No. 32856 – *Kimberley Merrill and Teresa Mayfield v. West Virginia Department of Health and Human Resources*

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OF WEST VIRGINIA

Albright, Justice, dissenting:

This case presents difficult, intertwined legal questions which the majority has addressed in an obtuse fashion through a per curiam opinion. As a result, the majority has succeeded only in confusing rather than squarely confronting and resolving the significant issues the case raises. The sad result is that the two sisters who are appellants are victims of yet another injustice. That impels me to write separately.

The ultimate conclusion of the majority, finding that the statute of limitations precludes Appellants' lawsuit, is grossly flawed because the majority failed to clearly examine the impact of the lower court's erroneous ruling on qualified immunity on the statute of limitations issue. This flaw is compounded by the majority's fuzzy and confusing analysis of the discovery rule and merely marginal examination of the doctrine of fraudulent concealment.

A. Qualified Immunity

The first step in a fair analysis of this case begins with a consideration of qualified immunity. In their amended complaint, Appellants sought recovery from "the West Virginia Department of Health and Human Resources, a West Virginia state agency in an amount under and up to the limits of the State's liability insurance coverage." Rather than supplying the court below with information about the extent of insurance coverage available through the State's insurance contract, DHHR responded to the complaint by claiming immunity from liability under the common-law doctrine of qualified immunity, in reliance on this Court's discussion in *Parkulo v. West Virginia Board of Probation and Parole*, 199 W. Va. 161, 483 S.E.2d 507 (1996). The Statement of the Law section of the lower court's order reflects that the lower court's determination of the qualified immunity issue was based upon the following premise:

> 29. To sustain a viable claim against a state agency or its employees or officials acting within the scope of their authority sufficient to overcome the common law doctrine of qualified immunity, it must be established that the agency employee or official knowingly violated a clearly established law, or acted maliciously, fraudulently or oppressively. *Parkulo v. West Virginia Bd. of Probation*, 199 W. Va. 161, 177, 483 S.E.2d 507, 524 (1996).

Indeed, the Conclusions of Law portion of the order reflects application of this premise:

> 49. The Court finds as fact that the Plaintiffs have not presented any arguments and/or a scintilla of evidence rebutting DHHR's argument that it was entitled to qualified immunity. The Plaintiffs merely argued that

> DHHR had a special relationship with the Plaintiffs. The special relationship doctrine is an exception to the public duty doctrine.
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> 50. DHHR did not argue the public duty doctrine as a defense, because it **conceded that it had a special relationship** with the Plaintiffs; therefore, the public duty doctrine was not a viable defense. (Emphasis added.)
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> * * * *
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> 52. Based upon the fact the Plaintiffs failed to address DHHR's averment of qualified immunity and failed to present any evidence demonstrating DHHR knowingly violated a clearly established law, or acted maliciously, fraudulently or oppressively, this Court does hereby find that the Plaintiffs have failed to overcome the doctrine of qualified immunity; therefore, since there is no genuine issue of material fact, DHHR is entitled to summary judgment on all the claims involving an alleged duty, predicated upon the doctrine of qualified immunity.

Appellants appealed this lower court ruling, asserting that the *Parkulo* principles relied upon by the lower court were decided in the context of exposing employees and officers of State entities to personal liability for damages resulting from performance of their government jobs. As Appellants' suit is not based on personal liability of any DHHR employee but on the liability of the State agency, Appellants claimed that DHHR may be held liable under the special relationship exception to the public duty doctrine which was also discussed in *Parkulo*.

In *Parkulo*, the plaintiff appealed the grant of summary judgment against her for claims she had filed against the State's Division of Corrections and the Board of Probation and Parole. The trial court had granted summary judgment to both State entities by finding that the civil action was barred by the public duty doctrine in that the plaintiff failed to establish the special relationship exception to that doctrine. After a lengthy discussion based on reconciling the concepts of common-law governmental immunities, the public duty doctrine and the insurance exception to constitutional immunity, this Court concluded under the facts presented in *Parkulo* that the Board of Probation and Parole *may* be able to claim quasi-judicial immunity and the West Virginia Division of Corrections *may* be able to claim the benefit of the public duty doctrine *depending* on what was determined on remand regarding whether or not the State's insurance contract provided coverage notwithstanding the availability of these defenses. Our precise holding in this regard is found in syllabus point six of *Parkulo*, as follows:

> Unless the applicable insurance policy otherwise expressly provides, a State agency or instrumentality, as an entity, is immune under common-law principles from tort liability in W. Va. Code § 29-12-5 actions for acts or omissions in the exercise of a legislative or judicial function and ***for the exercise of an administrative function involving the determination of fundamental governmental policy***.

