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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 DISMISS

(Oral Argument Requested)

(Assigned to the Hon. M. Scott McCoy)

Pursuant to Ariz. R. Civ. P. 8(a), 9(f), and 12(b)(6), Defendant Big Brothers Big Sisters of America (“BBBSA”), through undersigned counsel, moves to dismiss all of Plaintiff John CD Doe’s (“Plaintiff”) claims against it on the following bases: (1) Plaintiff’s claims are barred by the statute of limitations; (2) Plaintiff’s Complaint fails to state a claim against BBBSA upon which relief can be granted; and (3) the applicability provision of A.R.S. § 12-514 that purports to “revive” Plaintiff’s claims against BBBSA violates the Arizona and United States constitutions. This motion is supported by the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTUAL BACKGROUND.

Plaintiff alleges in his Complaint that BBBSA is an organization that benefits children by, among other things, providing one-on-one mentoring programs in which “Bigs” (adults) are matched with “littles” (minors). (Complaint ¶ 9). Plaintiff alleges that in June or July 1983, BBBSA “and or” Defendant Big Brothers Big Sisters of Central Arizona (“BBBS Central Arizona”) “matched” him with Italo Arbulu (“Arbulu”) as his “Big Brother.” (Complaint, ¶¶ 33, 36). Plaintiff alleges that Arbulu was allowed to spend the night with Plaintiff and that Arbulu engaged in acts of sexual abuse against Plaintiff, including fondling, masturbation, and/or oral sexual contact with Plaintiff’s penis. (Complaint, ¶¶ 34-37). Plaintiff does not provide a date for when the alleged sexual abuse occurred, but alleges that in July 1983 when Plaintiff was nine years old, he reported to Phoenix Police that after Arbulu had been assigned to be his “Big Brother,” Arbulu began touching Plaintiff’s penis. (Complaint, ¶¶ 34-37). Based on these allegations, Plaintiff was nine years old in July 1983 and was thus born in 1973 or 1974. Therefore, at the time Plaintiff filed his Complaint (on November 18, 2020), he was either 46 or 47 years old.

Plaintiff alleges that Arbulu is a convicted sex offender (Complaint, ¶ 10), but fails to make any factual allegations to establish that at the time Arbulu was matched with Plaintiff, BBBSA had actual knowledge that Arbulu was a danger to children, such as knowing Arbulu had previously been accused of or found to have engaged in any dangerous behavior toward children, including sexual misconduct. Plaintiff also alleges that at some unspecified time he told an agent, employee, representative of BBBSA “and or” BBBS Central Arizona that “Plaintiff did not recommend Defendants match Arbulu with another child because Arbulu had touched Plaintiff’s penis.” (Complaint, ¶ 35). Plaintiff does not allege that this occurred prior to the alleged abuse of Plaintiff, which it obviously did not. Plaintiff also does not allege that the alleged abuse continued after making this statement. Plaintiff’s Complaint contains a vague legal conclusion that BBBSA “knew or should have known” that Arbulu was a danger to children before Arbulu sexually abused Plaintiff or that there was a risk to children in their

1 programs generally. (Complaint, ¶¶ 60-63, 77, 90). However, there are no facts alleged in
2 the Complaint demonstrating that BBBSA had actual knowledge of any misconduct by
3 Arbulu toward Plaintiff or any other child prior to the alleged abuse of Plaintiff.

4 Plaintiff's Complaint contains nine causes of action against BBBSA, all based on
5 Arbulu being an agent, volunteer, representative, mentor, "Big" and or employee of BBBSA.
6 (Complaint, ¶¶ 10, 42, 50, 58, 68, 97, 104-106). However, Plaintiff's Complaint does not
7 allege that BBBSA is liable to him pursuant to the doctrine of *respondeat superior* based on
8 Arbulu's conduct. Instead, Plaintiff's Complaint makes broad, general allegations about
9 BBBSA's programs in general and the alleged risk to children from sex offenders. Plaintiff's
10 Complaint fails to allege the specific facts required to state any viable claims against BBBSA.

11 **II. LEGAL ARGUMENT.**

12 **A. Plaintiff's Claims Are Barred by the Statute of Limitations.**

13 The personal injury statute of limitations in Arizona is two years. See A.R.S. § 12-
14 542. When a cause of action accrues at the time a plaintiff is under eighteen years of age, the
15 statute of limitations does not begin to run until the plaintiff turns 18 years of age. In 2019,
16 the Arizona legislature enacted A.R.S. § 12-514, which extends the statute of limitations
17 applicable to sexual abuse claims to twelve years after the plaintiff reaches the age of 18.
18 Even under this extended statute of limitations, Plaintiff's claims are time barred. The statute
19 provides in relevant part:

20 A. Notwithstanding sections 12-505, 12-511 and 12-542, an action for the
21 recovery of damages that is based on either of the following shall be
22 commenced within twelve years after the plaintiff reaches eighteen years of age
and not afterward:

23 1. An injury that a minor suffers as a result of another person's
24 negligent or intentional act if that act is a cause of sexual conduct or
25 sexual contact committed against the minor.

