290 N.C. App.—No. 4 Pages 368-481

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

MARCH 12, 2024

MAILING ADDRESS: The Judicial Department
P. O. Box 2170, Raleigh, N. C. 27602-2170

THE COURT OF APPEALS

OF

NORTH CAROLINA

Chief Judge

DONNA S. STROUD

Judges

CHRIS DILLON
JOHN M. TYSON
VALERIE J. ZACHARY
HUNTER MURPHY
JOHN S. ARROWOOD
ALLEGRA K. COLLINS
TOBIAS S. HAMPSON

JEFFERY K. CARPENTER
APRIL C. WOOD
W. FRED GORE
JEFFERSON G. GRIFFIN
JULEE T. FLOOD
MICHAEL J. STADING
ALLISON J. RIGGS

Former Chief Judges

GERALD ARNOLD
SIDNEY S. EAGLES JR.
JOHN C. MARTIN
LINDA M. McGEE

Former Judges

J. PHIL CARLTON
BURLEY B. MITCHELL JR.
WILLIS P. WHICHARD
CHARLES L. BECTON
ALLYSON K. DUNCAN
SARAH PARKER
ELIZABETH G. McCRODDEN
ROBERT F. ORR
JACK COZORT
MARK D. MARTIN
JOHN B. LEWIS JR.
CLARENCE E. HORTON JR.
JOSEPH R. JOHN SR.
ROBERT H. EDMUNDS JR.
JAMES C. FULLER
RALPH A. WALKER
ALBERT S. THOMAS JR.
LORETTA COPELAND BIGGS
ALAN Z. THORNBURG
PATRICIA TIMMONS-GOODSON
ROBIN E. HUDSON
ERIC L. LEVINSON

JAMES A. WYNN JR.
BARBARA A. JACKSON
CHERI BEASLEY
CRESSIE H. THIGPEN JR.
ROBERT C. HUNTER
LISA C. BELL
SAMUEL J. ERVIN IV
SANFORD L. STEELMAN JR.
MARTHA GEER
LINDA STEPHENS
WENDY M. ENOCHS[1]
ANN MARIE CALABRIA
RICHARD A. ELMORE
MARK A. DAVIS
ROBERT N. HUNTER JR.
WANDA G. BRYANT
PHIL BERGER JR.
REUBEN F. YOUNG
CHRISTOPHER BROOK
RICHARD D. DIETZ
LUCY INMAN
DARREN JACKSON

[1] Died 25 June 2022.

Clerk
EUGENE H. SOAR

Assistant Clerk
Shelley Lucas Edwards

OFFICE OF STAFF COUNSEL

Executive Director
Jonathan Harris

Director
David Alan Lagos

Staff Attorneys
Michael W. Rodgers
Lauren T. Ennis
Caroline Koo Lindsey
Ross D. Wilfley
Hannah R. Murphy
J. Eric James
Megan Shook

ADMINISTRATIVE OFFICE OF THE COURTS

Director
Ryan S. Boyce

Assistant Director
Ragan R. Oakley

OFFICE OF APPELLATE DIVISION REPORTER

Alyssa M. Chen
Jennifer C. Peterson
Niccolle C. Hernandez

COURT OF APPEALS

CASES REPORTED

FILED 12 SEPTEMBER 2023

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

APPEAL AND ERROR

Criminal case—untimely notice of appeal—petition for certiorari granted— In a criminal case where defendant sought to appeal the trial court's denial of his motion to suppress, but where defendant did not file his written notice of appeal within the fourteen-day deadline established under Appellate Rule 4(a), his petition for a writ of certiorari was granted because defendant showed that his arguments on appeal had merit and that there was good cause for issuing the writ. **State v. Wright, 465.**

Declaratory judgment action—request under Public Records Act—mootness—capable of repetition yet evading review—In an action filed by a media group (plaintiff) against a city (defendant), where a private consulting firm—pursuant to a contract with defendant—had developed a public leadership survey for city council members, the trial court erred in granting summary judgment for defendant on plaintiff's request for a declaratory judgment that the survey form and responses constituted "public records" subject to disclosure under the Public Records Act. Although defendant eventually produced the survey materials before the summary judgment hearing, it did so without conceding that those documents constituted "public records," and therefore the main issue at stake—whether those documents and any other records created by public officials but possessed solely by a third party are "public records" under the Act—was not moot. At any rate, this issue would have fallen under the mootness exception for cases that are "capable of repetition yet evading review," where there was a reasonable likelihood that plaintiff would continue to request similar types of records from defendant and that defendant

