IN THE SUPREME COURT
STATE OF GEORGIA

WALTER JACKSON "JAKE" HARVEY, JR. and CAROLE ALLYN HILL HARVEY Appellant, v. JOY CAROLINE HARVEY MERCHAN, Appellee.	Case No. S21A0143

Appellee Joy Caroline Harvey Merchan's Principal Brief

Emma Hetherington
Georgia Bar No. 682022
Brian Atkinson
Georgia Bar No. 519769
Wilbanks Child Endangerment and Sexual Exploitation ("CEASE") Clinic
University of Georgia School of Law
P.O. Box 1792
Athens, GA 30603
Telephone (706) 227-5421

Esther Panitch
Georgia Bar No. 143197
The Panitch Law Group, P.C.
4243 Dunwoody Club Drive, Suite 201
Atlanta, GA 30350
Telephone (770) 364-6952

Counsel for Plaintiff-Appellee Joy Caroline Harvey Merchan

TABLE OF CONTENTS

Table of Contents……………………………..………………………………ii

Table of Authorities……………………….……..…………..……...……..iii

Introduction……………………………………………………………...1

Statement of the Case………………………………………………………4

Argument and Citation of Authority………………………………………..8

1. This Court should apply Georgia law in this case………………………………8

   a. Georgia law applies under *lex loci delicti* because the last event giving rise to Appellants' liability occurred in Georgia……………………………….…..9

   b. If this Court determines that Quebec law applies to this case, then the Quebec statute of limitations should also be applied and this case should be remanded for Quebec law to be pleaded and proven………………………11

2. The trial court did not err when it determined a plaintiff may pursue a cause of action pursuant to O.C.G.A. § 9-3-33.1(d)(1) (2015) for acts of child sexual abuse that did not occur in Georgia……………………………………14

   1. Georgia's statute of limitations does not need to be applied extraterritorially if applied to this case……………………………………………………..14

   2. The acts committed in Quebec can be pursued alongside the Georgia claims in Georgia courts…………………………………………………15

   3. Appellants' contention that O.C.G.A. § 9-3-33.1(a)(1) imputes Georgia's criminal venue requirements is unfounded………………………17

      i. The definition of "child sexual abuse" under O.C.G.A. § 9-3-33.1(a)(1) does not impute Georgia's criminal venue requirements…………………………………………...17

ii. Appellants' argument that criminal venue requirements should be imputed onto a civil claim impermissible interprets the law in a manner that renders it unconstitutional…………..18

3. O.C.G.A. § 9-3-33.1(d)(1) (2015) does not violate Appellants' rights to due process and equal protection under the state and federal constitutions…….19

a. O.C.G.A. § 9-3-33.1(d)(1) (2015) does not violate Appellants' rights to due process under the state and federal constitutions……………………....20

b. O.C.G.A. § 9-3-33.1(d)(1) (2015) does not violate Appellants' rights to equal protection under the state and federal constitutions………………....22

i. O.C.G.A. § 9-3-33.1(d)(1) (2015) does not create a separate class of defendants…………………………….……23

ii. O.C.G.A. § 9-3-33.1 passes rational basis scrutiny…………..24

iii. If this court finds that the delayed discovery provision in O.C.G.A. § 9-3-33.1(b)(2)(B) is unconstitutional, the provision is severable……………………………..…..27

Conclusion………………………………………………………………...30

TABLE OF AUTHORITIES

CASES

Albany Surgical, P.C. v. Ga. Dept. of Community Health,
278 Ga. 366 (2004) 19

Auld v. Forbes,
No. S20G0020, 2020 WL 5753317 (Ga. Sept. 28, 2020) ....*passim*

Avia Support Int'l, Inc. v. Acts Aero Tech. Support & Servs., Inc.,
2010 WL 11505692 (S.D. Fla. Aug. 31, 2010) 12

Bd. of Pub. Educ. v. Hair,
276 Ga. 575 (2003)...19

Brown v. City of Michigan City, Indiana,
462 F.3d 720 (7th Cir. 2006)...25

Bullard v. MRA Holding, LLC,
292 Ga. 748 (2013)..2, 8, 9, 10, 14-15, 16

Bunn v. State,
291 Ga. 183 (2012)...24-25, 27

Calder v. Bull,
3 U.S. 386 (1798) 22

Canton Textile Mills v. Lathem,
253 Ga. 102 (1984) 3, 20, 21, 22

Chase Sec. Corp. v. Donaldson,
325 U.S. 304 (1945) 3, 20, 26

City Council of Augusta v. Mangelly,
243 Ga. 358, 363 (1979) 28

Conner v. Hart,
252 Ga. App. 92 (2001) 15

Cowart v. Widener,
287 Ga. 622 (2010) 2, 10

Cox Enterprises, Inc. v. Nix,
274 Ga. 801 (2002) 2

Daimler Chrysler Corp. v. Ferrante,
281 Ga. 273 (2006) 28-29, 30

Deal v. Coleman,
294 Ga. 170 (2013) 18

Devore v. Liberty Mut. Ins. Co.,
257 Ga. App. 7 (2002) 26

Doe v. Moore,
410 F.3d 1337 (11th Cir. 2005) 25

Dowis v. Mud Slingers, Inc.,
279 Ga. 808 (2005) 2, 8

Drew v. State,
285 Ga. 848 (2009) 27

Fair v. State,
288 Ga. 244 (2010) 24

Farley v. State,
272 Ga. 432 (2000) 23

Fed. Deposit Ins. Corp. v. Loudermilk,
305 Ga. 558 (2019) 18

Fed. Ins. Co. v. Nat. Distrib. Co.,
203 Ga. App. 763 (1992) 11

Ga. Dept. of Human Resources v. Word,
265 Ga. 461 (1995) 19

Gray v. Armstrong,
222 Ga. App. 392 (1996) …………………………………………………..17-18

Hardin v. Hardin,
301 Ga. 532 (2017)……………………………………………………………10

Harper v. State,
292 Ga. 557 (2013) …………………………………………………………3, 25

Harris v. Murray,
233 Ga. App. 661 (1998) ……………………………………………………...26

Hendrix v. Taylor,
579 S.E.2d 320 (S.C. 2003) …………………………………………………...25

Huggins v. Powell,
315 Ga. App. 599 (2012) ……………………………………………….20, 21

Hunter v. Johnson,
259 Ga. 21 (1989) ……………………………………………………………..11

Kaplan v. Sandy Springs,
286 Ga. 559 (2010) ……………………………………………………………..2

M.H.D. v. Westminster Schools,
172 F.3d. 797 (11th Cir. 1999) ………………………………………………..13

