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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

JANE DOE 1, JANE DOE 2, JANE DOE 3, JANE DOE 4, JOHN DOE 1, and JOHN DOE 2,, Plaintiffs, v. RICHARD AND BRENDA MILES, Defendants.	**REPLY IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM** Case No. 1:18-cv-00121-JNP The Honorable Jill N. Parrish

Defendants Richard and Brenda Miles (together, the "Miles") submit this Reply in Support of Motion to Dismiss for Failure to State a Claim (the "Motion") pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

INTRODUCTION

Plaintiffs go to great lengths to distance themselves from already debunked claims that they were abused as part of a satanic, ritualistic sex ring in Bountiful in the 1980s. But that is precisely what they and their therapist, Dr. Barbara Snow, said at the time. Similarly, Plaintiffs' opposition attempts to divorce their claims from Dr. Snow. But Dr. Snow was the therapist who "treated" Plaintiffs and helped them to recover "memories" of satanic, ritualistic abuse. Plaintiffs' desire to write Dr. Snow out of the story is understandable given that she has a proven history of implanting false memories and the Utah Division of Occupational and Professional Licensing has previously suspended her license to practice.

In their opposition, Plaintiffs do not deny these facts. Instead, Plaintiffs attempt to dismiss reality as irrelevant. Sadly, however, Plaintiffs were victims of Dr. Snow's unethical and coercive interrogation techniques that implanted false memories of ritualistic abuse. This case should be seen for what it is—nothing more than an attempt by Plaintiffs' attorney to extort money from the Miles by digging up stale and baseless claims of abuse.

Although the unpled facts Plaintiffs try to avoid are central to the merits of the case, the Miles acknowledge that for purposes of this Motion, the Court is confined to the (incomplete) allegations selectively included in the Complaint. The complaint expressly relies on Utah Code § 78B-2-308, which purports to revive, against perpetrators, claims of sexual abuse that expired under the previously applicable statute of limitations. The problem for Plaintiffs is that a century of binding precedent, culminating recently in *State v. Apotex*, 2012 UT 36, has held that the legislature cannot revive dead claims. And this rule has been rooted in the Due Process Clause of the Utah Constitution since the very first case on this issue was decided in 1900. *See Ireland*

v. Mackintosh, 61 P. 901 (Utah 1900). Whether Utah should abandon this precedent and take a different course is a question beyond the power of this Court. The Miles acknowledge that the Utah Supreme Court is currently deliberating that issue. *See Mitchell v. Roberts*, Case No. 2:16-cv-00843-EJF (D. Utah); *Mitchell v. Roberts*, No. 20170447–SC (Utah S. Ct). Briefing and oral argument before the Utah Supreme Court was complete as of May 15, 2018.

Plaintiffs' argument in this case closely tracks the arguments made by the plaintiff in *Mitchell*, while the defendant in *Mitchell*, like the Miles here, points to *Apotex* and the century of consistent precedent on which it is based. Thus, this Court has two options: apply binding precedent and grant the Miles' motion, or wait to see if the Utah Supreme Court departs from its precedent in the *Mitchell* case. What this Court cannot do is ignore *Apotex* and its ancestry.

ARGUMENT

I. THE LEGISLATURE LACKS THE POWER TO REVIVE EXPIRED CLAIMS.

Plaintiffs' chief argument in opposition to the Motion is that their previously time-barred claims of child sexual abuse were revived when Utah Code § 78B-2-308 was enacted in May 2016. *See* Plaintiffs' Memorandum in Opposition of Defendants' Motion to Dismiss for Failure to State a Claim ("Opp'n") at 4–6. That statute provides, in part, that a civil action against a living individual who intentionally perpetrated child sexual abuse "that was time barred as of July 1, 2016, may be brought within 35 years of the victim's 18th birthday, or within three years of the effective date of this Subsection (7), whichever is longer." Utah Code § 78B-2-308(7). Plaintiffs rely upon this statute—as they must—to argue their claims are timely.

Plaintiffs' argument is contrary to long-standing Utah Supreme Court precedent confirming that that the expiration of a statute of limitations creates a vested right protected by

the Due Process Clause of the Utah Constitution, and that the legislature cannot take away that vested right by retroactively reviving a dead claim.

