Vermont Superior Court
Filed 06/10/22
Caledonia Unit

STATE OF VERMONT

SUPERIOR COURT — **CIVIL DIVISION**
Caledonia Unit — **Docket No. 82-5-20 Cacv**

AARON BIHARI,
Plaintiff,

v. ***FILED UNDER SEAL***

SHAMBHALA USA and JOHN WEBER,
Defendants

Defendants' Motions to Dismiss: Constitutionality of 12 V.S.A. § 522

Plaintiff Aaron Bihari claims that in 1983, when he was 15 years old, he attended a retreat at the Karme Choling Meditation Center, operated by Defendant Shambhala USA, Inc., in Barnet, Vermont, at which Defendant John Weber, an adult Shambhala employee, sexually assaulted him. Mr. Bihari alleged claims for "child sexual abuse" against both defendants (count 1) and "public and private nuisance" (count 2) and "gross negligent supervision and retention" (count 3) against Shambhala alone.

Shambhala filed a motion to dismiss, arguing that 12 V.S.A. § 522, recently amended to eliminate the statute of limitations retroactively for childhood sexual or physical abuse, violates the Due Process Clause of the Vermont Constitution insofar as it resurrects barred claims. Vt. Const. ch. I, art. 4. There is no dispute that under previous versions of the statute, Mr. Bihari's sexual abuse claims would have been barred by the time he filed this suit. It separately argued that each count should be dismissed for other reasons. The court proceeded to address the non-constitutional issues first and deferred ruling on the constitutional issue because, depending on the outcome of the motion to dismiss on the non-constitutional issues, it may or may not have been necessary to provide the State an opportunity to intervene on the constitutional issue pursuant to V.R.C.P. 24(d). The court has dismissed the nuisance claims but declined to dismiss the other claims on the non-constitutional bases argued. Thus, the remaining claims in the case are the child sexual abuse claims against both Defendants, and the gross negligent supervision claim against Shambhala.

Mr. Weber then filed his own motion to dismiss count 1, adopting Shambhala's constitutional argument, and the State has intervened in support of the constitutionality of § 522. The constitutional question now has been fully briefed by all parties, and the court heard oral argument on May 2, 2022. The court rules as follows.

Vermont first adopted a statute of limitations specific to childhood sexual abuse in 1990. 1989, No. 292 (Adj. Sess.), § 2; 12 V.S.A. § 522. Before that, such claims would have fallen under the 3-year limitation period for personal injuries, subject to the discovery rule. See 12 V.S.A. § 512. Among other things, the 1990 legislation extended the limitations period to 6 years, subject to the discovery rule, and adopted a specific tolling provision at 12 V.S.A. § 560,

which remains in effect, as follows: "When a person entitled to bring an action for damages as a result of childhood sexual abuse is unable to commence the action as a direct result of the damages caused by the sexual abuse, the period during which the person is incapacitated shall not be taken as a part of the time limited for commencement of the action."

The 1990 legislation also had retroactive effect, as follows: 12 V.S.A. § 560 applied in all cases filed on or after the effective date of Act 292, and the new limitations statute "shall apply to all causes of action commenced on or after the effective date of this act, so long as either the act of sexual abuse or the discovery that the injury or condition was caused by the act of sexual abuse occurred on or after July 1, 1984." 1989, No. 292 (Adj. Sess.), § 4.

In 2019, the legislature dropped the limitation period altogether, permitting suits "at any time." 2019, No. 37, § 1. This legislation added new subsection (d), making it fully retroactive, but with a limitation on claims against *entities* that would have been barred previously, as follows:

> Notwithstanding 1 V.S.A. § 214, this section shall apply retroactively to childhood sexual abuse that occurred prior to the effective date of this act [July 1, 2019], irrespective of any statute of limitations in effect at the time the abuse occurred. In an action based on childhood sexual abuse that would have been barred by any statute of limitations in effect on June 30, 2019, damages may be awarded against an entity that employed, supervised, or had responsibility for the person allegedly committing the sexual abuse only if there is a finding of gross negligence on the part of the entity.

12 V.S.A. § 522(d). In 2021, § 522 was amended to also apply to claims of "childhood physical abuse." 2021, No. 26, § 1.

There is no disagreement among the parties that this case was filed in a timely manner under § 522 against Mr. Weber and, subject only to the gross negligence provision, against Shambhala. That is, there is no dispute as to the interpretation of § 522 or its effect here if it is not found to be unconstitutional.

Defendants characterize § 522 as unfairly "reviving" ancient claims against them that had long been barred by the limitations period previously in effect. They claim that this upsets their settled expectations and violates their *right* to no longer be sued, thus violating their Vermont constitutional right to due process. Vt. Const. ch. I, art. 4; see also *Sturgis v. Hull*, 48 Vt. 302, 307 (1876) (noting that Vermont has "no constitutional provision against retrospective legislation"). They raise no similar issue under the U.S. Constitution, which has given rise to precedent unfavorable to their position. Their legal argument, substantially, is as follows: U.S. Supreme Court precedent that can be read to permit the revival of previously time-barred civil claims is poorly decided, has never been applied to a statute so broad as § 522, and the court should not apply that law here. Instead, they argue that the court should adopt recent case law from other states, particularly Utah, rejecting the retroactive resuscitation of barred claims.

