pac. R. Co., 441 S.W.2d 682 (Mo.1969); Gould v. Concord Hosp., 126 N.H. 405, 493 A.2d 1193 (1985); Wright v. Keiser, 568 P.2d 1262 (Okla.1977); Ford Motor Co. v. Moulton, 511 S.W.2d 690 (Tenn.), cert. denied, 419 U.S. 870, 95 S.Ct. 129, 42 L.Ed.2d 109 (1974).

As explained , in Waller v. Pittsburgh Corning Corp., 742 F. Supp. 581 (D. Kan. 1990),:

> Most of the state courts addressing the issue have held that the legislation which attempts to revive claims that have been previously time barred impermissibly interferes with vested rights of the defendant, and thus violates due process. These courts have taken the position that the passing of the limitations period creates a vested right of defense in the defendant, which cannot be removed by subsequent legislative action expanding the limitations period.

Id. at 583. Applying this principle in the current case, once the limitations period ran, the limitation ceased being mere procedure and became substantive - a vested

right. The Legislature always has the right to tinker with limitations - except in the case of a citizen having a vested right due to the expiration of the limitations period. To the extent current Georgia law is in conflict with this position, it should be overruled. [2]

In criminal matters, the Supreme Court of the United States has noted the artificial distinction between "procedure" and "substantive matters" ignores serious due process concerns about the erosion or loss of evidence over time:

> Significantly, a statute of limitations reflects a legislative judgment that, after a certain time, no quantum of evidence is sufficient to convict. [citation omitted] And that judgment typically rests, in large part, upon evidentiary concerns -- for example, concern that the passage of time has eroded memories or made witnesses or other evidence unavailable.

See Stogner v. California, 539 U.S. 607, 615 (2006) (striking down a retroactive revival of a prosecution for child sexual abuse long after the original statute of limitation had expired years earlier).

Georgia has recognized the right to be free of stale claims in other context. Statutes of limitation are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has

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[2] This position does not change the fact that the Court should apply Georgia law in this matter as the rules for determining the applicable choice of law set forth in Auld v. Forbes, 2020 WL 5753317 (2020) are not affected by the application of the statute of limitations in Georgia nor the constitutionality of the statute itself.

been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute.' Clark v. Singer, 250 Ga. 470, 472 (1983); Allrid v. Emory University, 249 Ga. 35, 39 (1982); Order of Railroad Telegraphers v. Railway Exp. Agency, 321 U.S. 342, 348–9 (64 SC 582 [586], 88 LE 788) (1943). Due process considerations are at issue here because the State has effectively deprived the Appellants of their vested right of defense, which cannot be removed by subsequent legislative action Under Article I, Section I, Paragraph II of the Georgia Constitution: "Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws." Moreover, the Appellants are entitled to due process of law under the Fifth and Fourteenth Amendments of the U.S. Constitution and Article I, Section 1, Paragraph I of the Georgia Constitution ("No person shall be deprived of ... property except by due process of law."). Enactment of O.C.G.A. § 9-3-33.1(d)(1) has deprived the Appellants of their right to be free of stale claims without due process of law.

The trial court is incorrect in stating that the Appellants have not shown any special hardship or oppressive effects from the revival of lifting the statute of

limitations for claims for damages resulting from childhood sexual abuse. The trial court's statement that the Appellants could hardly say they engaged in acts of childhood sexual abuse depending on a statute of limitations for shelter from liability misses the nature of the predicament. The Appellee has brought a claim for recovery of damages caused by actions she alleges occurred forty three to twenty-eight years before her lawsuit was filed. However, the Appellee informed the Appellants of her allegations in 2010. (Ex., pp 87-88). At that time, the statute had already expired. The Appellants had five years of dealing with the situation financially and emotionally after this disclosure until the statue of limitations was changed. (R. 86-89). Changing the statute of limitations creates the sorts of hardships and oppressive effects protected by due process by forcing them to defend a forty year old allegation after five years of acting in a manner consistent with the idea the Appellee could not legally act on her claims.

C. O.C.G.A. § 9-3-331.1 is unconstitutional on its face as it violates equal protection.

The classification of claims in O.C.G.A. § 9-3-33.1 violates equal protection. Equal protection of the laws is guaranteed by both the Federal Constitution and Georgia Constitution. U.S. Const. Amend. XIV, §§ 1 to 5.; Ga. Const. Art. I, § I, ¶ II. The 14th Amendment of the United States Constitution provides, "No state shall make or enforce any law which shall abridge the

privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The Georgia Constitution provides, "Protection to person and property is the paramount duty of the government and shall be impartial and complete. No person shall be denied equal protection of the laws." Ga. Const. Art. I, § I, ¶ II. Prior to the adoption of the 1983 Constitution, Georgia courts interpreted the "impartial and complete" provision as comparable to the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Courts have reiterated since its adoption that the Equal Protection clause in the 1983 Georgia Constitution and the United States Constitution are coextensive. See Grissom v. Gleason, 262 Ga. 374, 375 (1992).