Act in allowing previously time-barred claims consisting of "any civil action for child sexual abuse" to be revived during a specified window of time was not limited to claims against the perpetrator of the abuse, the trial court's interpretation was too narrow. **Cohane v. Home Missioners of Am., 378.**

CONSTITUTIONAL LAW

Effective assistance of counsel—appellate—failure to raise sufficiency of evidence—The trial court properly denied defendant's motion for appropriate relief, in which defendant alleged that his appellate counsel provided ineffective assistance because he failed to raise a sufficiency of the evidence argument on direct appeal from defendant's conviction for robbery with a dangerous weapon, where defendant failed to demonstrate that his appellate counsel provided deficient performance. Although defendant contended that fingerprint evidence from the victim's backpack was the only evidence of defendant being the perpetrator of the crime and therefore should have been challenged on the basis that there was no evidence that the fingerprint could only have been impressed at the time of the robbery, any argument to that effect would have failed because the State presented other pieces of evidence linking defendant to the crime. **State v. Todd, 448.**

North Carolina—Law of the Land clause—statute of limitations defense—retrospective claim revival—The divided decision of a three judge panel dismissing plaintiffs' claims against a county board of education—for allegedly failing to protect them from sexual abuse committed by a school employee when they were in high school—was reversed where the dismissal was based on the majority's erroneous determination that the SAFE Child Act, under which plaintiffs' claims were filed and which allowed them to revive previously time-barred claims, was facially unconstitutional. Although the majority concluded that the revival provision of the Act violated due process rights protected by the Law of the Land clause by retroactively taking away defendant's statute of limitations defense, and thus interfered with a vested right, nothing in the North Carolina Constitution prohibits the revival of statutes of limitation and, therefore, the Act was constitutional and plaintiffs' claims were dismissed in error. **McKinney v. Goins, 403.**

CONTRACTS

Separation agreement—breach of contract—anticipatory breach—pleading—In a legal dispute between separated spouses, the trial court erred in dismissing plaintiff wife's complaint for failure to state a claim where she adequately pleaded the elements of a breach of contract claim (thereby entitling her to the remedy of specific performance), alleging that defendant husband breached the terms of the parties' separation agreement by failing to pay monthly child support, provide health insurance for the parties' two children, and pay part of the children's uninsured medical expenses. However, plaintiff's claim of anticipatory breach by repudiation was properly dismissed where, rather than alleging that defendant refused to perform the "whole contract" or "a covenant going to the whole consideration," plaintiff alleged that defendant threatened to breach a specific provision of the separation agreement obligating him to pay part of their son's future college expenses. **Clute v. Gosney, 368.**

CRIMINAL LAW

Order denying motion to suppress—findings of fact—unsupported by the evidence—In a criminal defendant's appeal from an order denying his motion to

suppress evidence seized from his backpack following a *Terry* stop and frisk, four of the trial court's findings of fact were stricken from the order because they were unsupported by the evidence. Three of these unsupported findings stated that one of the officers observed defendant entering a pathway marked on both sides by "No Trespass" signs and that all of the officers at the scene believed defendant was trespassing at the time of the *Terry* stop. The fourth unsupported finding stated that, after asking defendant for his identification card, the officers returned the identification card to defendant prior to searching his backpack. **State v. Wright, 465.**

PROBATION AND PAROLE

Revocation—statutory basis—erroneous finding—discretion otherwise properly exercised—The trial court's order revoking defendant's probation was affirmed as modified where, although the court made an erroneous written finding that each of defendant's alleged probation violations constituted a basis for revocation (since only one of defendant's violations—a new criminal offense—could statutorily support revocation), the remainder of the judgment demonstrated that the trial court understood the appropriate basis for revocation and properly exercised its discretion. **State v. Daniels, 443.**

PUBLIC RECORDS

Public Records Act request—electronic survey form and responses—records created or owned by public officials—in sole physical custody of third party—subject to disclosure—Under the plain language of the Public Records Act, documents created or owned by public officials but possessed solely by a third party constitute "public records." Therefore, in an action filed by a media group (plaintiff) against a city (defendant), where a private consulting firm—pursuant to a contract with defendant—had developed a public leadership survey for city council members, emailed the survey to each council member in the form of a unique hyperlink, and then stored the responses in the firm's own server, the trial court erred in granting summary judgment for defendant on plaintiff's request for a declaratory judgment that the survey form and responses constituted "public records" subject to disclosure under the Act. **Gray Media Grp., Inc. v. City of Charlotte, 384.**

