DISTRICT COURT, ARAPAHOE COUNTY, COLORADO Court Address: 7325 S POTOMAC ST, CENTENNIAL, CO, 80112	DATE FILED: September 21, 2022 3:02 PM CASE NUMBER: 2022CV30137
Plaintiff(s) CYDNY NORRIS v. **Defendant(s)** CHERRY CREEK SCHOOL DISTRICT et al.	⚠ **COURT USE ONLY** ⚠ Case Number: 2022CV30137 Division: 21 Courtroom:

Order Denying Defendant Cherry Creek School District's Motion to Dismiss Plaintiff's Complaint Pursuant to CRCP 12(b)(5)

THE COURT, being duly advised in these premises after consideration of Defendant Cherry Creek School District's Motion To Dismiss Plaintiff's Complaint Pursuant To C.R.C.P. 12(B)(5) (the Motion), the response and reply thereto hereby finds and orders as follows:

1. Plaintiff, Cydny Norris, brings one claim against the School District under the Child Sexual Abuse Accountability Act, C.R.S. Â§ 13-20-1201, et seq. (the CSAAA) alleging that she was the victim of sexual assault as a minor perpetrated by a guidance counselor while she attended school and related activities organized and controlled by the Cherry Creek School District.

2. The Motion states:

a. The Complaint fails to state a plausible claim for relief because:

(1) The Complaint does not allege that her English teacher - the person she confided in about the sexual assault against her as a minor was a person whose knowledge can be imputed to the School District;

(2) The Complaint only states conclusory allegation that the School District had "full knowledge" and gave "consent" to the behavior she reported; and,

(3) The Complaint does not allege that the School District was on notice that the perpetrator posed a risk before the misconduct took place.

b. The CSAAA violates the Colorado Constitution Art II, § 11 which prohibits a law which is "retrospective in its operation" because:

(1) It eliminates a limitation of actions which is a vested right;

(2) It waives governmental immunity which is a substantive change to the law; and,

(3) It creates a new duty not recognized in common law.

3. The Response states:

a. The Complaint is plausible because it alleges:

(1) The alleged abuse began in 1975 when Norris was 12 years old and continued until she turned eighteen.

(2) The English teacher and the perpetrator were employed by the School District;

(3) The acts occurred while the perpetrator was acting in his employment capacity;

(4) The acts occurred on the School District's premises;

(5) The English teacher was aware of the abuse; and,

(6) A Student Counselor also employed by the School District was aware of related acts of misconduct and asked participants to keep it secret.

and,

b. The statute is constitutional because it is procedural and, or remedial, and even if it infringes on vested rights, it is rationally related to a legitimate government purpose.

4. The Issue

a. Whether the statute of limitations, and, or the CGIA, in effect when Plaintiff was no longer subject to any legal disability at the age of eighteen (1980) created a substantive right and, or limitation of liability for the School District, and, or created a new legal duty, which would make the CSAAA retrospective removal of those bars to suit unconstitutional.

5. The Court finds:

a. Content of the Complaint

(1) Colorado Rule of Civil Procedure 12(b)(5) requires a complaint to state a plausible claim for relief. Warne v. Hall, 373 P.3d 588, 597 (Colo. 2016) (adopting standard announced in Ashcroft v. Iqbal, 556 U.S. 662 (2009) and Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007)).

(2) A claim has "facial plausibility" when the plaintiff pleads "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678. This "plausibility" standard is "not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Id.

(3) Ultimately, "[w]here a complaint pleads facts that are "merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of 'entitlement to relief.'" Id. (internal quotes omitted); Warne, 373 P.3d at 597.

(4) Conclusory allegations and legal conclusions are insufficient to resist a motion to dismiss. Id.

(5) To survive a motion to dismiss, a complaint need only contain sufficient allegations that, if accepted true, state a claim to relief that is plausible on its face. Warne v. Hall, 373 P.3d 588, 595 (Colo. 2016).

b. The CSAAA

(1) Section 1 of the enacting legislation (S.B. 21-088) that "(1) The general assembly finds and declares that:

(a) Child sexual abuse differs from adult sexual abuse. Child sexual abuse frequently occurs as repeated episodes that become more invasive over time. Perpetrators, referred to in this act as actors, are typically known and trusted caregivers with unsupervised access to children who engage child victims in a gradual process of sexualizing the relationship, known as "grooming".

(b) Child sexual abuse is a significant public health problem in Colorado with long-term effects on the physical and mental health of children, including trauma, increased risk for unintended pregnancy, sexually transmitted infections, low academic performance, truancy, dropping out of school, eating disorders, substance abuse, self-harm, and other harmful behaviors; and

(c) Child sexual abuse creates financial burdens for victims, including costs associated with health care, child welfare, special education, short- and long-term physical and mental health treatment, violence and crime, suicide, productivity, and loss of future wages.

