

SUPREME COURT, STATE OF COLORADO
2 East 14th Ave.
Denver, CO 80203

C.A.R. 50 Certiorari to Court of Appeals,
2022CA1583
District Court, Arapahoe County, 2022CV30065

Petitioners:

Aurora Public Schools and David James O’Neill,

v.

Respondents:

Angelica Saupe and Brian Saupe

Leonard R. Higdon Attorney Reg. #29078
Law Office of Leonard R. Higdon
6565 S. Dayton, St., Ste. 3650
Greenwood Village, CO 80111
Tel: (303) 740-1966
Email: lhigdon@lrhlaw.com

COURT USE ONLY

Supreme Court Case
Number: 2022SC824

PETITIONER O’NEILL’S OPENING BRIEF

Certificate of Compliance

I certify that this Opening Brief complies with the requirements of Colorado Appellate Rules (C.A.R.) 28 and 32. Including:

Word Limits: My brief has **2,763 words**, which is not more than the 9,500 word limit.

Included Sections: In the arguments section, before arguing **each** issue on appeal, I have the following separately titled sub-sections:

The Standard of Review: I discuss which Standard of Review should be used to evaluate that issue.

Preservation: I discuss if that issue was preserved for appeal. I cite to the page in the Record on Appeal where I raised this issue before the District Court and I cite to the District Court decision concerning that issue.

*A duly signed original is available at
the office of undersigned counsel*

/s/ Leonard R. Higdon

Leonard R. Higdon, #29078
Attorney for Co-Petitioner

TABLE OF CONTENTS

Certificate of Compliance ii

Table of Contents iii

Table of Authorities v

Statement of the Issue Presented for Review..... 1

Statement of the Case..... 1

Summary of the Argument..... 2

Argument 2

 I. Whether applying a newly created cause of action to conduct
 that occurred prior to the creation of the cause of action
 violates the Colorado constitutional prohibition against laws
 that are retrospective in operation. 2

 A. Standard of Review 2-3

 B. Preservation of Issue 3

 C. Discussion 3

Conclusion 10

Certificate of Service 11

Table of Authorities

Table of Cases

<i>Coffman v. Williamson</i> , 348 P.3d 929, 934 (Colo. 2015)	5
<i>Dean v. People</i> , 366 P.3d 593 (Colo. 2016)	5
<i>In re Estate of Dewitt</i> , 54 P.3d 849 (Colo. 2002).....	7, 8
<i>Miller v. Florida</i> , 482 U.S. 423 (1987).....	6
<i>People v. Billips</i> , 652 P.2d 1060, 1064 (Colo. 1982).....	5
<i>People v. Bott</i> , 479, P.3d 29 (Colo. App. 2019).....	7
<i>People v. Hicks</i> , Court of Appeals No. 08CA1065 (Colo. App. Feb. 17, 2011)	6
<i>People v. Moreno</i> , 506 P3d 849, 852 (Colo. 2022)	2
<i>People v. Perez-Hernandez</i> , 348 P.3d 451 (Colo. App. 2013)	5
<i>People v. Shedd</i> , 702 P.2d 267 (Colo. 1985)	6
<i>People v. Zapotocky</i> , 869 P.2d 1234 (Colo. 1994)	6
<i>Stogner v. California</i> , 539 U.S. 607 (2003)	6
<i>Trailer Haven MHP, LLC v. City of Aurora</i> , 81 P3d 1132 (Colo. App. 2003)	7-8
<i>Van Sickle v. Boyes</i> , 797 P.2d 1267, 1271 (Colo. 1990)	7
<i>Weaver v. Graham</i> , 450 U.S. 24 (1981)	6
<i>Woo v. El Paso Cnty. Sheriff's Office</i> , 490 P.3d 884 (Colo. App. 2020)	2, 5

Statutes

C.R.S. § 13-20-12023, 4, 10
C.R.S. § 13-20-1203..... 4, 5
C.R.S. § 13-80-103.7 9, 10

Rules

C.A.R. 28..... ii
C.A.R. 32..... ii

Constitutional Provisions

COLO. CONST. art. II, § 11 4

Other Authorities

Senate Bill 21-088, 2021 Colo. Sess. Laws 3

Statement of the Issue Presented for Review.

