

SUPREME COURT OF NORTH CAROLINA

* * * * *

DUSTIN MICHAEL MCKINNEY,)	
GEORGE JERMEY MCKINNEY,)	
and JAMES ROBERT TATE,)	
)	
Plaintiff-Appellees,)	
)	
and)	
)	
STATE OF NORTH CAROLINA)	From Wake County
)	COA No. 22-261
Intervenor-Appellee,)	
)	
v.)	
)	
GASTON COUNTY BOARD OF)	
EDUCATION,)	
)	
Defendant-Appellant.)	
)	

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AMICUS CURIAE BRIEF ON BEHALF OF THE NORTH CAROLINA
ASSOCIATION OF DEFENSE ATTORNEYS

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ASSOCIATION OF DEFENSE ATTORNEYS

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SUMMARY OF ARGUMENT

Pursuant to North Carolina Rule of Appellate Procedure 28(i), the North Carolina Association of Defense Attorneys¹ [hereinafter “NCADA”] respectfully submits this *Amicus Curiae* Brief in support of Defendant-Appellant Gaston County Board of Education.

The issue before this Court inevitably involves a weighing of two interests of the people of North Carolina. One interest concerns an ability to rely upon a statute of limitations to prevent being drawn into civil courts many years after an alleged tort may have been committed. The second interest concerns the prevention of child abuse and the punishment of those responsible, directly or indirectly, for child abuse.

In 2019, the North Carolina General Assembly passed the SAFE Child Act [hereinafter “Safe Act”]. Act of Oct. 31, 2019, S.L. 2019-245, §§ 1-9, 2019 N.C. Sess. Laws 1231, 1231-39. This act included several changes to previous laws including expanding the duty to report crimes against children, extending the statute of limitations for criminal and civil claims to ten years so that individuals have until they are 28 years

¹ No person, other than amicus curiae, its members, or its counsel, directly or indirectly, wrote this brief or contributed money for its preparation.

old to bring claims forward, and even increasing protections for minors from registered sex offenders. Most of the Safe Act's provisions are prospective and are designed to *prevent* child sex abuse.

The Legislature also included a "Revival Window" contained in Section 4.2(b) of S.L. 2019-245. The Revival Window was added to the legislation after the House of Representatives passed the original bill, and while ultimately approved, it is not in the same vein as the other more prevalent pieces of the Safe Act. The Revival Window created a two-year period during which claims for "child sex abuse," which were previously time-barred, could be brought.

Well-intentioned as this may have been, the effect of the ratification of the Revival Window is that every school, person, church, business, or organization in North Carolina is now open to liability for acts alleged to have occurred many years ago, even multiple decades ago. The ultimate result is that when these claims are brought today, the leaders of these organizations and individuals are focusing on trying to find old records, many of which simply do not exist due to records destruction, attempting to locate witnesses, and diverting other resources, in attempt to defend

their organizations and selves from claims that have little to no existing supporting evidence.

The Revival Window conflicts with a reliance on the statute of limitations. It does so without meaningfully effectuating the stated purpose of the Safe Act. Thus, whether the statute of limitations is deemed constitutionally protected by the Law of the Land Clause, a vested right subject to strict scrutiny, or a right subject to rational basis review, the Revival Window clause must be stricken from the Safe Act.

ARGUMENT

I. STATUTES OF LIMITATIONS SERVE AN IMPORTANT PURPOSE.

Statutes of Limitations exist to provide a balance of fairness between a litigant bringing a claim and a litigant who must defend the claim. This Court has “long recognized that a party must initiate an action within a certain statutorily prescribed period after discovering its injury to avoid dismissal of a claim.” *Christenbury Eye Center, PA v. Medflow, Inc.*, 370 N.C. 1, 5, 802 S.E.2d 888, 891 (2017) (citing *Shearin v. Lloyd*, 246 N.C. 363, 370, 98 S.E.2d 508, 514 (1957)).