(2) The general assembly further finds and declares that:

(a) Members, employees, agents, and volunteers of an organization can and do commit child sexual abuse and, while organizations are often in the best position to identify perpetrators of child sexual abuse, organizations may cover up instances of child sexual abuse perpetrated by members, employees, agents, and volunteers of the organization;

(b) When institutions choose to protect their power and profit by concealing the truth, the cover-up is a distinctly different harm than the child sexual abuse being concealed and, therefore, victims must have access to recourse against the organization.

(3) The general assembly further finds and declares:

(a) The vast majority of child sexual abuse goes unreported because children often lack the knowledge needed to recognize sexual abuse or lack the ability to articulate that they've been abused; do not have an adult they can disclose their abuse to; do not have opportunities to disclose abuse; often are not believed when they try to disclose; or, when the sexual abuse is committed by an esteemed trusted adult, for example a faith leader, coach, adult volunteer, youth group leader, or teacher, it may be hard for the child to view the perpetrator in a negative light and, therefore, identify what has been done to them as abuse;

(b) When victims of child sexual abuse do report, a high percentage of them delay disclosure well into adulthood, after the expiration of the time permitted to file civil actions against those responsible for the abuse; and

(c) Because of the delay in disclosure, statutes of limitations are often used to deny and defeat claims of childhood sexual abuse.

(4) Therefore, the general assembly determines that:

(a) This act does not revive any common law cause of action that is barred and instead creates a new right for relief for any person sexually abused in Colorado while the person was participating in a youth-related activity or program as a child;

(b) Creating a new civil cause of action that allows all victims of child sexual abuse, including those who delayed reporting the abuse well into adulthood after the statute of limitations on an action has expired, to hold the abusers and organizations accountable is in the best interest of the state's public health and safety and is needed to address the long history of child sexual abuse that occurred within organizations that are culpable and complicit in the abuse; and

(c) Establishing a civil cause of action that allows for victims of child sexual abuse to bring a claim against perpetrators of abuse, referred to in this act as actors, and responsible organizations is related to a legitimate governmental interest of allowing victims of child sexual abuse to hold the abusers and enablers accountable.

(2) To state a claim for relief under the CSAAA, a plaintiff must show:

(a) that a managing organization knew or should have known,

(b) that an actor or youth-related activity or program operated or managed by the organization,

(c) posed a risk of sexual misconduct against a minor; and

(d) the sexual misconduct occurred while the victim was participating in the youth-related activity or program.

(C.R.S. 13-20-1201(1)(b)).

(3) Pursuant to the CSAAA a victim may bring an action against a "managing organization" a term which includes public entities such as school districts (C.R.S. 13-20-1201(4), (7)).

(4) Pursuant to the CSAAA a "managing organization" has responsibilities when it hires adults as employees or agents or retains adults as volunteers of the youth-related activity or program (C.R.S. 13-20-1201(4).

(5) C.R.S. 13-20-1203 (2) states that "A person who was the victim of sexual misconduct that occurred when the victim was a minor and that occurred on or after January 1, 1960, but before January 1, 2022, may bring an action ... before January 1, 2025."

c. Constitutional Factors

(1) A defendant has the burden of proving the statute is unconstitutional beyond a reasonable doubt in a motion to dismiss or a motion for summary judgment (see, Colo. Union of Taxpayers Found. v. City of Aspen, 418 P.3d 506, 511 (Colo. 2018); and, People v. Janousek, 871 P.2d 1189, 1195 (Colo. 1994)).

(2) A statute is presumed to operate only prospectively unless the legislature clearly reveals an intent that it be applied retroactively. Ficarra v. Dep't of Regulatory Agencies, 849 P.2d 6 (Colo.1993).

(3) A statute is retroactive if it operates on transactions that have already occurred or on rights and obligations that existed before its effective date. In re Estate of DeWitt, 54 P.3d 849, 855 (Colo. 2002) citing Ficarra v. Dep't of Regulatory Agencies, 849 P.2d 6, 11 (Colo.1993).

(4) However, the retroactive application of a statute is permitted where the statute effects a change that is procedural relating only to remedies or procedures to enforce such rights or liabilities. Dewitt, supra, at fnt 3, citing People v. D.K.B., 843 P.2d 1326, 1331 (Colo.1993); see, Shell W. E & P, Inc. v. Dolores Cnty. Bd. of Commis., 948 P.2d 1002, 1012 (Colo.1997), and Kuhn v. State, 924 P.2d 1053, 1058 (Colo.1996).

(5) A substantive statute is "retrospective" if it "either (1) impairs a vested right, or (2) creates a new obligation, imposes a new duty, or attaches a new disability. People v. D.K.B., 843 P.2d 1326, 1331 (Colo.1993), cited to in DeWitt, supra.