A statute attacked as unconstitutional is presumed by the judiciary to be constitutional until it is established that the statute manifestly infringes upon a constitutional provision or violates the rights of the people. Love v. State, 271 Ga. 398, 517 S.E.2d 53 (1999). Equal protection requires that the State treat similarly situated individuals in a similar manner. Gliemmo v. Cousineau, 287 Ga. 7, 694 S.E.2d 75 (2010); Dunn v. State, 286 Ga. 238, 686 S.E.2d 772 (2009); Nichols v. Gross, 282 Ga. 811, 653 S.E.2d 747 (2007).

Thus, there are two prongs to an evaluation of legislation under an equal protection claim, to-wit: (1) whether the claimant is similarly situated to members of the class who are treated differently from him or her and (2) whether the state action was taken with an unreasonable purpose or was arbitrary and capricious. Gliemmo v. Cousineau, 287 Ga. 7, 9(2010). When assessing equal protection challenges, a statute is tested under a standard of strict judicial scrutiny if it either operates to the disadvantage of a suspect class or interferes with the exercise of a fundamental right. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973); Fair v. State, 288 Ga. 244, 702 S.E.2d 420 (2010); Drew v. State, 285 Ga. 848, 684 S.E.2d 608 (2009); Ambles v. State, 259 Ga. 406, 383 S.E.2d 555 (1989).

(1) There are two different categories of defendant under O.C.G.A. § 9-3-331.1.

The General Assembly recognized the unfairness of delayed civil actions when it provided in O.C.G.A. § 9-3-33.1(b)(2)(A)(ii) that when a civil action is commenced (a) after a plaintiff attains the age of 23 years, and (b) within two years from the date that the plaintiff knew or had reason to know of such abuse and that such abuse resulted in injury "established by competent medical or psychological evidence." Similarly, O.C.G.A. §9-3-33.1(b)(2)(B) provides: When a plaintiff's civil action is filed after the plaintiff attains the age of 23 years but within two

years from the date that the plaintiff knew or had reason to know of such abuse and that such abuse resulted in injury to the plaintiff, the court shall determine from admissible evidence in a pretrial finding when the discovery of the alleged childhood sexual abuse occurred. The pretrial finding required under this subparagraph shall be made within six months of the filing of the civil action.

No such protection, however, is afforded when a plaintiff "of any age" brings a civil action decades after the alleged childhood sexual abuse under § 9-3-33.l(d)(l), as is the case here. Defendants of claims brought pursuant to the revival statute of 9-3-33.l(d)(l) are treated differently. Plaintiffs bringing these claims do not have to establish their injuries by competent medical or psychological evidence. Thus, defendants in these actions do not benefit from the pretrial hearing establishing the date of the alleged childhood sexual abuse.

Thus, there are two different categories of defendants under § 9-3-33. 1(b) and § 9-3-33.1(d)(1). Both groups of defendants face claims for childhood sexual abuse. However, when a defendant is sued under subsection (b), the plaintiff is required to establish his injury by competent medical or psychological evidence and to have a pretrial finding when the discovery of the alleged childhood sexual abuse occurred based on admissible evidence. In contrast, members of the class of defendants sued under subsection (d)(1) are severely disadvantaged as compared to

defendants sued under subsection (b). There is no statute of limitations and the plaintiff is not required - no matter how old the case is - to establish his or her injury by competent medical or psychological evidence. Moreover, defendants sued pursuant to § 9-3-33.1(d)(1) do not receive the benefit of a pretrial finding as to date the alleged childhood sexual abuse occurred based on admissible evidence.

(b) The Appellants are deprived of their fundamental rights of due process under Articles Amendments V and XIV of the United States Constitution and Art. I, §1, ¶ XII of the Ga. Const by the classification of defendants under O.C.G.A. § 9-3-33.1.(b) and § 9-3-33.l (d)(1).