26 2. The failure to report pursuant to section 13-3620 sexual conduct
27 or sexual contact committed against a minor.
28

1 A.R.S. § 12-514. With this extended statute of limitations, a plaintiff would need to file a
2 complaint before he or she turns 30. Based on the allegations in the Complaint, Plaintiff was
3 either 46 or 47 at the time he filed his Complaint. Therefore, his claims against BBBSA are
4 barred as a matter of law, even under the extended statute of limitations of A.R.S. § 12-514.¹

5 **B. Plaintiff's Complaint Fails to State a Claim Upon Which Relief Can Be**
6 **Granted.**

7 When the Arizona legislature enacted A.R.S. § 12-514 in 2019, it also enacted the
8 following Applicability section (Sec. 3) that “revives” previously time-barred claims:

9 A. Section 12–514, Arizona Revised Statutes, as added by this act, applies
10 to any cause of action that either:

- 11 1. Is commenced on or after the effective date of this act.
- 12 2. Was filed before and remains pending on the effective date of this
13 act.

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

21 C. A cause of action revived pursuant to subsection B of this section may
22 be brought against a person who was not the perpetrator of the sexual conduct
23 or sexual contact if that person knew or otherwise had actual notice of any
24 misconduct that creates an unreasonable risk of sexual conduct or sexual contact
25 with a minor by an employee, a volunteer, a representative or an agent.

26 D. For a claim described in subsection B or C of this section, both of the
27 following apply:
28

¹As set forth below in Section II(C), BBBSA believes that applying this new statute
of limitations retroactively to Plaintiff's claims against it would be unconstitutional.
However, for purposes of the arguments in Section II(A) and (B), BBBSA is assuming the
statute does apply to Plaintiff's claims against it.

1 1. The plaintiff has the burden of proving the claim by clear and
2 convincing evidence.

3 2. Punitive damages may not be awarded.

4 SEXUAL EXPLOITATION—CHILDREN AND MINORS—ACTIONS AND
5 PROCEEDINGS—LIMITATION OF ACTIONS, 2019 Ariz. Legis. Serv. Ch. 259 (H.B.
6 2466). To reiterate, claims “revived” under this section against an entity “who was not the
7 perpetrator of the sexual conduct” require that the entity “knew or otherwise had actual notice
8 of any misconduct that creates an unreasonable risk of sexual conduct or sexual contact with
9 a minor by an employee, a volunteer or an agent.” The plaintiff must prove these claims with
10 “clear and convincing evidence.” Additionally, punitive damages may not be awarded for
11 these claims. Despite the revival of these types of claims by the Arizona legislature, in his
12 Complaint, Plaintiff fails to allege sufficient facts as required under Arizona law to support
13 his claims and even seeks damages that are expressly barred.

14 Arizona law is clear that a plaintiff must allege more than “mere conclusory statements
15 . . . to state a claim upon which relief can be granted.” Cullen v. Auto-Owners Ins. Co., 218
16 Ariz. 417, 419, ¶ 7, 189 P.3d 344, 346 (2008). In fact, in order to survive dismissal, a
17 plaintiff’s complaint must contain “supporting factual allegations” and not just “legal
18 conclusions” to “satisfy Arizona’s notice pleading standard under Rule 8.” Id. Further,
19 “Rule 8 does ‘not permit a trial or appellate court to speculate about hypothetical facts that
20 might entitle the plaintiff to relief.’ Instead, . . . courts are limited to considering the well-
21 pled facts and all reasonable interpretations of those facts.” Id. at 420, ¶ 14, 189 P.3d at 347
22 (internal citations omitted). Also, Ariz. R. Civ. P. 9(f) requires that “time or place” must be
23 pled for an allegation to be sufficient. Therefore, any claim that is not sufficiently pled is
24 subject to dismissal.

25 The applicability section of A.R.S. 12-514 that applies to this case requires Plaintiff
26 to allege facts in the Complaint to demonstrate that prior to Arbulu being matched with
27 Plaintiff, BBBSA “**knew or otherwise had actual notice**” of misconduct by Arbulu that
28 created an unreasonable risk of sexual conduct or sexual contact with a minor by Arbulu. The

1 applicability section requirement of actual knowledge is not limited to any specific type of
2 claim. Thus, it applies to all causes of action for personal injury asserted by Plaintiff.