Mason v. Home Depot U.S.A., Inc.,
283 Ga. 271 (2008) ……………………………………………………………26

Montgomery v. Barrow,
286 Ga. 896 (2010)…………………………...……………………………….10

Moore v. Savannah Cocoa, Inc.,
217 Ga. App. 869 (1995) ……………………………………………………...20

Nixon v. State,
256 Ga. 261 (1986) ……………………………………………………………28

Oswell v. Nixon,
275 Ga. App. 205 (2005) ...15

Polito v. Holland,
258 Ga. 54 (1988) ...26

Risdon Enter., Inc. v. Colemill Enter, Inc.,
172 Ga. App. 902 (1984) ...9, 15, 16

Romer v. Evans,
517 U.S. 620 (1996) ...3-4

San Antonio Indep. Sch. Dist v. Rodriguez,
411 U.S. 1 (1973) ...25

Seaboard A.L. Ry. v. Benton,
175 Ga. 491 (1932) ...21

State v. Jackson,
269 Ga. 308 (1998) ...29

State v. Jackson,
271 Ga. 5 (1999) ...23

State v. Ward,
869 P.2d 1062 (Wash. 1994) ...25

State v. Nankervis,
295 Ga. 406 (2014) ...27

Stogner v. California,
539 U.S. 607 (2003) ...22, 27

Taylor v. Murray,
231 Ga. 852 (1974) ...11, 12

U.S. v. LeMay,
260 F.3d 1018 (9th Cir. 2001) ...25

Vaughn v. Vulcan Materials Co.,
266 Ga. 163 (1996) 20, 21

Wall v. Federal Land Bank,
240 Ga. 236 (1977) 17-18

STATUTES

O.C.G.A. § 1-3-1(a)..........18

O.C.G.A. § 9-3-33.1..........*passim*

O.C.G.A. § 9-10-30..........17

O.C.G.A. § 9-11-15..........14

O.C.G.A. § 9-11-43(c)..........14

O.C.G.A. § 16-5-46..........21

O.C.G.A. § 16-6-1..........21

O.C.G.A. § 16-6-2..........21

O.C.G.A. § 16-6-3..........21

O.C.G.A. § 16-6-4..........21

O.C.G.A. § 16-6-22..........21

O.C.G.A. § 51-14-3(a)..........30

Quebec Civil Code, c. 8, s. 2926.1 (2015)..........12, 13

Quebec Civil Code, c. 64, s. 1497 (1991)..........12

OTHER AUTHORITIES

2015 Georgia Laws Act 97 (H.B. 17)…………………………………………..29

Elizabeth O. Paolucci et al., *A Meta-Analysis of the Published Research on the Effects of Child Sexual Abuse*, 135 The J. of Psychol. 17, 18-19 (2001)…………27

CONSTITUTIONAL PROVISIONS

Ga. Const. Art. 1, § 1, Para. X……………………………………………..22

Ga. Const. Art. VI, § II, Para.VI…………………………………………17, 19

Ga. Const. Art. VI, § VI, Para. II………………………………………………1

INTRODUCTION

This Court should affirm the Trial Court's Order Denying Defendants' Motion for Summary Judgement and Order on Defendants' Motion to Dismiss. Appellee agrees that Georgia law should apply in this case, but for different reasons, as Appellants' stated reasons are inconsistent with settled Georgia law and this Court's precedent.

This Court should find that (1) Georgia law applies to tort claims brought in Georgia where the tortious conduct spans both Canada and Georgia, and where the final elements of tort occurred in Georgia; (2) The trial court did not err when it determined Appellee could 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 because the tortious conduct was transitory in nature and continued into Georgia, where the final elements of the tort occurred; and (3) OCGA § 9-3-33.1(d)(1) (2015) does not violate a defendant's rights to due process and equal protection under the state and federal constitutions.

In their Motion for Summary Judgment, Appellants argue that OCGA § 9-3-33.1(d)(1) does not apply to acts of child sexual abuse that occurred outside of Georgia. Appellants' argument ignores Georgia's well-established application of the doctrine of *lex loci delicti* in tort cases, where "a tort action is governed by the substantive law of the state where the tort was committed," and the state where the

tort was committed is the location where the last element of the tort, the injury, was suffered. *Dowis v. Mud Slingers, Inc.*, 279 Ga. 808, 809 (2005); *See Bullard v. MRA Holding, LLC*, 292 Ga. 748, 750-51 (2013).

To prevail on a motion for summary judgment, the moving party must demonstrate that there is no genuine issue of material fact and therefore the party is entitled to judgment as a matter of law. *See Cowart v. Widener*, 287 Ga. 622, 623 (2010). The moving party "need not affirmatively disprove the nonmoving party's case, but may point out by reference to the evidence in the record that there is an absence of evidence to support any essential element of the nonmoving party's case." *Id*, citing *Cox Enterprises, Inc. v. Nix*, 274 Ga. 801, 803 (2002). This Court "must view the evidence, and all reasonable inferences drawn therefrom, in the light most favorable to the nonmovant." *Cowart* at 624, citing *Kaplan v. Sandy Springs*, 286 Ga. 559, 560 (2010).

The record is replete with evidence that tortious conduct occurred in Georgia and that at least one essential element of Appellee's claims of child sexual abuse occurred in Georgia – the final element of the tort, the injury. The fact that tortious conduct and the final element occurred in Georgia distinguishes this case from *Auld v. Forbes*, No. S20G0020, 2020 WL 5753317 (Ga. Sept. 28, 2020), where the final injury occurred outside of Georgia. Therefore, this Court should find that Georgia law applies in this case and that OCGA § 9-3-33.1(d)(1) applies to any acts or

elements of the tort that occurred outside of Georgia. Thus, Appellants cannot demonstrate that there is no genuine issue of material fact and are therefore not entitled to judgment as a matter of law as they cannot demonstrate "an absence of evidence to support any essential element" of Appellee's case in the record. Id.

In their Motion to Dismiss, Appellants argue that OCGA § 9-3-33.1(d)(1) (2015) violates the defendants' rights to due process and equal protection under the state and federal constitutions. Both this Court and the United States Supreme Court have found that modifications of civil statutes of limitations, such as the one at issue in this case, are constitutional and that due process "does not make an act of state legislation void merely because it has some retrospective operation." *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 315-16 (1945). *See Canton Textile Mills v. Lathem*, 253 Ga. 102, 105 (1984).