SEARCH AND SEIZURE

Terry stop and frisk—reasonable suspicion—reliability of tip by confidential informant—search of backpack—beyond scope of frisk—In a prosecution for crimes relating to the possession of a stolen firearm by a felon, the trial court erred in denying defendant's motion to suppress evidence seized from his backpack following a *Terry* stop and frisk. Law enforcement had reasonable suspicion to conduct the stop and to frisk defendant's person based on a confidential informant's tip, which carried sufficient "indicia of reliability" where one of the officers had known the informant for over a year and had previously corroborated information from that informant. However, the search of defendant's backpack went beyond the lawful scope of the initial frisk, which was limited to ensuring that defendant was unarmed and posed no threat to the officers. **State v. Wright, 465.**

Warrantless search of backpack—consent exception—voluntariness—probable cause—tip from confidential informant—In a prosecution for crimes relating to the possession of a stolen firearm by a felon, the trial court erred in denying

defendant's motion to suppress evidence seized from his backpack following a *Terry* stop and frisk which, though lawful, did not justify the warrantless search of the backpack. The search did not fall under the consent exception to the warrant requirement because, although defendant did consent to the search, he did not do so voluntarily where, on a cold and dark night, multiple uniformed police officers surrounded defendant—an older homeless man—and repeatedly requested to search the backpack after he repeatedly asserted his Fourth Amendment right to decline those requests. Further, where law enforcement had received a tip from a confidential informant saying that an individual matching defendant's description was carrying a firearm at the location where defendant was stopped, that tip (though sufficiently reliable to establish reasonable suspicion to stop and frisk defendant) was insufficient to establish probable cause to search the backpack because it provided no basis for the allegation that defendant was carrying an illegal firearm. **State v. Wright, 465.**

STATUTES OF LIMITATION AND REPOSE

Limitations period—breach of contract—separation agreement—executed under seal—In a legal dispute between separated spouses, plaintiff wife's claim for breach of contract and specific performance in relation to the parties' separation agreement—which they executed under seal before a notary public—was not time-barred, and therefore the trial court erred in dismissing it. Although breach of contract actions are typically subject to a three-year limitations period, an action upon a sealed instrument is subject to a ten-year statute of limitations, and plaintiff's complaint alleged that defendant husband breached the separation agreement within the applicable ten-year period. **Clute v. Gosney, 368.**

N.C. COURT OF APPEALS
2024 SCHEDULE FOR HEARING APPEALS

Cases for argument will be calendared during the following weeks:

January	8 and 22
February	5 and 19
March	4 and 18
April	1, 15, and 29
May	13 and 27
June	10
August	12 and 26
September	9 and 23
October	7 and 21
November	4 and 18
December	2

Opinions will be filed on the first and third Tuesdays of each month.

CLUTE v. GOSNEY

[290 N.C. App. 368 (2023)]

VIRGINIA CLUTE (F/K/A VIRGINIA GOSNEY), PLAINTIFF
v.
CHRISTOPHER P. GOSNEY, DEFENDANT

No. COA22-1074

Filed 12 September 2023

1. Contracts—separation agreement—breach of contract—anticipatory breach—pleading

In a legal dispute between separated spouses, the trial court erred in dismissing plaintiff wife's complaint for failure to state a claim where she adequately pleaded the elements of a breach of contract claim (thereby entitling her to the remedy of specific performance), alleging that defendant husband breached the terms of the parties' separation agreement by failing to pay monthly child support, provide health insurance for the parties' two children, and pay part of the children's uninsured medical expenses. However, plaintiff's claim of anticipatory breach by repudiation was properly dismissed where, rather than alleging that defendant refused to perform the "whole contract" or "a covenant going to the whole consideration," plaintiff alleged that defendant threatened to breach a specific provision of the separation agreement obligating him to pay part of their son's future college expenses.

2. Statutes of Limitation and Repose—limitations period—breach of contract—separation agreement—executed under seal

In a legal dispute between separated spouses, plaintiff wife's claim for breach of contract and specific performance in relation to the parties' separation agreement—which they executed under seal before a notary public—was not time-barred, and therefore the trial court erred in dismissing it. Although breach of contract actions are typically subject to a three-year limitations period, an action upon a sealed instrument is subject to a ten-year statute of limitations, and plaintiff's complaint alleged that defendant husband breached the separation agreement within the applicable ten-year period.