3 Further, Plaintiff does not allege that BBBSA is liable to him under the theory of
4 respondeat superior, which allows a principal to be held liable for its agents' actions only if
5 the agents were acting in the course and scope of their agency at the time they injured the
6 plaintiff. See Baker ex rel. Hall Brake Supply, Inc. v. Stewart Title & Trust of Phoenix, Inc.,
7 197 Ariz. 535, 540, ¶ 17, 5 P.3d 249, 254 (App. 2000) (“In Arizona, an employer may be held
8 vicariously liable under the doctrine of *respondeat superior* for the negligent acts of its
9 employee acting within the course and scope of employment”). There are no factual
10 allegations demonstrating that Arbulu was acting in the course and scope of his employment
11 or agency with BBBSA when he allegedly sexually assaulted Plaintiff. Plaintiff’s legal
12 conclusions that Arbulu was acting in the “course and scope” of his position with BBBSA
13 are insufficient to state a claim for *respondeat superior* liability for any of his claims that
14 require this allegation.

15 For the specific reasons set forth below, none of the nine counts asserted by Plaintiff
16 in his Complaint, nor his claim for punitive damages, state a claim upon which relief can be
17 granted as to BBBSA. Thus, his Complaint should be dismissed with prejudice.

18 **1. Count 1 – Sexual Assault/Sexual Abuse/Sexual Conduct**

19 In this Count, Plaintiff alleges that Arbulu “intentionally, knowingly, recklessly, or
20 negligently engaged in sexual contact, and or sexual intercourse with Plaintiff” when Plaintiff
21 was a minor. (Complaint, ¶¶ 40-41). Plaintiff alleges that Arbulu used his position as a “Big”
22 with Defendants BBBSA “or” BBBS Central Arizona to sexually abuse Plaintiff.
23 (Complaint, ¶ 42). Plaintiff alleges that these allegations “constitute traditional negligence
24 and negligence *per se* for violation of A.R.S. § 13-3623 and other relevant statutes and laws.”
25 (Complaint, ¶ 43). A.R.S. § 13-3623 provides in relevant part:

26 A. Under circumstances likely to produce death or serious physical injury, any
27 person who causes a child or vulnerable adult to suffer physical injury or,
28 having the care or custody of a child or vulnerable adult, who causes or permits
the person or health of the child or vulnerable adult to be injured or who causes

1 or permits a child or vulnerable adult to be placed in a situation where the person
2 or health of the child or vulnerable adult is endangered is guilty of an offense
3 . . .

4 Plaintiff fails to allege that prior to Arbulu being matched with Plaintiff, BBBSA knew or
5 otherwise had actual notice of misconduct by Arbulu that created an unreasonable risk of
6 sexual conduct or sexual contact with a minor by Arbulu, such that it can be liable to him
7 under the applicability section of A.R.S. § 12-514 and/or A.R.S. § 13-3623. Indeed the only
8 mention of BBBSA in this Count is in the paragraph alleging that Arbulu was a “Big” acting
9 with actual apparent authority of BBBSA “or” BBBS Central Arizona. This is insufficient
10 to demonstrate that BBBSA had actual knowledge of any misconduct that created an
11 unreasonable risk of sexual conduct or sexual contact with a minor by Arbulu as required by
12 the applicability section of A.R.S. § 12-514. Alleging that BBBSA or another Defendant
13 was the cause of Plaintiff’s injury does not demonstrate actual knowledge. As set forth above,
14 Plaintiff also fails to sufficiently allege that BBBSA is liable to him under the doctrine of
15 *respondeat superior*. Therefore, Count 1 fails to state a claim upon which relief can be
16 granted against BBBSA and should be dismissed.

16 2. Count 2 – Negligence

17 Count 2 of Plaintiff’s Complaint is a claim for negligence. To state a claim for
18 negligence under Arizona law, a Plaintiff must demonstrate the following elements: (1) a
19 duty requiring the defendant to conform to a certain standard of care; (2) a breach by the
20 defendant of that standard; (3) a causal connection between the defendant’s conduct and the
21 resulting injury; and (4) actual damages. Plaintiff alleges in Count 2 of his Complaint that
22 “Defendants” owed Plaintiff a duty because they had a special relationship with him and that
23 they “knew or should have known” that “numerous agents, volunteers, members, Bigs,
24 mentors, employees and or agents of any kind had sexually molested children.” (Complaint,
25 ¶¶ 47-49, 63). Regarding Arbulu, Plaintiff alleges that “Defendants” “knew or should have
26 known” or “learned or should have learned” that Arbulu was a danger to children.
27 (Complaint, ¶¶ 60-61). Again, he fails to make any factual allegations showing that BBBSA
28 had actual knowledge of any misconduct of Arbulu that created an unreasonable risk of sexual

1 conduct or sexual contact with a minor by Arbulu, which is required to state a claim under
2 the applicability section of A.R.S. § 12-514. To proceed with this negligence claim, it is
3 insufficient to allege that BBBSA “knew or should of known” or “learned or should have
4 learned.” This is not actual knowledge. Therefore, Count 2 fails to state a claim upon which
5 relief can be granted against BBBSA and should be dismissed.