1. Whether applying a newly created cause of action to conduct that occurred prior to the creation of the cause of action violates the Colorado constitutional prohibition against laws that are retrospective in operation.
2. Whether applying a newly enacted waiver of immunity from suit to conduct that occurred prior to the enactment of the waiver, and at a time when the immunity was in effect, violates the Colorado constitutional prohibition against laws that are retrospective in operation.¹

Statement of the Case

Respondents brought claims against Defendants pursuant to the newly enacted Child Sexual Abuse Accountability Act (“CSAAA”). Respondents’ claims arise from allegations of sexual misconduct alleged to have occurred between 2001 and 2005, when Respondent Angelica Saupe, was a minor. Respondent Angelica Saupe alleged to have become aware of the alleged wrongful conduct in 2007 when she was experienced a memory flood concerning the allegations set forth in her

¹ Co-Petitioner O’Neill understands this Court’s reframed issue No. 2 respecting the newly enacted waiver of immunity from suit, to be exclusively applicable to that issue of waiver of sovereign immunity under the CGIA, as applied to Petitioner Aurora Public Schools, and; therefore, not applicable to O’Neill. Therefore, Co-Petitioner O’Neill respectfully makes no independent argument concerning that issue.

complaint. Ms. Saupe further alleges that her allegations were then contemporaneously reported to law enforcement for investigation which resulted in no criminal charges against O'Neill. Respondent Brian Saupe brings a derivative claim for loss of consortium predicated upon the psychological and emotional injury alleged to have been suffered by Ms. Saupe and resulting from the alleged underlying conduct.

Summary of the Argument

The enactment of the CSAAA creates a Constitutionally impermissible new cause of action when it creates a new cause of action that is retrospective in its application and divests a targeted defendant of a long-enjoyed, and vested, right to protection from prosecution in suit.

Argument

1. Whether applying a newly created cause of action to conduct that occurred prior to the creation of the cause of action violates the Colorado constitutional prohibition against laws that are retrospective in operation

- a. **Standard of Review**

Where the Constitutionality of a statute is challenged, the statute is presumed to be Constitutional. When considering a question concerning the constitutionality of a statute, this Court reviews *de*

novo, whether the statute is unconstitutional, *beyond a reasonable doubt*. *People v. Moreno*, 506 P3d 849, 852 (Colo. 2022); *Woo v. El Paso Cnty. Sheriff's Office*, 490 P.3d 884 (Colo. App. 2020).

b. Preservation of the Issue

The issue before the Court was properly preserved by the briefing of the motions, responses thereto, and order of the trial court.

c. Discussion

The trial court correctly determined that that the Respondents are barred from relief due to the unconstitutionality of the CSAAA as enacted and codified at C.R.S. §13-20-1202, et. seq. The trial court correctly applied the Constitutional protection against Ex Post Facto laws found at Colo. Const. Art. II, §11, which mandates:

No ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges, franchises or immunities, shall be passed by the general assembly.

The CSAAA became effective on January 1, 2022, and by its terms, it “creates a new right for relief.” Senate Bill 21-088, section 1(4)(a), 2021 Colo. Sess. Laws p. 2923 (*emphasis added*).

The act is codified at C.R.S. §13-20-1202 and provides:

“(1) A person who is a victim of sexual misconduct that occurred when the victim was a minor may bring a civil action for damages against:(a) An actor who committed the sexual misconduct.”

The act further expressly provides for *retroactive* application as set forth at C.R.S. § 13-20-1203, which provides as follows:

(2) 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 pursuant to this part 12. An action described in this subsection (2) must be commenced before January 1, 2025.

The CSAAA creates a “new cause of action” where none previously existed, and which is based upon retrospective application.

Article II, section 11 of the Colorado Constitution bars “ex post facto” laws that, by retrospective application, impair vested rights acquired and secured under existing laws or create new obligations, duties, or disabilities. The CSAAA, if applied allow suit against Mr. O’Neill, creates new obligations, duties, or disabilities that were not applicable, that did not apply to him, and from which he was legally and constitutionally protected, prior to January 1, 2022.