Defendants purport to bring their constitutional challenge both facially and as applied to

them, but it is really an as-applied challenge. "In a facial challenge, a litigant argues that 'no set of circumstances exists under which [a statute or regulation] [c]ould be valid.' . . . In an as-applied challenge, however, a party claims that a statute or regulation is invalid as applied to the facts of a specific case." *In re Mt. Top Inn & Resort*, 2020 VT 57, ¶ 22, 212 Vt. 554 (citations omitted). Defendants do not argue that § 522 is unconstitutional in all circumstances, which would include, for example, a claim brought the day after a sexual assault occurred. They argue that it is unconstitutional as applied to them because the claims against them had been barred under prior law. That is an as-applied challenge.[1]

As the Vermont Supreme Court has explained, "statutes are presumed to be constitutional and are presumed to be reasonable. We have often observed that the proponent of a constitutional challenge has a very weighty burden to overcome." *Badgley v. Walton*, 2010 VT 68, ¶ 20, 188 Vt. 367 (citations omitted).

The court begins with a review of federal case law because there is no Vermont Supreme Court decision fully on point, and Article 4 is "equivalent to the federal Due Process Clause." *Quesnel v. Town of Middlebury*, 167 Vt. 252, 258 (1997) (also noting, however, that Article 4 does not create substantive rights).

The U.S. Supreme Court addressed the matter presented here conclusively in *Campbell v. Holt*, 115 U.S. 620 (1885). Texas had suspended its statute of limitations for civil suits during the Civil War. In 1866, it lifted the suspension, and a limitations period began to run against a claim possessed by Malvina Stamps until it became barred. Texas then adopted a constitutional provision removing the bar of the limitations statute "until the acceptance of this constitution by the United States congress," which was construed to apply even if the bar had earlier become "complete." *Id*. at 621–22. Defendants "insisted that the bar of the statute, being complete and perfect, could not, as a defense, be taken away by this constitutional provision, and that to do so would violate that part of the fourteenth amendment to the constitution of the United States which declares that no state shall 'deprive any person of life, liberty, or property without due process of law.'" *Id*. at 622.

The Court found no due process problem with the "revival" of the claim before it. It began by distinguishing between a property claim, for which the passage of time may vest legal rights in the one in possession (e.g., adverse possession), from a claim of breach of a promise to pay, for which a limitations statute does not "destroy the right" but merely "bars the remedy." *Id*. at 624. "'The statute of limitations only disqualifies the plaintiff to recover a debt by suit if the defendant rely on time in his plea. It is a personal privilege, accorded by law for reasons of public expediency; and the privilege can only be asserted by plea.'" *Id*. 624–25 (citation omitted). When the statutory impediment to a remedy dissolves, the underlying right that was never extinguished may be asserted. The Court expressly dismissed the argument that the bar, once complete, becomes a vested right to not be sued: "We certainly do not understand that a right to defeat a just debt by the statute of limitations is a vested right, so as to be beyond

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[1] The difference has no impact on Defendants' legal arguments or the court's ruling. It merely indicates the narrower scope of relief that would be available in the event of a successful challenge. See *In re Mt. Top Inn & Resort*, 2020 VT 57, ¶ 22.

legislative power in a proper case. The statutes of limitation, as often asserted, and especially by this court, are founded in public needs and public policy,-are arbitrary enactments by the law-making power." *Id*. at 628 ("No man promises to pay money with any view to being released from that obligation by lapse of time. It violates no right of his, therefore, when the legislature says time shall be no bar, though such was the law when the contract was made." Thus, "no right is destroyed when the law restores a remedy which had been lost.").[2]

The Court has never wavered from its holding in *Campbell*. See *International Union of Elec., Radio and Mach. Workers, AFL-CIO, Local 790*, 429 U.S. 229, 243 (1976) (explaining that *William Danzer* is not properly interpreted to overturn *Campbell*); *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 311–12 (1945) ("In [*Campbell*], this Court held that where lapse of time has not invested a party with title to real or personal property, a state legislature, consistently with the Fourteenth Amendment, may repeal or extend a statute of limitations, even after right of action is barred thereby, restore to the plaintiff his remedy, and divest the defendant of the statutory bar. This has long stood as a statement of the law of the Fourteenth Amendment, and we agree with the court below that its holding is applicable here and fatal to the contentions of appellant."); *William Danzer & Co. v. Gulf & S.I.R. Co*., 268 U.S. 633, 636–37 (1925) (discussing *Campbell*; noting that it did not apply to the facts of the case); *Doe v. Hartford Roman Catholic Diocesan Corp*., 119 A.3d 462, 501 (Conn. 2015) ("The rule of *Campbell* and *Chase Securities Corp*., namely, that there is no absolute vested right in a statute of limitations defense absent entry of a final judgment, remains controlling as a matter of federal due process.").