Similarly, O.C.G.A. § 9-3-33.1(d)(1) (2015) does not violate the Appellants' right to equal protection under the state and federal constitutions. Appellants contend that the statute creates two classes of defendants and that this Court should review the statute under a strict scrutiny standard of review. First, the statute does not create two classes of defendants. Second, even if the statute did create two classes of defendants, neither a suspect class nor a fundamental right is implicated and this Court should find that any legislative classification under the statute bears a rational relation to a legitimate end. *See Harper v. State*, 292 Ga. 557, 560 (2013); *Romer v.*

Evans, 517 U.S. 620, 631 (1996). Finally, if this Court finds that the delayed discovery provision in O.C.G.A. § 9-3-33.1(b)(2) is unconstitutional, it is severable from the statute as a whole and therefore the remainder of the act still stands. Therefore, Appellee ask this Court to affirm the trial court's orders in this case.

STATEMENT OF THE CASE

Joy Caroline Merchan ("Caroline" or "Appellee") was repeatedly and continuously sexually abused by her parents, the Appellants, throughout the entirety of her childhood, from Canada and into the state of Georgia where the family ultimately relocated. R-869. Caroline was born in Fort Lauderdale, Florida. R-558. Soon thereafter the family moved to Quebec, where they lived until 1989, when Appellants moved Caroline and her sister, April Skorupa ("April"), to Savannah, Georgia.. R-558-560. Although the child sexual abuse began in Quebec, continued acts of abuse, related acts of intentional infliction of emotional distress, and the final injuries occurred in Georgia. R-871; 868-881. Both Appellants, as well as the Appellee, are currently residents of Georgia, and Appellee's claim was filed in Superior Court of Carroll County, in the county of the Appellants' residence. R-868-869.

Caroline cannot recall a time in her childhood during which she did not suffer sexual abuse. R-871. While Caroline was a child under the age of 18, Appellants fondled Caroline's breasts and genitalia; digitally penetrated her vagina; forced

Caroline to play with Appellant Jake Harvey's penis under the guise of driving "game" where the penis took the place of the gear shift; drugged Caroline on at least one occasion so that she could be photographed and raped by other adults; forced Caroline to watch her sister, who was also a minor at the time, being sexually abused; forced Caroline and her sister to take showers with Appellants during which they sexually abused both children; forced Caroline to take showers with the door open so the Appellants could view her naked body; and exposed their genitalia to Caroline for the purpose of their own sexual arousal. R-870. In legal terms, Appellants committed acts of incest, assault, battery, sodomy, aggravated sodomy, sexual battery, aggravated sexual battery, child molestation, and aggravated child molestation. R-871. Appellee's Third Amended Complaint also sets forth claims of intentional infliction of emotional distress. R.878-879.

Although both Caroline and April state in their depositions that most of the abuse occurred in Quebec, they did in fact suffer continued abuse and intentional infliction of emotional distress in the state of Georgia. R-590-595. For example, while Caroline was a minor and residing in Savannah, Georgia, Appellants frequently and repeatedly walked around the house naked, intentionally exposing their genitalia to Caroline and her sister. Id. In her deposition, Caroline remembers being "in the Kensington House in Savannah when the doors were still open, [and her] Dad still came in…" She remembers, "that nudity and that level of exposure

happened up until I left." R-590. Her sister, April, also recalls nudity in the Savannah home. R-791-792. In response to what made her afraid even when she was in the shower alone, Caroline describes the door to the bathroom being left open so her father could watch her while she was naked, during which he made sexual comments about her body. R-591. While watching her in the shower, her father would comment on her genitalia and breasts, "how much [she] was growing, what size [her] breasts were, [and] how much pubic hair [she] had." R-591-592. Appellant Jake Harvey maintained power and control over Caroline's body while she was a minor and living in the Savannah home. R-595. Caroline remembers him watching her try on bras and having to get his approval for which bras she could purchase and wear. Id. To Caroline, "...even though a lot of the more physical things died down [in Georgia] there was still so much emotional woundedness and--constant comment about our sexual bodies" and that "[s]ometimes [she] felt like that was worse." Id.

Caroline suffered multiple injuries in the state of Georgia as a result of the abuse, including, but not limited to, shame, humiliation, severe psychological trauma, emotional distress, and psychosomatic symptoms. R-871. April remembers Caroline "was always sick with mysterious illnesses with stuff that they could never find… And then when Caroline finally moved out, she started getting better." R-780. However, Caroline's injuries did not end when she left the home in Savannah. In her deposition, Caroline describes being "medicated for trauma" and

posttraumatic stress disorder in 2007; "sensing fear for [her] unborn child" during an intravaginal ultrasound when she was pregnant in 2009; the traumatic acts of child sexual abuse affecting her marriage, leading to divorce, requiring extensive counseling, and participation in a 12-step program; and experiencing panic attacks and "heart palpitations" that required hospitalization in 2011, after being in the presence of Appellant Jake Harvey. R-576; 667-670;672-673. All of these injuries that resulted from the child sexual abuse occurred while Caroline was in the state of Georgia. Id.

On June 28, 2017, Appellee filed this action in the Superior Court of Carroll County. R-3. The original complaint was amended on January 23, 2019, and again on August 26, 2019. R-341-354; R-868-881. On June 18, 2019, Appellants filed a Motion to Dismiss and Motion for Summary Judgment, with supporting documents and exhibits. R-469-810. Appellee timely filed responses to Appellants' Motions on July 18, 2019. R-812-844. On August 28, 2019, the trial court held an extensive hearing on both motions. R-1195-1237. On November 4, 2019, the trial court denied Appellants' Motion to Dismiss, with the exception of the negligence claim, and denied their Motion for Summary Judgment in full. R-1278-1291; R-1273-1277. Appellants applied for interlocutory appeal, which this Court granted on January 9, 2020. This case was docketed on September 3, 2020, and this Court granted Appellants an extension to file their brief. Appellants' brief was timely filed on

October 13, 2020. The Supreme Court of Georgia has exclusive jurisdiction over this case, as the Appellants challenge the constitutionality of O.C.G.A. § 9-3-33.1. Ga. Const. Art. VI, § VI, Para. II.

ARGUMENT AND CITATION OF AUTHORITY

1. This Court should apply Georgia law in this case.

Although numerous acts of child sexual abuse occurred in Canada, because additional acts of abuse, intentional infliction of emotional distress, and the final injuries occurred in Georgia, this Court should apply Georgia law to this case. In tort cases that involve extraterritorial harms, Georgia courts differentiate between "substantive and procedural law . . . and determine[] which law will apply to the case through the doctrines of *lex loci delicti* (the law of the place where the injury was sustained) and *lex fori* (the law of the forum state)." *Auld v. Forbes*, 2020 WL 5753317, at *2. In general, the Court will apply the substantive law of the place where the injury was sustained and the procedural law of the forum state. *Id.* Georgia has followed the doctrine of *lex loci delicti* in tort cases for over 100 years and this Court has consistently found that tort actions are "governed by the substantive law of the state where the tort was committed" and that the state where the tort was committed is the location where the last element of the tort, the injury, was suffered. *Dowis v. Mud Slingers, Inc.*, 279 Ga. 808, 809 (2005); *See Bullard v. MRA Holding, LLC*, 292 Ga. 748, 750-51 (2013). Because a necessary element of Appellee's claim,

the injury she suffered, was satisfied after she moved to Georgia, *lex loci delicti* dictates that Georgia law applies.[1]

a. Georgia law applies under *lex loci delicti* because the last event giving rise to Appellants' liability occurred in Georgia.

