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BY

NORTH CAROLINA

WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
21 CVS 7438

DUSTIN MICHAEL MCKINNEY, GEORGE JERMEY MCKINNEY and JAMES ROBERT TATE,

Plaintiffs,

v.

GARY SCOTT GOINS and THE GASTON COUNTY BOARD OF EDUCATION,

Defendants.

ORDER

This matter comes before the undersigned three-judge panel upon Defendant Gaston County Board of Education's motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

In this litigation, Defendant Gaston County Board of Education (hereinafter "Defendant Gaston Board") seeks an order from this Court declaring that certain provisions of North Carolina Session Law 2019-245 (known as the SAFE Child Act and hereinafter referred to as "S.L. 2019-245") violate its due process rights under what is known as the "Law of the Land" clause of Article I, Section 19 of the North Carolina Constitution. Article I, Section 19 of the North Carolina Constitution, dictates, in relevant part, that "[n]o person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner

deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art. I, § 19.

SUMMARY OF RELEVANT FACTS[1]

In 2019, the General Assembly unanimously passed the SAFE Child Act, S.L. 2019-245, which Governor Cooper signed into law on November 7, 2019. Section 4.2(b) of the Act (hereinafter, "Revival Window"), an uncodified section of the session law, provides a two-year window from January 1, 2020, to December 31, 2021, in which any civil action for child sexual abuse is revived if it was otherwise time-barred under N.C.G.S. § 1-52 prior to the enactment of S.L. 2019-245.

All three Plaintiffs were high school wrestlers at East Gaston High School, which is in the Gaston County school system. The East Gaston High School coach at that time was Defendant Gary Goins. After several years of repeated incidents, Defendant Goins was indicted on multiple counts in 2013. Defendant Goins's separation from employment with East Gaston High School coincided with the indictment. Defendant Goins was found guilty of two counts of statutory rape sex offenses, six counts of indecent liberty with a child, five counts of indecent liberty with a student by a teacher, two counts of sex act with student by teacher, and two counts of crimes against nature. The three Plaintiffs in this case participated in the criminal prosecution of Defendant Goins.

[1] The Court does not make findings of fact in connection with a motion to dismiss made pursuant to Rule 12(b)(6); instead, to be helpful to the parties and the courts, the Court includes the following allegations derived from the complaint and relevant to the Court's analysis in resolving Defendant's Motion to Dismiss under Rule 12(b)(6).

Plaintiffs were born: August 20, 1986 (Dustin McKinney); May 21, 1982 (Jermey McKinney); and July 24, 1987 (Robert Tate). The youngest Plaintiff, Tate, turned eighteen in 2005. Under the previous version of N.C.G.S. § 1-52, the statute of limitations barred these claims in 2007 (Dustin); 2003 (Jermey); and 2008 (Robert). Plaintiffs filed this action on November 2, 2020, and rely solely on the Revival Window under § 4.2(b).

PROCEDURAL HISTORY

Plaintiffs filed their Complaint on November 2, 2020. Defendant Gaston Board thereafter filed an Answer, Counterclaim, and a Motion to Dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, each of which seeks dismissal of Plaintiffs' claims on the basis that Plaintiffs' claims are time-barred because provisions of S.L. 2019-245 violate the Law of the Land Clause.

Defendant Gaston Board filed an amended motion to transfer the facial constitutional challenges presented in this action, pursuant to N.C.G.S. § 1A-1, Rule 42(b)(4), to Superior Court, Wake County, to be heard and determined by a three-judge panel in accordance with N.C.G.S. § 1-267.1. In an order entered February 17, 2021, the trial court in Superior Court, Gaston County, ordered that Defendant Gaston Board's facial constitutional challenges in this action be transferred to be heard by a three-judge panel in Superior Court, Wake County. On September 8, 2021, the Chief Justice of the Supreme Court of North Carolina, pursuant to N.C.G.S. § 1-267.1(b2), appointed the three undersigned resident superior court judges to hear Defendant's facial challenge to S.L. 2019-245. On September 27, 2021, the State of

North Carolina filed a Motion to Intervene by right pursuant to N.C.G.S. § 1A- 1, Rule 24(a)(1). The State's motion was granted on October 11, 2021. On October 21, 2021, the undersigned three-judge panel heard argument from the parties regarding the facial challenges presented in Defendant Gaston Board's Motion to Dismiss and took the matter under advisement.

