

SENATE JUDICIARY COMMITTEE

STATEMENT TO

SENATE COMMITTEE SUBSTITUTE FOR

SENATE, No. 477

STATE OF NEW JERSEY

DATED: MARCH 7, 2019

The Senate Judiciary Committee reports favorably a Senate Committee Substitute for Senate Bill No. 477.

This substitute bill would extend the statute of limitations in civil actions for sexual abuse claims, as well as create a two-year window for parties to bring previously time-barred actions based on sexual abuse. The bill would also expand the categories of potential defendants in civil actions, and for some actions permit retroactive application of standards of liability to past acts of abuse for which liability did not previously exist. The following section-by-section summary of the bill's provisions further details its scope and application to lawsuits which could be filed beginning on December 1, 2019, the bill's effective date.

Section 1: This section amends the current law's general two-year statute of limitations for personal injury claims, N.J.S.2A:14-2, in order to indicate an exception for the new, extended statute of limitations periods detailed in section 2 of the bill.

Section 2 - Child and Adult Victims: This section creates the new, extended statute of limitations periods for sexual abuse, one of which would apply to persons who were abused when minors under the age of 18 years, and one of which would apply to persons who were abused after reaching 18 years of age. It would prohibit lawsuits to proceed as a class action, due to the particular circumstances unique to each person's abuse, and privately negotiated settlements of abuse claims on a class basis would be void and unenforceable. This section also provides guidance as to the retroactive application of potential new standards of liability created by the bill for lawsuits that could be filed in accordance with the new statute of limitations periods.

Child Victim – For abuse that occurred prior to, on or after the bill's effective date, a lawsuit would need to be filed within 37 years after the child victim turns 18 years of age (filed by the victim's 55th birthday), or within seven years of discovering the injury and its cause if the end date of the seven-year period would occur after the victim turns 55 years of age. Since the extended

statute of limitations is retroactive to cover past acts of abuse, any child victim of past abuse who is under the age of 55 years when the bill takes effect, or who will reach 55 years of age sometime after the bill takes effect, and who is aware of the injury and its cause could file a suit; the “reasonable discovery” requirement would only apply if the victim filed suit after turning 55 years of age due to a delayed discovery of the injury and its cause.

This date of reasonable discovery (no more than seven years prior to filing suit) could be challenged, triggering the need for the date to be judicially determined by a Lopez hearing in order to properly find whether the lawsuit was filed in time. See Lopez v. Swyer, 62 N.J. 267 (1973) (establishing objective, reasonable person standard to determine when injured party knew or should have known sufficient factors about injury to trigger running of statute of limitations); R.L. v. Voytac, 199 N.J. 285 (2009) (adding a second layer of analysis to Lopez hearing for sexual abuse lawsuits to consider several subjective factors concerning the individual victim as grounds for tolling statute of limitations).

The bill would establish retroactive application of the standard of liability set forth in the Charitable Immunity Act, section 1 of P.L.1959, c.90 (C.2A:53A-7), as amended by the bill in section 5. This could create, for child victim lawsuits filed under the new, extended statute of limitations, additional retroactive liability for non-profit organizations organized exclusively for religious, charitable, educational, or hospital purposes concerning willful, wanton or grossly negligent acts resulting in abuse that occurred prior to August 8, 2006. That date is when the New Jersey Supreme Court decided the case of Hardwicke v. American Boychoir School, 188 N.J. 69 (2006), and found for the first time that the Charitable Immunity Act does not bar lawsuits against organizations based on such aggravated forms of wrongful conduct; it only bars suits based on “simple” or “standard” negligent conduct (with some statutorily carved out exceptions). Id. at 96-97. Prior to this decision, the Supreme Court and lower courts found that the act did shield organizations from liability for gross negligence and even intentional conduct committed by its trustees, directors, officers, employees, agents, servants, or volunteers. See Schultz v. Roman Catholic Archdiocese, 95 N.J. 530, 535-536 (1984); Monaghan v. Holy Trinity Church, 275 N.J. Super. 594 (App. Div. 1994). The bill’s amendment to the Charitable Immunity Act, to be applied retroactively, recognizes the current interpretation and scope of organizational liability based on Hardwicke.