Under Georgia's rule of *lex loci delicti*, Georgia courts apply the law of "the place where the last event necessary to make an actor liable for an alleged tort takes place," which is "the place where the injury was suffered." *Bullard*, 292 Ga. at 750-51 (quoting *Risdon Enter., Inc. v. Colemill Enter, Inc.*, 172 Ga. App. 902, 903 (1) (1984)). Here, Georgia is the primary and final place "where the injury was suffered." *Bullard*, 292 Ga. at 750-51. In *Bullard*, this Court concluded that the final injuries resulting from distribution of nude images taken in Florida of a 14 year old girl occurred in Georgia because "Bullard lived and attended school in Georgia, where she would have sustained any injury that resulted from the distribution of her image." *Id.* at 751; *see also Risdon Enter.*, 172 Ga. App. at 902 (applying South Carolina law where defective assembly of a plane in Georgia led to a plane crash in South Carolina).

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[1] Georgia also refuses to apply the laws of a foreign jurisdiction where those laws contravene its public policy. *See Auld*, 2020 WL 5753317, at *3. However, since the final acts of child sexual abuse, as well as the final injuries, occurred in Georgia, this Brief does not address whether Quebec law contravenes Georgia public policy.

Importantly, a material question of fact exists as to whether Appellants committed acts in Georgia which constitute a part of their tortious conduct. *See Cowart*, 287 Ga. at 624 (asserting that this Court "must view the evidence, and all reasonable inferences drawn therefrom, in the light most favorable to the nonmovant"). Ultimately, the question of where the final injury occurred is a question of fact, and "[i]t is not the role of this Court ... to sort through the evidence, resolve conflicts, and make findings of fact based on the evidence it finds credible." *Hardin v. Hardin*, 301 Ga. 532 (2017), citing *Montgomery v. Barrow*, 286 Ga. 896, 898 (2010).

Like in *Bullard,* Appellee's injuries occurred in Georgia, not where the Appellants' initial conduct took place. Appellants regularly and intentionally exposed their exposed genitalia to both Appellee and her sister while they lived in Savannah, Georgia, a fact which is corroborated by Appellee's sister. R. at 590-95. Appellee's father watched her bathe, commented on her body, and constantly discussed her sexuality, all or which caused extensive injury in Georgia. *Id*.; R. at 591-92. Appellee recalls that " . . . even though a lot of the more physical things died down there was still so much emotional woundedness and constant comment about our sexual bodies" and that "[s]ometimes [she] felt like that was worse." *Id*. Appellee suffered many of the same injuries as those which led this Court to apply Georgia law in *Bullard*—embarrassment, shame, and humiliation—in addition to extensive

mental, emotional, and psychological injuries. Viewing the evidence in the light most favorable to the nonmovant, Appellee, a material question of fact exists that must be determined by a trier of fact, and not by this Court.

If this Court determines that Georgia law applies, then this Court must also apply Georgia's statute of limitations as set forth in O.C.G.A. § 9-3-33.1(d)(1). "[S]tatutes of limitations are generally procedural and are therefore governed by the 'lex fori' or the law of the forum state." *Auld*, 2020 WL 5753317 at *3 (citing *Taylor v. Murray*, 231 Ga. 852, 853 (1974)); *see also Hunter v. Johnson*, 259 Ga. 21 (1989) ("Statutes of limitation look only to the remedy and so are procedural.") (internal citations omitted). Although there is a notable exception to this rule discussed *infra*, if this Court applies Georgia law, it will not be applying a "foreign statute creating a cause of action not known to the common law," as the statute of limitations of the forum state would apply. *See Taylor*, 231 Ga. at 853.

b. If this Court determines that Quebec law applies to this case, then the Quebec statute of limitations should also be applied and this case should be remanded for Quebec law to be pleaded and proven.

Georgia law should be applied to this case; however, if this Court disagrees and finds that Quebec law should apply, then Quebec's statute of limitations should also apply as a substantive provision of Quebec law. "Under the rule of *lex fori*, procedural or remedial questions are governed by the law of the forum, the state in which the action is brought." *Fed. Ins. Co. v. Nat. Distrib. Co.*, 203 Ga. App. 763,

765 (1992) (citations omitted). This Court generally views statutes of limitations as procedural, therefore applying the limitations period prescribed by the forum state. *Auld*, 2020 WL 5753317, at *2 (citing *Taylor,* 231 Ga. at 853). However, this court applies an exception to that general rule:

> [W]hen the applicable foreign law creates a cause of action that is not recognized in the common law and includes a specific limitation period, that limitation period is a substantive provision of the foreign law that governs, and it applies when it is shorter than the period provided for under Georgia law.

Id.; *see also Taylor*, 231 Ga. at 853 (articulating the same exception).

The cause of action in this case comes from statute, not common law. Actions for child sex abuse in Quebec are based on the general statute for civil liability. *See* Quebec Civil Code, c. 64, s. 1497 (1991) (providing liability for failures of the duty not to cause harm to one another). Because Quebec is a civil system, "decisions by the courts of Quebec in civil matters are based primarily upon the application of the principles set forth in the Civil Code of Quebec, as opposed to rules emanating from decisions rendered in individual cases." *Avia Support Int'l, Inc. v. Acts Aero Tech. Support & Servs., Inc.*, 2010 WL 11505692, at *10 (S.D. Fla. Aug. 31, 2010).

Under the Quebec Civil Code in place at the time of Appellee's filing of this suit[2] a thirty-year prescriptive period (the equivalent of a statute of limitations)

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[2] The Quebec legislature has since amended Section 2926.1 of its civil code to retroactively eliminate the prescriptive period for cases involving sexual

would apply for cases involving injuries resulting from sexual aggression. *See* Quebec Civil Code, c. 8, s. 2926.1 (2015). Importantly, this thirty-year prescriptive period does not run from the date of the abuse, but "from the date the victim becomes aware that the injury suffered is attributable to that act." *Id.*

Quebec's statute of limitations for child sexual abuse at the time of the filing of this claim is "not recognized in the common law" of Georgia. *Auld*, 2020 WL 5753317, at *2; *See* O.C.G.A. § 9-3-33.1(b)(2) (statutorily created delayed discovery provision for acts of childhood sexual abuse occurring on or after July 1, 2015); *M.H.D. v. Westminster Schools*, 172 F.3d. 797 (11th Cir. 1999) (declining to allow delayed discovery claims for child sexual abuse absent action by the legislature). Additionally, Quebec's statute of limitations is shorter than O.C.G.A. § 9-3-33.1(d)(1) (2015)--the statute of limitations under which the present action was filed--which allowed for actions to be brought without limitation. Because the foreign jurisdiction applies a specific limitations period for a statutorily created tort, that limitations period is substantive in nature, and if this Court determines that Quebec law should apply, Quebec's statute of limitations should also apply. *Auld*, 2020 WL

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aggression. *See* Quebec Civil Code, c. 8, s. 2926.1 (2020). However, the amended prescriptive period was not in force at the time that the complaint was filed and the thirty-year prescriptive period would have applied to this case if filed in Quebec.

