

IN THE SUPREME COURT OF THE STATE OF UTAH

TERRY MITCHELL,

Plaintiff-Appellant,

v.

No. 20170447-SC

RICHARD WARREN ROBERTS,

Defendant-Appellee.

BRIEF OF *AMICUS CURIAE*
THE OFFICE OF THE UTAH ATTORNEY GENERAL

On certified questions from United States District Court, District of Utah
Honorable Evelyn J. Furse, Magistrate Judge
No. 2:16-cv-00843

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INTRODUCTION

This case is before the Court on two certified questions from the U.S. District Court for the District of Utah. Neither question specifically asks whether Utah Code section 78B-2-308(7) violates the Utah Constitution. Instead, the certified questions focus on whether section 308 can revive time-barred claims under this Court's retroactive legislation precedent. Plaintiff argues that the statute applies retroactively under this Court's case law because the Legislature clearly expressed its intent that the law revives previously time-barred sexual abuse claims. Defendant argues that legislation can never retroactively eliminate a vested right like an expired statute of limitations regardless of legislative intent. And he asserts that his position finds support in the Utah Constitution's Due Process and Open Courts Clauses. Given the questions' phrasing—and the resultant focus of the parties' briefing—the Court may be able to answer the certified questions without assessing section 308's constitutionality.

But Defendant's arguments still imply that section 308 may be constitutionally infirm. So to rebut that notion—in the event it's relevant to the Court's ultimate answers—the Office of the Utah Attorney General respectfully offers its views that the statute does not violate either the Due Process Clause or the Open Courts Clause.

First, the United States Supreme Court has long held that the federal constitution's Due Process Clause does not invalidate legislation that revives expired claims. Against this backdrop, Utah enacted an identical due process provision. Though the state constitution can provide more protection than the federal constitution, neither Defendant nor the Utah cases he relies on offers the necessary rationale to support his view that the state constitution prohibits retroactive legislation that revives time-barred claims.

Second, even assuming the Open Courts Clause somehow applies to Defendant's statute of limitations defense, the provision's promise of a day in court guarantees *judicial access* to assert applicable legal rights. It provides no guarantee about what those rights are.

ARGUMENT

I. Section 308 Does Not Violate The State Due Process Clause.

Defendant claims that the state constitution's Due Process Clause protects a right to avoid liability under a vested statute of limitations defense. Def. Br. at 28-29. And he claims that this right "cannot be taken away by legislation." Def. Br. at 31. In other words, he asserts something in Utah's Due Process Clause prohibits the Legislature from reviving expired

claims. *Id.* at 31.¹ But the argument lacks an adequate state constitutional foundation. Interpreting the state constitution starts with the relevant text, informed as needed by the historical evidence of the state of the law when it was drafted and any of the State’s relevant, particular traditions at the time of drafting. *Am. Bush v. City of South Salt Lake*, 2006 UT 40, ¶¶ 10-12, 140 P.3d 1235.

To begin, Defendant recognizes that his argument fails under the federal Due Process Clause. Def. Br. at 29 n.17. In 1885, the United States Supreme Court held that the Fourteenth Amendment did not prohibit a state from reviving expired claims. *Campbell v. Holt*, 115 U.S. 620, 628-29 (1885). The High Court reaffirmed *Campbell’s* holding without dissent 60 years later.

¹ Defendant tries to put the Attorney General’s Office on his side of the argument by citing a recent federal district court case in which the Office is involved. Def. Br. at 36. There, an assistant Utah attorney general argued that a procedural statute should not apply retroactively because it enlarged the plaintiff’s vested right. Defendants’ Reply to Plaintiff’s Response to Defendants’ Partial Motion to Dismiss at 4 (Dkt. No. 71), *Hyland v. Dixie State Univ.*, No. 2:15-cv-36-TS (D. Utah). The district court noted the presumption that Utah statutes are not retroactive unless expressly declared so and then concluded “there is no expression of retroactivity in the [statute], so retroactivity depends on whether the amended portions are procedural or substantive, and whether they enlarge or eliminate vested rights.” *Hyland v. Dixie State Univ.*, 2017 WL 2123839, *2 (D. Utah May 16, 2017). Neither the district court nor the Attorney General’s Office said anything about the effect of a statute the Legislature expressly declared to be retroactive.

Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 311-16 (1945). So it has long been settled federal constitutional law that 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.” *Id.* at 311-12.