Just six years ago, in *State v. Apotex*, the Utah Supreme Court considered an amended statute of limitation providing that "civil action[s] . . . may be brought for acts occurring prior to the effective date of this [amended] section if the limitations period set forth in [the amended statute] has not lapsed." Utah Code § 26-20-15(2) (cited in *Apotex*, 2012 UT 36, ¶ 66, 282 P.3d 66). Similar to the statute in this case, the amended statute at issue in *Apotex* attempted to "revive claims that were already time-barred under the prior version of the statute." *Apotex*, 2012 UT 36, ¶ 14 (internal quotation marks omitted). The Utah Supreme Court held the legislation to be unlawful in light of the longstanding rule that the "amended [statute] cannot resurrect claims that have already expired." *Id.* ¶ 67. The Utah Supreme Court tied this holding to the line of cases stating "'after a cause of action has become barred by the statute of limitation, the defendant *has a vested right to rely on that statute as a defense* . . . which cannot be taken away by legislation . . . or by affirmative act, such as lengthening the limitation period.'" *Id.* (alteration in original) (quoting *Roark v. Crabtree*, 893 P.2d 1058, 1063 (Utah 1995)).

In *Roark*, the Utah Supreme Court posted the following question: "can a claim which was barred under the then-applicable statute of limitations be revived by a subsequent extension of the limitations period?" *Roark*, 893 P.2d at 1062. In answering "no," the Utah Supreme Court did not frame the question as "whether the defense of statute of limitations is a vested right." *Id.*; *see also infra* at 7–10 (discussing the vested rights underpinnings of the rule). Rather, the Court tied the rule to the past century of its precedent, beginning with the Court's "first examin[ation of] retroactive revival of a time-barred civil action" in *Ireland v. Mackintosh*,

61 P. 901 (Utah 1900). *Id.* The *Roark* Court reiterated *Ireland*'s holding that "subsequent passage of an act increasing the period of limitation could not operate to affect or renew a cause of action already barred." *Id.* The Court traced the consistent rule over a century. *Id.* at 1062.

In short, a century of consistent precedent from *Ireland* through *Apotex* established the "firm stance" of the Utah Supreme Court "that when 'the statute has run on a cause of action, so that it is dead, it cannot be revived by any . . . statutory extension.'" *Roark*, 893 P.2d at 1062 (alteration in original) (quoting *Del Monte*, 580 P.2d at 225). As stated in *Roark*, "[s]ince 1900, [the Utah Supreme Court] has consistently maintained that the defense of an expired statute of limitations is a vested right" that "could not be impaired or affected by subsequent legislation extending the limitation period." *Roark*, 893 P.2d at 1062. This straightforward rule has been applied in both criminal cases, *see State v. Lusk*, 2001 UT 102, 37 P.3d 1103, and civil cases where the legislature purported to revive expired claims, including cases where the legislature expressly attempted to revive expired claims, *see, e.g.*, *Apotex*.

Relying on the faulty assertion that the legislature can resurrect time-barred claims, Plaintiffs argue that Utah law permits such legislation if the legislature expresses its intent to do so. Opp'n at 6–8. That is incorrect and is based on a conflation of the issue in this case—namely, revival of expired claims and "retroactive application" of an amended statute to claims that are still viable at the time of the amendment's effective date. While Utah employs a two-part test to assess the validity of "retroactive" application to still-viable claims, the Utah Supreme Court has expressly held, on many occasions, that the legislature *may not* revive expired claims, and its intentions do not factor into the analysis. *E.g.*, *Ireland*, 61 P. 903 (holding that defendant's interest in a perfected statute of limitation defense is a "vested,

permanent right"); *Del Monte Corp.*, 580 P.2d at 225 ("[I]f the statute has run on a cause of action, so that it is dead, it cannot be revived by any statutory exception," and the legislature "cannot . . . take[] away by legislation . . . or by affirmative act, such as lengthening of the limitation period" a defendant's right to rely on the defense of an expired statute of limitation).

II. UTAH'S CONSTITUTION PROTECTS THE MILES'S VESTED RIGHTS.

A. Retroactive Application of § 78-2-308 Violates the Due Process Clause.

Plaintiffs contend that Utah Code § 78B-2-308 is constitutional and revives Plaintiffs' claims because it "is rationally related to helping victims of child sexual abuse have the necessary time to heal before being able to bring forth their civil claims." Opp'n at 9. But Plaintiffs' argument is inapplicable where, as here, the Utah Supreme Court has relied on the vested rights doctrine for analyzing expired claims under the Utah Due Process Clause. The vested rights doctrine was first recognized in *Ireland* and later reaffirmed by the Utah Supreme Court. *Supra* Section I. Under the framework set forth in *Ireland*, the court analyzes simply whether the prescribed period of limitations has expired such that the defendant acquired "a defense to the action." *Ireland*, 61 P. at 902. If the limitations period has expired, the defendant has a "vested, permanent right" to repose that is "quite beyond the power of legislation" to restore. *Id.* at 902, 903.