ANALYSIS

Legal Standards Applicable to Facial Constitutional Challenges

Defendant's Motion presents a facial challenge to an act of our General Assembly. Unlike an as-applied challenge, which "concedes a statute's general constitutionality but instead 'claims that a statute is unconstitutional on the facts of a particular case or in its application to a particular party,'" *State v. Grady*, 372 N.C. 509, 562, 831 S.E.2d 542, 579-80 (2019) (Newby, J. dissenting) (quoting *As-Applied Challenge, Black's Law Dictionary* (10th ed. 2014)), a "facial challenge maintains the statute 'always operates unconstitutionally,'" *id.* at 564, 831 S.E.2d at 581 (quoting *Facial Challenge, Black's Law Dictionary* (10th ed. 2014)).

In a facial challenge, our courts presume "that any act passed by the legislature is constitutional," and "will not strike it down if [it] can be upheld on any reasonable ground." *State v. Bryant*, 359 N.C. 554, 564, 614 S.E.2d 479, 486 (2005) (quoting *State v. Thompson*, 349 N.C. 483, 491, 508 S.E.2d 277, 281-82 (1998)); *Poor Richard's, Inc. v. Stone*, 32 N.C. 61, 63, 366 S.E.2d 697, 698 (1988) (noting presumption of constitutionality).

A facial challenge must therefore demonstrate a constitutional violation "beyond reasonable doubt." *Town of Boone v. State*, 369 N.C. 126, 130, 794 S.E.2d 710, 714 (2016) (citing *Baker v. Martin*, 330 N.C. 331, 334-35, 410 S.E.2d 887, 889 (1991)); *Cooper v. Berger*, 370 N.C. 392, 413, 809 S.E.2d 98, 111 (2018) (explaining that courts will not declare a law invalid unless it is determined to be "unconstitutional beyond a reasonable doubt"). And "[a]n individual challenging the facial constitutionality of a legislative act 'must establish that no set of circumstances exists under which the [a]ct would be valid.'" *Thompson*, 349 N.C. at 491 (second alteration in original) (quoting *United States v. Salermo*, 481 U.S. 739, 745, 107 S. Ct. 2095, 2100 (1987)).

Legal Standards Applicable to an Extension of a Statutory Limitations Period and a Revival of Claims After the Expiration of the Statute of Limitations

A defendant's vested right in a statute of limitations defense, as laid out in *Wilkes Cty. v. Forester*, 204 N.C. 163, 167 S.E. 691 (1933), has consistently been applied as a constitutionally-protected vested right. *Id.* at 169, 167 S.E. 2d at 695; *see Waldrop v. Hodges*, 230 N.C. 370, 373, 53 S.E. 2d, 263, 265 (1949); *Colony Hill Condominium I Assoc. v. Colony Co.*, 70 N.C. App. 390, 394, 320 S.E. 2d 273, 276 (1984); *Troy's Stereo Ctr., Inc. v. Hodson*, 39 N.C. App. 591, 595, 251 S.E. 2d 673, 675 (1979). Further, the Supreme Court of the United States has explicitly acknowledged North Carolina's right to make this distinction under our Law of the Land Clause, noting that "some state courts have not followed [*Campbell*] in construing provisions of their constitutions similar to the due process clause. Many have, as they are privileged to do, so interpreted their own . . . constitutions to give

restrictive clauses a more rigid interpretation than we properly could impose upon them." *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 312-313 (1945) (citing *Wilkes*, 204 N.C. 163, 167 S.E. 691 (1949)).

