

J.H.,

Plaintiff-Respondent,

vs.

WARREN HILLS BOARD OF
EDUCATION and WARREN
HILLS JUNIOR HIGH,

Defendants-Appellants,

and

THE ESTATE OF F.M.,

Defendant.

SUPREME COURT OF NEW JERSEY

Docket No. 090726

Civil Action

On Motion for Leave to Appeal from
Superior Court of New Jersey, Appellate
Division

Docket No. A-2896-23

Order/decision dated: April 28, 2025

Sat Below: Part E

Hon. Robert J. Gilson, P.J.A.D.

Hon. Lisa A. Firko, J.A.D.

Hon. Lorraine M. Augostini, J.A.D.

**AMENDED *AMICUS CURIAE* BRIEF OF
NEW JERSEY DEFENSE ASSOCIATION**

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INTRODUCTION

This Court correctly granted leave to appeal the Appellate Division’s opinion below and now must reverse. As expressed cogently by Defendants-Appellants Warren Hills Board Of Education and Warren Hills Junior High (“Warren Hills”), the appellate panel below showed no appreciation for the critical distinction between the Legislature’s elimination of a procedural hurdle to a lawsuit seeking redress for 1970s conduct violating then-existing law, as compared to the creation of new theories of secondary liability for conduct not actionable at the time of the events alleged. The former represents a procedural change in the law, eliminating obstacles to suit; the latter represents a substantive change, creating new liability exposures for an employer based upon decades-old allegations concerning an employee. The latter also necessarily implicates the longstanding policy disfavoring the retroactive imposition of liability under theories not available at the time of the underlying conduct. The new theory of secondary liability endorsed by the Appellate Division would leave organizations of all forms and purposes across this State facing exposure for alleged wrongdoing, having had no notice or opportunity to implement suitable risk-mitigating practices and procedures at the relevant time.

This Court spelled out precisely this distinction in its recent decision about changes to the Wage and Hour Law, *Maia v. IEW Constr. Grp.*, 257 N.J. 330 (2024), but the appellate panel misapplied that opinion to the December 1, 2019

“amendatory and supplementary act” addressing sexual abuse lawsuits, *L.* 2019, c. 120. While the Appellate Division discussed the procedural/substantive dichotomy addressed in *Maia*, the panel entirely misapprehended the distinction. The panel then compounded the error by ignoring the laborious steps taken by the Legislature to explain which statutory changes in the 2019 Act were to have retroactive effect and which were to only become effective after December 1, 2019. That question — which changes the Legislature intended to be retroactive and which were to have prospective effect only — was precisely the issue before the Appellate Division, but the Court muddled the analysis, relying in large part upon this Court’s decision in *W.S. v. Hildreth*, 252 N.J. 506 (2023), which does not meaningfully inform the question presented here. It is a grievous error, having the potential to wreak havoc on the thousand or more child sex abuse actions pending in the trial courts, given the approval for publication of the opinion below. Moreover, the panel arrived at a statutory interpretation that results in the long-disfavored outcome of retroactively imposing substantive liability, portending similar outcomes involving other statutes that have been, or may come to be, enacted by the Legislature.

STATEMENT OF INTEREST

The New Jersey Defense Association (“NJDA”) is a non-profit organization that creates a communications pathway among its members, consisting of New Jersey defense attorneys, insurance claim professionals, self-insurers, insurers, and

other New Jersey businesses engaged in claims administration and the defense of damage suits. The purpose of the NJDA is to encourage the prompt, fair, and just disposition of tort claims, enhance the knowledge and improve the skills of defense lawyers, and support improvements to the adversarial system of justice and the overall administration of justice in New Jersey's state and federal courts. The NJDA also advocates for improvements in legal services available to the public, works toward the reduction of court congestion and delays in civil litigation, and cooperates with public education programs directed toward reducing lawsuits and costs related to personal, financial, and other compensatory losses.

The NJDA submits this brief to address the serious public interests at stake in this appeal. Specifically, the NJDA asks this Court to consider the harm that would befall employers if, as advocated by Plaintiff-Appellee, public and private sector entities were subjected to the unfair and unwarranted retroactive creation of liability and damages for an employee's wrongdoing occurring decades before the Child Sexual Abuse Act was enacted, having had no opportunity to implement risk-mitigation practices and procedures. Such a result violates the Legislature's stated prospective intent in changing the statutory passive abuser text as well as relevant New Jersey precedent disfavoring the construction of a statute to have retroactive effect.

Given that the NJDA is committed to improving the administration of justice to ensure fair and just litigation, it is well-suited to address the consequential issues at stake in this appeal, contributing a meaningful viewpoint on the implications of the arguments advocated by Plaintiff.