(6) Retrospectivity may result from the creation of a new obligation, imposition of a new duty, or attachment of a new disability with respect to "transactions or considerations already past," but a statute is not rendered retrospective "merely because the facts upon which it operates occurred before the adoption of the statute." [citations omitted]. DeWitt, supra.

(7) A determination that a statute implicates a vested right is not dispositive as to its retrospectivity because vested rights do not thwart the reasonable exercise of the police power for the public good and should be "balanced against public health and safety concerns, the state's police powers to regulate certain practices, as well as other public policy considerations." Lakewood Pawnbrokers, Inc. v. City of Lakewood, 183 Colo. 370, 377, 517 P.2d 834, 838 (1973); Ficarra, 849 P.2d at 21; Van Sickle, 797 P.2d at 1271.

d. Common Law Duty: The common law custodial duty of a school towards its students exists in Colorado (see, Jefferson County School Dist. R-1 v. Justus By and Through Justus, 725 P.2d 767, at. 770 - 772 (Colo. 1986)), citing, in part, to Restatement (2d) of Torts § 323 (1965).

e. The Colorado Governmental Immunity Act

(1) In 1971 the Colorado Supreme Court decided a trilogy of cases that abrogated the doctrine of sovereign immunity and excluded it from Colorado common law. See, Evans v. Board of County Comm'rs, 482 P.2d 968, 973 (Colo.1971); Flournoy v. School Dist., 174 Colo. 110, 482 P.2d 966 (1971); Proffitt v. State, 174 Colo. 113, 482 P.2d 965 (1971).

(2) In response the legislature passed the CGIA (Ch. 323, sec. 1, - 130-11-1 to 17, 1971) that same year. That act included the following sections:

(a) It is the intent of this article to cover all actions which lie in or could lie in tort regardless of whether that may be the type of action chosen by the claimant, and no public entity shall be liable for such actions except as provided in this article. (C.R.S. 24-10-105, 1973)

(b) A public entity shall be immune from liability in all claims for injury which are actionable in tort (listing inapplicable exceptions) (C.R.S. 24-10-106(1), 1973)

(3) In 1986 the general assembly modified the law governing the assumption of a duty of care for acts, omissions, and injuries (S.B. 86-176; H.B. 86-1196) for private parties (C.R.S. 13-21-116) and public entities (C.R.S. 24-10-106.5) regarding the CGIA's affect on "court procedure"(Jefferson County School v Justus, supra, at fnt 2).

f. Statute of Limitations

(1) Prior to 1986, negligence claims were subject to a six-year statute of limitations. Cassidy v. Smith, 817 P.2d 555, 557 (Colo. App. 1991).

(2) "Where a statute of limitations has run and the bar attached, the right to plead it as a defense is a vested right which cannot be taken away or impaired by subsequent legislation" because doing so would violate the prohibition against retrospective legislation." Jefferson Cty. Dep't of Soc. Servs. v. D. A. G., 607 P.2d 1004, 1006 (Colo. 1980).

6. The Court concludes:

a. There is a clear and expressly stated legislative intent to address the substance of this Complaint in the CSAAA.

b. The legislature clearly meant the CSAAA to have retrospective application.

c. The School District is alleged to have hired and managed the English Teacher as it employee; other employees knew or should have known that the English teacher posed a risk of sexual misconduct due to reports of similar misconduct; and the sexual misconduct occurred while the Plaintiff was participating in the youth-related activity or program managed by the School District. Therefore, the allegations of the Complaint allow the Court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

d. The School District may have had a common law custodial duty of care to the Plaintiff in 1980, and, therefore, the CSAAA is not creating a new duty, obligation, or disability to transactions that already have occurred.

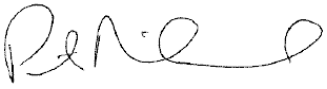
e. However, before the expiration of the applicable statute of limitation the CGIA was amended, and barred tort claims based on the assumed duty theory specifically. Arguably, the CGIA barred such tort claims since its inception in 1971. Therefore, this Court concludes there was no effective statute of limitations which applied to Plaintiff's claims as she was prohibited by governmental immunity from making any tort claim at all by, as noted in the Justus case, a procedural statute.

f. As the School District cannot demonstrate a reasonable reliance on the bar created by any applicable limitation of actions statute, or any other vested right, duty or obligation, retrospectively affected by the CSAAA the Court concludes the CSAAA does not violate Colorado Constitution Art II, § 11.

g. In the alternative, if the statute of limitations applied and expired, creating a vested right for the School District the Court concludes that the CSAAA is a legitimate exercise of the police power for the public good, promotes public health and safety concerns, the state's police powers to regulate certain practices, as well as other public policy considerations and in the balance does not violate Colorado Constitution Art II, § 11.

7. Accordingly, the Motion is DENIED.

Issue Date: 9/21/2022



PETER FREDERICK MICHAELSON
District Court Judge