However, this right only vests when the statute of limitations expires before any legislative enactment that alters or otherwise changes the limitations period. While the legislature may not retroactively *revive* a time-barred claim, the Supreme Court of North Carolina consistently holds that the legislature may *extend* a statute of limitations on a claim that is not already time-barred. *Jewell v. Price*, 264 N.C. 459, 142 S.E.2d 1 (1965); *see also Armstrong v. Armstrong*, 322 N.C. 396, 401, 368 S.E.2d, 595, 598 (1988) (holding that "[t]here is no such thing as a vested right in the continuation of an existing law"). Further, "[w]hen a statute would have the effect of destroying a vested right if it were applied retroactively, it will be viewed as operating prospectively only." *Bolick v. Am. Barmag Corp.*, 306 N.C. 364, 371, 293 S.E. 2d 415, 420 (1982) (citations omitted).

Defendant's Facial Challenges to S.L. 2019-245

As noted above, Defendant Gaston Board challenges Section 4.2(b) of S.L. 2019-245.

Revival Window

Defendant challenges as facially unconstitutional the uncodified provision of S.L. 2019-245, § 4.2(b), the Revival Window. The Revival Window expressly states that it "revives any civil action for child sexual abuse otherwise time-barred under

G.S. 1-52 as it existed immediately before the enactment of this act." S.L. 2019-245 § 4.2(b). The Revival Window exclusively applies to previously time-barred claims.

There is no vested right in a statute of limitations defense under the federal constitution. *Campbell v. Holt*, 115 U.S. 620 (1885). However, "the United States Constitution provides a constitutional floor of fundamental rights . . . state constitutions frequently give citizens of individual states basic rights in addition to those guaranteed by the United States Constitution." *Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 475, 515 S.E.2d 675, 692 (1999). As such, the North Carolina Constitution may permissibly provide additional vested rights beyond those provided in the federal constitution, as it does so here.

Generally speaking, the Law of the Land Clause protects vested rights from "the state's exercise of its police power." *Godfrey v. Zoning Bd. Of Adjustment*, 317 N.C. 51, 62, 344 S.E.2d 272, 279 (1986). Our Supreme Court holds a vested right "*must have become a title*, legal or equitable, *to the present or future enjoyment of property, a demand, or legal exemption from a demand by another.*" *Armstrong*, 322 N.C. at 402, 368 S.E.2d at 598 (citations omitted) (emphasis in original).

A vested right in a statute of limitations defense under the North Carolina Constitution flows from *Wilkes Cty. v. Forester*, 204 N.C. 163, 167 S.E. 691 (1933). In *Wilkes*, our Supreme Court explicitly acknowledged the *Campbell* holding, *id.* at 170, 167 S.E. at 695, but then went on to hold that "[w]hatever may be the holdings in other jurisdictions, we think this jurisdiction is committed to the rule that an enabling statute to revive a cause of action barred by the statute of limitations is

inoperative and of no avail. It cannot be resuscitated," *id.* (citations omitted). The *Wilkes* decision has never been overturned. *See*, *Waldrop*, 230 N.C. at 373, 53 S.E.2d at 265 (holding that while the legislature can extend a limitation period that has not yet expired, "[a] right or remedy, once barred by a statute of limitations, may not be revived by an Act of the General Assembly"); *Troy's Stern Ctr., Inc. v Hudson*, 39 N.C. App. at 595, 251 S.E.2d at 675 ("While the General Assembly may extend at will the time within which a right may be asserted or a remedy invoked so long as it is not already barred by an existing statute, an action already barred by a statute of limitations may not be revived by an act of the legislature."). In sum, the North Carolina Constitution affords defendants a vested right in a statute of limitations defense, and the constitutional protection for such a vested right is contained within the Law of the Land Clause. *See Lester Bros., Inc. v. Pope Realty & Ins. Co.*, 250 N.C. 565, 568, 109 S.E.2d 263, 266 (1959) (holding that a statute could not be given retroactive effect to interfere with a vested right in a cause of action) (citing U.S. Const. art. I, § 10 and the former Law of the Land Clause, N.C. Const. art. I, § 17)).

