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Big Sisters of America

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

John CD Doe, a single man,

Plaintiff,

vs.

Big Brothers Big Sisters of America, a
District of Columbia, non-profit
corporation; Big Brothers Big Sisters of
Central Arizona, an Arizona corporation;
John Doe 1-100; Jane Doe 1-100; and Black
& White Corporations 1-100,

Defendants.

Case No. CV2020-014920

**MOTION TO STAY CASE PENDING
SPECIAL ACTION OR, IN THE
ALTERNATIVE, MOTION TO
EXTEND TIME TO FILE ANSWER**

(Assigned to the Hon. Bradley Astrowsky)

Defendant Big Brothers Big Sisters of America (“BBBSA”), through undersigned counsel, moves to stay this action pending the outcome of a petition for special action that it will be filing regarding conflicting Superior Court interpretations of A.R.S. § 12-514 – the recently enacted statute on which Plaintiff seeks recovery of punitive damages for conduct which he alleges occurred nearly 40 years ago. As this Court is aware, BBBSA filed a Motion

1 to Dismiss Plaintiff's claims on the bases that: (1) Plaintiff's claims are barred by A.R.S. §
2 12-505(A); (2) Plaintiff's Complaint fails to state a claim against BBBSA upon which relief
3 can be granted because, among other things, it includes a punitive damages claim that is
4 expressly prohibited by A.R.S. § 12-514; and (3) the applicability provision of A.R.S. § 12-
5 514 that purports to "revive" Plaintiff's claims against BBBSA violates the due process and
6 ex post facto clauses of the Arizona and United States constitutions. This Court denied the
7 Motion to Dismiss in its entirety. See this Court's Order entered 8/26/2021 (hereafter,
8 "Order").

9 Meanwhile, another Maricopa County Superior Court Judge was considering virtually
10 identical claims that opposing counsel in this case also filed on behalf of a different Plaintiff,
11 IM Doe. Following oral argument in the IM Doe case, Judge Randall Warner dismissed all
12 of the plaintiff's claims except for negligence and vicarious liability for intentional torts. See
13 Judge Warner's Order entered 9/26/2021, attached hereto as Exhibit 1 (hereafter, "Warner
14 Order" and collectively with this Court's Order, the "Superior Court Rulings").

15 This Court and Judge Warner interpreted the elements of A.R.S. § 12-514 differently
16 in several important respects, creating a conflict between whether and how certain of CD Doe
17 and IM Doe's claims may proceed. For example, Judge Warner dismissed IM Doe's punitive
18 damages claim as barred under Laws 2019, Ch. 259, § 3(d)(2) (expressly prohibiting punitive
19 damages claims under A.R.S. § 12-514) and did not reach the constitutional question of
20 whether a punitive damages claim under A.R.S. § 12-514 must be dismissed as a violation of
21 the ex post facto clause. In contrast, this Court did not dismiss CD Doe's punitive damages
22 claim under Laws 2019, Ch. 259, § 3(d)(2) but found that there is no constitutional violation
23 because the ex post facto prohibition applies to criminal laws, not claims under civil statutes.
24 Order at p. 4.¹ The conflicting analysis as to whether a punitive damages claim under A.R.S.

25
26 ¹ But see, e.g., Kansas v. Hendricks, 521 U.S. 346, 361 (1997) (quoting United States v.
27 Ward, 448 U.S. 242, 248–49 (1980)) (a civil statute may violate the ex post facto clause if it
28 is "so punitive either in purpose or effect as to negate [the State's] intention' to deem it
'civil.'"); Landgraf v. USI Film Products, 511 U.S. 244, 281 (1994)(recognizing that ex post
facto review may be implicated where a civil law authorizes punitive damages for
preenactment conduct); Louis Vuitton S.A. v. Spencer Handbags Corp., 765 F.2d 966, 972

§ 12-514 may survive a motion to dismiss is a legal question of statewide importance that BBBS should have the opportunity to present to the Court of Appeals before it is required to litigate Plaintiff CD Does' claims in this case.

The Superior Court Rulings in the CD Doe and IM Doe cases also raise legal issues of state-wide importance as to the appropriate standard of knowledge under A.R.S. § 12-514. Judge Warner ruled that the statute "cannot reasonably be read to mean that the knowledge of a perpetrator who is an employee or volunteer is, by that fact, imputed to the organization." Warner Order at p. 4. This Court held that plaintiff must demonstrate that BBBSA knew or otherwise had actual notice that "any" alleged misconduct created an unreasonable risk of a sexual act with a minor by "a" Big Brother, such as Mr. Arbulu," suggesting that knowledge regarding one incident may be imputed to the organization as knowledge of any incident. Order at p. 3.