5753317, at *2. Under any such holding, this Court should remand the case to the trial court so that Quebec law may be pleaded and proven.[3]

2. The trial court did not err when it determined a plaintiff may pursue a cause of action pursuant to O.C.G.A. § 9-3-33.1(d)(1) (2015) for acts of child sexual abuse that did not occur in Georgia.

Appellee can pursue a cause of action for acts of child sexual abuse that occurred in Quebec because, although the initial acts of abuse occurred in Quebec, the final injury occurred in Georgia. Allowing Appellee's claims to go forward in Georgia would not require this Court to apply Georgia law extraterritorially, and Appellants' contention that O.C.G.A. § 9-3-33.1(a)(1) imputes Georgia's criminal venue requirements is unfounded. Therefore, this Court should find that the trial court did not err when it determined Appellee may pursue a cause of action for acts of child sexual abuse committed in Quebec.

a. Georgia's statute of limitations will not be applied extraterritorially if applied to this case.

This Court has held that "'the locus delicti[] is the place where the injury sustained was suffered rather than the place where the act was committed'" and an

[3] O.C.G.A. § 9-11-43(c) requires written notice in pleadings or another reasonable source of an intention to rely upon the law of another state or of a foreign country. In this case, intention to rely on foreign law has not been pleaded. Because no pretrial order has been entered in this matter, Appellee may amend her pleading as a matter of course. O.C.G.A. § 9-11-15(a). Therefore, if this Court determines Quebec law should apply to this action, Appellee requests that this matter be remanded to allow Appellee to plead and prove Quebec law.

essential element of tort claims "is the existence of damage proximately caused by the alleged tortious act." *Bullard*, 292 Ga. at 750-751 (citing *Risdon Enter., Inc.*, 172 Ga. App. at 903(1)); *Oswell v. Nixon*, 275 Ga. App. 205, 207 (2005) (citing *Conner v. Hart*, 252 Ga. App. 92, 94 (1)(a) (2001)). Where the injury occurs outside of Georgia, absent express language in the statute allowing for extraterritorial application, Georgia courts refrain from applying statutes extraterritorially. *See Auld,* 2020 WL 5753317, at *3.

In contrast to *Auld*, where the final injury occurred extraterritorially, Appellee's final injuries, and damages proximately caused by the abuse, were suffered in Georgia. See *Bullard*, 292 Ga. at 751. Although the abuse began in Quebec, Appellants moved Appellee to Georgia where they exposed their genitalia to Appellee, forced Appellee to expose herself to Appellants, and continuously made sexual comments aimed at Appellee. R-591-592, 595. Appellee describes suffering severe injuries in Georgia that resulted from child sexual abuse and intentional infliction of emotional distress, including panic attacks and other symptoms of posttraumatic stress disorder. *See* R-576; 667-673; 780. As the final element of the torts claimed in this case occurred in Georgia, Georgia's statute of limitations would not be applied extraterritorially.

b. The acts of child sexual abuse committed in Quebec can be pursued alongside the Georgia claims in Georgia courts.

In cases where the tort is transitory in nature, the *lex loci delecti* will determine the substantive rights of the parties. *Ridson Enterprises, Inc. v. Colemill Enterprises, Inc.*, 172 Ga. App. 902. In *Ridson*, the court noted that where a tort is transitory in nature, the tortious conduct as a whole will be considered by the trier of fact, and the appropriate forum is where the last event necessary for liability occurred. *Ridson Enter*, 172 Ga. App. at 904. *See also Bullard*, 292 Ga. at 751 (applying Georgia law where the initial act giving rise to liability occurred in Florida, but the final injury occurred in Georgia).

The same principle should apply in the present case before this Court. The acts that give rise to liability in this case were transitory in nature, occurring continuously and repeatedly in Quebec, and continuing after the Appellants moved the then-15-year old Appellee to Georgia. R-868-881. The tortious conduct committed by the Appellants must be considered as a whole by the trier of fact at trial, including any conduct that occurred in Quebec. *See Ridson Enter*, 172 Ga. App. at 904. Although Georgia has a presumption against extraterritorial application, considering the elements and acts of the tort that occurred in Quebec would not require this Court to apply Georgia law extraterritorially. See *Auld*, No. S20G0020, 2020 WL 5753317, at *3. In *Auld*, although several negligent acts were alleged to have occurred in Georgia, the last event necessary to give rise to liability occurred in Belize. *Auld*, at *2. Conversely, here, while several acts of child sexual abuse were

committed in Quebec, the last events necessary to give rise to liability occurred in Georgia, and therefore the Court's concerns present in *Auld* are not present. Consistent with prior decisions of this Court, the acts of abuse that occurred in Quebec may be considered under Georgia law.

c. Appellants' contention that O.C.G.A. § 9-3-33.1(a)(1) (2015) imputes Georgia's criminal venue requirements is unfounded.

i. The definition of "child sexual abuse" under O.C.G.A. § 9-3-33.1(a)(1) (2015) does not impute Georgia's criminal venue requirements.

Appellants argue that O.C.G.A. § 9-3-33.1 imputes Georgia's criminal venue requirements to civil claims of child sexual abuse. In their brief, Appellants make a superficial distinction between the definitions of "proscribed by" and "in violation of" to attach criminal venue requirements onto a civil statute of limitations. However, Appellants fail to cite any law or precedent that supports their argument.

The Georgia Constitution establishes the appropriate venue for civil cases as the county where the defendant resides. Ga. Const. Art. VI, § II, Para.VI. The civil venue requirement is codified under O.C.G.A. § 9-10-30, which requires that "[a]ll actions seeking equitable relief shall be filed in the county of the residence of one of the defendants against whom substantial relief is prayed." *See also, Wall v. Federal Land Bank*, 240 Ga. 236, 237 (1977); *Gray v. Armstrong*, 222 Ga. App. 392 (1996) (finding Georgia was the appropriate venue for the case when the accident occurred in Tennessee because defendants resided in Georgia).