199 W.Va. at 163-64, 483 S.E.2d at 509-10 (emphasis added). Accordingly, the first step that a trial court must undertake when presented with the issue of qualified immunity involving a state entity is to determine whether the State's insurance policy expressly waives

common-law immunity for tort liability. If such waiver does not exist, then the question before the court is whether the state entity was exercising a legislative or judicial function or an administrative function involving the determination of a fundamental governmental policy. Absent proof of any such functions, a state agency covered by insurance may be sued for damages up to the limit of the applicable insurance policy. *Pittsburgh Elevator Co. v. West Virginia Bd. of Regents*, 172 W.Va. 743, 310 S.E.2d 675 (1983).

The qualified immunity "test" applied by the lower court in the instant case was first adopted, as Appellants correctly note, as the sole syllabus point of *State v. Chase Securities, Inc*., 188 W. Va. 356, 424 S.E.2d 591 (1992). As stated in *Chase Securities*,

> A public executive official who is acting within the scope of his authority and is not covered by the provisions of W. Va. Code, 29-12A-1, *et seq*., is entitled to qualified immunity from personal liability for official acts if the involved conduct did not violate clearly established laws of which a reasonable official would have known. There is no immunity for an executive official whose acts are fraudulent, malicious or otherwise oppressive.

We noted in *Parkulo* that this standard was thereafter extended to the actions of a State employed conservation officer, acting within the scope of his employment, in the case of *Clark v. Dunn*, 195 W. Va. 272, 465 S.E.2d 374 (1995). We also noted in *Parkulo*, that absent fraudulent, malicious or otherwise oppressive acts of the state employee or officer which might negate qualified immunity for the employee or officer, the agency for which

the employee or officer worked ordinarily – but not always – enjoys qualified immunity co-terminus with, or of equal effect to, that enjoyed by the officer or employee. *See* 199 W.Va. 161, at 177-78, 482 S.E.2d 507, at 523-24 (discussing vicarious liability of the state under such circumstances). We said there, however, that the issue of whether the agency immunity would be as broad as that of its officer or employee would be determined on a case-by-case basis. Further into that discussion we quoted the following comment attached to *Restatement (Second) of Torts* § 895D:

> [D]uties or obligations may be placed on the government that are not imposed on the officer, and statutes sometimes make the government liable when its employees are immune.

Restatement (Second) of Torts § 895D, cmt. j, in part (1979).[1]

In the instant case, that portion of the final order granting summary judgment on the grounds of qualified immunity relates the lower court's conclusion that DHHR was entitled to qualified immunity because Appellants had failed to adduce even a scintilla of evidence that DHHR had violated any clearly established law. In so deciding, the court below disregarded statements of law embodied in our child welfare statute. The Legislature has expressly provided that the purpose of those statutes, embodied in Chapter 49 of the Code of West Virginia 1931, as amended, "is to provide a coordinated system of child

[1]*Restatement (Third) of Torts* was published in 2000 but does not touch upon this subject.

welfare and juvenile justice for the children of this state." W.Va. Code § 49-1-1(a) (Repl. Vol. 2004). That section provides further that the goals of the system include: assuring "each child's care, safety and guidance," serving "the mental and physical welfare of the child," and providing "for early identification of the problems of children and their families and respond[ing] appropriately with measures and services to prevent abuse and neglect . . . ."

In our child welfare statute, West Virginia Code Chapter 49, these elegant statements of purpose and goals are followed by the grant of substantial power to DHHR for their implementation, including an expansive definition of abuse and neglect, West Virginia Code § 49-1-3; the imposition of specific duties regarding children committed to the care of DHHR, West Virginia Code Chapter 49 Article 2; and broad powers to investigate and prosecute cases of suspected abuse and neglect, West Virginia Code Chapter 49 Articles 6 and 6A.

The allegations in Appellants' complaint asserted a failure of DHHR to utilize the statutorily designed broad array of tools at the agency's disposal to achieve for Appellants, as children, the care, safety and guidance necessary to promote their mental and physical welfare envisioned by these statutes, as well as a failure to respond appropriately

with measures and services which could put an end to the abuse and neglect each of the Appellants endured from an early age and for years thereafter because of such failures.

Seen in that light, Appellants' complaint does not allege any administrative determination of fundamental policies governing DHHR, the kinds of administrative actions for which qualified immunity is designed and readily available. Rather, the amended complaint seeks recovery primarily on the theory of the negligence – including consideration of DHHR's duties arising from the agency having undertaken the custody of Appellants as children – for the failure of DHHR to adequately protect Appellants in keeping with its statutory purpose, goals and child protective powers. Accordingly, the lower court's determination that DHHR was entitled to summary judgment on the basis of qualified immunity should have failed because the cause of action asserted by Appellants – properly analyzed – did not address an administrative determination of a fundamental policy governing DHHR, but asserted a negligent failure to perform the duties and exercise the powers afforded DHHR by law.