The Superior Court Rulings also raise significant legal questions about whether A.R.S. § 12-514 unconstitutionally abrogates substantive rights vested by operation of A.R.S. § 12-505(A) —a statute of repose under which plaintiffs' claims were previously extinguished by the lapse of time —and new substantive elements must be proven under the revival statute. Accordingly, the Rulings present issues of statewide importance as to whether A.R.S. § 12-514 violates due process. Indeed, where, as here, the statute purports to allow a window of time for a plaintiff to revive a long extinguished claim, regardless of how many decades may have passed without notice to the defendant after the plaintiff turned 18, such notice is fundamentally unfair and prejudices a defendant's ability to defend itself. Any defendant would be prejudiced by the kind of extraordinary, decades-long delay that CD Doe and IM Doe created in failing to provide actual notice to BBBSA of the need to maintain records or other information necessary to mount a defense.

(2d. Cir. 1985) (the Ex Post Facto Clause may "be applied in civil cases where the civil disabilities disguise criminal penalties."). The concept that civil penalties may be punitive in nature for constitutional purposes is not limited to the ex post facto context, but also arises where, for example, civil proceedings implicate the Eighth Amendment Excessive Fines Clause. See, e.g., State v. Leyva, 195 Ariz. 13, 19, ¶ 23 (App. 1998).

1 These are significant legal issues of first impression that are likely to affect not only
2 BBBS in these two matters, but all other cases involving claims brought under A.R.S. § 12-
3 514. The divergent decisions of two judges on the same Superior Court bench foreshadows a
4 significant risk of materially inconsistent interpretation and application of this statute,
5 implicating additional due process concerns absent timely resolution through special action
6 relief. Indeed, BBBS has no equally plain remedy to address these issues other than to seek
7 special action review.

8 BBBS respectfully requests that this Court enter a stay of these proceedings pending
9 the outcome of its petition for special action review because this case meets all of the criteria
10 that the appellate courts usually rely upon to exercise special action jurisdiction.² Special
11 action jurisdiction is appropriate where, as here, legal questions of first impression regarding
12 statutory interpretation are of statewide significance and the petitioner has no “equally plain
13 speedy and adequate remedy” by appeal. Moore v. Browning, 203 Ariz. 102, 104, ¶ 2 (App.
14 2002). The Court of Appeals thus has exercised special action jurisdiction to resolve novel
15 questions of law requiring the interpretation of statutes, including statutes of limitation and
16 repose. *See, e.g., Harris Tr. Bank of Arizona v. Superior Court In & For County of Maricopa*,
17 188 Ariz. 159, 162 (App. 1996) (accepting special action jurisdiction to address questions of
18 law involving statute of limitations); Moore v. Browning, 203 Ariz. At 104, ¶ 1 (accepting
19 special action jurisdiction regarding question of law as to whether a cause of action has been
20 extinguished by a statute of repose).

21 As the Arizona Supreme Court has recognized, special action jurisdiction is
22 particularly appropriate where interpretation of a statute presents questions “of first
23 impression that will affect other cases in superior court.” Piner v. Superior Court In & For
24 County of Maricopa, 192 Ariz. 182, 185, ¶ 10 (1998). See also Matter of

25
26 ² BBBS plans to file its petition as soon as practicable after receiving the transcript it has
27 ordered of the oral argument in this matter. Although the transcript was ordered on an
28 expedited basis, the Court’s transcription contractor informed undersigned counsel’s staff
that the contractor has been significantly backlogged and today we were informed that the
transcript will be available by the end of next week.

1 Guardianship/Conservatorship of Denton, 190 Ariz. 152, 154 (1997) (accepting special
2 action jurisdiction on petition for review *en banc* where “trial courts were unclear as to how
3 to decide” questions of statutory interpretation and application that “resulted in contrary
4 rulings in courts in the same county”). Where such issues affect not only the parties involved,
5 but anyone else who might be a party to litigation under a relatively new statute, the matter
6 is of statewide significance warranting special action review, especially where the affected
7 population is of advanced age. Id. (considering questions of first impression under then-new
8 elder abuse statute and recognizing that statutes affecting the rights of persons of advanced
9 age militate in favor of a speedy special action remedy).