The retroactive expansion of organizational liability under this section does not create any additional retroactive liability for trustees, directors, officers, employees, agents, servants, or volunteers, as they were always generally liable for their own willful, wanton or grossly negligent acts, and this more-than-

negligence liability standard would remain the same following the bill's enactment. Such persons were added to section 1 of P.L.1959, c.90 (C.2A:53A-7) by the enactment of P.L.1995, c.183 (effective July 24, 1995), but only granted immunity for acts amounting to simple negligence.

A subcategory of such persons, the uncompensated trustees, directors, officers, or voluntary members serving on the boards or other governing bodies of non-profit organizations, would also not be impacted by the retroactive organizational liability. These uncompensated leaders were provided an earlier immunity for their own acts of negligence, and even gross negligence, resulting from the performance of their duties of office pursuant to a supplement to the Charitable Immunity Act, P.L.1987, c.87 (C.2A:53A-7.1) (effective April 6, 1987); these people can only be held liable for acts amounting to a "reckless disregard" of their duties, which "conduct [is a] degree[] of civil culpability greater than gross negligence." See Steinberg v. Sahara Sam's Oasis, LLC, 226 N.J. 344, 365-366 (2016).

Additionally, the bill establishes retroactive application of an exception to the Charitable Immunity Act set forth in P.L.2005, c.264 (C.2A:53A-7.4 et seq.), making non-profit organizations liable for acts of mere negligence in the hiring, supervision, or retention of an employee, agent, or servant resulting in sexual abuse committed against a minor under the age of 18 years. This liability for simple negligence, when first enacted by P.L.2005, c.264, took effect on January 5, 2006, and applied prospectively only. See P.L.2005, c.264, s.2 (C.2A:53A-7.5). However, as amended by this bill in section 6, organizational liability for an act of negligently hiring, supervising, or retaining a person resulting in abuse against a child could be applied retroactively in lawsuits for abuse occurring prior to the bill's effective date, which also means it could be applied retroactively to acts of abuse occurring prior to the effective date of P.L.2005, c.264.

This retroactive expansion of organizational liability does not create any additional retroactive liability for trustees, directors, officers, employees, agents, servants, or volunteers, including the aforementioned subcategory of uncompensated leaders, as these persons, who are not referenced in the relevant statutory provisions, are not intended to be subject to liability for acts of mere negligence in lawsuits concerning the hiring, supervision, or retention of an individual resulting in sexual abuse against a child. The standard immunity for negligent acts provided to such persons by the Charitable Immunity Act, as amended in 1995 and earlier supplemented in 1987, as explained above, is not pierced by the exception established in P.L.2005, c.264 (C.2A:53A-7.4 et seq.). Additionally, in any such lawsuit involving acts of sexual abuse that pre-date the statutory negligence immunity provided to such

persons, such lawsuit would still only be permitted against the non-profit organization because the retroactively applied organizational liability of P.L.2005, c.264 would be the basis of the suit, and not any form of pre-statutory common law negligence liability.

Adult Victim – For abuse committed against a person 18 years of age or older that occurred prior to, on or after the bill's effective date, a lawsuit would need to be filed within seven years of discovering the injury and its cause. The same “reasonable discovery” requirement described above that could apply to lawsuits involving child victims, and the possible use of a Lopez hearing to judicially determine the discovery date, if needed, would apply to adult victim suits filed under the new, extended statute of limitations.

The retroactive application of the amended Charitable Immunity Act, per section 5, would also apply to adult victim suits filed under the new, extended statute of limitations (adult victims could not bring suit under the charitable immunity exception based upon the negligent hiring, supervision, or retention of a person resulting in abuse, as amended by section 6, because such a cause of action is only available to child victims).

Section 3 - Child Victim: This section applies the new, extended statute of limitations period for child victims of abuse detailed in section 2 of the bill (suit must be filed by the 55th birthday, or within seven years of discovering the injury) to lawsuits brought by children, through a parent, guardian, or advocacy organization, or personally upon turning 18 years of age, for the following forms of intentional (willful) sexual exploitation that are intended to target the child pornography industry:

- permitting, enticing or coercing a child to engage in a prohibited sexual act or in the simulation of such an act if the person knows, has reason to know or intends that the prohibited act may be photographed, filmed, reproduced, or reconstructed in any manner or may be part of an exhibition or performance;

- photographing or filming a child in a prohibited sexual act or in the simulation of such an act or who uses any device to reproduce or reconstruct the image of the child in a prohibited sexual act or in the simulation of such an act; or

- knowingly receiving, for the purpose of selling or knowingly selling, procuring, manufacturing, giving, providing, lending, trading, mailing, delivering, transferring, publishing, distributing, circulating, disseminating, presenting, exhibiting, advertising, offering or agreeing to offer any photograph, film, videotape or any other reproduction or reconstruction which depicts a child engaging in a prohibited sexual act or in the simulation of such an act. See P.L.1992, c.7, ss.2 and 3 (C.2A:30B-2 and 2A:30B-3).