The Utah Supreme Court in *Ireland* grounded this "vested, permanent right" in Utah's then-recently ratified Due Process Clause. Case law across the country had reached conflicting conclusions. A majority of the U.S. Supreme Court in *Campbell v. Holt*, 115 U.S. 620 (1885) held that the Due Process Clause of the federal constitution did not prohibit legislative revival of time-barred claims. But in *Ireland*, the Utah Supreme Court, interpreting the Utah Constitution,

sided with the dissenting opinion of Justices Bradley and Harlan in *Campbell* that "when the statute of limitations gives a man a defense to an action, and that defense has absolutely arisen, *it is a vested right in the place where it has accrued, and is an absolute bar to the action there, and is protected by the fourteenth amendment to the constitution from legislative aggression.*" *Ireland*, 61 P. at 902 (emphasis added). "While the majority opinion in that case is supported by a few of the state courts," the Utah Supreme Court explained, a "much greater number" of state courts had adopted the view expressed in that dissenting opinion with respect to their own state constitutions. *Id.* Like those states, the court in *Ireland* concluded that when an appellant's right of action became barred, the respondent in that case acquired a constitutionally protected "vested, permanent right" to plead the statute of limitation as a defense and bar. *Id.* at 902, 904.

Because *Ireland* was decided only four years after Utah's Constitution was ratified, it is the best contemporaneous evidence of the meaning of the Utah Due Process Clause. The term "vested rights" had an inherently constitutional dimension when *Ireland* was decided. *See, e.g.*, *Black's Law Dictionary* (1st ed. 1891) (describing "vested rights" as a term "[i]n constitutional law"). Further, at the time *Ireland* was decided, the principle that "property" subject to constitutional protection included vested rights was not new; it had a long tradition in American constitutional law. *See* Edward S. Corwin, *The Basic Doctrine of Am. Const. Law*, 12 Mich. L. Rev. 247, 255–57 (1914).

The Utah Supreme Court has reaffirmed *Ireland's* constitutional vested rights doctrine in its subsequent decisions. *See Roark*, 893 P.2d at 1061 (recognizing the "right to plead a defense of statute of limitations is a vested right which cannot be impaired without denying [defendant]

due process of law"); *Lusk*, 2001 UT 102, ¶ 30 (stating that allowing resurrection of dead claims "solely upon the whim and vagary of the legislature . . . would be untenable").

Plaintiffs argue the legislature may abrogate vested rights by expressing a legislative intent to do so. Opp'n at 13. Plaintiffs contend that in none of the cases applying the "vested rights" doctrine did the legislature intend the statute to apply retroactively. *Id.* That is not accurate. In *Apotex*, the legislation expressly intended to revive barred claims. In any case, the reasoning of the Utah Supreme Court does not depend on what the legislature intended. While some of the cases may be factually distinct, the Utah Supreme Court unquestionably established that a vested right to a statute of limitations defense cannot be taken away by subsequent retroactive legislation. *See supra* Section I.[1]

Plaintiffs next urge this Court to adopt an equitable tolling rule to revive their claims. Opp'n at 14. Plaintiffs reason that "sexual abuse is an exceptional circumstance where applying the previous statute of limitations rule leads to an unjust result" and thus justifies equitable tolling. Opp'n at 14. But binding precedent precludes the application of an equitable discovery rule here. *See O'Neal v. Division of Family Services*, 821 P.2d 1139, 1140 (Utah 1991) (rejecting exceptional circumstance rationale where plaintiff was aware of alleged child sexual abuse). The judicially created common-law doctrine of equitable tolling cannot overcome the constitutionally based vested-rights doctrine. Moreover, these plaintiffs have affirmatively pled that they were aware of and had their claims investigated at the time they first arose in the 1980s. There is no rationale or basis to suggest that these Plaintiffs only recently discovered their

[1] Notably, Plaintiffs cannot cite a single case in which the Utah Supreme Court has allowed a previously barred claim to be revived.

purported claims. The Miles' statute of limitations defense became a vested right long ago, and this Court should apply long-standing Utah Supreme Court precedent interpreting the Utah Constitution holding that previously time-barred claims cannot be revived by legislation. *See Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 79 (1938). Federal courts have applied this settled line of precedent. Most recently, in *Hyland v. Dixie State Univ.*, No. 2:15CV36-TS, 2017 WL 2123839 (D. Utah, May 16, 2017), the court, addressing legislation trying to revive expired claims, held that the statute was unlawful because it "deprives Defendants of a right to a statute of limitations defense," which is "a vested right that cannot be taken away by legislation, and "'subsequent passage of an act increasing the period of limitation [cannot] operate to affect or renew a cause of action already barred.'" *Id*. at *2 (quoting *Roark*, 893 P.2d at 1062).