In that legal context, and only eleven years after *Campbell*, Utah enacted its own Due Process Clause that mirrored its federal counterpart(s): “No person shall be deprived of life, liberty or property, without due process of law.” Utah Const. art I, § 7; *cf.* U.S. Const. amend V (“No person shall be . . . deprived of life, liberty, or property, without due process of law”); U.S. Const. amend XIV, § 1 (“nor shall any State deprive any person of life, liberty, or property, without due process of law”). Utah’s constitutional framers said nothing suggesting that the State’s clause would mean something different than—or provide additional protections than—the federal due process provisions. Indeed, Utah’s framers hardly discussed the due process provision at all. *See, e.g.*, 1 Official Report of the Proceedings and Debates of the Convention Assembled at Salt Lake City on the Fourth Day of March, 1895, to Adopt a Constitution for the State of Utah at 257 (Forgotten Books 2015).

Though the United States Supreme Court’s interpretations of the identical federal Due Process Clause are not controlling, *State v. Briggs*, 2008 UT 83, ¶ 24, 199 P.3d 935, they remain “highly persuasive” in construing Utah’s provision. *Terra Utils., Inc. v. Pub. Serv. Comm’n*, 575 P.2d 1029, 1033 (Utah 1978); *General Elec. Co. v. Thrifty Sales, Inc.*, 301 P.2d 741, 745 (Utah 1956); *Untermeyer v. State Tax Comm’n*, 129 P.2d 881, 885 (Utah 1942). To be sure, as Defendant argues, state constitutions may provide more protections than the federal constitution.² But a holding that state constitutional provisions protect more rights than their federal counterparts (and thus impose greater restraints on legislative power) can’t rest on mere policy preferences or common law concepts. There has to be a state constitutional

² And some states have done so on this issue under varying rationales. Addressing the constitutionality of a statute that revived expired sex-abuse claims, the Supreme Court of Connecticut conducted its own survey to see how sister states resolved the issue. *Doe v. Hartford Roman Catholic Diocesan Corp.*, 119 A.3d 462, 508-14 (Conn. 2015). The court found 18 states (plus Connecticut) that followed the federal approach and allowed revival of expired claims. *Id.* at 509-10. Two other states also allow revived claims depending on the private and public interests at stake. *Id.* at 512-13. On the other hand, the court counted 24 states (including Utah) that prohibit legislation reviving expired claims; although 8 of those states did so based on constitutional or statutory prohibitions against retroactive legislation, and another 5 offer little to no meaningful constitutional justification for their decisions. *Id.* at 510-11. That leaves only 10 states (not including Utah) to have held that statutes reviving previously time-barred claims violate their state due process provisions. *Id.* at 511. Based on its review of the cases, the Connecticut Supreme Court concluded that “the more persuasive cases” favored the federal approach allowing laws that retroactively revive expired claims. *Id.* at 509.

rationale justifying the alleged broader rights. *Briggs*, 2008 UT 83, ¶ 24 (noting the state constitution may provide more protection “where appropriate”); *State v. Tiedemann*, 2007 UT 49, ¶ 37, 162 P.3d 1106 (while a litigant need not prove a federal interpretation is wrong, an “[i]ndependent [state constitutional] analysis must begin with the constitutional text and rely on whatever assistance legitimate sources may provide in the interpretive process”); *State v. Worwood*, 2007 UT 47, ¶ 18, 164 P.3d 397 (“truism” that a state constitutional provision may provide greater protections than federal constitutional provisions “fails to advance an adequate state constitutional analysis”).

Defendant never provides the necessary state constitutional footing. Granted, the Court has held that an expired statute of limitations defense is a vested right, *Roark v. Crabtree*, 893 P.2d 1058, 1062 (1995), and that vested rights are “property” under the Due Process Clause. *Miller v. USAA Cas. Ins. Co.*, 2002 UT 6, ¶¶ 39-40, 44 P.3d 663. But that takes Defendant’s theory only so far. It means only that vested rights are treated like all other property rights the Utah Due Process Clause protects. *Halling v. Indus. Comm’n of Utah*, 263 P. 78, 81 (Utah 1927) (“A vested right of action is property in the same sense in which tangible things are property, and is *equally* protected against arbitrary interference.” (emphasis added) (internal quotation marks omitted)). While constitutionally protected property rights

are important, they are not per se beyond legislative reach. The Due Process Clause itself expressly states that life, liberty, and property can be “deprived” by government action. Utah Const. art. I, § 7. Defendant’s theory, on the other hand, creates a unique class of “vested” property rights that receive special treatment and can never be deprived. Neither Defendant nor the cases he relies on point to anything in the constitution supporting such a rule.