The court is not bound by federal case law when interpreting the Vermont Constitution. See *State v. Morris*, 165 Vt. 111, 126–27 (1996) ("We are a sovereign state, and this Court is entitled to take issue with any constitutional decision of the United States Supreme Court, regardless of whether our constitution provides the same or a different text. Like us, the Supreme Court hands down its decision on paper, not stone tablets."). Nevertheless, due process is not an area where the Vermont Supreme Court historically has seen much reason to depart from federal precedent and, more importantly, the court sees no compelling reason to do so in this case.

Campbell's holding that a limitations bar, once complete, does not establish a vested right in its beneficiary makes good sense and is persuasive. No limitations statute is intended to reward a tortfeasor with a new right anymore than it is intended to punish the tort victim by taking his away. It serves as a *legislated* bar to a remedy only and for other reasons. As the U.S. Supreme Court has described:

> Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not

[2] Two justices dissented on the theory that a statutory bar, once complete, operates as a vest right.

> through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a 'fundamental' right or what used to be called a 'natural' right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.

Chase Securities Corp. v. Donaldson, 325 U.S. 304, 314 (1945). The Vermont Supreme Court has been clear that, as a matter of the common law, limitations statutes bar remedies; they do not create rights. See *Stewart v. Darrow*, 141 Vt. 248, 252 (1982) (explaining that relevant distinctions are collapsed and irrelevant when, unlike here, 1 V.S.A. § 214 applies).

The court perceives no basis for finding a vested right in this context despite a tortfeasor's vague sense of unfairness that something has been taken away when a barred claim again becomes viable. Tort victims no doubt suffer a corresponding sense of unfairness when a limitations statute ultimately precludes their opportunity for a remedy even if they had a "reasonable" opportunity to bring them beforehand. These are policy matters fit for the legislature, not vested rights. With no vested right to not be sued, Defendants offer no grounds upon which to predicate their asserted due process interest but policy arguments favoring a different outcome.

To the extent that Defendants would claim to have some sort of settled expectation or reliance interest, it is not so. To paraphrase the U.S. Supreme Court, no man sexually assaults a child with any view to being released from liability by lapse of time. To the extent that the expectation or reliance would be claimed to arise only after the bar had become complete, any such expectation or reliance is necessarily based on guesswork because, under the discovery rule and the tolling provision at 12 V.S.A. § 560, no tortfeasor could reliably calculate the date of the bar.

To the extent that Defendants simply complain that, with such old claims, there could be prejudice to them due to the loss or destruction of evidence, faded memories, etc., the court notes that this is an issue of age rather than retroactivity, and it would be as true had there never been any applicable limitations statute in the first place.[3] Defendants do not argue that a regime in which a limitations statute had never existed at all would for that reason violate any due process right of theirs, and the court is aware of no such authority.[4]

To the extent that Defendants would seek to apply ex post facto case law to this case, the court notes that it arises under a different constitutional provision that bars retroactive

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[3] At this point, Defendants have not attempted to prove any such prejudice.

[4] Old claims not otherwise subject to a limitations statute may be subject to the affirmative defense of laches. See *Preston v. Chabot*, 138 Vt. 170, 172 (1980) ("Laches involves prejudice to the adverse party, actual or implied, resulting from plaintiffs' delay in asserting their rights."); see also *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, 137 S. Ct. 954, 961 (2017) ("Laches is a gap-filling doctrine, and where there is a statute of limitations, there is no gap to fill."). The parties have not briefed the issue, and the court therefore takes no position on whether laches is properly available as a defense in this case.

punishment. Punishment within the contemplation of the Ex Post Facto Clause is not at issue here.

Defendants also rely heavily on a recently decided Utah case, *Mitchell v. Roberts*, 469 P.3d 901 (Utah 2020) that addresses essentially the same issue presented here. *Mitchell*, however, is predicated on Utah case law conclusively establishing that a statutory bar to filing suit in fact gives rise to a *vested right* to not be sued, with little examination of why that should be so other than the doctrine of stare decisis. See *id*. at 904–08. Vermont simply lacks the body of historical case law that Utah evidently has.

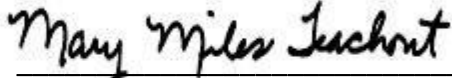
Applying 12 V.S.A. § 522 retroactively to Defendants in these circumstances does not violate Article 4.

ORDER

For the foregoing reasons, Defendants' motions to dismiss on their claims of unconstitutionality are *denied*.

If the parties have not submitted a stipulation to the terms of a pretrial scheduling order by July 1, 2022, the clerk shall set a scheduling status conference.

Electronically signed pursuant to V.R.E.F. 9(d) on June 10, 2022 at 2:47 PM.



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Mary Miles Teachout
Superior Court Judge