Here, the Revival Window "revives any civil action . . . otherwise time-barred . . . before the enactment of this act." S.L. 2019-245 § 4.2(b). The language and operative effect of the Revival Window directly runs afoul of the case law to which a majority of this panel is bound. As such, the Revival Window infringes on a vested right in a statute of limitations defense under the Law of the Land Clause of the North Carolina Constitution.

Under the North Carolina Constitution, fundamental rights and vested rights are viewed separately. A Fundamental Right is defined as "[a] significant component of liberty, encroachments of which are *rigorously tested* by courts to ascertain the soundness of purported governmental justifications." Black's Law Dictionary 744 (9th ed. 2009) (emphasis added); *see also Comer v. Ammons*. 135 N.C. App. 531, 539, 522 S.E. 2d 77, 82 (1999) ("[A fundamental right] can only be infringed upon if the state can show it has a compelling need to do so." (citing *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678 (1965)). A law which violates a Fundamental Right is subject to strict scrutiny to determine whether it is narrowly tailored and serves a compelling state interest. *Stephenson v. Bartlett*, 355 N.C. 354, 377, 562 S.E. 2d 377, 393 (2002).

Conversely, a vested right is defined as "[a] right that so completely and definitely belongs to a person that it cannot be impaired or taken away[.]" Black's Law Dictionary 1438 (9th ed. 2009); see also *Gardner v. Gardner*, 300 N.C. 715, 719, 268 S.E. 2d 468, 471 (1980) ("[A] right is 'vested' when it is so far perfected as to permit no statutory interference."). "Without question, vested rights of action are property, just as tangible things are property." *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 176, 594 S.E.2d 1, 12 (2004) (citing, *Duckworth v. Mull*, 143 N.C. 461, 466-67, 55 S.E. 850, 852 (1906)). "It is . . . clear that the statute of limitations operates to vest a defendant with the right to rely on the statute of limitations as a defense." *Congleton v. Asheboro*, 8 N.C. App. 571, 573, 174 S.E. 2d 870, 872 (1970) (citing *Wilkes,* 204 N.C. 163, 167 S.E. 691). "Indeed, in this State a statute will not be given

retroactive effect when such construction would interfere with vested rights, . . . [a] retrospective statute, affecting or changing vested rights, is founded on unconstitutional principles and consequently void." *Lester Bros.*, 250 N.C. at 568, 109 S.E. 2d at 266.

A majority of this panel is bound to the precedent before it, and the precedent is clear beyond a reasonable doubt: the General Assembly may not revive a time-barred claim. Any argument outside of the precedent before this panel is better suited for our State's highest court.

> "The purpose of a statute of limitations is to afford security against stale demands, not deprive anyone of his just rights by lapse of time. In some instances, it may operate to bar the maintenance of meritorious causes of action. When confronted with such a cause, the urge is strong to write into the statute exceptions that do not appear therein. In such case, we must bear in mind Lord Campbell's caution: Hard Cases must not make bad law."

Congleton, 8 N.C. App. at 574, 174 S.E. 2d at 872 (internal quotation marks and citations omitted).

CONCLUSION

Upon considering the pleadings, parties' briefs and submitted materials, arguments, and the record established thus far, the majority of this panel rules as follows:

Defendant Gaston Board has met its considerable burden of demonstrating beyond a reasonable doubt that Section 4.2(b) of S.L. 2019-245 is facially unconstitutional. The majority of this panel determines that Section 4.2(b) exclusively revives previously time-barred claims. Such time-barred claims have

been consistently interpreted by our courts as a vested right under the North Carolina Constitution which is afforded absolute protection from acts of the legislature. The majority, therefore, concludes that Defendant Gaston Board is entitled to dismissal of Plaintiff's Amended Complaint on this ground.

For the foregoing reasons, Defendant's Motion to Dismiss is GRANTED. Plaintiff's Amended Complaint against Defendant Gaston Board is hereby dismissed with prejudice.

So ORDERED, this the 17 day of December, 2021.