6 **3. Counts 3 and 4 – Negligent Supervision/Training/Retention**

7 Count 3 of Plaintiff’s Complaint is a claim of negligent supervision and training and
8 Count 4 is a claim for negligent retention. Because these claims have similar elements, they
9 will be addressed together in this section. To state a claim for negligent training under
10 Arizona law, a plaintiff must allege facts showing that the defendant’s training was deficient,
11 including alleging what training should have been provided. A plaintiff must also allege that
12 the omission of the training was the cause of the plaintiff’s injuries. See Petty v. Arizona,
13 2016 WL 4095835, 1 (D. Ariz. 2016);² Guerra v. State, 234 Ariz. 482, 489-490, 323 P.3d
14 765, 772-773 (App. 2014), vacated on other grounds 348 P.3d 423 (Ariz. 2015). To state a
15 claim for negligent supervision or retention of an employee, a plaintiff must allege facts
16 showing that an employer had reason to know its employee would commit misconduct and
17 failed to supervise him and negligently retained him. See Petty, 2016 WL 4095835 at 1;
18 Kuehn v. Stanley, 208 Ariz. 124, 130, 91 P.3d 346, 352 (App. 2004); Boomer v. Frank, 993
19 P.2d 456, 461 (Ariz. App. 1999). In addition, to state a claim for negligent training,
20 supervision, and/or retention, there must be facts alleged showing that the negligent training,
21 supervision, and/or retention was the proximate cause of the plaintiff’s injuries. See Ward v.
22 Mount Calvary Lutheran Church, 178 Ariz. 350, 357, 873 P.2d 688, 695 (App. 1994). These
23 claims typically require the defendant to have “known or should have known” of the
24

25 ²Under Ariz. R. Sup Ct. 111(d), “A party may cite a decision of a tribunal in another
26 jurisdiction, as permitted in that jurisdiction.” Additionally, under Fed. R. Civ. P. 32.1(a),
27 “A court may not prohibit or restrict the citation of federal judicial opinions, orders,
28 judgments, or other written dispositions that have been. . . designated as ‘unpublished,’ . . .
[and] issued on or after January 1, 2007.” Therefore, citations to unpublished federal court
cases in this Court are proper.

employee's wrongful behavior or need for training, etc., but under the applicability section of A.R.S. § 12-514, factual allegations that BBBSA knew or had actual notice of misconduct by Arbulu that created an unreasonable risk of sexual conduct or sexual contact with a minor by Arbulu are required and there are no such factual allegations in the Complaint. Once again, Plaintiff fails to allege actual knowledge by BBBSA of any misconduct by BBBSA as required by the applicability provision of A.R.S. § 12-514. Even without the additional requirement of the applicability provision, Plaintiff fails to allege facts to demonstrate that the alleged negligent training, supervision, and/or retention caused the alleged sexual abuse by Arbulu, nor does he allege facts to demonstrate the specific training that should have been conducted. Instead, he recites legal conclusions and vague assertions such as failing to "create, institute, and/or enforce rules, policies, procedures, and/or regulations to prevent Italo Arbulu's sexual abuse of Plaintiff." (Complaint, ¶ 73). Therefore, for all of these reasons, Counts 3 and 4 both fail to state a claim upon which relief can be granted against BBBSA and should be dismissed.

4. Count 5 – Breach of Fiduciary Duty

Count 5 of Plaintiff's Complaint is a claim for breach of fiduciary duty. Under Arizona law, "[a] fiduciary relationship has been described as 'something approximating business agency, professional relationship, or family tie impelling or inducing the trusting party to relax the care and vigilance he would ordinarily exercise.'" Taeger v. Catholic Family and Cmty. Servs., 196 Ariz. 285, 290, ¶ 11, 995 P.2d 721, 726 (App. 1999). To allege a breach of a fiduciary duty, a plaintiff must allege facts to show the fiduciary relationship creating a duty, the breach of the duty owed, causation and resulting damages. See Surowiec v. Cap. Title Agency, Inc., 790 F. Supp. 2d 997, 1004 (D. Ariz. 2011), citing Smethers v. Campion, 210 Ariz. 167, 170, ¶ 12, 108 P.3d 946, 949 (App. 2005). In his Complaint, Plaintiff simply recites the legal conclusion that "Defendants" had "a special relationship" with Plaintiff, breached the duty, and caused Plaintiff damages. (Complaint, ¶¶ 82-84). These legal conclusions are not factual allegations that demonstrate the elements of a claim for breach of fiduciary duty. For example, there are no factual allegations that demonstrate

any alleged breach of a duty by BBBSA was the cause of Arbulu's alleged sexual assault of Plaintiff. Plaintiff also fails to allege facts demonstrating any knowledge or actual notice on the part of BBBSA of misconduct by Arbulu that created an unreasonable risk of sexual conduct or sexual contact with a minor by Arbulu. This allegation is required to proceed with a claim against BBBSA under the applicability provision of A.R.S. § 12-514. Therefore, for all of these reasons, Count 5 fails to state a claim upon which relief can be granted against BBBSA and should be dismissed.