Had the majority properly examined the doctrine of qualified immunity, this Court would nevertheless be left with the question of whether the public duty doctrine would preclude recovery by Appellants. In many circumstances claims not barred by qualified immunity might still fail by reason of the public duty doctrine. As acknowledged in

Parkulo, the public duty doctrine does not rest squarely on the principle of governmental immunity. It rests on the principle that recovery may not be had for the negligence of a governmental entity for its failure to perform a duty owed to the public generally, even by a member of the public directly injured by such failure. 199 W.Va. at 172, 483 S.E.2d at 518. However, we have long recognized an exception to that doctrine where it is found that the defaulting agency had established a "special relationship" with an injured party under which the agency assumed specific duties with respect to that particular injured party, as contrasted with the general public. *See Parkulo; Randall v. Fairmont City Police Dept*. 186 W.Va. 336, 412 S.E.2d 737 (1991); *Benson v. Kutsch*, 181 W.Va. 1, 380 S.E.2d 36 (1989); *Wolfe v. City of Wheeling*, 182 W.Va. 253, 387 S.E.2d 307 (1989).

A "special relationship," establishing that an agency assumed specific duties owed to a particular person injured by the alleged negligence of the agency – apart from duties owed the public generally – is established where the agency: (1) assumed an affirmative duty to act on behalf of the injured party; (2) knew that inaction on the part of its workers could lead to harm; (3) had direct contact with the injured party through its officers or employees; and (4) knew that the injured party was relying on the agency to take all necessary and reasonable steps to protect such injured party. Syl. Pt. 12, *Parkulo.* Ordinarily, the burden rests on the party claiming the benefit of the "special relationship" to

prove its four elements to the finder of fact. *See* Syl. Pt. 11, *Parkulo* (state government); Syl. Pt. 3, in part, *Wolfe v. City of Wheeling* (local government).

In the case *sub judice* it was not necessary for Appellants to prove that a "special relationship" existed between them and DHHR. As represented in the summary judgment order below, the agency conceded the existence of the relationship, establishing without more that DHHR (1) assumed an affirmative duty to act on behalf of Appellants; (2) knew that inaction on the part of its workers could lead to harm to Appellants; (3) had direct contact with Appellants through its officers or employees; and (4) knew that Appellants were each relying on the agency to take all necessary and reasonable steps to protect each of the Appellants. That is the law of the case.

Based on the foregoing, the lower court erred in entering summary judgment on the grounds of qualified immunity and by failing to take into account the impact of the public duty doctrine and its "special relationship" exception. In turn, by failing to examine the lower court's qualified immunity determination, the majority did not consider the impact of the special relationship between DHHR and Appellants on whether the discovery rule should be employed to extend the statute of limitations period.

B. Statute of Limitations

1. Preliminary Issue

There is no question that the two year statute of limitations in West Virginia Code § 55-2-12(b) (1959) (Repl. Vol. 2000) was tolled during Appellants' minority as provided by West Virginia Code § 55-2-15.[2] However, our case law raises a threshold question, a subject disregarded or avoided by the majority, of whether the discovery rule can further toll the limitations period in cases where West Virginia Code § 55-2-15 is applicable in light of syllabus point five of *Albright v. White*, 202 W. Va. 292, 503 S.E.2d 860 (1998). The appellant in *Albright v. White* had attempted to invoke the discovery rule with respect to injuries which he claimed occurred about twenty-five years before the complaint was filed. Refusing to permit the case to proceed, this Court held: "The plain language of W.Va. Code § 55-2-15 (1923) (Repl. Vol. 1994) clearly prohibits the application of the discovery rule to extend the ***statutory filing periods*** provided in this section." *Id*. at Syl. Pt. 5 (emphasis added). Thus, it would seem that West Virginia Code § 55-2-15 and West

[2]West Virginia Code § 55-2-15 (1923) (Repl. Vol. 2000) states as follows:

> If any person to whom the right accrues to bring any such personal action, suit or scire facias, or any such bill to repeal a grant, shall be, at the time the same accrues, an infant or insane, the same may be brought within the like number of years after his becoming of full age or sane that is allowed to a person having no such impediment to bring the same after the right accrues, or after such acknowledgment as is mentioned in section eight [§ 55-2-8] of this article, except that it shall in no case be brought after twenty years from the time when the right accrues.

Virginia Code § 55-2-12(b) when read together establish two filing periods relevant to the present case: (1) within two years of the removal of the disability of minority and (2) within twenty years of the date of injury. A literal reading of syllabus point five of *Albright v. White* would compel a conclusion that the discovery rule may not be applied to extend the statute of limitations beyond "the number of years allowed to a person having no impediment" after the disability is removed, in this case two years after majority is attained. W.Va. Code § 55-2-15; § 55-2-12(b). However, a few years later in *Miller v. Monongalia County Board of Education*, 210 W.Va. 147, 556 S.E.2d 427 (2001), this Court considered a case brought within the twenty-year period of limitation, but after the expiration of the two-year period following removal of the disability of minority. Pointing out that *Albright v. White* involved a case filed more than twenty years after the date of injury, and that the case before the Court in *Miller* was filed less than twenty years from the date of injury, this Court said:

> Miller filed her action before the twenty year statute expired; therefore, we must now answer the questions left unanswered by *Albright*. We must determine whether the discovery rule can for any reason toll the running of the 55-2-12(b) statute of limitations.