R. Gregory Horne, Superior Court Judge

Imelda J. Pate, Superior Court Judge

I do not entirely agree with the majority's analysis regarding the Revival Window, and, therefore, I dissent and write separately to express that I cannot find that this provision is unconstitutional beyond a reasonable doubt after analyzing the text of the Constitution, the historical context in which the people of North Carolina adopted the applicable constitutional provisions, and our court's unsettled law. This opinion is not meant to criticize the majority, as I know the majority's decision was not made lightly or without careful reasoning. However, my own reasoning leads me to a different conclusion.

Overcoming a facial constitutional challenge is a high burden. "The General Assembly, which comprises of the legislative branch, enacts laws that 'protect or promote the health, morals, order, safety, and general welfare of society.'" *State ex rel. McCrory v. Berger*, 368 N.C. 633, 635, 781 S.E.2d 248, 250 (2016) (quoting *State v. Ballance*, 229 N.C. 764, 769, 51 S.E.2d 731, 734 (1949). Conversely, "[t]he judicial branch interprets the laws and, through its power of judicial review, determines whether they comply with the constitution." *Id.* In exercising this power of judicial review, our state courts must presume that laws enacted by the legislature are constitutional and "not declare a law invalid unless [the court] determine[s] that it is unconstitutional *beyond a reasonable doubt*." *Id.* (emphasis added).

To determine if a statute is unconstitutional, this Court must look the text of the Constitution, the historical context in which the people of North Carolina adopted the applicable constitutional provisions, and our precedent. *Id.*

In the criminal context, the North Carolina Constitution expressly declares that "[r]etrospective laws, punishing acts committed before the existence of such laws and by them only declared criminal, are oppressive, unjust, and incompatible with liberty, and therefore no ex post facto law shall be enacted." N.C. Const. art. I, § 16. Defendants, however, rely on N.C. Const. art. I, § 19 (hereinafter, the "Law of the Land Clause") which declares "[n]o person shall be . . . in any manner deprived of his life, liberty, or property, but by the law of the land." Neither party in this action disputes that the Revival Window is a retrospective law. However, the express text of the Constitution does not address whether this remedy, a statute of limitations defense, is a vested property right.

As early as 1867, our state courts not only recognized the importance of what is written into our Constitution on this point, but also what is not. In *State v. Bell*, the Supreme Court of North Carolina upheld a retrospective tax as constitutional. 61 N.C. 76, 90 (1867). In doing so, the Court recognized that retrospective laws effecting criminal liability were explicitly prohibited by the North Carolina Constitution. *Id.* at 83. However, "[t]he omission of any such prohibition in the Constitution of the United States, and also of the State, is a strong argument to show that retrospective laws, merely as such, were not intended to be forbidden." *Id.* Within a year of the *Bell* decision, North Carolina amended its Constitution's *ex post facto* clause to prohibit retrospective taxes by adding: "No law taxing retrospectively, sales, purchases, or other acts previously done, ought to be passed." N.C. Const. art. I, § 32 (1868). This Constitutional Amendment clearly directed our

courts to consistently hold that a retrospective tax is unconstitutional. *See Young v. Henderson*, 76 N.C. 420, 424 (1877); *North Carolina Eastern Municipal Power Agency v. Wake County*, 100 N.C. App. 693, 700, 398 S.E.2d 486, 490 (1990); *Coley v. State*, 360 N.C. 493, 631 S.E.2d 121 (2006). And this constitutional directive was again adopted in its present form by the people of our State in the North Carolina Constitution of 1971. N.C. Const. art. I, § 16 ("No law taxing retrospectively sales, purchases, or other acts previously done shall be enacted."). *Bell*, which has not been overturned, provides strong support that retrospective general legislation, such as the provision under consideration here, is not per se unconstitutional. Moreover, the history following Bell shows a clear path for how the people of North Carolina could make retroactive general legislation per se unconstitutional – by constitutional amendment. N.C. Const. art. XIII. *See generally* N.C. Const. art. I § 16;[2] Pa. Const. art. I § 17;[3] Tenn. Const. art. I § 20;[4] N.H. Const. p. I art. 23.[5]

Finally, it is of the utmost importance to understand the lack of clarity in the precedent before this Court. Although the *Wilkes* line of cases hold that a statute of limitations defense is a vested right, none of these cases tie this vested right to explicit provisions or text in the North Carolina Constitution. *Wilkes Cty. v. Forester*, 204 N.C. 163, 167 S.E. 691 (1933). Conversely, other cases dispute this right in retrospective laws by holding: "Does any part of our Constitution prohibit

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[2] "Retrospective laws, punishing acts committed before the existence of such laws and by them only declared criminal, are oppressive, unjust, and incompatible with liberty, and therefore no ex post facto law shall be enacted. No law taxing retrospectively sales, purchases, or other acts previously done shall be enacted."