ARGUMENT

This appeal requires consideration of two legislative enactments addressing sexual abuse. The first is the Child Sexual Abuse Act (“CSAA”), N.J.S.A. § 2A:61B-1, which became law in 1992, and which established the first statutory cause of action for sexual abuse in New Jersey. *Hardwicke v. Am. Boychoir Sch.*, 188 N.J. 69, 84 (2006). The CSAA defines “sexual abuse” as “sexual contact or sexual penetration between a child under the age of 18 years old and an adult.” N.J.S.A. § 2A:61B-1(a)(1). This same provision of the CSAA establishes two categories of abusers: active abusers who inflict the abuse, and passive abusers who “knowingly permit[] or acquiesce[] in sexual abuse by any other person.” *Id.*; *see also Hardwicke*, 188 N.J. at 80.

The second legislative enactment at issue is *L. 2019, c. 120* (“2019 Act”), a collection of “amendatory and supplementary” measures. The 2019 Act modified statutes of limitation, codified at N.J.S.A. 2A:14-2a; narrowed the scope of the Charitable Immunity Act, codified at N.J.S.A. 2A:53A-7.5; and created the two-year window for actions for damages resulting from sexual assault that were previously

time-barred by the prior statute, codified at N.J.S.A. 2A:14-2b. In addition, relevant to this appeal, the 2019 Act modified the elements of “passive” or secondary liability for child sexual abuse.

As originally enacted, the relevant CSAA provision imposed a “household” requirement for passive liability:

(1) “Sexual abuse” means an act of sexual contact or sexual penetration between a child under the age of 18 years and an adult. A parent, foster parent, guardian or other person standing in loco parentis within the household who knowingly permits or acquiesces in sexual abuse by any other person also commits sexual abuse ***.

1992 NJ Sess. Law Serv. Ch. 109 (SENATE 257) (emphasis added).

The new CSAA definition, revised by the 2019 Act, omitted the “household” requirement, to read:

(1) “Sexual abuse” means an act of sexual contact or sexual penetration between a child under the age of 18 years and an adult. A parent, resource family parent, guardian or other person standing in loco parentis who knowingly permits or acquiesces in sexual abuse by any other person also commits sexual abuse ***.

N.J.S.A. 2A:61B-1.

In *Maia*, this Court provided a detailed explanation how courts are to determine whether a statutory change is procedural or substantive, citing the U.S. Supreme Court’s decision in *Landgraf v. USI Film Products*, 511 U.S. 244, 247 (1994). 257 N.J. at 345. This Court noted that, in *Landgraf*, the U.S. Supreme Court had determined that a 1991 change to the Civil Rights Act, as applied to alleged mid-

1980s conduct, would impact the legal consequences faced by the parties, emphasizing

the “[r]etroactive imposition of punitive damages would raise a serious constitutional question,” and the “introduction of a right to compensatory damages” and “new damages” would create a “new legal burden” on the parties. The Court therefore held that, because it had “found no clear evidence of congressional intent that [the relevant section of the 1991 Act] should apply to cases arising before its enactment,” the new provisions could not be applied to the plaintiff’s claims.

Maia, 257 N.J. at 343 (quoting *Landgraf*, 511 U.S. at 281-83) (alterations in original). After providing this detailed explication of *Landgraf*, this Court then laid out the precise inquiry that should have guided the Appellate Division in this case:

[T]he relevant inquiry is “whether the new provision attaches new legal consequences to events completed before its enactment.” The Court noted that the “application of new statutes passed after the events in suit is unquestionably proper in many situations,” such as statutes that affect the “propriety of prospective relief”; “statutes conferring or ousting jurisdiction”; and “[c]hanges in procedural rules.” The Court distinguished such situations from statutes that “would operate retroactively” — i.e., statutes that “would impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed.”

Maia, 257 N.J. at 343 (internal citations omitted; emphasis in original).

Applying *Landgraf*, this Court had no difficulty concluding in *Maia* that the changes made to the Wage and Hour Law (“WHL”) by the subsequently enacted “Chapter 212” were indeed substantive because those changes “add[ed] liquidated damages and a retaliation claim to both the [Wage Payment Law (“WPL”)] and

WHL, attorneys' fees to the WPL, and by extending the statute of limitations in the WHL." 257 N.J. at 347 (emphasis added). These changes, this Court wrote, "are not merely procedural; rather, they affect the duties and liabilities involved. Because Chapter 212 attaches new legal consequences to events, applying the provisions of Chapter 212 to conduct completed before its enactment would therefore be retroactive application." *Id.* (internal citations and quotations omitted; emphasis in original). As this Court recognized in *Maia*, this analysis is rooted in the "fundamental principle of jurisprudence that retroactive application of new laws is usually unfair." *Id.* at 349 (cleaned up).