As any such cause of action involves intentional action on the part of the personal abuser or organizational entity under which the

sexual exploitation occurs, it does not create any liability based on merely negligent acts resulting in abuse.

Section 4 - Child Victim: This section amends the Child Sexual Abuse Act, section 1 of P.L.1992, c.109 (C.2A:61B-1), to apply the new, extended statute of limitations period for child victims of abuse detailed in section 2 (suit must be filed by the 55th birthday, or within seven years of discovering the injury) to lawsuits filed against two specific categories of abusers: (1) the “active” abuser, being the person who inflicted the abuse; and (2) the “passive” abuser, being a “parent, resource family parent, guardian or other person standing in loco parentis” who “knowingly permits or acquiesces” to the abuse by an active abuser. See Hardwicke v. American Boychoir Sch., 188 N.J. at 86.

Under the Child Sexual Abuse Act, the phrase “person standing in loco parentis” may provide for organizational liability for passive abuse, because the use of “person,” per the definition set forth in R.S.1:1-2, includes private and public corporations (e.g., a county or municipality) as well as individuals. See Hardwicke v. American Boychoir Sch., 188 N.J. at 91-93; J.H. v. Mercer County Youth Detention Ctr., 396 N.J. Super. 1, 10-12 (App. Div. 2007). However, under the Child Sexual Abuse Act as currently written, this “in loco parentis” liability (meaning in place of a parent, Black’s Law Dictionary 787 (6th ed. 1990)) is limited, in that the organization’s setting in which the abuse knowingly occurred must also be deemed to be a “household.” On this point, courts have determined a private, full-time boarding school and a county’s full-time youth detention center to each be a “household” establishing liability, but determined that a public school is not a “household” based on the school’s more limited, temporary custody and control of children only during school hours. See American Boychoir Sch., 188 N.J. at 93-94 (discussing private boarding school); J.H. v. Mercer County Youth Detention Ctr., 396 N.J. Super. at 14-15 (discussing full-time detention center); D.M. v. River Dell Regional High Sch., 373 N.J. Super. 639, 649 (App. Div. 2004) (discussing public school). The “household” limitation would be deleted by the bill, so that “passive” abuser liability could apply to any individual person, or private or public entity, who takes custody and control of children even on a limited, temporary basis, so long as this custody and control is sufficient to establish the person or entity as being “in loco parentis.”

Both an “active” and “passive” abuser are subject to a knowing (willful) standard of liability, and therefore this section does not create any liability based on merely negligent acts resulting in abuse. Also of note, a cause of action under this section based on the expanded liability against a “passive” abuser, removing the “household” setting as a requirement for liability, is not listed in section 2 or section 9 concerning the retroactive application of

certain newly created forms of liability to lawsuits brought under the new, extended statute of limitations or, as further detailed below, during a two-year filing window available for otherwise time-barred claims (see comments for those sections), and is intended to only apply prospectively.

Section 5 - Child and Adult Victims: This section amends the Charitable Immunity Act, section 1 of P.L.1959, c.90 (C.2A:53A-7), to add language to subsection c., indicating that non-profit organizations are expressly liable for willful, wanton or grossly negligent acts. This codifies what was already understood via case law since August 8, 2006 - that organizational charitable immunity only applies to protect organizations from lawsuits claiming injury based on merely negligent acts, not more aggravated forms of wrongful conduct, such as willful, wanton or grossly negligent acts. See Hardwicke v. American Boychoir Sch., 188 N.J. at 96-97 (2006). The added language may establish retroactive liability for lawsuits filed under the new, extended statute of limitations periods, or filed during the below described two-year filing window for otherwise time-barred claims, concerning abusive acts that occurred prior to August 8, 2006, as detailed in the comments provided for section 2 and section 9 of the bill.