3. Child Custody and Support—separation agreement—breach of child support provisions—independent claim for child support under Child Support Guidelines—improper dismissal

In a legal dispute between separated spouses, where the trial court erred in dismissing plaintiff wife's claim for breach of contract

alleging that defendant husband breached the child support provisions of the parties' separation agreement, the court also erred in dismissing plaintiff's separate, alternative claim for child support under the Child Support Guidelines where, if upon reviewing the breach of contract claim on remand, the trial court were to decide that defendant's child support obligations under the separation agreement were unreasonable (and therefore required modification pursuant to the Guidelines), plaintiff's claim for ongoing child support under the Guidelines would not be time-barred under the applicable statute of limitations.

4. Attorney Fees—separation agreement—breach of child support provisions—child support under Child Support Guidelines—issues not yet determined

In a legal dispute between separated spouses, where the trial court's order dismissing plaintiff wife's claims for breach of contract (alleging that defendant husband breached the child support provisions of the parties' separation agreement) and for child support pursuant to the Child Support Guidelines was reversed on appeal, the issue of whether plaintiff was entitled to attorney fees pursuant to the separation agreement or under N.C.G.S. § 50-13.6 was left for the trial court to decide on remand, since it remained to be determined whether defendant did breach the agreement or was otherwise obligated to pay child support under the Guidelines.

Appeal by plaintiff from order entered 31 August 2022 by Judge Paige B. McThenia in Mecklenburg County District Court. Heard in the Court of Appeals 8 August 2023.

The Blain Law Firm, P.C., by Sabrina Blain, for plaintiff-appellant.

Law Office of Thomas D. Bumgardner, PLLC, by Thomas D. Bumgardner, for defendant-appellee.

ZACHARY, Judge.

Plaintiff Virginia Clute ("Wife") appeals from an order granting the motion to dismiss filed by Defendant Christopher P. Gosney ("Husband"), denying Wife's motion for attorney's fees, and dismissing her amended complaint with prejudice pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. After careful review, we affirm in part, reverse in part, and remand.

I. Background

Wife and Husband married in 1994. They had two children during their marriage; however, "as a result of certain irreconcilable differences and disagreements," Wife and Husband separated in 2006.

On 5 April 2006, the parties entered into a separation agreement ("the Agreement"), by which the parties intended to effectuate a "final settlement of all marital and property rights." As relevant to this appeal, Section 4.3 of the Agreement provides for Husband's contribution to the support of the parties' children; Section 6.12 provides that "[e]ither party shall have the right to compel the performance of the provisions of this Agreement by suing for specific performance in the courts where jurisdiction of the parties and subject matter exists"; and Section 6.1 provides that the Agreement will "not be incorporated, by reference or otherwise, into any final judgment of divorce." Husband and Wife signed the Agreement under seal before a notary public.

Wife filed an amended complaint in Mecklenburg County District Court on 1 April 2022, advancing claims for breach of contract and for ongoing and retroactive child support pursuant to the North Carolina Child Support Guidelines. In her amended complaint, Wife alleged that Husband had violated the terms of the Agreement governing his support obligations "[s]tarting in August of 2017" when "Husband unilaterally reduced his child support payment from $908.00 to $600.00"; "in June of 2021, [when] Husband unilaterally reduced his child support payment to $150.00 per month; and as of December 2021, [when] Husband . . . stopped paying monthly child support all together[.]" Wife also alleged that Husband had failed and refused to comply with additional terms of the Agreement: Namely, Wife alleged that Husband had failed to contribute his share of the children's uninsured medical expenses; to provide the children with "[h]ospital, [m]edical and [d]ental [i]nsurance" coverage; or to contribute toward the payment of the parties' son's college education expenses, should the son choose to attend college. In her prayer for relief, Wife asked the trial court to award her (1) specific performance on her breach of contract claim; (2) attorney's fees pursuant to the provisions of the Agreement, or alternatively, N.C. Gen. Stat. § 50-13.6; and (3) the entry of "an Order of Child Support, including an award of retroactive child support[.]"

On 27 May 2022, Husband filed a motion to dismiss "pursuant to Rules 12(b)(1) and/or 12(b)(6) of the North Carolina Rules of Civil Procedure." By order entered 31 August 2022, the trial court granted Husband's motion to dismiss pursuant to Rule 12(b)(6); denied Wife's "motion for attorney's fees pursuant to Rule 11 of the North Carolina

Rules of Civil Procedure and the terms of the parties' separation agreement"; and dismissed Wife's amended complaint with prejudice. From this order, Wife timely filed written notice of appeal.