In interpreting statutes, this Court presumes "that the General Assembly meant what it said and said what it meant." *Fed. Deposit Ins. Corp. v. Loudermilk*, 305 Ga. 558, 562 (1) (2019) (citations and punctuation omitted). "To that end, we must afford the statutory text its plain and ordinary meaning . . . we must read the statutory text in its most natural and reasonable way." *Deal v. Coleman*, 294 Ga. 170, 172-173 (1)(a) (2013) (citations and punctuation omitted). Under O.C.G.A. § 1-3-1(a) (2018), "[i]n all interpretations of statutes, the courts shall look diligently for the intention of the General Assembly, keeping in view at all times the old law, the evil, and the remedy." The plain and ordinary meaning of O.C.G.A. § 9-3-33.1 is that the statute is a *civil* statute of limitations for *civil* claims of child sexual abuse. The only reference to criminal statutes lies in the definition section. Otherwise the code section is clear that the statute applies to civil claims. To read a novel and pseudo-criminal venue requirement into the civil statute of limitations denies that the legislature "meant what it said and said what it meant." *Fed. Deposit Ins. Corp.*, 305 Ga. at 562.

ii. Appellants' argument that criminal venue requirements should be imputed onto a civil claim impermissibly interprets the law in a manner that renders it unconstitutional.

Statutes are presumed to be constitutional. *Albany Surgical, P.C. v. Ga. Dept. of Community Health*, 278 Ga. 366, 368 (2004) (citing *Ga. Dept. of Human Resources v. Word*, 265 Ga. 461 458 (1995)). "The General Assembly is presumed

to enact laws with full knowledge of the condition of the law and with reference to it, and the courts will not presume that the legislature intended to enact an unconstitutional law." *Bd. of Pub. Educ. v. Hair*, 276 Ga. 575, 576 (2003). "When a statute can be read in both a constitutional and unconstitutional manner, the courts apply the construction that upholds the law's constitutionality." *Id.*

As stated above, the Georgia Constitution establishes the appropriate venue for civil cases as the county where the defendant resides. Ga. Const. Art. VI, § II, Para.VI. To accept Appellant's argument that the legislature's change in language from "proscribed by" to "in violation of" creates a criminal venue requirement within O.C.G.A. § 9-3-33.1, a civil statute of limitation, would be to interpret the statute in a way that would render it unconstitutional. Because the statute can be read in a manner that does not conflict with the constitutional venue provision for civil actions, this Court find that the legislature did not enact a different pseudo-criminal venue requirement for these civil actions.

3. **O.C.G.A. § 9-3-33.1 (d) (1) (2015) does not violate the Appellants' rights to due process and equal protection under the state and federal constitutions.**
   a. **O.C.G.A. § 9-3-33.1 (d) (1) (2015) does not violate the Appellants' right to due process under the state or federal constitutions.**

Any alleged hardship experienced by Appellants does not rise to the level of a due process violation. In *Chase Securities*, the Supreme Court of the United States explained that a retroactive statute of limitations could potentially violate due

process only if it creates "special hardships or oppressive effects," such as a defendant engaging in previously lawful conduct in reliance of the statute. *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945). There, the Court found no such hardship occurred because "[t]his is not a case where appellant's conduct would have been different if the present rule had been known and the charge foreseen." *Id.* at 316.

This Court expressly adopted the Supreme Court's holding in *Chase Securities* when it established that "the legislature may revive a . . . claim which would have been barred by a previous limitation period by enacting a new statute of limitation, without violating our constitutional prohibition against retroactive laws." *Canton Textile Mills v. Lathem*, 253 Ga. 102, 105 (1984). This rule has played a consistent role in this state's jurisprudence. *See, e.g., Vaughn v. Vulcan Materials Co.,* 266 Ga. 163, 164 (1996); *Huggins v. Powell*, 315 Ga. App. 599, 602 (2012); *Moore v. Savannah Cocoa, Inc.*, 217 Ga. App. 869, 871 (1995).

This Court's established rules are based on sound logic and should not be disturbed because statutes of limitation are remedial in nature and do not implicate vested rights. *Canton*, 253 Ga. at 104. Retroactive, remedial laws are enforceable as long as they do not "creat[e] new rights or tak[e] away vested ones . . . ." *Seaboard A.L. Ry. v. Benton*, 175 Ga. 491 (1932). Because of their procedural nature, "[t]here is no vested right in a statute of limitations" and "Georgia statutes addressing

procedural and remedial rights may be retroactively applied." *Vaughn*, 266 Ga. at 164; *Huggins v. Powell*, 315 Ga. App. 599, 602 (2012).

O.C.G.A. § 9-3-33.1(d)(1) provides a retroactive civil remedy for child sexual abuse, which was not lawful at the time the abuse against Appellee occurred, and is not lawful now. The statute limits its definition of childhood sexual abuse to items already included in the criminal code. *See* O.C.G.A. § 9-3-33.1(b)(1) (2015) (limiting the applicability of the Hidden Predator Act to criminal violations of O.C.G.A. §§ 16-5-46, 16-6-1, 16-6-2, 16-6-3, 16-6-4, or 16-6-22). Therefore, Appellants could not have relied upon the previous civil statute of limitations in their actions, as those actions were unlawful at the time of their commission.

O.C.G.A. § 9-3-33.1(d)(1) does not violate the prohibition of *ex post facto* laws under the Georgia or the United States Constitutions. The Georgia Constitution 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." This Court has found that while modification of criminal statutes of limitations is unconstitutional in Georgia, modification of *civil* statutes of limitations is presumed to be constitutional. Ga. Const. Art. 1, § 1, Para. X; *See* Canton Textile Mills 253 Ga. at 105 (1984). Appellants improperly rely on criminal cases, such as *Stogner v. California*, 539 U.S. 607 (2003), to argue that O.C.G.A. § 9-3-33.1(d)(1) is unconstitutional. In, Stogner, the Court found a

retroactive *criminal* statute of limitations for child sex abuse to be unconstitutional and in violation of the prohibition of *ex post facto* laws.[4] The Court's prohibition in *Stogner* extends only to criminal cases, and does not apply to the case before this Court. Therefore, this Court should affirm the trial court's order.

b. O.C.G.A. § 9-3-33.1 (d) (1) (2015) does not violate the Appellants' right to equal protection under the state and federal constitutions.

O.C.G.A. § 9-3-33.1(d)(1) does not violate a defendant's right to equal protection under the state and federal constitutions. The statute does not create a separate class of defendants, and even if class distinctions were created, the statute easily passes rational basis scrutiny. Finally, if this Court does find that the statute violates equal protection, the offending portion of the statute would be severable.