10 Here, where nearly forty (40) years have elapsed since the alleged acts of abuse, a
11 speedy remedy is necessary to resolve questions of law, especially considering the present
12 age of any persons who might have information relevant to the claims or defenses at issue.
13 Decades of delay before bringing claims creates extraordinary evidentiary and due process
14 challenges stemming from the inevitable loss of information that necessarily occurs over
15 extended periods of time when a current party never received timely notice of the need to
16 preserve relevant information, including evidence regarding lack of knowledge. These
17 challenges will only exacerbate with the passage of additional time, resulting in unnecessary
18 cost and delay to all litigants facing the same questions of law. Thus, special action
19 jurisdiction is appropriate in the interests of judicial economy, where, as here, “there are
20 several pending cases in the superior courts which present the same issue. Normal appellate
21 procedures will result in unnecessary cost and delay to all litigants [and] [t]he question
22 presented is a clear issue of law with obvious statewide significance. The congruence of these
23 factors militates in favor of our accepting [special action] jurisdiction.” Summerfield v.
24 Superior Court, 144 Ariz. 467, 469 (1985) (accepting special action jurisdiction on petition
25 for review following superior court’s ruling on motion to dismiss); Farmers Ins. Exch. v.
26 Udall, 245 Ariz. 19, 21–22, ¶ 7 (App. 2018) (same).

1 **Conclusion**

2 Given that the questions of law presented here meet all of the factors that weigh
3 heavily in favor of exercising special action jurisdiction, BBBS respectfully requests a stay
4 of this matter pending resolution of its impending petition for special action.³ Alternatively,
5 if the Court is not inclined to do so, BBBS respectfully requests that the Court enter an order
6 extending the Answer deadline in this matter for a period of thirty (30) days to afford BBBS
7 the opportunity to seek a stay from the Court of Appeals.

8 DATED this 8th day of October, 2021.

9
10 BERKE LAW FIRM, PLLC

11 By /s/ Stacey F. Gottlieb
12 Lori V. Berke
13 Stacey F. Gottlieb
14 Jody C. Corbett
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Sisters of America

15 The foregoing document was e-filed
16 with the Clerk of Court this 8th day
17 of October, 2021, and a copy e-served via
AZTurboCourt to:

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25
26

27
28 ³ Undersigned counsel requested that Plaintiff stipulate to a stay, but opposing counsel declined the request.

EXHIBIT 1

EXHIBIT 1

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2020-017354

09/27/2021

HONORABLE RANDALL H. WARNER

CLERK OF THE COURT
A. Meza
Deputy

JOHN I M DOE

ROBERT E PASTOR

v.

BIG BROTHERS BIG SISTERS OF AMERICA, JODY CAMPBELL CORBETT
et al.

SHAWNA M WONER
JUDGE WARNER

MINUTE ENTRY

Motions to Dismiss filed by Defendant Big Brothers Big Sisters of America and Defendant Big Brothers Big Sisters of Southern Arizona are under advisement following argument. For reasons that follow, the Motions are granted in part and denied in part.

1. Background.

This is a sexual abuse case. As a child in Tucson in the 1970's, Plaintiff participated in the Big Brothers Big Sisters program. Big Brothers Big Sisters matches children facing adversity (called "Littles") with adult volunteers (called "Bigs") to develop relationships that will positively affect the children's lives. Plaintiff alleges that Defendants matched him with Gordon Clive Blevins, who used the Big/Little relationship to groom and sexually abuse him.

Plaintiff seeks to hold Big Brothers Big Sisters of America and Defendant Big Brothers Big Sisters of Southern Arizona liable. His claims would be time-barred but for a 2019 law (the "Revival Law") that revived otherwise time-barred claims involving sexual conduct or contact:

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Notwithstanding any other law, a cause of action for damages described in subsection A, paragraph 1 of this section that involves sexual conduct or sexual contact and that would be time barred under section 12-514, Arizona Revised Statutes, as added by this act, or that would otherwise be time barred because of an applicable statute of limitations, a claim presentation deadline or the expiration of any other time limit is revived and may be commenced before December 31, 2020.