For example, *Ireland v. Mackintosh*, 61 P. 901 (Utah 1900), doesn’t appear to analyze Utah’s Due Process Clause. The Court does briefly discuss *Campbell’s* majority and dissenting opinions and notes that this Court had not previously addressed the issue. *Id.* at 902. After discussing the statute at issue there and the purpose of statutes of limitations, the Court declared that legislation must be “construed as to have a prospective effect, merely, and will not be permitted to affect past transactions, unless such intention is clearly and unequivocally expressed.” *Id.* at 904. The Court then found that the statute in question failed to show any indication that the legislature “intended to revive causes of action which had before the passage of that act become barred.” *Id.* Accordingly, the Court held “that it was not the intention of the legislature to revive causes of action on claims which had previously become stale, and against which the statute had fully run; and . . . when appellant’s right of action . . . became barred under the previous

statute, the respondent acquired a vested right, in this state, to plead that statute as a defense and bar to the action.” *Id. Ireland* fails to clearly support Defendant’s view that the Legislature can’t revive expired claims, much less provide his view with any reasoned state constitutional protection.

The same goes for *Roark*. There the Court again reiterated the “long-standing rule of statutory construction that a legislative enactment which alters the substantive law or affects vested rights will not be read to operate retrospectively unless the legislature has clearly expressed that intention.” *Roark*, 893 P.2d at 1061. In a section titled “Legislative Intent,” the Court determined that a statute of limitations for sex-abuse claims contained no express declaration of retroactivity and the legislative history suggested that the law was meant to be prospective only. *Id.* at 1061-62. The Court then noted that even absent legislative intent, the law could apply retroactively if it affected only procedural rather than substantive rights. *Id.* at 1062 (“this exception has been narrowly construed to permit retroactive application where a statute changes only procedural law by providing a different mode or form of procedure for enforcing substantive rights, . . . and to prohibit retroactivity when a statute enlarges, eliminates, or destroys vested or contractual rights.” (internal quotation marks and citation omitted)). And in a section titled “The Nature of Section 78-12-25.1,” the Court concluded that the statute could not be applied retroactively because it affected a defendant’s

vested right to an expired statute of limitations defense. *Id.* at 1062-63. The Court cited to *Ireland* and Am. Jur. 2d, and claimed to follow the majority rule. *Id.* But again, *Roark* doesn't clearly support Defendant's retroactivity views given the Court's discussion of legislative intent. More important, regardless of how one interprets *Roark's* holding and analysis, the Court never grounded its decision in the Utah Constitution.

Defendant also cites *McGuire v. University of Utah Medical Center*, because it characterized *Ireland* and another case as holding that "a right to plead a defense of statute of limitations may become a vested right which cannot be impaired without denying due process of law." 603 P.2d 786, 790 (Utah 1979). This doesn't provide the necessary state constitutional foundation either. Announcing an alleged rule is no substitute for constitutional analysis explaining why Utah's Due Process Clause puts vested rights beyond the Legislature's reach. None of the cases *McGuire* cites provides that missing state constitutional link.

To the extent Defendant challenges section 308's constitutionality, it appears to be a substantive due process claim. *In re Adoption of J.S.*, 2014 UT 51, ¶ 22, 358 P.3d 1009 (explaining difference between procedural and substantive due process claims and that a substantive claim attacks a statute "on the ground that the right foreclosed is so fundamental or important that it is protected from extinguishment"). This Court applies a rational basis test

to these claims unless the statute affects a fundamental right or interest. *State v. Angilau*, 2011 UT 3, ¶ 10, 245 P.3d 745. Defendant has not shown that his vested right is fundamental. *See, e.g., In re Adoption of J.S.*, 2014 UT 51, ¶ 39 (explaining fundamental rights are “deeply rooted in this Nation’s history and tradition” and “in the history and culture of Western civilization” (internal quotation marks omitted)). Thus the vested right at issue must be treated like other property rights and subjected to rational basis review. Section 308 readily clears that hurdle as explained by Plaintiff and the Utah Legislature. Plaintiff’s Br. at 27-29; Br. of Amicus Curiae Utah Legislature at 10-11.