[3] "No ex post facto law, nor any law impairing the obligation of contracts, or making irrevocable any grant of immunities shall be passed."

[4] "That no retrospective law, or impairing the obligations of contracts, shall be made."

[5] "Retrospective laws are . . . unjust. No such laws, therefore, should be made . . . of civil causes[.]"

the passing a retrospective law? It certainly does not. *State v.* -----, 2 N.C. 28, 39 (1794). In doing so, the *State* decision analyzes our Constitution's text and history:

> [W]ithout such a power no Government could exist for any considerable length of time, without experiencing great mischiefs. The exercise of such a power hath been found frequently necessary here since the Revolution, and divers retrospective acts, which the Legislature have passed, have been carried into execution and sanctioned by the Judiciary. The fact is, the affairs of Government will sometimes, nay often, require the exercise of this power. These instances may serve to shew the necessity of it. And it is not like an ex post facto retrospective law any way incompatible with the safety of a free people. The Convention foresaw the necessity there would be for sometimes enacting such laws, and therefore they have been careful to word the 24th section so as not to exclude the power of passing a retrospective law, not falling within the description of an ex post facto law--the Convention meant to leave it with the Legislature to pass such laws when the public convenience required it.

Id. (internal citations omitted). *See also Bell.* There are no cases in North Carolina raised in the parties' briefs or during oral argument or known by this Court which explicitly overturn *State's* clear directive that a statute of limitations defense is not a constitutionally protected right. Unlike *State* and cases after *Bell*, the cases cited by the majority do not tie this vested right to any constitutional provision. On balance, without any explicit directive that *State* has been overturned or that *Wilkes*, and its subsequent case law, explicitly ties this vested right to any specific constitutional provision or text, I cannot find beyond a reasonable doubt that the

General Assembly, acting unanimously in enacting Session Law 2019-245, acted outside their constitutional bounds[6].

With these conflicts in mind, the Fourteenth Amendment of the United States Constitution should be used as guidance because "'[l]aw of the land' is synonymous with 'due process of law'[.]" *Bentley v, North Carolina Ins. Guaranty Ass'n*, 107 N.C. App. 1, 9, 418 S.E.2d 705, 709 (1992) (citing *Brand Distributors and Watch Co., v. Motor Market*, 285 N.C. 467, 474, 206 S.E.2d 141, 146 (1974)). There is no vested right in a statute of limitations defense under the federal constitution. *Campbell v. Holt*, 115 U.S. 620 (1885). To determine if there is a violation of the Law of the Land Clause in this context, the statute at issue must affect the exercise of a fundamental right. *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 180, 594 S.E.2d 1, 15. If a fundamental right is affected, this Court must apply strict scrutiny. *Id.* If no fundamental right is impacted, this Court must apply rational basis. *Id.* No such right is protected federally, and the *Wilkes* line of cases define a statute of limitations defense as a vested right, not a fundamental one. In this instance, the General Assembly is merely altering the procedural bar prohibiting child victims from seeking a remedy. As such, given our constitution's text, history, and our court's precedent, it is proper for this Court to apply the rational basis test because

[6] The passing of this historic legislation unanimously by our General Assembly appears to be the type of action that was contemplated by our Supreme Court in 1794 when it reasoned that: "The fact is, the affairs of Government will sometimes, nay often, require the exercise of this power [to enact retrospective legislation]. These instances may serve to shew the necessity of this power. . . . The Convention meant to leave it with the Legislature to pass such laws when the public convenience required it." State, 1 N.C. at 39.

no fundamental right is affected under the United States or North Carolina Constitution.