This recognition is significant. The effects of statutes of limitations “are designed to promote justice by preventing surprises through the

revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.” *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-49 (1944). This Court has echoed this sentiment. “With the passage of time, memories fade or fail altogether, witnesses die or move away, evidence is lost or destroyed.” *Estrada v. Burnham*, 316 N.C. 318, 327, 341 S.E.2d 538, 544 (1986).

The purpose of a statute of limitations is not punitive or meant to deprive litigants of an opportunity to bring their claims; rather, the purpose is to “afford security against stale claims,” a security which must be “jealously guarded.” *Christenbury*, 370 N.C. at 5-6, 802 S.E.2d at 891 (internal citations omitted). A statute of limitations allows a party to bring any action within a certain period of time, but also safeguards potential defendants by allowing them the opportunity to properly preserve and ultimately present their defense. “[I]t is for these reasons, and others, that statutes of limitations are inflexible and unyielding and operate without regard to the merits of a cause of action.” *Id.* at 6, 802 S.E.2d at 891-92 (citing *Estrada*, 316 N.C. at 327, 341 S.E.2d at 544) (citing *Shearin*, 246 N.C. at 370, 98 S.E.2d at 514)).

A statute of limitations “establishes a deadline after which the defendant may legitimately have peace of mind; it also recognizes that after a certain period of time it is unfair to require the defendant to piece together his defense to an old claim.” *Walker v. Armco Steel Corp.*, 446 U.S. 740, 751 (1980). At

some point the slate should be wiped clean, and wrongdoers--or those who are merely uncertain about whether they have committed a wrong--should be relieved of the fear that they will be called to account for past misconduct after some definite period of time has elapsed. The rationale is that it is unfair to subject an individual to the threat of being sued indefinitely.

Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitations*, 28 Pac. L.J., 453, 460 (1997).

In sum, a statute of limitations is a balance between rights of the two litigants, providing protection to both parties' rights. “The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.” *Order of Railroad Telegraphers*, 321 U.S. at 349.

Because a statute of limitations needs to be inflexible to preserve the balance between litigants, should an existing statute of limitations

be deemed to be too short of a time to bring a claim, like the legislature has done here, the appropriate remedy is to change the statute going forward, or have it only apply to a statute of limitations that has not expired. Either of these remedies preserves a defendant's ability to prepare a viable defense while also effectuating the policy reason for extending the statute of limitations. However, to do otherwise, as the legislature has done here, destroys the balance between the litigants.

A. The People of North Carolina Depend on Statutes of Limitations as a Right.

This Court examined the question of whether the legislature can revive claims after those claims have expired nearly 90 years ago. This Court reasoned 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.” *Wilkes County v. Forrester*, 204 N.C. 163, 167 S.E. 691, 695 (1933).

The NCADA agrees with the arguments asserted by the Gaston County Board of Education that the Law of the Land Clause prohibits the legislature from reviving claims already barred by a statute of limitation, because a defendant has a vested right in the extinguishment

of that claim. Furthermore, this principle has been held to be the law of this state in *Wilkes County* and other subsequent cases. Our Court of Appeals has held retroactively reviving claims deprives defendants of due process and destroys vested rights a defendant relies upon for a defense. See *Colony Hill Condominium I Ass'n v. Colony Co.*, 70 N.C. App. 390, 394, 320 S.E.2d 273, 276 (1984); *Staley v. Lingerfelt*, 134 N.C. App. 294, 299, 517 S.E.2d 392, 396 (1999).

Thus, the Revival Window is facially unconstitutional. Whether this Court continues to follow this rule or not, it will not change that for the 90 years since *Wilkes County*, the people of North Carolina have depended upon this rule of law. This dependence upon the certainty created by statutes of limitations has been beneficial to the people of North Carolina.

B. Businesses' Reliance on Statutes of Limitations Is Valuable to the People of North Carolina.

The reasons why “it is unjust not to put the adversary on notice to defend” and “the right to be free of stale claims in time comes to prevail over the right to prosecute them” are many, especially here, where civil claims are not being brought against the actual perpetrator, but against the employers of those perpetrators. Quite simply, employers, whether

corporations, small companies, public schools, or any governmental agency, rely on statutes of limitations to establish crucial business practices.