The act results in an impermissible risk of liability for alleged conduct once enjoyed as a vested right of protection by voiding the then-existing statute of

limitations for claims involving sexual misconduct involving a minor that occurred on or after January 1, 1960, and before January 1, 2022. See C.R.S. § 13-20-1203(2).

As this Court has recently held, “The constitutionality of a statute is a question of law subject to de novo review. *Dean v. People*, 366 P.3d 593, 596 (Colo. 2016). The de novo standard of review applies to both facial and as-applied constitutional challenges. *People v. Perez-Hernandez*, 348 P.3d 451, 455 (Colo. App. 2013).

“[D]eclaring a statute unconstitutional is one of the gravest duties impressed upon the courts.” *Coffman v. Williamson*, 2015 CO 35, ¶ 13, 348 P.3d 929, 934. For that reason, courts “must presume that a statute is constitutional unless the party challenging it proves its unconstitutionality beyond a reasonable doubt.” *Id.* It follows that a party challenging the constitutionality of a statute bears a heavy burden. *People v. Vasquez*, 84 P.3d 1019, 1022 (Colo. 2004). *Woo v. El Paso Cnty. Sheriff’s Office*, 490 P.3d 884 (Colo. App. 2020) (Colo. 2022).

To determine this question, the trial court was required to determine whether the statute, as applied here, divested O’Neill of a vested right. “A statute is not rendered unconstitutional as an ex post facto law merely because the facts upon which it operates occurred before the adoption of the statute.” *People v. Billips*, 652 P.2d 1060, 1064 (Colo. 1982). Rather, two elements must be present before a criminal law will be stricken down as ex post facto. First, the law must be

retrospective, that is, it must apply to events occurring before its enactment. Second, the law must disadvantage the person affected by it. *Miller v. Florida*, 482 U.S. 423, 430 (1987); *Weaver v. Graham*, 450 U.S. 24, 29 (1981).

To be retrospective, the law must change the legal consequences of acts completed before its effective date. *Weaver* at 31. *People v. Zapotocky*, 869 P.2d 1234, 1244-45 (Colo. 1994).

Here both elements are met.

In considering that question and argument of Respondents, the trial court correctly relied upon that well settled reasoning that divesting a person, in this case, Mr. O'Neill, of the protections of the previously expired statutes of limitations, worked to deprive him of his vested right to protection against the action. It is well established that "a law enacted after expiration of a previously applicable limitations period violates the Ex Post Facto Clause when it is applied to revive a previously time-barred prosecution." *Stogner v. California*, 539 U.S. 607, 632-33 (2003); see *People v. Shedd*, 702 P.2d 267, 268 (Colo. 1985) ("Retroactive application of a statute of limitations to revive a previously barred prosecution violates the fundamental constitutional prohibition against ex post facto legislation.")” *People v. Hicks*, Court of Appeals No. 08CA1065, at *8-9 (Colo. App. Feb. 17, 2011)

The trial court correctly found that in this instance the CSAAA as applied is *impermissibly retrospective*, because allowing this action to go forward under the facts asserted, and even if true, were time barred at the time of the filing of the action and could not be revived by the statute without violating Mr. O’Neill’s Constitutionally protected right against Ex Post Facto application. The trial court cited controlling authority:

“A statute is retrospective if it ‘takes away or impairs vested rights acquired under existing laws, or creates, a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.’” *In re Estate of DeWitt*, 54 P.3d 849, 854 (Colo. 2002), CF. p. 137.

Co-Petitioner O’Neill asserts that unlike permissible retroactive legislation that the CSAAA does not merely affect some new or alternative procedure or legal mechanism to assert an extant right, it creates (by its own language) a *new cause of action, and new right to seek recovery where none previously existed*. The new right of action created by the CSAAA creates rights and claims that did not exist at the time of the underlying conduct. It creates exposure to litigation and damages under the circumstances that are virtually impossible to later defend.

The trial court reasoned that that the Constitutional prohibition against “retrospective” application of law is intended to prevent unfairness that results from

changing the legal consequences of an act after the act has occurred.” *Trailer Haven MHP, LLC v. City of Aurora*, 81 P3d 1132, 1139 (Colo. App. 2003). CF. p. 136.