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[4] In *Stogner*, the Court referenced the categories of *ex post* facto laws as set forth by Justice Chase in *Calder v. Bull*, 3 U.S. 386, 390-91 (1798): "1st. Every law that makes an action done before the passing of the law, and which was innocent when done, *criminal*; and punishes such action. 2d. Every law that aggravates a *crime*, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and *inflicts a greater punishment, than the law annexed to the crime*, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*" (emphasis added). None of the categories set forth by Justice Chase are at issue in this case and therefore *Stogner* does not apply.

i. O.C.G.A. § 9-3-33.1 (d) (1) (2015) does not create a separate class of defendants.

O.C.G.A. § 9-3-33.1(d)(1) does not require differential treatment between Appellants and similarly situated "class" members. A prerequisite to asserting an equal protection violation is showing "that [the party] is similarly situated to members of a class who are treated differently than he." *Farley v. State*, 272 Ga. 432, 433 (2000); *State v. Jackson*, 271 Ga. 5 (1999). Appellant alleges that the "delayed discovery" provision of O.C.G.A. § 9-3-33.1(b)(2) differentiates between individuals who committed child sexual abuse before July 1, 2015, and those who committed sexual abuse after that date.

Under O.C.G.A. § 9-3-33.1(b)(2)(A)(i), regardless of when the abuse occurred, a plaintiff may bring a claim up until age 23. For abuse occurring after July 1, 2015, plaintiffs may also bring claims "[w]ithin 2 years from the date that the plaintiff knew or had reason to know of the abuse and that the abuse resulted in injury to the plaintiff as established by competent medical or psychological evidence," colloquially known as the "delayed discovery" provision. O.C.G.A. § 9-3-33.1(b)(2)(A)(ii). When a plaintiff files a complaint under the delayed discovery provision, they have an additional pretrial burden to prove "from admissible evidence in a pretrial finding *when* the discovery of the alleged childhood sexual abuse occurred." O.C.G.A. § 9-3-33.1(b)(2)(B) (emphasis added). Importantly, the

pretrial requirement is for purposes of establishing the *date* of discovery of the injury -- not the injury itself. A plain reading of the statute does not indicate any additional burden to defendants, nor does it create a new evidentiary burden.[5] The provision merely adds a pretrial hearing where the plaintiff must prove that the claim was timely filed--a requirement expected in all civil claims.

ii. O.C.G.A. § 9-3-33.1 (2015) passes rational basis scrutiny.

Even if this Court finds that O.C.G.A. § 9-3-33.1 did create separate classes of defendants, the trial court correctly ruled that O.C.G.A. § 9-3-33.1 does not violate equal protection because the legislature had a rational basis for any such classification. R-1287-1291.

Equal protection claims brought under both the Georgia and United States Constitutions are considered jointly "because the protection provided in the Equal Protection Clause of the United States Constitution is coextensive with that provided in Art. 1, Sec. 1, Par. 2 of the Georgia Constitution of 1893." *Fair v. State*, 288 Ga. 244, 246(1)(A) (2010) (internal citations omitted). When assessing an equal

[5] The argument that the addition of the pretrial hearing imposes a new evidentiary burden would be to interpret the statute in a manner that is unconstitutional. As argued above, when the statute can also be read in a constitutional manner, the courts apply the construction that upholds the law's constitutionality. Further, claims still must be proven by a preponderance of the evidence and the pretrial hearing does not require anything other than what is already required by our evidence code.

protection claim, this Court applies rational basis scrutiny unless a suspect class or fundamental right is implicated. *Bunn v. State*, 291 Ga. 183 (2012).[6] "If neither a suspect class nor a fundamental right is implicated, the most lenient level of judicial review — 'rational basis' — applies." *Harper v. State*, 292 Ga. 557, 560, (2013).

O.C.G.A. § 9-3-33.1's application to perpetrators of child sexual abuse does not implicate a suspect class. Suspect classes have traditionally included vulnerable or oppressed peoples, individuals with disabilities, those "subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Indep. Sch. Dist v. Rodriguez*, 411 U.S. 1, 28 (1973). Alleged child sex abusers do not fall within a historically protected class, nor do they have a history of vulnerability or oppression that requires additional protection. Following this logic, other courts have concluded that sex offenders do not constitute a suspect class under equal protection, even in the context of sex offender registrations.[7]

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[6] Appellants erroneously conflate rational basis scrutiny and strict scrutiny throughout their argument. Rational basis scrutiny is the clear standard under which the Court should assess this case, as no suspect class or fundamental right is implicated.

[7] *See, e.g., Doe v. Moore*, 410 F.3d 1337, 1346 (11th Cir. 2005)("Since sex offenders are not considered a suspect class in general, and the various sub-classifications presented by the Appellants do not implicate a suspect class, we review those classifications under a rational basis test . . . ."); *State v. Ward*, 869

O.C.G.A. § 9-3-33.1 does not implicate a fundamental right. "Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles … [t]heir shelter has never been regarded as ... a 'fundamental' right." *Chase Securities*, 325 U.S. at 314. "[W]here a statute governs only procedure of the courts, including the rules of evidence, it is to be given retroactive effect absent an expressed contrary intention." *Polito v. Holland*, 258 Ga. 54, 55 (1988); *see also Harris v. Murray*, 233 Ga. App. 661 (1998); *Devore v. Liberty Mut. Ins. Co.*, 257 Ga. App. 7 (2002). Under Georgia law, defendants do not have a vested right to evidentiary rules. *Mason v. Home Depot U.S.A., Inc.*, 283 Ga. 271, 278 (2008). Contrary to Appellants' contentions, O.C.G.A. § 9-3-33.1 did not create an additional evidentiary burden on defendants, and even if an evidentiary burden was added under O.C.G.A. § 9-3-33.1, a fundamental right is not implicated and rational basis scrutiny still applies.

The trial court correctly found that the legislature had a rational basis for the provisions of O.C.G.A. § 9-3-33.1, including the delayed discovery provision.

P.2d 1062, 1077 (Wash. 1994)("Sex offenders are not a suspect class for purposes of equal protection review."); *Hendrix v. Taylor*, 579 S.E.2d 320, 323 (S.C. 2003)(declining to apply heightened scrutiny for sexual offender registration); *U.S. v. LeMay*, 260 F.3d 1018, 1030 (9th Cir. 2001)("Sex offenders are not a suspect class."); *Brown v. City of Michigan City, Indiana*, 462 F.3d 720 (7th Cir. 2006)(applying rational basis scrutiny to a city resolution banning child abusers from city parks).