Statutes of limitations “are intended to put defendants on notice of adverse claims.” *Crown, Cork & Seal Co. Inc., v. Parker*, 462 U.S. 345, 352 (1983). This notice is all the more essential in the context of unique aspects of businesses compared to individuals. The fluid nature of businesses, the need for policies for record retention and destruction, insurance premiums, and the overall valuation of businesses for commercial transactions are all positively affected by establishing statutes of limitations.

1. Businesses Comprise a Fluid Membership.

While a business or governmental agency may remain intact for 20, 30, 40 or even 100 years, inevitably the employees of that entity will turnover. Both the people involved in supervisory roles and general employees will cycle through, perhaps advancing within the organization, migrating to other organizations, or moving on to other pursuits. The idea of memories fading or failing, and the members dying or moving away is more pronounced in the business setting because of

this turnover. And, more specifically, the evidence to be provided by these members is dispersed and lost. Statutes of limitations help minimize this natural and expected turnover in corporate settings.

2. Record Keeping.

Another benefit of statutes of limitations is that businesses can establish policies of destroying records. Keeping exhaustive amounts of records in perpetuity is burdensome, creates a high cost for businesses, and is an inefficient way to conduct business. At some point, these records need to be destroyed.

For instance, local government agencies in North Carolina are permitted to destroy litigation case records related to non-adjudicated matters after 6 years. Records Retention and Disposition Schedule General Records Schedule for Local Government Agencies, Issued by North Carolina Department of Cultural Resources Division of Archives and History (October 1, 2021) available at [https://
https://archives.ncdcr.gov/2021localgeneralstandardspdf/open](https://archives.ncdcr.gov/2021localgeneralstandardspdf/open).

Private businesses, at a minimum, should be able to rely on the most restrictive policies set out by the federal government or their respective state governments outlining their own procedures. Again,

these policies are based in part upon statutes of limitations, and many of these records are specifically allowed to be destroyed a set number of years after the expiration of statutes of limitations.

3. Insurance.

A statute of limitations allows businesses and organizations the ability to properly assess potential liabilities, potential risks, and potential debts which will impact the financial viability of the business. Specifically, businesses and their insurance companies properly assess risks and set appropriate insurance premiums because a statute of limitations helps define some level of certainty in what those risks may be. Insurance premiums need to reflect proper amount of potential liability – in order to benefit both employer and insurance company.

4. Valuation of Businesses.

Valuation of businesses, including assets and debts, are important for our economy and maintaining a viable and stable system of commerce. Buying and selling of companies, investments in companies and by companies, potential growth of companies, allocation of resources are all tied to the value of a company. This value is affected by debt, or potential debts, in the form of potential future liabilities.

The opportunity costs of uncertainty, though hidden, are real. Unasserted potential claims may prevent or hinder prospective defendants from engaging in business transactions, such as financings or mergers, until the risk of liability has been resolved. Such uncertainty also may limit a potential defendant's ability to allocate resources most efficiently. Threatened claims or contingent liabilities may inhibit investment in new ventures, even if the claims are not presently the subject of pending litigation.

Ochoa, *supra*, at 466-467.

Statutes of limitations allow for some level of certainty in the corporate world because they allow businesses to put a cap on their liabilities and potential debts. The time period for investigating what potential liabilities a perspective buyer or lender or insurer may encounter is limited. Statutes of limitations not only effect the company which may become a potential defendant, but the myriad of other individuals and corporations that seek to do business with the company.

C. Reviving Claims Already Extinguished by a Statute of Limitations Destroys this Certainty.

The NCADA emphasizes that the issue in this matter is not about the prospective reach of the Safe Act. It is solely about the retroactive changes triggered by the Revival Window. The prospective provisions of the Safe Act not at issue in this matter will certainly have an effect on

businesses and insurance companies. Businesses will need to retain records for a longer period of time at a higher cost. Insurance premiums will likely increase. While these prospective provisions may have a negative impact on businesses going forward, the impacts can at least be anticipated and managed. Even if the legislature were to determine victims of sexual abuse should have no statute of limitations going forward, the risks could be managed.