Section 6 - Child Victim: This section amends an existing exception to the Charitable Immunity Act set forth in P.L.2005, c.264 (C.2A:53A-7.4 et seq.), making non-profit organizations liable for acts of mere negligence in the hiring, supervision, or retention of an employee, agent, or servant resulting in sexual abuse committed against a minor under the age of 18. This liability for simple negligence, when first enacted by P.L.2005, c.264, took effect on January 5, 2006, and applied prospectively only. See P.L.2005, c.264, s.2 (C.2A:53A-7.5). However, as amended by the bill (by adding subsection b.), organizational liability for an act of negligently hiring, supervising, or retaining a person resulting in abuse against a child could be applied retroactively in lawsuits filed under the new, extended statute of limitations period (suit must be filed by the 55th birthday, or within seven years of discovering the injury) or during the below described two-year window, per section 2 or section 9, respectively, for abuse occurring prior to the bill's effective date, which also means it could be applied retroactively to acts of abuse occurring prior to the effective date of P.L.2005, c.264 (January 5, 2006).

This retroactive expansion of organizational liability does not create any additional retroactive liability for trustees, directors, officers, employees, agents, servants, or volunteers, as these persons, who are not referenced in the relevant statutory provisions, are not intended to be subject to liability for acts of mere negligence in lawsuits concerning the hiring, supervision, or retention of an individual resulting in sexual abuse against a child. The standard

immunity for negligent acts provided to such persons by the Charitable Immunity Act, as amended in 1995 and earlier supplemented in 1987, as explained in the comments for section 2, is not pierced by the exception established in P.L.2005, c.264 (C.2A:53A-7.4 et seq.). Additionally, in any such lawsuit involving acts of sexual abuse that pre-date the statutory negligence immunity provided to such persons, such lawsuit would still only be permitted against the non-profit organization because the retroactively applied organizational liability of P.L.2005, c.264 would be the basis of the suit, and not any form of pre-statutory common law negligence liability.

Section 7 – Child and Adult Victims: This section provides that the “New Jersey Tort Claims Act,” N.J.S.59:1-1 et seq., or any other law, that may provide some form of governmental immunity from lawsuits based on injuries resulting from acts of sexual abuse are inapplicable, so that any public entity, as defined in the “New Jersey Tort Claims Act,” may be held liable in any such suit in the same manner as a private organization.

Section 8 – Child and Adult Victims: This section eliminates the “New Jersey Tort Claims Act” two-year statute of limitations period, set forth in N.J.S.59:8-8, for bringing a sexual abuse lawsuit against a public entity, as well as any of the act’s procedural requirements, such as the 90-day period for filing notice of a claim of liability against a public entity for such lawsuits; the process of filing a lawsuit with service upon the liable public entity or entities would thus be the same as when suing a private organization. Public entities would also be subject, just like a private organization, to the new, extended statute of limitations periods for child and adult victims of abuse detailed in section 2 (child victim - suit must be filed by the 55th birthday, or within seven years of discovering the injury; adult victim – suit must be filed within seven years of discovering the injury).

Section 9 - Child and Adult Victims: This section creates a two-year window for lawsuits to be filed for acts of sexual abuse that occurred prior to the bill’s effective date which would otherwise be time-barred, even after applying (retroactively) the new, extended statute of limitations period for child and adult victims of abuse detailed in section 2 (child victim - suit must be filed by the 55th birthday, or within seven years of discovering the injury; adult victim – suit must be filed within seven years of discovering the injury).

The same retroactive application of the amended Charitable Immunity Act, per section 5, and the amended charitable immunity exception based upon the negligent hiring, supervision, or retention of a person resulting in abuse, per section 6, that would apply to lawsuits

filed during any applicable extended statute of limitations period would also apply to child and adult victim suits filed during the two-year window established by this section (see comments on retroactivity under section 2, section 5, and section 6).

As with lawsuits filed in accordance with any applicable statute of limitations pursuant to section 2, suits otherwise time-barred that were filed during the two-year window could not proceed as a class action, due to the particular circumstances unique to each person's abuse, and privately negotiated settlements on a class basis concerning abuse claims that could be brought during the two-year window would be void and unenforceable.

Section 10 - Effective Date: The effective date section provides that the bill would take effect on December 1, 2019, and beginning on that date lawsuits could be filed in accordance with the bill's provisions, as described above.