210 W.Va. at 151, 556 S.E.2d at 431. The *Miller* Court then proceeded to apply the discovery rule to toll the statute of limitations set out in West Virginia Code § 55-2-12(b), notwithstanding the fact that the suit had been filed more than two years after the appellant attained the age of majority, relying on the appellant's claim of fraudulent concealment. If

the majority had been faithful to this Court's obligation under our State Constitution to consider and decide every point fairly arising upon the record, a new syllabus point should have been adopted in the present case to harmonize the *Albright* and *Miller* decisions. *See* W.Va. Constitution Art. VIII, § 4. That new point of law would represent that the plain language of West Virginia Code § 55-2-15 clearly prohibits the application of the discovery rule to extend the statutory filing periods provided by this section unless the civil action to which the discovery rule is applied has been filed within the twenty-year period permitted by this section.

The facts in the present case do parallel those in *Miller* in that Appellants filed their claim before the twenty-year statute expired and the argument for tolling the applicable two-year statute of limitations prescribed by West Virginia Code § 55-2-12(b) is based at least in part upon a fraudulent concealment claim. Given this Court's application of the law in *Miller*, *Albright v. White* presented no obstacle to the prosecution of each Appellants' claims for injuries that occurred less than twenty years before the filing of their complaint, even though the complaint asserting those claims may have been filed more than two years after Appellants attained the age of majority, if the claims are otherwise appropriate for the application of the discovery rule.

2. Discovery Rule

I am perhaps most perplexed and troubled with the majority's assertion that two versions of the discovery rule have developed in this State.[3] I contend that a close examination of the case law from which current, proper application of the discovery rule has

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[3]I believe that the majority's self-serving evisceration of Justice Starcher's concurring opinion in *Miller v. Monongalia County Board of Education*, to support the double standard proposition is blatantly misleading. For the sake of clarity, the portion quoted in the majority opinion is set forth here along side an unedited version of Justice Starcher's analysis:

From the majority opinion	From Justice Starcher's Concurrence
A studious observer will note that this Court stated one form of the discovery rule in *Cart v. Marcum*, and then stated a different, more lenient form of the discovery rule in *Gaither v. City Hospital*[, *Inc.*, 199 W.Va. 706, 487 S.E.2d 901 (1977)] . . .	A studious observer will note that this Court stated one form of the discovery rule in *Cart v. Marcum*, and then stated a different, more lenient form of the discovery rule in *Gaither v. City Hospital*. While it is not perfectly clear, it appears that the Court, without specifically saying so, modified or overruled *Cart v. Marcum* in *Gaither v. City Hospital*.
. . . [D]ecisions such as *Keesecker*[*v. Bird*, 200 W.Va. 667, 490 S.E.2d 754 (1997)] make clear that . . . *Cart v. Marcum* governs only those cases where the plaintiff is compelled to allege some deed by the defendant concealed the cause of action from the plaintiff.	Regardless of the Court's unstated intent, subsequent decisions such as *Keesecker* [*v. Bird*, 200 W.Va. 667, 490 S.E.2d 754 (1997),] make clear that *Gaither v. City Hospital* is the preferred statement of the discovery rule; *Cart v. Marcum* governs only those cases where the plaintiff is compelled to allege some deed by the defendant concealed the cause of action from the plaintiff.

210 W. Va. at 153 n. 3, 556 S.E.2d 433 n. 3.

evolved – beginning with *Cart v. Marcum*, 188 W.Va. 241, 423 S.E.2d 644 (1992) – demonstrates that this Court has developed a coherent jurisprudence regarding the application of the discovery rule.

In the landmark case of *Cart v. Marcum,* in which this Court extended the application of the discovery rule to all torts generally, we held in syllabus point one that "under the 'discovery rule,' the statute of limitations is tolled until a claimant knows or by reasonable diligence should know of his claim." We explained in *Cart* that because the rule was largely developed as a response to defendant conduct that served to conceal either the tort or the wrongdoer's identity, it must "be applied with great circumspection on a case-by-case basis only where there is a strong showing" that the plaintiff was prevented from learning of the claim. *Id*. at 245, 423 S.E.2d at 648. As noted in *Cart,* to overcome the general rule – that mere ignorance of the existence of a cause of action or of the identity of the wrongdoer does not toll the statute of limitations – there must be "a strong showing of fraudulent concealment, inability to comprehend the injury, or other extreme hardship." *Id*. (footnotes omitted). We then went on to state in *Cart* that "special rules apply in a case involving particular hardship or other circumstances justifying different accrual rules." *Id*. (quoting 54 C.J.S. *Limitations of Actions* § 87(a) (1987)).