"Under the rational basis test, a court will uphold the statute if, under any conceivable set of facts, the classifications drawn in the statute bear a rational relationship to a legitimate end of government not prohibited by the Constitution." *State v. Nankervis*, 295 Ga. 406, 408 (2014). Because the legislation is presumptively valid, "the claimant has the burden of proof" in establishing that a statute does not meet the rational basis test. *Drew v. State*, 285 Ga. 848, 850 n.3 (2009) (citations omitted).

Justice Kennedy wrote that when a "child molester commits his offense, he is well aware the harm will plague a victim for a lifetime." *Stogner*, 539 U.S. at 651. Childhood sexual abuse is linked to a myriad of injuries and the state has a legitimate interest in protecting its citizens and allocating harms to the perpetrators rather than victims.[8] In passing O.C.G.A. § 9-3-33.1, the legislature engaged in "the sort of line-drawing and balancing of rights and interests regularly and properly done by legislatures," and had a rational basis for creating any alleged distinction so that

[8] Injuries from child sexual abuse include, but are not limited to emotional and mental health problems such as posttraumatic stress disorder and depression, increased suicidal ideations, over-sexualized behavior, increased involvement in the delinquency or criminal system, and increased instances substance use disorders. *See* Elizabeth O. Paolucci et al., *A Meta-Analysis of the Published Research on the Effects of Child Sexual Abuse*, 135 The J. of Psychol. 17, 18-19 (2001).

courts could allocate fault and costs of child sexual abuse to perpetrators *Bunn*, 291 Ga. at 191.

iii. If this Court finds that the delayed discovery provision in O.C.G.A. § 9-3-33.1(b)(2)(B) (2015) is unconstitutional, the provision is severable.

Appellants argue that when read with O.C.G.A. § 9-3-33.1(b)(2), O.C.G.A. § 9-3-33.1(d)(1) violates equal protection laws and is unconstitutional. First, O.C.G.A. § 9-3-33.1(d)(1) (2015) itself does not violate equal protection as it revived *all* expired claims, regardless of the date the abuse occurred, and therefore Appellants cannot claim to have been treated differently than other similarly situated defendants. *Id*. Second, if this Court determines that one portion of a statute is unconstitutional, it "has the power to sever that portion of the statute and preserve the remainder if the remaining portion of the Act accomplishes the purpose the legislature intended." *Daimler Chrysler Corp. v. Ferrante*, 281 Ga. 273, 274 (2006), citing *Nixon v. State,* 256 Ga. 261, 264 (1986). However, if this Court finds that the unconstitutional portion of the statute is "so connected with the general scope of the statute that, should it be stricken out, effect cannot be given to the legislative intent, the rest of the statute must fall with it." *Id*. at 275, citing *City Council of Augusta v. Mangelly,* 243 Ga. 358, 363 (1979).

In *Daimler*, this Court found unconstitutional the application of a newly established statute to pending claims, and that the offending provision could not be

severed from the act as a whole. The Court found that the legislature imposed "a greater evidentiary burden than was required under the law in effect at the time [the] actions were filed" and that the additional evidentiary requirements were "at the heart of the Act" and therefore to sever the new requirements would "result in a statute that fails to correspond to the main legislative purpose, or give effect to that purpose." *Id.* at 274; *Id.* at 275, citing *State v. Jackson*, 269 Ga. 308, 312 (1998).

The legislative purpose in 2015 Georgia Laws Act 97 (H.B. 17) that is specifically applicable to O.C.G.A. § 9-3-33.1 was "to extend the statute of limitations for actions for childhood sexual abuse under certain circumstances." To accomplish this purpose, the legislature added the delayed discovery provision as codified under O.C.G.A. § 9-3-33.1(b)(2)(A)(ii), which allows for survivors of child sexual abuse whose abuse occurred on or after July 1, 2015 to file claims after the age of 23, but "[w]ithin 2 years from the date that the plaintiff knew or had reason to know of the abuse and that the abuse resulted in injury to the plaintiff as established by competent medical or psychological evidence." The legislature included a pretrial hearing requirement for delayed discovery cases, requiring plaintiffs to establish the date of the delayed discovery. *See* O.C.G.A. § 9-3-33.1(b)(2)(B).

Unlike the statute at issue in *Daimler*, O.C.G.A. § 9-3-33.1(b)(2)(B) does not add an additional evidentiary burden on plaintiffs or defendants. The evidentiary

burden added in *Daimler* constituted "an essential element" to the claim. *Daimler*, 281 Ga. at 273, citing O.C.G.A. § 51-14-3(a). O.C.G.A. § 9-3-33.1(b)(2)(B) contains no express language creating a new "essential element" to claims filed after the plaintiff reaches the age of 23. Rather, the provision merely adds a pretrial hearing where the plaintiff must prove that the claim was timely filed--a requirement of all civil claims that must be filed within a prescribed time-period.

Finally, if this Court determines that the delayed discovery provision is unconstitutional due to the addition of the pretrial hearing requirement, it may sever the provision without striking the entire act. To sever the pretrial hearing requirement would not "result in a statute that fails to correspond to the main legislative purpose, or give effect to that purpose." *Daimler,* 281 Ga. at 275. Severing the pretrial hearing requirement would still allow for an extension of the statute of limitations, the legislative purpose of the Act, and like all other civil claims subject to a statute of limitations, plaintiffs will still have to file their claims within the time prescribed in the statue.

CONCLUSION

For the foregoing reasons, Appellee respectfully requests that this Court affirm the trial court's orders in this case.

IN THE SUPREME COURT
STATE OF GEORGIA

WALTER JACKSON "JAKE" HARVEY, JR. and CAROLE ALLYN HILL HARVEY Appellant, v. JOY CAROLINE HARVEY MERCHAN, Appellee.	Case No. S21A0143

CERTIFICATE OF SERVICE

This is to certify that I have this date served a copy of the within and foregoing *Appellee Joy Caroline Harvey Merchan's Principal Brief* to the party listed below via U.S. Mail with the appropriate postage attached, addressed as follows:

Candace E. Rader
Attorney for Appellants
Candace E. Rader, P.C.
301 Tanner Street
Carrollton, GA 30117
candacerader@bellsouth.net

Charles Merritt Lane
Attorney for Appellants
Shadrix, Lane & Palmer, P.C.
414 College Avenue
Carrollton, GA 30117
mlane@shadrixlane.com

This the 30th day of October, 2020.

Emma Hetherington
Georgia Bar No. 682022
Brian Atkinson
Georgia Bar No. 519769
Wilbanks CEASE Clinic
P.O. Box 1792
Athens, GA 30603
Telephone (706) 227-5421

Esther Panitch
Georgia Bar No. 143197
The Panitch Law Group, P.C.
4243 Dunwoody Club Drive, Suite 201
Atlanta, GA 30350
Telephone (770) 364-6952