5. Count 6 – Intentional Infliction of Emotional Distress

Count 6 is a claim for intentional infliction of emotional distress. To state a claim for intentional infliction of emotional distress under Arizona law, a plaintiff must allege facts demonstrating:

- (1) that the defendant's conduct was "extreme" and "outrageous;"
- (2) that the defendant either intended to cause emotional distress or recklessly disregarded the near certainty that such distress would result from his conduct; and
- (3) that severe emotional distress in fact occurred as a result of the defendant's conduct.

Citizen Publ'g Co. v. Miller, 210 Ariz. 513, 516, ¶ 11, 115 P.3d 107, 110 (2005). With respect to the first element, a plaintiff must allege facts demonstrating that the defendant's conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." Johnson v. McDonald, 197 Ariz. 155, 160, ¶ 23, 3 P.3d 1075, 1080 (App. 1999). Under this standard, even a defendant's "unjustifiable" conduct does not necessarily rise to the level of "atrocious" and "beyond all possible bounds of decency" that would cause an average member of the community to believe it was "outrageous." Nelson v. Phoenix Resort Corp., 181 Ariz. 188, 199, 888 P.2d 1375, 1386 (App. 1994). The "conduct necessary to sustain an intentional infliction claim falls at the very extreme edge of the spectrum of possible conduct." Watts v. Golden Age Nursing Home, 127 Ariz. 255, 258, 619 P.2d 1032, 1035 (1980). Furthermore, the court determines whether the acts at issue are

1 sufficiently outrageous to state a claim for relief. Johnson, 197 Ariz. at 160, 3 P.3d at 1080.
2 To sufficiently allege the second element, a plaintiff must allege facts showing that the
3 defendant acted with intent to cause emotional distress or recklessly disregarded the near
4 certainty that emotional distress would result from his conduct. Wallace v. Casa Grande
5 Union High School District, 184 Ariz. 419, 428, 909 P.2d 486, 495 (App. 1995). Finally, to
6 sufficiently allege the third element, a plaintiff must allege facts showing that the defendant's
7 conduct "actually caused" him to suffer distress "so severe that no reasonable man could be
8 expected to endure it." Pankratz v. Willis, 155 Ariz. 8, 17, 744 P.2d 1182, 1191 (App. 1987).
9 In addition to these elements, under the applicability section of A.R.S. § 12-514, Plaintiff
10 must allege facts demonstrating BBBSA knew or had actual notice of misconduct by Arbulu
11 that created an unreasonable risk of sexual conduct or sexual contact with a minor by Arbulu,
12 in order to be held liable for intentional infliction of emotional distress. Plaintiff's Complaint
13 simply recites the legal conclusion that "Defendants' wrongful conduct, including sexual
14 abuse, conspiracy to conceal sexual abuse, failure to report Italo Arbulu's sexual abuse of
15 children" etc. were extreme and outrageous. He does not allege any specific actions by
16 BBBSA that were extreme and outrageous. Nor does he allege facts demonstrating that
17 BBBSA acted with intent to cause emotional distress or recklessly disregarded the near
18 certainty that emotional distress would result from its conduct. Finally, he fails to allege that
19 BBBSA's conduct caused him severe emotional distress. Yet, again, no facts are alleged to
20 demonstrate that BBBSA had knowledge or actual notice of misconduct by Arbulu that
21 created an unreasonable risk of sexual conduct or sexual contact with a minor by Arbulu.
22 Therefore, for all of these reasons, Count 6 fails to state a claim upon which relief can be
23 granted against BBBSA and should be dismissed.

24 **6. Count 7 – Endangerment**

25 Count 7 purports to be a claim for Endangerment. Counsel for BBBSA could not find
26 any authority establishing a civil cause of action for endangerment under Arizona law. If
27 Plaintiff is attempting to state a claim for negligence *per se* based on the criminal
28 endangerment statute, for the same reasons set forth above in Section II(B)(1), he fails to state

a claim upon which relief can be granted. In his Complaint, Plaintiff alleges that “Defendants knew, should have known and or were deliberately ignorant that Italo Arbulu posed a significant risk of injury to children, including Plaintiff” and that they acted “individually or in concert with each other.” (Complaint, ¶¶ 91-93). Even if “endangerment” was a civil cause of action under Arizona law, Plaintiff’s allegation that BBBSA “should have known” or was “deliberately ignorant” is not the same as “knowledge” or “actual notice.” Plaintiff has failed to allege facts to establish that BBBSA had knowledge or actual notice of misconduct by Arbulu that created an unreasonable risk of sexual conduct or sexual contact with a minor by Arbulu. Further, to state a claim for acting in concert, a plaintiff must allege facts demonstrating that two parties

[E]nter[ed] into a conscious agreement to pursue a common plan or design to commit an intentional tort and actively taking part in that intentional tort. Acting in concert does not apply to any person whose conduct was negligent in any of its degrees rather than intentional. A person’s conduct that provides substantial assistance to one committing an intentional tort does not constitute acting in concert if the person has not consciously agreed with the other to commit the intentional tort.