The rationale underlying these prohibitions is self-evident: “The purpose of the constitutional ban on retrospective legislation, like the ban on ex post facto laws, is to prevent the unfairness that results from changing the legal consequences of an act after the act has occurred.” *Van Sickle v. Boyes*, 797 P.2d 1267, 1271 (Colo. 1990); *In re Estate of DeWitt*, 54 P.3d 849, 854 (Colo. 2002).

The trial court correctly analyzed the retrospective application of the CSAAA in this instance by considering whether the application of the CSAAA, like other retrospective laws, “attaches a new legal consequence to events completed before its enactment” citing *People v. Bott*, 479, P.3d 29, 37 (Colo. App. 2019).

Applying these duties and disabilities to conduct that occurred up to 60 years prior to the creation of these duties and disabilities is a per se violation of the clause prohibiting retrospective legislation.

The trial court considered and relied upon the then existing and applicable statutes of limitations governing Respondents’ claims, as applied to the allegations within the complaint. CF. p. 138 – 139.

The trial court considered whether the facts as alleged by within the complaint offered any the statutes of limitations that applied to Respondents’ claims prior to

the enactment of the CSAAA, to analyze Respondents' assertion that the CSAAA survives scrutiny because Co-Petitioner O'Neill's right to be protected from stale allegations was indeed a vested right prior to the enactment and codification of the CSAAA. Respondents' allegations within the complaint concerning her discovery of the alleged acts giving rise to the claims in 2007, the statutes of limitations on each of those claims were otherwise barred long ago. CF. p.5, 137- 139.

The trial court also addressed that, in addition to the constitutionality of CSAAA, Respondents' claims were also time barred pursuant to C.R.S. §13-80-103.7, which statute did not apply the no limitations provision for conduct prior to January 1, 2022, and which statute specifically states:

(1)(a) Notwithstanding any other statute of limitations specified in this article 80, or any other provision of law that can be construed to limit the time period to commence an action described in this section, any civil action based on sexual misconduct, including any derivative claim, may be commenced at any time without limitation.

(b) This subsection (1) applies to causes of action accruing on or after January 1, 2022, and to causes of action accruing before January 1, 2022, *if the applicable statute of limitations, as it existed prior to January 1, 2022, has not yet run on January 1, 2022.*

Emphasis added. §13-80-103.7(1)(a) and (b), C.R.S. (2022). CF at 139.

Co-Petitioner O'Neill asserts that he has a vested right to be protected from litigation because the statute of limitations had run prior to the enactment of CSAAA. An interpretation of that statute that subjects him to liability is

indeed, unconstitutional. Co-Petitioner asserts that it was the intent of the legislature, who also amended C.R.S. §13-80-103.7, in conjunction with C.R.S. §13-20-102, that any claims that had not yet had their statute of limitations run as of January 1, 2022, would be afforded the benefit of CSAAA, but that if the statute of limitations had already expired, as is the case in this matter, that a claim for sexual misconduct was time barred.

The application of the CSAAA against Mr. O’Neill under the above analysis, is constitutionally barred and for that reason the instant complaint must be dismissed with prejudice.

Conclusion

For all of the foregoing reasons, Co-Petitioner O’Neill respectfully requests that this Court affirm the order of the Trial Court.

DATED this 17th day of January, 2023

Respectfully submitted,

*A duly signed original is available at the
office of undersigned counsel*

/s/ Leonard R. Higdon

Leonard R. Higdon, #29078
6565 S. Dayton, Street, Ste. 3650
Greenwood Village, CO 80111
(303) 740-1966

Attorney for David O’Neill, Co-Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of January, a true and correct copy of the foregoing **PETITIONER O'NEILL'S OPENING BRIEF** was served via CCEF upon all counsel having entered their appearance(s) in this case, as follows:

Gwyneth Whalen, #20027

W. Stuart Stuller, #22082

Anne L. Stuller, #54031

gwhalen@celaw.com

sstuller@celaw.com

astuller@celaw.com

Attorneys for Petitioner Aurora
Public Schools

James W. Avery, Esq.

Denver Injury Law, LLC

averylawfirm@gmail.com

Attorney for Saupe Respondents

/s/ Jacqueline M. Schneider