However, with the Revival Window, the legislature went back in time and allowed claims already extinguished by the statute of limitations to be reopened and brought. Reviving claims that have been extinguished cannot occur without grave injustice to those drawn into court to defend allegations of enabling sexual abuse, along with the citizenship of the state as a whole.

1. Revival Window Destroys the Certainty
Businesses Rely Upon.

Statutes of limitations create certainty and peace of mind.

It is widely believed that most people are risk-averse, and that as a consequence, uncertainty creates for them opportunity costs that greater certainty could reduce. . . . As the California Supreme Court has acknowledged, “the subsidiary aim of the statute of limitations [is] promptly to resolve disputes in order that commercial

and other activities can continue unencumbered by the threat of litigation.”

Ochoa, *supra*, at 466 (citing *Elkins v. Derby*, 525 P.2d 81, 86 n.4 (1974)).

Obliterating a particular statute of limitations chills the economic viability of companies. The knowledge that the legislature, in the future, may obliterate any statute of limitations definitely creates a chilling effect on commerce by creating unnecessary costs to handle risk and hindering business transactions.

Keeping voluminous records in perpetuity is burdensome and costly. It affects society as a whole as business costs are passed along to consumers.

Without a clear statute of limitations, potential defendants may choose instead to incur the cost of additional storage and pass it on to their customers. That cost burden is imposed on all members of society for the benefit of a small group, namely, the relatively small subset of plaintiffs who either are not diligent or whose loss does not manifest itself for a lengthy period of time.

Ochoa, *supra*, at 470-71.

The ability of a legislature to after the fact rescind a statute of limitations throws this system awry both prospectively and retroactively. Retroactively, businesses that have confidently relied upon a statute of

limitations may now be subject to a lawsuit it may not be properly prepared for because it failed to preserve relevant evidence in reliance on statute of limitations. Furthermore, the principle that a legislature can after the fact revive already extinguished claims also means that businesses will not be able to rely upon any statute of limitations going forward, meaning a business cannot destroy records going forward. Being able to rely upon a statute of limitations at least allows a company to predict costs and rely upon procedures associated with records retention.

Statutes of limitations create certainty. Obliterating those limitations creates uncertainty. In the context of insurance and valuation of businesses, this uncertainty has a quelling effect on commerce. “Regardless of the merits of the plaintiff’s claim, it may be contrary to the interests of society as a whole to discourage even culpable defendants from allocating their resources optimally for long periods of time.” Ochoa, *supra*, at 466.

2. Claims Are More Difficult to Defend Because of Changes in Landscape of the Litigation.

Members of the NCADA will be called upon to defend these claims. Reviving claims that have already been distinguished creates many obstacles in litigation.

As stated above, businesses that have confidently relied upon a statute of limitations may now be subject to a lawsuit it may not be properly prepared for because it failed to preserve relevant evidence in reliance on a statute of limitations. A “revival of the defendants' liability to suit, long after they have been statutorily entitled to believe it does not exist, and have discarded evidence and lost touch with witnesses, would be so prejudicial as to deprive them of due process.” *Colony Hill*, 70 N.C. App. at 394, 320 S.E.2d at 276. As indicated above, this Court has acknowledged the prejudice that results when claims are brought many years after alleged incidents occur: “memories fade or fail altogether, witnesses die or move away, evidence is lost or destroyed.” *Estrada*, 316 at 327, 341 S.E.2d at 544.

Defending these claims against allegations supported only by a plaintiff's testimony is difficult when the evidence which may disprove whether the individual worked with the company, or what days worked, likely have been destroyed, let alone any contemporaneous witness

statements, incident reports, or a list of witnesses who could be contacted.