See Laws 2019, Ch. 259 § 3(B). Although this law revived claims for damages arising from sexual abuse, it treats perpetrators differently from others who may be sued. For someone who is not the perpetrator, a cause of action is revived only if “that person knew or otherwise had actual notice of any misconduct that creates an unreasonable risk of sexual conduct or sexual contact with a minor by an employee, a volunteer, a representative or an agent.” *Id.* § 3(C).

The issue here is whether the Revival Law revived Plaintiff’s claim against Defendants Big Brothers Big Sisters of America and Big Brothers Big Sisters of Southern Arizona.

2. The Revival Law Is Constitutional.

Defendants argue that the Revival Law is unconstitutional for two reasons. One is that the statute is an ex post facto law, but that argument has no merit. The State and Federal prohibitions against ex post facto laws apply only to penal statutes, not civil liability. *State v. Trujillo*, 248 Ariz. 473, 487, 462 P.3d 550, 564 (2020); *Martin v. Reinstein*, 195 Ariz. 293, 307, 987 P.2d 779, 793 (App. 1999).

The other is that the Revival Law violates due process. This is a closer question. Cases from other states have reached opposite results on whether a Revival Law like the one here violates due process. *Compare, e.g., Mitchell v. Roberts*, 469 P.3d 901, 913 (Utah 2020) (law reviving sexual abuse claims that otherwise would be barred by limitations violated Utah’s due process clause); *Doe v. Hartford Roman Cath. Diocesan Corp.*, 119 A.3d 462, 516 (Conn. 2015) (law reviving sexual abuse claims that otherwise would be barred by limitations did not violate Connecticut’s due process clause). *See also Doe*, 119 A.3d at 509-510 (surveying state law and finding 18 states that allow the revival of time-barred claims and 24 that do not).

Arizona case law is more in line with authority holding that revival laws do not violate due process. In *Chevron Chem. Co. v. Superior Ct.*, 131 Ariz. 431, 641 P.2d 1275 (1982), the Supreme Court considered a due process challenge to a change to a workers’ compensation statute. Before the change, an injured worker seeking to sue a third-party tortfeasor had a year to file suit, after which the claim was deemed assigned to the workers’ compensation carrier and the

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worker could no longer sue. The amended statute allowed reassignment of the claim back to the injured worker so they could sue after the one-year period, so long as they filed suit within the two-year statute of limitations for negligence claims. Further, the statute was effective as to existing claims even if the one-year statute had expired. This, it was argued, violated due process by reviving barred claims.

The Supreme Court rejected the argument, holding that “the right to raise a one year statute of limitations defense instead of a two year statute of limitations defense is [not] a vested property right.” 131 Ariz. at 438, 641 P.2d at 1282. Although *Chevron* can be distinguished on its facts, a fair reading of its reasoning is that the expiration of a statute of limitations is not a vested right that would preclude application of a revival law. *Accord San Carlos Apache Tribe v. Superior Ct. ex rel. Cty. of Maricopa*, 193 Ariz. 195, 208-09, 972 P.2d 179, 192-93 (1999) (“reopener provision” that extended the deadline for filing a statement of claim to water rights was constitutional, even though it was enacted after the prior deadline expired).

Chevron relied in part on U.S. Supreme Court cases holding that “a state legislature may restore a barred remedy without violating the Fourteenth Amendment.” 131 Ariz. at 438, 641 P.2d at 1282, *citing Campbell v. Holt*, 115 U.S. 620, 6 S. Ct. 209 (1885); *see also Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 316, 65 S. Ct. 1137, 1143, 89 L. Ed. 1628 (1945) (lifting the bar of a statute of limitation to restore a remedy is not “per se” a due process violation). The Revival Law does not violate the due process clauses of either Arizona’s Constitution or the United States Constitution.

3. Plaintiff Sufficiently Alleges Defendants’ Notice Of Misconduct.

Defendants further argue that the First Amended Complaint does not sufficiently allege that they “knew or otherwise had actual notice of any misconduct that creates an unreasonable risk of sexual conduct or sexual contact with a minor by an employee, a volunteer, a representative or an agent.” In broad terms, the First Amended Complaint alleges that Defendants knew or should have known of Blevins’s misconduct:

46. Defendants knew, had constructive knowledge or otherwise had actual notice of misconduct by its agents, volunteers, representatives, mentors, and or Bigs, including Blevins and other agents, volunteers and Bigs, including that Blevins:

a. Showered Littles, including Plaintiff, with affection, praise, attention, gifts, experiences, travel, and or overnight stays among other grooming behavior;

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b. Pressured, manipulated, coerced, threatened, and or intimidated Littles, including but not limited to Plaintiff, into reluctant behavior including sexual acts;

c. Touched the genitals and or body parts of Littles and or engaged in other physical and psychological boundary violations of Littles, including Plaintiff.