A.R.S. § 12-2506(F)(1) (emphasis added); see also Mein ex rel. Mein v. Cook, 219 Ariz. 96, 99, 193 P.3d 790, 793 (App. 2008). There are no facts alleged in the Complaint demonstrating that BBBSA and BBBS Central Arizona entered into a conscious agreement to commit an intentional tort. Therefore, for all of these reasons, Count 7 fails to state a claim upon which relief can be granted against BBBSA and should be dismissed.

7. Count 8 – Child Abuse

Count 8, like Count 1, alleges a violation of a criminal statute, A.R.S. § 13-3623, by “Defendants.” For the same reasons set forth above in Section(B)(1), Plaintiff fails to allege facts demonstrating BBBSA had knowledge or actual notice of misconduct by Arbulu that created an unreasonable risk of sexual conduct or sexual contact with a minor by Arbulu. Additionally, as set forth above, Plaintiff has not sufficiently pled that BBBSA is liable to him under the doctrine of *respondeat superior*. Therefore, Count 8 fails to state a claim upon which relief can be granted against BBBSA and should be dismissed.

1 **8. Count 9 – Assault**

2 To prove a claim for assault, a plaintiff must show that the defendant intentionally
3 caused a harmful or offensive contact with the plaintiff to occur. Johnson v. Pankratz, 196
4 Ariz. 621, 623, 2 P.3d 1266, 1268 (App. 2000). In the Complaint, Plaintiff does not allege
5 that BBBSA committed an assault against him, but that Arbulu did and BBBSA is liable for
6 it because Arbulu was its “agent, representative, mentor, Big and/or employee.” (Complaint,
7 ¶¶ 104-107). As set forth above, Plaintiff has not sufficiently pled that BBBSA is liable to
8 him under the doctrine of *respondeat superior*. Under the applicability provision of A.R.S.
9 § 12-514, to be held liable as a non-perpetrator for this claim, Plaintiff must allege facts
10 demonstrating BBBSA had knowledge or actual notice of misconduct by Arbulu that created
11 an unreasonable risk of sexual conduct or sexual contact with a minor by Arbulu. Therefore,
12 Count 9 fails to state a claim upon which relief can be granted against BBBSA and should be
13 dismissed.

14 **9. Plaintiff’s Claim for Punitive Damages**

15 In his Complaint, Plaintiff seeks “punitive damages or exemplary damages to be set
16 by a jury in an amount sufficient to punish Defendants for their outrageous conduct and to
17 make an example out of them so that others do not engage in similar conduct in the future.”
18 (See Complaint, pp. 23-24). However, the applicability section of A.R.S. § 12-514 expressly
19 bars a plaintiff from seeking punitive damages against an entity that was not the perpetrator
20 of the alleged sexual assault. Thus, Plaintiff’s claim for punitive damages is barred and must
21 be dismissed.

22 **C. The Applicability Provision of A.R.S. § 12-514 that Purports to “Revive”**
23 **Plaintiff’s claims against BBBSA Violates the Arizona Constitution.**

24 For the reasons set forth above, Plaintiff’s Complaint fails to state a claim upon which
25 relief can be granted under the applicability provision of A.R.S. § 12-514 that purports to
26 revive his claims, as well as other reasons. However, should the Court determine that any of
27 Plaintiff’s causes of action do state a claim upon which relief can be granted, the claims are
28 barred because the applicability provision of A.R.S. § 12-514 violates due process and is a

1 prohibited ex post facto law. Under A.R.S. § 12-505(A), “An action barred by pre-existing
2 law is not revived by amendment of such law enlarging the time in which such action may be
3 commenced.” Further, Ariz. Const. art. II, § 4 provides, “No person shall be deprived of life,
4 liberty, or property without due process of law,” and Ariz. Const. art. II, § 25 states, “No bill
5 of attainder, ex-post-facto law, or law impairing the obligation of a contract, shall ever be
6 enacted.”

7 The Arizona Supreme Court has recognized that a statute may not “attach new legal
8 consequences to events completed before its enactment.” San Carlos Apache Tribe v.
9 Superior Court ex rel. Cty. of Maricopa, 193 Ariz. 195, 205 ¶ 15, 972 P.2d 179, 189 (1999),
10 citing Landgraf v. USI Film Prods., 511 U.S. 244 (1994)). In San Carlos, the Arizona
11 Supreme Court specifically recognized that civil ex post facto laws violate the constitution.
12 As applied to the water rights legislation at issue in the case, the court concluded, “[T]he legal
13 effect of acts that resulted in acquisition and priority of water rights cannot be changed by
14 subsequent legislation. Any implementation of Section 24’s retroactive intent to affect vested
15 substantive rights to water would violate the due process guarantee of article II, section 4 of
16 the Arizona Constitution.” Id. Indeed, even when a law specifically expresses the legislative
17 intent to apply both substantive and procedural changes retroactively, the Arizona Supreme
18 Court holds such statutes violate due process. Id. “That the Legislature intended the statutes
19 to apply retroactively does not end our analysis.” Id. Whether the legislature intended or not
20 to “revive” causes of action, legislation reviving previously-barred causes of action violates
21 the rule of law and due process. “In other words, legislation may not disturb vested
22 substantive rights by retroactively changing the law that applies to completed events. . . A
23 vested right ‘is actually assertable as a legal cause of action or defense or is so substantially
24 relied upon that retroactive divestiture would be manifestly unjust.’” Id.³ Similarly, courts