Imposing liability for sexual abuse by employees upon day schools, which provide no "household" to students, clearly runs contrary to *Maia*, as it "allows plaintiffs to bring new claims with enhanced damages that were not previously available to plaintiffs at the time their injuries occurred, thereby changing the 'legal consequences of acts.'" *See ibid.* The retroactive elimination of the "household" requirement changes the "legal consequences" to Warren Hills with respect to the operation of its school system in the mid-late 1970s, when J.H. alleges he was abused by a school custodian. At that time, the concept of a school system's "passive" liability for employee sexual abuse had not yet been conceived, let alone enacted into law. The panel below ignored the *Maia* analysis, erroneously concluding that such changes to the CSAA passive liability provision were "changes to the law that

are procedural rather than substantive.” *J.H. v. Warren Hills Board of Education*, 481 N.J. Super. 536, 550 (App. Div. 2025). This holding requires immediate reversal.

What is even more perplexing is that the Senate Judiciary Committee Statement on the 2019 Act told the lower court precisely what changes in “this amendatory and supplementary act” should be understood to have “expanded liability.” See *S. Judiciary Comm. Statement to S. Comm. Substitute for S.477*, § 4 (Mar. 7, 2019).¹ The Report states:

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 . . . during a two-year filing window available for otherwise time-barred claims . . . and is intended to only apply prospectively.

Ibid. (emphasis added).

Not only did this passage explicitly provide the lower court with the unmistakable direction that the change was substantive, triggering analysis under *Landgraf* and *Maia*, but it also provided the panel with “clear evidence” under *Landgraf* that the Legislature did not intend the change to be retroactive, see 511 U.S. at 286. As *Maia* emphasized, “courts generally ‘enforce newly enacted

¹ Available at <https://repo.njstatelib.org/items/234e90b5-6908-4005-821f-061a1dc0def3>, https://pub.njleg.gov/bills/2018/S0500/477_S1.HTM and https://www.njleg.state.nj.us/bill-search/2018/S477/bill-text?f=S0500&n=477_S1.

substantive statutes prospectively unless [the Legislature] clearly expresses a contrary intent.” 257 N.J. at 350 (quoting *Matter of J-D-F*, 248 N.J. 11, 22 (2021)) (emphasis and alterations in original).

Here, the Legislature expressed a prospective intent by virtue of both the clear language of the 2019 Act (e.g., “effective as of December 1, 2019”) and the Judiciary Committee Statement. It is astounding that this passage from the 2019 Committee Statement, which explicitly recites the Legislature’s intent, is never referenced in the Appellate Division’s published opinion.

As discussed above, the Appellate Division mischaracterized its drastic expansion of substantive rights and liabilities as the mere elimination of barriers of time or procedure to pursuing certain claims, again citing *W.S.* without due, or any, regard for the direct application of *Maia* that this matter required. 481 N.J. Super. at 550. In that same passage, the panel concluded that “[t]he text, structure, purpose and legislative history of the amended CSA Act support that construction.” *Ibid.* (internal quotations and alterations omitted). For the reasons explained above and at length by Defendant-Appellant Warren Hills, the text, structure, and legislative history necessitate the opposite conclusion.

The Appellate Division is correct that the procedural aspects of the amendments, i.e., the near-boundless statute of limitations imposed thereby, are applicable to matters filed after the effective date, a fact evidenced by the legions of

actions commenced in the years since the 2019 Act. What is manifest error, however, is the practical import of the Appellate Division's decision: unjustly forcing untold numbers of New Jersey entities and individuals to contend with significantly expanded theories of liability and drastically enhanced damages without notice at the relevant time.

This Court should have access to statistics reflecting the number of child sexual abuse actions pending in the trial courts. NJDA estimates that the figure exceeds one thousand cases. Many have been pending for five or more years. Trial judges have worked, and continue to work, mightily to achieve settlements in these cases before trial and often before dispositive motion practice. To date, these cases involve claims of negligence; negligent supervision, hiring, and retention; and gross negligence — all common law claims for which fee-shifting is unavailable. The quantum of legal fees on the part of counsel for plaintiffs has not entered into the settlement equation or dialogue. If, due to the Appellate Division's error below, the CSAA's fee-shifting provision suddenly becomes available in all cases still pending, the percentage of matters which could settle before trial doubtless will crater. This Court should not allow such a dire turn of events. Further, plaintiffs who resolved abuse cases based upon the law prior to the Appellate Division's opinion may second-guess guidance they received that resulted in settlement.

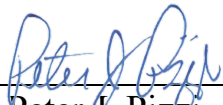
CONCLUSION

For all the foregoing reasons, the Appellate Division's April 28, 2025 decision should be reversed and summary judgment granted on J.H.'s claims under the CSAA and, specifically, N.J.S.A. § 2A:61B-1(a)(1) of that enactment.

Dated: September 22, 2025

Respectfully yours,

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