We undertook a closer examination of the meaning of what "a claimant knows or by reasonable diligence should know of his claim" from syllabus point one of *Cart* in *Gaither v. City Hospital, Inc.*, 199 W.Va. 706, 487 S.E.2d 901 (1997). The discussion in *Gaither* resulted in this Court holding that:

> In tort actions, unless there is a clear statutory prohibition to its application, under the discovery rule the statute of limitations begins to run when the plaintiff knows, or by the exercise of reasonable diligence, should know (1) that the plaintiff has been injured, (2) the identity of the entity who owed the plaintiff a duty to act with due care, and who may have engaged in conduct that breached that duty, and (3) that the conduct of that entity has a causal relation to the injury.

Id. at Syl. Pt. 4. Immediately following the announcement of this new point of law in the body of the opinion, this Court emphasized the objective of the holding by saying the discovery "rule tolls the statute of limitations until a plaintiff, acting as a reasonable, diligent person, discovers the essential elements of a possible cause of action, that is, discovers duty, breach, causation and injury." *Id*. at 714, 487 S.E.2d at 909.

In *Keesecker v. Bird*, 200 W.Va. 667, 490 S.E.2d 754 (1997), this Court applied the discovery rule, synthesizing the standards articulated in *Cart* and *Gaither* into a four-step process. *Id*. at 683-84, 490 S.E.2d 770-71. When a statute of limitations question arises and no statutory prohibition to application of the discovery rule exists, the first two components in the review process involve identifying the applicable statute of limitations and establishing when the requisite elements of the tort occurred. A court then

must apply the *Gaither* test to determine when the plaintiff knew or should have known of his or her possible cause of action. Finally, if the plaintiff alleges that the delay in discovering the cause of action is due to misconduct of the defendant, then the court must determine if there is a proper showing of such misconduct in keeping with syllabus point three of *Cart*, which requires "a strong showing by the plaintiff that some action by the defendant prevented the plaintiff from knowing of the wrong at the time of the injury." Although the order and depth in which these components are analyzed is naturally dependent upon the procedural posture and facts of the case under review, the factors encompass the law which has developed to provide ***a uniform and singular method by which the discovery rule is to be applied in this state***.

Appellants argued that they did not have the requisite knowledge to start the running of the statute of limitations on their claims because of fraudulent concealment on the part of DHHR which affected their ability to know or when they should have known of their claims. This argument is based on the contention that they could not and did not know that they had been injured by the acts and omissions of DHHR until they read their DHHR case files and became aware that their father admitted to the agency he sexually molested them. They further maintain that they logically could not know that there was a breach of duty owed to them as individuals, let alone the causal relationship between the breach and the injuries they sustained. Consequently, the initial inquiry regarding the application of the

discovery rule is whether the fraudulent concealment claim has merit because it has direct bearing on the question of what appellants *should have known*. The majority neglected to meaningfully address the topic of fraudulent concealment as a preliminary matter or otherwise and thus did not undertake an earnest examination of Appellants' argument.

Fraudulent concealment is an equitable doctrine that operates to estop a defendant from asserting the statute of limitations as a bar to a claim because the defendant in some way prevented the plaintiff from getting the information needed to pursue a claim. *See Bailey v. Glover*, 88 U.S. 342 (1874). Addressing the impact of fraudulent concealment on statutes of limitations, we concluded in syllabus point four of *Miller v. Monongalia County Board of Education*,

> The general statute of limitations contained in W. Va. Code § 55-2-12(b) is tolled with respect to an undiscovered wrongdoer by virtue of fraudulent concealment when the cause of action accrues during a victim's infancy and the injured person alleges in his or her complaint that the wrongdoer fraudulently concealed material facts. The statute begins to run when the injured person knows, or by the exercise of reasonable diligence should know, the nature of his or her injury, and determining that point is a question of fact for the jury. However, pursuant to W. Va. Code § 55-2-15, no case may be brought after twenty years from the time the right accrues.

We further explained in syllabus point three of *Miller* that "[f]raudulent concealment requires that the defendant commit some positive act tending to conceal the cause of action from the plaintiff, although any act or omission tending to suppress the truth is enough."

What constitutes an act or omission sufficient to toll a statute of limitations on fraudulent concealment grounds has been aptly summarized by one legal authority as follows:

> To invoke the doctrine of fraudulent concealment, the presence of which bars a defendant from asserting a statute of limitations as a defense, mere silence or unwillingness to divulge wrongful activities ordinarily is not sufficient. However, when a fiduciary relationship exists, omission by silence may constitute the supplying of false information, for purposes of determining whether the defendant fraudulently concealed the plaintiff's cause of action. That is, if a trust or confidential relationship exists between the parties, which imposes a duty to disclose, mere silence by the one under that duty constitutes fraudulent concealment and will be sufficient to toll the applicable statute of limitations. Moreover, the existence of a confidential relationship between the parties lessens, if not negates, the necessity of a showing of actual fraud to toll the statute of limitations.