25
26 ³Reviving barred causes of action is far different from a procedural requirement such
27 as the procedure and necessity for service of a notice of claim, see DeVries v. State, 219 Ariz.
28 314, 318-319, ¶¶ 9-10, 198 P.3d 580, 584-585 (2008), or the admissibility of evidence at trial,
see State v. Carver, 227 Ariz. 438, 442-45, ¶¶ 15-29, 258 P.3d 256, 260-263 (App. 2011).
For example, in Chevron Chemical Co. v. Superior Court, 131 Ariz. 431 (1982), the court

1 in other states have specifically ruled that once a statute of limitations has run, a defendant
2 has “a vested right that cannot be taken away or impaired by subsequent legislation.”
3 Jefferson Cty. Dep’t of Soc. Servs v. D.A.G., 607 P.2d 1004, 1006 (Colo. 1980); see also
4 Mendez v. Progressive Express Ins. Co., 35 So. 3d 873, 878 (Fla. 2010) (“even where the
5 Legislature has expressly stated that a statute will have retroactive application, this Court will
6 reject such an application if the statute impairs a vested right, creates a new obligation, or
7 imposes a new penalty”); Doe v. Roman Catholic Diocese, 862 S.W.2d 338, 341 (Mo. 1993)
8 (holding that once the original statute of limitations expires, the defendant has acquired a
9 vested right to be free from suit under Missouri’s Constitution).

10 Here, the applicability provision of A.R.S. § 12-514, as set forth in HB 2466 purports
11 to revive decades old causes of action, previously long barred by the statute of limitations.
12 Courts considering similar statutes reviving claims for sexual abuse after the statute of
13 limitations has passed have recognized that a statute of limitations is a substantive vested due
14 process right and could not apply retroactively under various state’s laws. For example, in a
15 recent case, the Utah Supreme Court held that there is a due process right to retain a statute
16 of limitations defense after a plaintiff’s claim has expired under existing law. See Mitchell
17 v. Roberts, 469 P.3d 901, 903 ¶¶ 5-6 (Utah 2020); see also Kelly v. Marcantonio, 678 A.2d
18 873, 883 (R.I. 1996) (holding that the due process clause of the Rhode Island constitution
19 bars the legislature from enacting a statute that revives a cause of action for sexual assault
20 that was already time-barred at the time the statute is enacted); Frideres v. Schiltz, 540
21 N.W.2d 261, 267 (Iowa 1995) (holding that statute amending the statute of limitations for
22 claims of sexual abuse could not apply retroactively under Iowa law).

23 In the Mitchell case, the Utah Supreme Court quoted Thomas Cooley’s treatise on
24 constitutional limitations stating, “It is certain that he who has satisfied a demand cannot have

25 _____
26 held that it was not a violation of due process for the legislature to change who had the right
27 to file the cause of action under worker’s compensation law (worker or the insurer), because
28 in either case the defendant was still liable to respond to a claim for damages within the two-
year statute of limitations period. In contrast, the statute at issue here is far different than a
procedural change because it revives claims that had previously been completely barred.

1 it revived against him, and he who has become released from a demand by the operation of
2 the statute of limitations is equally protected.” Id. at 905, ¶ 14, quoting Thomas M. Cooley,
3 A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the
4 States of the American Union 454 (6th ed. 1890). The court further explained:

5 We hold that the Utah Legislature is constitutionally prohibited from
6 retroactively reviving a time-barred claim in a manner depriving a defendant of
7 a vested statute of limitations defense. This principle is well-rooted in our
8 precedent, a point meriting respect as a matter of *stare decisis*. It is also
9 confirmed by the extensive historical material presented to us by the parties in
10 their supplemental briefs, which shows that the founding-era understanding of
11 “due process” and “legislative power” forecloses legislative enactments that
12 vitiate a “vested right” in a statute of limitations defense.

13 . . .

14 Our laws are written down for a reason. And a key reason is to establish clear,
15 fixed limits that the public may rely on—unless and until the law is repealed or
16 amended by established procedures for doing so. The people of Utah retain the
17 power to amend the Utah Constitution to alter the legislature’s authority in this
18 area if they see fit. But the document as it stands (and as originally understood)
19 forecloses the legislature’s power to enact legislation that retroactively vitiates
20 a ripened statute of limitations defense.