Additionally, the revival of expired claims from decades in the past likely places the defendant in a position where it will have to defend itself against standards of the present, when those standards may have changed dramatically from the time of alleged incidents. Here, the text of the Safe Act itself implicitly acknowledges that the previous laws, enacted by the legislature, were inadequate and archaic based upon recent research; the stated purpose of the Act is to *modernize* the laws. The standards of identifying, recognizing, and intervening in child abuse cases today are not the same as they were 30 to 40 years ago.

The legislature could have amended these statutes 30 to 40 years ago, but they did not, ostensibly because the scientific developments had not developed or the legislature was not aware of these developments. Yet the legislature has sought to hold businesses and other government entities to a standard that the legislature itself did not understand and appreciate during the time periods that these defendants are being forced to defend their actions or inactions. These defendants are hailed into

court and forced to defend themselves based on today's standards, not the standards of the late 20th century. Statutes of limitations exist

to prevent the application of contemporary legal and moral standards to conduct that occurred in the distant past. . . . it is unfair to retroactively judge past behavior by present standards, at least when there has been a meaningful change in those standards.

Ochoa, *supra*, at 493-94.

The facts relevant to this specific case are approximately 30 years old. Yet the Revival Window does not set any limit on the time period. It would encompass claims 50, 60 or 100 years old. Certainly, if the legislature can strike this statute of limitations, it can strike others, creating a slippery slope extending to claims 100 years ago based on the standards of the present day, and based upon the will of people today.

The difficulty of defending against changed standards without access to preserved evidence is even more prejudicial in light of the harsh accusations that can be thrown at these organizations who may have employed or been tangentially associated with persons convicted of child sexual abuse. A review of Plaintiffs' previous briefs in this matter reveals several instances where Plaintiffs have already charged and convicted the Gaston County Board of Education as enablers, based merely on

accusations. The stigma of these allegations is harsh, and the ability to defend against them is weakened due to the passage of time.

Deteriorated evidence, or evidence that has been lawfully destroyed in reliance on a statute of limitations, coupled with changed standards a jury would employ in judgment, alters the landscape to one unfair to a potential defendant. Here, the right to be free of a stale claim overcomes the right to prosecute it. *Order of Railroad Telegraphers*, 321 U.S. at 349.

II. THE REVIVAL WINDOW IS INEFFECTIVE IN ACHIEVING THE GOALS OF THE SAFE ACT.

The NCADA is not attempting to challenge the overall goals of the Safe Act. The NCADA's contention is that the Revival Window does not help effectuate these goals.

A. The Safe Act Has an Admirable Purpose.

The NCADA agrees the stated goals of the Safe Act are admirable and are much needed. The title of the Act states it is an Act “to protect children from sexual abuse and to strengthen and modernize sexual assault laws.” Among other things, the Act seeks to protect children from online predators; increase training providing awareness of child sexual abuse, recognizing child sexual abuse, and preventing child sexual abuse;

and to clarify that the parameters of “without consent” includes consent that is revoked. These purposes are necessary.

The NCADA also agrees that modern research has shown victims of child sexual abuse may not realize the effects the abuse for some time. The Safe Act is a way to handle these issue.

B. The Revival Window Does Not Effectuate the Purpose of the Safe Act.

The NCADA’s contention is that the Revival Window does not effectuate the purposes of the Safe Act. However, to date, neither the State nor Plaintiffs have parsed out how the Revival Window meets the goals of the Safe Act, separate from the Safe Act generally. This is because the Revival Window does not meet these goals.

The Revival Window will not protect children from sexual abuse. The Revival Window is only concerned with abuses which occurred in the past, irrespective of how long ago those offenses occurred.

The State has generally argued that the Revival Window allows victims to seek a legal remedy they were previously denied. While true, the State does not show how allowing this remedy prevents child abuse which has already occurred.