A rational basis challenge is upheld "as long as there could be some rational basis for enacting the statute at issue[.]" *Id.* at 181 (internal citations omitted). A law providing an avenue in our civil courts for victims of child sexual abuse to hold accountable child abusers, and their enablers, for past actions involving and arising from child sexual abuse undoubtably would survive rational basis.

However, assuming *arguendo* that vested rights to a statute of limitations defense are protected under the Law of the Land provision of North Carolina Constitution, the constitutional protections afforded should not be absolute. *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 180, 594 S.E.2d 1, 15 (2004) (holding fundamental rights are not absolute and burdens on fundamental rights may be permissible if these rights survive strict scrutiny).[7] Vested rights are, at most, property interests. *Id.* at 176. If a government action implicates a fundamental liberty or property interest, then it receives strict scrutiny. *Toomer v. Garrett*, 155 N.C. App. 462, 574 S.E. 2d 76 (2002). "Under strict scrutiny, a challenged governmental action is unconstitutional if the State cannot establish that it is narrowly tailored to advance a compelling governmental interest." *Stephenson v. Bartlett*, 355 N.C. 354, 377, 562 S.E. 2d 377, 393 (2002).

Here, the Revival Window should arguably be reviewed under strict scrutiny because, as Defendant has shown, a property interest is at issue. *Toomer*, 155 N.C.

[7] It is difficult to square the notion that Fundamental Rights are not absolute, but that Vested Rights are beyond further analysis by the court.

App. at 462; *see also Rhyne*, 358 N.C. at 176. The burden is therefore on Plaintiff and the State to establish that the Revival Window is narrowly tailored to advance a compelling governmental interest. *Stephenson*, 355 N.C. at 377.

First, neither party disputes the compelling governmental interest at hand. These compelling interests of the General Assembly in enacting S.L. 2019-245 as a whole, and specifically Section 4.2(b), include protecting children from physical and psychological harm, the legislators' determination that many incidents of sexual abuse involve delayed disclosure, and supplying civil remedies to victims of childhood sexual abuse. As such, Plaintiff and the State have sufficiently shown a compelling governmental interest.

Second, Plaintiff and the State must also show that the challenged legislation is narrowly tailored to serve these compelling interests. Importantly, the Revival Window is not unlimited in time or scope. The Revival Window is only open for a two-year period, and if an action is not brought in that two-year window, the action remains time-barred. Further, the Revival Window only revives civil actions for child sexual abuse. Finally, claims against alleged sexual abusers and enablers do not automatically create and determine liability. The Revival Window does not relieve a plaintiff's burden to prove liability and damages in court. As such, Plaintiff and the State have sufficiently shown the Revival Window is narrowly tailored to advance a compelling governmental interest. Therefore, the Revival Window statute would survive strict scrutiny.

The majority has made a strong assessment that it is bound by *Wilkes* to find that the Defendants' vested rights have been violated by reviving a time-barred claim and that this finding ends the Court's analysis. I, however, given the high bar of finding an act of the General Assembly unconstitutional beyond a reasonable doubt, respectfully disagree. As provided above, the text of the constitution and the history of the Law of the Land and Ex Post Facto provisions do not support finding the Revival Window, as general retrospective legislation, unconstitutional. Our case law appears to be unsettled with *Bell* and *State* pointing one way and the line of *Wilkes* cases pointing another. On balance, I am not convinced that *Wilkes* compels this Court to find the Revival Window unconstitutional. *Wilkes* and its progeny point to no textual support and do no analysis. I find *Bell* and *State* to be better reasoned and still good law. The Revival Window withstands both the rational basis review, and it deemed appropriate, strict scrutiny.

For the reasons stated above, I respectfully dissent.

This the 17th day of December 2021.

Martin B. McGee, Superior Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document was served on the individuals listed below by transmitting a copy hereof via e-mail, addressed as follows,

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This the 20th day of December 2021.

Kellie Z. Myers
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