54 C.J.S. *Limitations of Actions* § 120 (2005) (footnotes omitted). In the course of its discussion of the fraudulent concealment law of New Mexico in a case involving a special relationship, the U.S. Court of Appeals for the Tenth Circuit observed that:

> [t]he false statement or omission by a defendant who has a special relationship with the plaintiff may . . . constitute constructive fraud.
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> > Generally speaking[,] constructive fraud is a breach of a legal duty which the law declares fraudulent *because of its tendency to deceive others*. Such fraud may be present on the part of the fraud feasor *without any showing of dishonesty of purpose or intent to deceive[.]* (Citation omitted.)

Ramsey v. Culpepper, 738 F.2d 1092, 1096 (10th Cir. 1984) (emphasis in original).[4] The Supreme Court of Indiana, examining the concept of fraudulent concealment in a case where the plaintiff had repressed memories of her father's acts of sexual molestation, found that the general rule that discovery of a cause of action by a parent is imputed to a child regardless of the child's actual cognition or memory could be overcome on fraudulent concealment grounds in situations where the parent is the wrongdoer. The high court of Indiana said, "the doctrine of fraudulent concealment should be available to estop a defendant from asserting the statute of limitations 'when he has, either by deception or by a violation of duty, concealed from the plaintiff material facts thereby preventing the plaintiff from discovering a potential cause of action." *Fager v. Hundt*, 610 N.E.2d 246, 251 (Ind. 1993).

Unlike the case before the court in *Fager*, the factual focus in the present case is not on whether Appellants knew they had been injured by their father's aberrant sexual behavior. Rather, the injury for which Appellants seek compensation is DHHR's breach of its duty to protect. Here the prominent relevant factual inquiry under the principles of the discovery rule is when and to what extent Appellants knew or in the exercise of reasonable diligence should have known: that DHHR had a duty to protect them, that DHHR breached

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[4]This Court similarly defined constructive fraud in *Stanley v. Sewell Coal Co.*, 169 W.Va. 72, 76-77, 285 S.E.2d 679, 683 (1982), wherein we said constructive fraud is "a breach of a legal or equitable duty, which, irrespective of moral guilt of the fraud feasor, the law declares fraudulent, because of its tendency to deceive others, to violate public or private confidence, or to injure public interests."

its duty, and that the alleged breach of duty caused them injury. Thus, silence coupled with DHHR's admission of a special relationship with Appellants establishes the type of "act or omission tending to suppress the truth" or deceive others which we recognized in *Miller*. *Miller*, Syl. Pt. 3. Moreover, the admitted existence of a special relationship between DHHR and Appellants is the type of "particular hardship or other circumstances justifying different accrual rules" as contemplated in *Cart*. 188 W.Va. at 245, 423 S.E.2d at 648.

This Court spoke with eloquence and clarity in *Miller* as to circumstances in which a plaintiff might suffer an inability to comprehend an injury due to extreme hardship. In that opinion, which also involved children who were subjected to deviant sexual behavior, Justice Maynard stated straightforwardly:

> [W]e would be remiss if we did not at least comment on the unique situations where criminal sexual misconduct is committed on young children. The level of emotional pain inflicted on these children is beyond our understanding. Many times, the child victim feels great embarrassment, shame, and guilt, and frequently, with a child's mind, wrongly blames himself or herself. The child then internalizes the guilt and represses the memory, forcing it out of conscious awareness. It simply hurts too much to allow the memory of such painful and devastating events to surface in the conscious mind.
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> Also, on occasion, the child is confused about the exact identity of the wrongdoer and, again, wrongly internalizes guilt, blame, or culpability. These children do not know whether they should tell someone about the abuse or not. They are fearful, confused, and uncertain, and commonly remain so for years after the statute of limitations has run. It would be a cruel

> system indeed that did not consider such factors in reaching a just and fair result in this arena of litigation.

210 W.Va. at 152, 556 S.E.2d at 432. The facts in the present case certainly warrant the compassionate consideration Justice Maynard urged. If such consideration had been employed in this case, it would have compelled the conclusion that due to fraudulent concealment on the part of DHHR different accrual rules were justified due to the extreme hardship thereby created.