As members of the class of defendants facing claims revived by O.C.G.A. § 9-3-33.l(d)(l), the Appellants are deprived of their fundamental rights of due process. The majority of states have taken the position that the passing of the limitations period creates a vested right of defense in the defendant, which cannot be removed by subsequent legislative action expanding the limitations. Waller v. Pittsburgh Corning Corp., 742 F. Supp 581 (1990). This vested right has been taken from the Appellants.

"'Statutes of limitation ... are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on

notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute.'" Clark v. Singer, 250 Ga. 470, 472 (1983); Allrid, supra, 249 Ga. at 39, 285 S.E.2d 521. Order of Railroad Telegraphers v. Railway Exp. Agency, 321 U.S. 342, 348–9 (64 SC 582 [586], 88 LE 788) (1943)."

As further recognized by the United States Supreme Court, "a statute of limitations reflects a legislative judgment that, after a certain time, no quantum of evidence is sufficient to convict. And that judgment typically rests, in large part, upon evidentiary concerns .-- for example, concern that the passage of time has eroded memories or made witnesses or other evidence unavailable." See Stogner v. California, 539 U.S. 607, 615 (2006) (striking down a retroactive revival of a prosecution for child sexual abuse long after the original statute of limitation had expired years earlier).

O.C.G.A. §9-3-33.l(d)(l)'s revival of stale claims renders the Appellants' fundamental rights of due process meaningless. Worse, defendants facing these claims are granted none of the protections afforded defendants of claims made on acts occurring after July 1, 2015. Thus, the disparate treatment of defendants under O.C.G.A. § 9-3-33.1 should be evaluated under a strict scrutiny analysis.

(c) There is no rational basis for the two different categories of defendant created by O.C.G.A. § 9-3-33.1.(b) and § 9-3-33.l(d).

Strict judicial scrutiny demands that the statute be narrowly tailored to serve a compelling state interest. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973); Ambles v. State, 259 Ga. 406, 383 S.E.2d 555 (1989). The difference between the two different categories of defendants - sued for the same alleged acts - under § 9-3-33.1(b) and § 9-3-33.l(d) is irrational. There is no logical reason why a defendant who is sued more than three decades after the alleged "childhood sexual abuse" occurred should face a plaintiff having to meet a lower standard of proof than a plaintiff who is more than 23 years old but is within two years from the date the Plaintiff knew the abuse resulted in injury to the plaintiff. There is no rational basis for such different treatment between defendants under § 9-3-33.1(b) and § 9-3-33.1(d). Indeed, the logic is backwards - the more stringent standard of proof should apply to cases brought decades after the alleged childhood sexual abuse, but is instead being applied in the reverse.

The trial court found that there were any number of rational explanations for the different standards. This logic falls under strict scrutiny analysis. There is no reason to believe that claims of those allegedly abused years ago are inherently

more reliable than claims arising in more recent years. In fact, in lengthening the statute of limitations for non-expired claims, the General Assembly has seeming recognized the inherent dangers of allowing older clams and required that newer claims be supported by medical documentation. The State does not have a compelling interest in encouraging stale, frivolous claims allegedly arising twenty-eight to forty-three years ago. Thus, the classification and statute are unreasonable and in violation of equal protection.

CONCLUSION

For all the foregoing reasons, Appellants ask that the Court reverse the trial court's Order Denying Defendants' Motion to Dismiss dated November 4, 2019 and reverse the trial court's Order Denying Defendants' Motion for Summary Judgment dated November 4, 2019.

Respectfully submitted, this the 13th day of OCTOBER, 2020.

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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served a copy of the above and foregoing APPELLANTS' BRIEF, upon the opposing party by regular mail with proper postage attached, to-wit:

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EXHIBIT "A"

SUPREME COURT OF GEORGIA
Case No. S21A0143

September 10, 2020

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

WALTER JACKSON HARVEY JR. et al. v. JOY CAROLINE HARVEY MERCHAN.

Your request for an extension of time to file the brief of appellant in the above case is granted. You are given an extension until October 13, 2020.

Appellee's brief shall be filed within 20 days after the filing of appellant's brief.

A request for oral argument must be independently timely filed, except in direct appeals from judgments imposing the death penalty, every interim review which is granted pursuant to Rule 37, appeals following the grant of petitions for writ of certiorari, applications of certificates of probable cause to appeal in habeas corpus cases where a death sentence is under review, and appeals in habeas corpus cases where a death sentence has been vacated in the lower court, where oral argument is mandatory. Rule 50(1) -(2). No extensions of time for requesting oral argument will be granted. Rule 50(3).

A copy of this order **MUST** be attached as an exhibit to the document for which you received this extension.

All the Justices concur.