B. The Miles' Vested Right Is Also Protected by the Open Courts Clause.

Plaintiffs assert the Open Courts Clause of the Utah Constitution is not implicated in this case because Utah Code § 78B-2-308 is a statute of limitation and not of repose. Opp'n at 15. According to Plaintiffs, the Open Court Clause concerns only "limitations on the legislature's ability to prevent claims from being heard before a cause of action may even accrue, which is not the case with a statute of limitation." *Id.* at 16. But Plaintiffs fail to cite *any* case for this narrow interpretation of the Open Courts Clause.

The Utah Supreme Court has interpreted the Open Courts Clause to mean that parties are "constitutionally entitled to . . . their day in court," which includes the "'right and opportunity, in a judicial tribunal, to litigate a claim, seek relief, *or defend one's rights.*'" *Miller*, 2002 UT 6, ¶ 38 (emphasis added) (quoting Black's Law Dictionary 402 (7th ed. 1999)); *see also Daines v. Vincent*, 2008 UT 51, ¶ 46, 190 P.3d 1269 (holding that "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") (emphasis added; quotes omitted).

The stated purpose of the Open Courts Clause is "to 'impose some limitation' on the legislature's 'great latitude in defining, changing, and modernizing the law,'" even with prospective legislation. *Craftsman Builder's Supply Inc. v. Butler Mfg. Co.*, 1999 UT 18, ¶¶ 15, 17, 974 P.2d 1194 (affirming holding that plaintiff's causes of action were barred and finding that the statute of limitation at issue remedied "hardships" including the "difficulties defending against claims asserted many years after" events at issue) (citation omitted). The clause prevents the legislature "from closing the doors of the courts against any person who has a legal right which is enforceable in accordance with some known remedy." *Brown v. Wightman*, 151 P. 366, 366–67 (Utah 1915).

Here, the Miles have a vested legal right to plead a fully matured defense based on expiration of the then-applicable statute of limitations. The known remedy for that vested right is dismissal of the expired claims. Section 78B-2-308(7) purports to "close the doors of the courts" to that dispositive, vested defense. The statute unquestionably infringes on the constitutional "opportunity to present claims *and defenses*, and have them properly adjudicated on the merits," and accordingly violates the Open Courts Clause. *Daines*, 2008 UT 51, ¶ 46.

III. Plaintiffs' Federal Claims Are Time-Barred Under 18 U.S.C. § 2255.

Plaintiffs last assert that John Doe 1's claim under 18 U.S.C. § 2255 is timely because he "did not discover his sexual abuse had been videotaped until 2018." Opp'n at 18. But the Complaint and John Doe 1's declaration show he should have discovered his claim years earlier.

The statute of limitation for § 2255, on which John Doe 1 relies, provides that an action commenced "shall be barred unless the complaint is filed . . . not later than 10 years after the date on which the plaintiff *reasonably discovers* the later of" (a) "the violation that forms of the basis for the claim" or (b) "the injury that forms the basis of the claim." 18 U.S.C. § 2255(b) (emphasis added). Other federal courts analyzing 18 U.S.C. § 2255 have applied a discovery rule. *See, e.g.*, *Amy v. Anderson*, 2017 WL 1098823, at *8 (M.D. Ga. Mar. 23, 2017) (unpublished). The discovery rule provides that "if a party has knowledge of some underlying facts, then that party must reasonably investigate potential causes of action because the limitations period will run." *Colosimo v. Roman Catholic Bishop of Salt Lake City*, 2007 UT 25, ¶ 17, 156 P.3d 806 (citation omitted).

To be clear, the abuse never occurred, so it could not have been video recorded, but Plaintiffs' allegations confirm the discovery rule bars their claims regardless. John Doe 1 claims his mother and sisters knew of the alleged video-recorded abuse, and he says he remembers "how much turmoil the[] events" relating to the abuse "caused our family." John Doe 1 Decl. ¶¶ 2, 5, Ex. 3 to Compl.; Compl. ¶ 12. He also claims he remembers recurring nightmares of abuse as a child. *Id.* ¶ 2. John Doe 1 further admits information regarding his alleged abuse was publicly available: "After hearing the[] [Miles'] names, I typed them in on google [*sic*] and discovered my grandmother's stories, and the full extent of the abuse I suffered." *Id.* ¶ 5. The basis of John Doe 1's claim would have been available from his mother, sister, and grandmother near the time the alleged abuse was investigated—approximately 32 years ago. Compl. ¶¶ 15–19. That same information was publicly available. John Doe 1 should have and could have reasonably discovered his claim under § 2255 long ago. His claim is thus time-barred.

CONCLUSION

For the foregoing reasons, the Court should grant this Motion and dismiss Plaintiffs' claims against the Miles.

DATED: October 31, 2018.

RAY QUINNEY & NEBEKER

/s/ Samuel C. Straight
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CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of October 2018, I caused to be served via ECF/Email and/or U.S. mail, postage prepaid, a true and correct copy of the foregoing **REPLY IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM** to the foregoing:

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