Presented with a summary judgment motion, the trial court is required to analyze mixed questions of fact and law such as those raised in the present case in order to determine "whether there is . . . [a] genuine issue of fact to be tried and inquiry concerning the facts is . . . desirable to clarify the application of the law." Syl. Pt. 3, *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of N.Y.*, 148 W.Va. 160, 133 S.E.2d 770 (1963). The final order in this case reveals that the lower court examined the issue of when each Appellant knew, or by the exercise of reasonable diligence, should have known of their potential claims against DHHR in order to begin the running of the statute of limitations. The order reflects the lower court's belief that Appellants were aware of their claims against DHHR because they knew of the father's acts of sexual abuse and of DHHR's involvement in each of their cases. From this perspective, it is tempting to give credence, as the majority did, to such findings of the lower court about Appellants remembering the workers at DHHR who had let them down, their stated beliefs about the social service system being dysfunctional and

Kimberly's awareness that a file had been opened in 1984 on behalf of her sister because of sexual abuse by her father, but in fact those findings do not answer the question before the lower court or this Court. These findings clearly do not address the material issues regarding when the statute of limitations began to run in this case because they fail to recognize the significance of DHHR's admission of a "special relationship" with Appellants and the attendant duty the agency owed to them as individuals. While Appellants during their deposition testimony said that they did not remember all of the details of what had occurred to them, they never claimed that the statute of limitations should be tolled based on repressed memories of being sexually abused or of DHHR being involved during that time in their lives. Rather, Appellants contend that they did not know and reasonably could not have discovered that DHHR owed them a particular duty to protect, let alone the breach of that duty, until they viewed their DHHR case records on or about October 2, 2000. DHHR asserts that Appellants had reason to know of their father's confession of sexual misconduct to the agency because they were present at meetings with DHHR when the father made the disclosure. After carefully reading the caseworker notes DHHR offered to support this contention, I simply am not convinced that only one conclusion can be reached. The May 4, 1982, caseworker notes document what occurred at a meeting involving Kimberly and her parents after Kimberly had run away from home because of a particular instance of sexual assault by the father. Teresa was not included in this meeting. The notes contain numerous remarks about the extreme emotional atmosphere of the meeting and described Kimberly as

being in tears and visibly shaking. According to the notes, Kimberly's emotional state deteriorated during the meeting while the father twice denied the accusation that he sexually accosted her. While the notes indicate that the father finally admitted to the sexual misconduct with his daughter, the notes do not specifically represent that Kimberly was in the room at the time the confession occurred or that she was emotionally capable of understanding that it occurred. While it is clearly documented in the notes that Kimberly was escorted out of the room by one of the workers because she was too "emotionally shaken to continue," they do not conclusively establish when this occurred. The meeting at which Teresa allegedly heard her father confess occurred on August 3, 1984. In June of that year, Teresa ran away from home at age fifteen after her father raped her. Kimberly was not at the meeting. The notes of this meeting document that the father made the statement that "it would not happen again" and Teresa responded, "that was what he had said before to Kim." What "it" was and what had happened before were not explained in the notes; no clear confession of the father's misconduct was recorded in the August 3 meeting notes. Additionally, the father's confession is not the sole consideration. Appellants contend that the confession only served as a catalyst for Appellants – to file criminal charges against the abusive father and then to inquire about whether there was a way to recover for the injuries they sustained. To decide if Appellants acted with reasonable diligence to acquire this information necessarily involves the examination of such issues as whether others in similar situations would routinely examine government records, would be aware that a governmental

entity may owe a duty to individual citizens or would understand that the State could be named in a suit.

The evidence raises questions of fact under the unique circumstances of this case that need to be resolved in order to apply the law, that is, to determine the onset of the limitations period. As the determination of these ultimate facts are predominantly rooted in fact rather than law, summary judgment is not appropriate. As concluded by the authors of a monograph developed for the Federal Judicial Center entitled *The Analysis and Decisions of Summary Judgment Motions*, when resolution of ultimate facts turns on the assessment of human behavior and expectations, the matter ordinarily is one for the jury. The authors of the monograph suggest that in order to arrive at a principled resolution of the court-versus-jury issue before the court at the summary judgment stage, it is well to view facts and law at two separate ends of a spectrum with mixed questions of law and fact filling the gap between the two. The range of the fact-law spectrum is explained in the monograph as follows:

> At one extreme of this spectrum lie so-called historical facts. A historical fact is a thing done, an action performed, or an event or occurrence. Some historical facts may be proved by direct evidence. Others, such as notice, intent, or other states of mind, are proved by inference from evidence of other facts. The resolution of disputes over historical facts or the inferences to be drawn from them is a jury function. A dispute over historical facts or inferences, if genuine and material within the meaning of Rule 56, precludes summary judgment.

At the other extreme of the spectrum lie issues of law. When the facts material to the application of a pure rule of law are undisputed, the application is a matter of law for the court, requiring no trial. . . . When there is no dispute over the sufficiency of evidence establishing the facts that control the application of a rule of law, summary judgment is the appropriate means of deciding the issue. . . .

When the application of a rule of law depends on the resolution of disputed historical facts, however, it becomes a mixed question of law and fact. Plaintiff's standing to sue, for example, may turn on activities of the plaintiff that are in dispute. Whether the statute of limitations has run may depend on a dispute over when plaintiff received notice. Such disputed facts normally preclude summary judgment.