See First Amended Complaint ¶ 46. This alone is insufficient to allege notice as required by the Revival Law. For one, it does not allege knowledge or actual notice. Rather, it hedges by alleging constructive notice in the alternative. Constructive notice is not enough under the Revival Law. Further, the allegations in this paragraph are conclusory. They provide no facts explaining how or why Defendants allegedly knew of Blevins's misconduct. Although the Court must assume the truth of "well-pled factual allegations," conclusory statements are not enough. *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, 189 P.3d 344, 346 (2008).

Plaintiff argues that Blevins's knowledge should be imputed to Defendants, and bases that argument on two allegations. One is that Blevins—a Big Brothers volunteer—is the "alter ego" of Defendants. There is no allegation that Blevins intermingled assets with Defendants or used their corporate structure for some kind of fraud, as would be required for an alter ego claim. See, e.g., *JTF Aviation Holdings Inc v. CliftonLarsonAllen LLP*, 249 Ariz. 510, 514, 472 P.3d 526, 530 (2020) (requirements for alter ego liability).

The second is that Blevins was an agent of Defendants such that his knowledge is their knowledge. The Revival Law cannot reasonably be read to mean that the knowledge of a perpetrator who is an employee or volunteer is, by that fact, imputed to the organization. The statute distinguishes perpetrators from others who are not perpetrators, a clear reference to the youth and religious organizations that get sued for sexual abuse committed by their employees or volunteers. If a perpetrator's knowledge is imputed to the organization, then there would be no need for the statute to distinguish between perpetrators and others. Although there might be cases in which a perpetrator is so high up in an organization that their knowledge should be imputed, Plaintiff does not make that allegation here.

In addition to alleging knowledge of Blevins's conduct, Plaintiff alleges Defendants had more general knowledge that their program attracted sexual predators who used it to commit abuse against children. Specifically, Plaintiff cites a report revealing that the Big Brother Big Sister program attracts sexual predators. See First Amended Complaint ¶ 25. Although the report is from 1982, after the time when Plaintiff alleges he was abused, Plaintiff argues that it can be inferred that Defendants were aware of this problem before the official report came out. This

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allegation, if true, satisfies Paragraph 3(C) of the Revival Law, at least at the pleading stage. It is a sufficient factual allegation that Defendants knew of misconduct—sexual abuse by Bigs against Littles—and knew that conduct created an unreasonable risk of sexual misconduct with minors by volunteer Bigs.

Defendants argue that this kind of general knowledge is insufficient to satisfy the Revival Law. But the law uses the term “any misconduct.” Had the Legislature intended to require notice of misconduct by the particular perpetrator at issue, it would have said so.

4. The First Amended Complaint Sufficiently Alleges Common Law Claims.

Defendants also argue that Plaintiff’s allegations fail to state a claim. The First Amended Complaint sufficiently alleges common law claims against Defendants for negligence (in multiple respects) and breach of fiduciary duty. It also sufficiently alleges vicarious liability for Blevins’s intentional conduct, which includes assault, battery, and intentional infliction of emotional distress. The facts alleged are insufficient to state direct (as distinct from vicarious) claims against Defendants for intentional torts.

Plaintiff asserts counts based on criminal statutes, but those statutes do not create liability independent of common law torts. Plaintiff’s allegations based on criminal statutes fail to state a claim except to the extent the facts alleged state claims for negligence, battery, and other common law claims.

5. Plaintiff Cannot Obtain Punitive Damages.

Finally, Plaintiff’s punitive damages claim is barred. *See* Laws 2019, Ch. 259, § 3(D)(2). Plaintiff’s constitutional argument based on Arizona’s anti-abrogation clause was made for the first time at oral argument, so it will not be considered.

6. Orders.

IT IS ORDERED granting the Motion in part. All causes of action alleged except for negligence (including negligent training, supervision, retention, etc.), breach of fiduciary duty, and vicarious liability for Blevins’s intentional torts (such as assault, battery, and intentional infliction of emotional distress) are dismissed. Plaintiff’s claim for punitive damages is dismissed. In all other respects the Motion is denied.