In short, Defendant offers no constitutionally based reason to read Utah’s due process provision as prohibiting legislative revival of expired claims, particularly when the identical federal due process provision does not. Utah’s framers enacted the same due process language that the United States Supreme Court had recently held allowed legislation reviving expired claims. This contemporaneous legal context strongly suggests that the Utah Due Process Clause should be construed the same as the federal Due Process Clause on this issue.

II. Section 308 Does Not Violate The Open Courts Clause.

Defendant also claims that a right “to raise the affirmative defense of an expired statute of limitation is . . . protected by the Open Courts Clause.” Def. Br. at 31. As support, he points to cases where this Court has said the clause guarantees a “day in court,” which includes the ability to “litigate a claim, seek relief, or defend one’s rights.” *Id.* (quoting *Miller*, 2002 UT 6, ¶ 38)). But Defendant stretches the day-in-court principle too far.

A guarantee to having one’s day-in-court is a guarantee of judicial access and fair process based on the applicable facts and law, not a substantive guarantee that the law (or certain defenses) will never change. *See, e.g., Miller*, 2002 UT 6, ¶ 42 (“a day in court means that each party shall be afforded the opportunity to present claims and defenses, and have them properly adjudicated on the merits according to the facts and the law” (footnote omitted)); *see also id.* ¶ 38 (citing *Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 675 (Utah 1985) (“The clear language of the [open courts provision] guarantees *access* to the courts and a judicial procedure that is based on fairness and equality.” (emphasis added))). To confirm the point, the Court has emphasized that the day-in-court analysis is the same under both the Open Courts and Due Process Clauses. *Id.* ¶ 38. Defendant is certainly entitled to his day in court to defend against Plaintiff’s claims. But that says

nothing about which defenses will be available under existing law once he's inside the courtroom.

Defendant's argument also lacks support in the Open Courts Clause's text. The provision states:

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

Utah Const. art. I, § 11.

While the clause expressly protects a person's access to court to defend himself in a civil suit, it says nothing about guaranteeing the availability of any and all former *defenses*. The clause promises only a "remedy by due course of law" for an "injury." At the time the clause was enacted, "injury" meant "[a]ny wrong or damage done to another, either in his person, rights, reputation, or property"; "remedy" meant "the means by which the violation of a right is prevented, redressed, or compensated"; and "due course of law" was "synonymous with due process of law" and meant "law in its regular course of administration through courts of justice." *Black's Law Dictionary* (1st ed. 1891).

Here, Defendant hasn't suffered an "injury" from Plaintiff, and he certainly isn't seeking a "remedy" based on her conduct under the Open

Courts Clause. Rather, Defendant essentially argues that the Legislature has injured him by changing a statute of limitations defense he wants to assert against Plaintiff so Defendant can avoid the remedies *Plaintiff seeks* for the *injuries that Defendant caused* her. Def. Br. at 32. That turns the Open Courts Clause on its head.

The clause's relevant text focuses on a remedy for an injury, not a defense to a remedy. And the Court's focus under the clause has been on preserving causes of action, not defenses. *See, e.g., Brown v. Wightman*, 151 P. 366, 367 (Utah 1915) ("Where no right of action is given, however, or no remedy exists, under either the common law or some statute, those [open courts] provisions create none."). The Court currently interprets the Open Courts Clause to prevent the Legislature from passing any law that (1) abrogates a cause of action existing at the time of the law's enactment unless (2) the law provides a reasonable and effective alternative remedy or (3) seeks to eliminate a clear social and economic evil by non-arbitrary and reasonable means. *Scott v. Universal Sales, Inc.*, 2015 UT 64, ¶ 52, 356 P.3d 1172. The clause, as Defendant acknowledges, has been interpreted to restrict the Legislature's power to prospectively alter the law. Def. Br. at 32. So under Defendant's view—where the clause protects defenses (and anything else that might be deemed a legal right)—the Legislature can't prospectively limit any law that provides any defense (or right) unless the

law provides an alternate remedy or eliminates a clear social evil. Defendant has not cited, and the Attorney General's Office is unaware of, any case that stretches the Open Courts Clause that far and imposes such significant restraints on the Legislature.

In sum, the Open Courts Clause doesn't offer the constitutional protection that Defendant seeks. And it doesn't invalidate section 308.

CONCLUSION

The Court need not address section 308's constitutionality. But to the extent section 308's constitutionality is relevant, section 308 does not violate either the Due Process or Open Courts Clauses.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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s/ Stanford Purser

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of November 2017 a true, correct, and complete copy of the foregoing Amicus Brief of the Office of the Utah Attorney General was filed with the Court and served via electronic mail as follows:

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