Mixed questions of law and fact arise in a variety of other forms. Normally, the legal questions presented are resolved by the court and the fact issues by the jury. Contract disputes, though frequently questions of law, may present mixed questions; when the court determines that a document is ambiguous, for example, the jury resolves evidentiary disputes such as what the parties intended. Constitutional issues, though generally questions of law, may be mixed questions when they turn on factual determinations.

Although the terms are sometimes used interchangeably, it is useful to distinguish mixed questions of law and fact from questions of ultimate fact. Mixed questions generally require the resolution of disputes over historical fact. Ultimate facts present a different kind of "factual" inquiry, one involving a process that "implies the application of standards of law." [*Baumgartner v. U.S.*, 322 U.S. 665, 671 (1944).] Like some historical facts, ultimate facts are derived by reasoning or inference from evidence, but, like issues of law, they incorporate legal principles or policies that give them independent legal significance. They often involve the *characterization* of historical facts, and their resolution is generally outcome-determinative.

> Ultimate facts occupy a broad segment of the spectrum between fact and law. Where on that spectrum a particular ultimate fact belongs depends on whether it is predominantly factual or legal. For example, whether a defendant used due care in the operation of a vehicle or was driving in the course of employment or whether that person's acts were the proximate cause of plaintiff's injuries are all questions of ultimate fact that are predominantly factual rather than legal and therefore clearly for the jury. Similarly, whether a person had reasonable cause, acted within a reasonable time, or can be charged with notice are predominantly factual (though outcome-determinative) questions. The resolution of such questions turns on an assessment of human behavior and expectations within the common experience of jurors. Concerning issues of this sort, traditionally resolved by juries, the Supreme Court [in *Railroad Co. v. Stout*, 84 U.S. 657, 664,] said in 1873: "It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge."
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> Near the opposite end of the spectrum lie those ultimate facts that, though nominally facts, have a high law content. Their resolution (in the absence of evidentiary disputes) turns on matters of law and policy and on technical issues underlying the legal scheme. The administration of the rules under which they arise benefits from consistency, uniformity, and predictability. Whether an instrument is a security, whether a plaintiff is a public figure, whether a publication is not copyrightable as historical, whether an invention was reduced to practice, and whether a carrier operated as a common carrier are questions of ultimate fact calling for the interpretation and application of essentially legal standards.

Schwarzer, Hirsch & Barrans, *The Analysis and Decision of Summary Judgment Motions*, 139 F.R.D. 441, 455-457 (1992) (footnotes omitted).

Following this reasoning, it comes as no surprise that a great majority of the cases where the question of whether a claim is barred by a statute of limitations is found to be a question of fact for the jury or trier of fact. *See* Syl. Pt. 4, *Miller*; Syl. Pt. 3, *Stemple v. Dobson*, 184 W.Va. 317, 400 S.E.2d 561 (1990) (also internally listing cases supporting the proposition); *see also Aldrich v. McCulloch Properties, Inc.*, 627 F.2d 1036, 1042 (10th Cir. 1980) ("[t]he question of whether a plaintiff should have discovered the basis of his suit under the doctrine of equitable tolling does not lend itself to determination as a matter of law"). Unless the facts are so clear as to admit of no other conclusion than that the discovery rule does not apply, the issue is for the jury to draw from the evidence such inferences as may be appropriate. The facts in this case hardly favor such certainty.

In summary, the majority has sanctioned an application of the principal of common law qualified immunity to facts that do not justify its use. The majority has ignored the special relationship between Appellants, as children, and DHHR, resulting in a failure to consider the impact of that special relationship on Appellants' claim of the benefit of the discovery rule. Finally, contrary to well-established law, the majority has allowed the lower court to intrude into fact-finding regarding the proper application of the statute of limitations and the discovery rule where genuine issues of fact cry out for jury determination to clarify the proper application of the law of limitations and the discovery rule in Appellants' case.

What dismays me the most is that all of this has occurred in a case decided in what our Court – at the behest of a member of the majority – has declared to be the "Year of the Child." Contrary to the eloquent declaration of Justice Maynard in the *Miller* case, that the Court would listen with great care to those injured in their childhood and seeking relief many years later, Appellants are turned out into the cold, with a mixed signal to similarly situated individuals and the practitioners in our legal system. On the one hand, this Court claims profound interest in protecting children from abuse and neglect, while, on the other, refusing a full hearing to Appellants who claim that the system failed them during their childhood.

The "King's Purse" has been protected. In this "Year of the Child," the claims of negligent injury of children by the arm of the state designated to protect them have been summarily rejected.

Accordingly, I have no choice but to voice my sincere and sad dissent.

I am authorized to state that Judge Madden joins in this dissenting opinion.