21 Id. 903-904, ¶¶ 5-9. The Utah Supreme Court’s sound reasoning is in agreement with
22 Arizona’s law and early history. The Arizona Supreme Court frequently cites Cooley’s
23 treatise on constitutional limitations for support in ruling on constitutional issues. See, e.g.,
24 Citizens Clean Elections Comm’n v. Myers, 196 Ariz. 516, 521, ¶ 18, n.2, 1 P.3d 706, 711
25 (2000); Hudson v. Kelly, 76 Ariz. 255, 263, 263 P.2d 362, 367 (1953); Consol. Arizona
26 Smelting Co. v. Egich, 22 Ariz. 543, 551, 199 P. 132, 134–35 (1920); Clark v. Boyce, 20
27 Ariz. 544, 555, 185 P. 136, 141 (1919). Therefore, because the due process clause and ex
28 post facto law clause of the Arizona constitution prohibit the Arizona legislature from passing
statutes that retroactively revive claims, the applicability section of A.R.S. § 12-514 is
unconstitutional and the Court should also dismiss Plaintiff’s Complaint against BBBSA on
that basis.

1 Additionally, A.R.S. § 12-505(a), which provides, “An action barred by pre-existing
2 law is not revived by amendment of such law enlarging the time in which such action may be
3 commenced,” has been a part of Arizona law since territorial days. City of Tucson v. Clear
4 Channel Outdoor, 209 Ariz. 544, 548-549 (2005). The territorial legislature recognized this
5 limiting principle and codified the precursor to A.R.S. § 12-505. Id. Therefore, the principle
6 of Arizona law that a previously-barred action cannot be revived by a statute of limitation is
7 a principle older than the state itself.

8 Finally, federal courts have held that the ex post facto clause of the United States
9 Constitution also prohibits previously time-barred claims from being revived by legislation.
10 See Stogner v. California, 539 U.S. 607, 610-611, 615 (2003) (holding that a criminal statute
11 extending statute of limitations in sexual abuse cases did not apply retroactively because that
12 would violate the ex post facto clause of the United States Constitution); Chenault v. U.S.
13 Postal Service, 37 F.3d 535, 539 (9th Cir. 1994) (“a newly enacted statute that lengthens the
14 applicable statute of limitations may not be applied retroactively to revive a plaintiff’s claim
15 that was otherwise barred under the old statutory scheme because to do so would ‘alter the
16 substantive rights’ of a party and increase a party’s liability”). In Stogner, the United States
17 Supreme Court stated the following regarding the importance of statutes of limitations:

18 Significantly, a statute of limitations reflects a legislative judgment that, after a
19 certain time, no quantum of evidence is sufficient to convict [or hold a party
20 liable]. And that judgment typically rests, in large part, upon evidentiary
21 concerns—for example, concern that the passage of time has eroded memories
22 or made witnesses or other evidence unavailable. Indeed, this Court once
described statutes of limitations as creating “a presumption which renders proof
unnecessary.”

23 539 U.S. at 615-16 (internal citations omitted). In fact, it is also unconstitutional to
24 retroactively apply the amendment of a statute that removes a tolling period of a statute of
25 limitations because doing so would affect a plaintiff’s substantive rights. See TwoRivers v.
26 Lewis, 174 F.3d 987, 993-996 (9th Cir. 1999) (holding that the amendment of a tolling statute
27 to remove the provision that a prisoner’s claims were tolled until he knew or had reason to
28 know he could file suit could not be applied retroactively to bar a previously allowed cause

1 of action). Therefore, both state and federal courts recognize that it is unconstitutional to
2 apply retroactively any legislation that changes a statute of limitations because doing so
3 affects the substantive rights of the parties.

4 Therefore, because the due process provision and prohibition against ex post facto
5 laws in the Arizona Constitution require that substantive changes to the law may only be
6 prospective, any legislation that purports to revive previously time-barred claim is
7 unconstitutional. While the Arizona legislature can take action to amend statutes of limitation
8 for future actions, it cannot legislate out the rule of law and due process for past time-barred
9 actions. The recently enacted statute of limitations in A.R.S. § 12-514 is valid for prospective
10 claims, but the applicability provision that attempts to “revive” old claims for a limited time
11 period is unconstitutional and violates A.R.S. § 12-505(A). It is fundamentally unfair and
12 unfairly prejudicial to BBBSA to require it to defend a case in which the alleged abuse
13 occurred over 37 years ago. Therefore, Plaintiff’s Complaint should also be dismissed
14 because the applicability provision of A.R.S. § 12-514 is unconstitutional.

15 **III. CONCLUSION.**

16 For the reasons set forth above, all of Plaintiff’s claims against BBBSA should be
17 dismissed with prejudice and Judgment entered in favor of BBBSA.

18 DATED this 12th day of April, 2021.

19
20 BERKE LAW FIRM, PLLC

21
22 By /s/ Jody C. Corbett
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24 Jody C. Corbett
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26 The foregoing document was e-filed
27 with the Clerk of Court this 12th day
28 of April, 2021, and a copy e-served via
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