The Revival Window will not deter sexual abuse. Again, the business entity sued may still be present, but not the individuals who may have been present 30 or 40 years ago. The actual individuals responsible, directly or indirectly, for the harm to the plaintiff will likely not still be with the organization. Furthermore,

the incremental value of deterrence obtained by the pursuit of old claims is likely to be minimal. If the wrongdoer has not continued his or her wrongdoing, then he or she has reformed and punishment will not improve his or her conduct. If the wrongdoer has continued his or her wrongdoing, then there are more recent wrongs for which he or she could more easily and inexpensively be punished.

Ochoa, *supra*, at 492.

Finally, the Revival Window will not shift the cost of sexual abuse away from the victims and their communities. While the Revival Window may shift the cost away from the victims, it does not shift the cost away from their communities.

Specifically here, the Revival Window seeks to shift the costs of sexual abuse to an entity that is very much in the community. Tellingly, the Revival Window places costs on a selected entity, without proof, depriving that entity of resources which should be used to effectuate the purpose of the Safe Act. The Revival Window essentially reallocates the

cost from the community around, but ultimately right back to the community. It undermines the goal of the Safe Act as a whole, which is to allocate resources to businesses and governmental entities to prevent child abuse.

III. THE REVIVAL WINDOW CANNOT SURVIVE EVEN A RATIONAL BASIS TEST.

The NCADA agrees with Gaston County Board of Education's assertion that North Carolina precedent creates an absolute prohibition on the Legislature reviving expired statute of limitations because an expired statute of limitations creates a vested right in any potential defendant. Thus, ultimately, there is no strict scrutiny or rational basis test to be applied.

However, the Revival Window nonetheless would not survive even a rational basis test when compared to the obliteration of the statute of limitations defense. Businesses and other public institutions must be able to rely on the time-based defenses, simply to manage their operations. If the legislature is held to have authority to revive previously barred claims on grounds that defendants have no substantive right to be exempt from suit, the certainty created by the statutes of

limitations jurisprudence will be eradicated; all kinds of causes of action could open upon businesses, in effect penalizing the next generation as their institutions pay out claims and litigate issues from decades past.

As stated above, the Revival Window does *not* protect children against child abuse. Thus, the purpose of the Revival Window is not to prevent future child abuse, which is already a priority for businesses everywhere, and a priority strengthened by the prospective provisions of the Safe Act, but to impose liability on an organization for actions that occurred years or decades earlier.

Furthermore, the Revival Provision does not provide relief to the State at all. Instead, it benefits only private parties, i.e., potential plaintiffs. To the extent that the State's interest is in providing remedies to private parties, the Revival Provision is not tailored to provide relief from the person who actually perpetrated abuse. As a practical matter, the actual wrongdoers (*i.e.*, the abusers) are unlikely to have any appreciable assets decades after the abuse (assuming that the abusers are even still living).

On the other side of the scale, the Revival Window would impose liability for claims that had already been extinguished years or decades

earlier, leaving businesses to attempt to defend themselves when witnesses, memories, documents, and insurance policies have long since disappeared. The actual effect of the Revival Window is to impose massive liability, where no liability existed, on businesses and institutions who have structured their limited finances with an eye toward a known universe of expenses and liabilities.

The balance between the prejudice that would occur by obliterating a statute of limitations versus the minimal impact the Revival Window has in effectuating the purposes of the Safe Act cannot survive a rational basis test. The Revival Window should be stricken as unconstitutional.

CONCLUSION

For the above reasons, the NCADA requests that this Court reverse the Court of Appeals and affirm the decision of the Three-Judge Panel dismissing Plaintiff's Complaint with prejudice. The legislature impermissibly included the Revival Window in the Safe Act.

Respectfully submitted, this the 20th day of November, 2023.

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that a copy of the foregoing AMICUS CURIAE BRIEF ON BEHALF OF THE NORTH CAROLINA ASSOCIATION OF DEFENSE ATTORNEYS was filed electronically with the Supreme Court pursuant to Rule 26(a)(2) of the North Carolina Rules of Appellate Procedure and served upon all counsel of Record by electronic correspondence addressed as follows:

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