II. Discussion

A. Standard of Review

The question for the court when considering a motion to dismiss pursuant to Rule 12(b)(6) "is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory[.]" *Leary v. N.C. Forest Prods. Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (citation omitted), *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003). "The Court must construe the complaint liberally and should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief." *Id.* (cleaned up).

The statute of limitations, however, "may be raised as a defense by a Rule 12(b)(6) motion to dismiss if it appears on the face of the complaint that such a statute bars the plaintiff's action." *Laster v. Francis*, 199 N.C. App. 572, 576, 681 S.E.2d 858, 861 (2009). On appeal, this Court reviews the pleadings de novo "to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary*, 157 N.C. App. at 400, 580 S.E.2d at 4.

B. Breach of Contract and Specific Performance

[1] On appeal, Wife argues that her amended complaint "contained sufficient allegations to proceed on her claims" because she "plead[ed] the elements of a claim for [b]reach of [c]ontract" and advanced sufficient allegations to entitle her to the remedy of specific performance of the parties' Agreement.

"The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract." *Becker v. Graber Builders, Inc.*, 149 N.C. App. 787, 792, 561 S.E.2d 905, 909 (2002). "A marital separation agreement which has not been incorporated into a court order is generally subject to the same rules of law with respect to its enforcement as any other contract." *Condellone v. Condellone*, 129 N.C. App. 675, 681, 501 S.E.2d 690, 695 (cleaned up), *disc. review denied*, 349 N.C. 354, 517 S.E.2d 889 (1998). Thus, as a contract, "a separation agreement not incorporated into a final divorce decree may be enforced through the equitable remedy of specific performance." *Reeder v. Carter*, 226 N.C. App. 270, 275, 740 S.E.2d 913, 917

(2013) (cleaned up). To bring a claim for breach of contract and specific performance, "[t]he party claiming the right to specific performance must show the existence of a valid contract, its terms, and either full performance on his part or that he is ready, willing and able to perform." *Curran v. Barefoot*, 183 N.C. App. 331, 335, 645 S.E.2d 187, 190 (2007) (emphasis omitted).

Here, Wife alleges in her amended complaint that "[o]n April 5, 2006, the parties entered into a Contract of Separation, Property Settlement, Waiver of Alimony, Child Custody, and Child Support Agreement[.]" Pursuant to the terms of the Agreement, Husband is obligated to "pay to . . . Wife as child support the sum of $908.00 per month[.]" Husband must also "maintain in full force and effect the policies of . . . insurance covering the children of the marriage" until "such child graduates from college . . . or as long as his insurance carrier will allow him to provide such coverage if it takes longer than 4 years for the child to graduate from college"; "in the event coverage is no longer afforded through [Husband's] employment, then . . . he shall provide policies of . . . insurance coverage comparable to that presently maintained." Additionally, the Agreement provides that Husband shall pay a portion of the children's uninsured medical expenses and college education expenses. Finally, Wife alleges that "Husband is capable of complying with the terms of the Agreement but has simply decided not to"; that his "breaches of the Agreement are willful and intentional"; and that "Wife has complied and performed pursuant to the Agreement." For these alleged breaches, Wife seeks specific performance of the Agreement.

After careful review in the appropriate light mandated by our standard of review, we conclude that Wife has sufficiently alleged the elements of breach of contract as it relates to Husband's obligations for monthly child support, health insurance, and uninsured medical expenses under the Agreement. Wife has "show[n] the existence of a valid contract, its terms, and either full performance on [her] part or that [s]he is ready, willing and able to perform" sufficient to raise a claim for breach of contract seeking the remedy of specific performance. *Id.*

We further conclude, however, that Wife has failed to allege a breach with regard to the son's future college expenses. Unlike the issues of support, health insurance, and uninsured medical expenses, as regards the son's future college expenses, Wife does not allege that Husband has yet breached this provision of the Agreement, merely that he has threatened to do so. But Wife's claim of anticipatory breach is inapt.

It is true that, as a general matter, "breach may occur by repudiation. Repudiation is a positive statement by one party to the other party

indicating that he will not or cannot substantially perform his contractual duties." *Profile Invs. No. 25, LLC v. Ammons E. Corp.*, 207 N.C. App. 232, 236, 700 S.E.2d 232, 235 (2010) (cleaned up), *disc. review denied*, 365 N.C. 192, 707 S.E.2d 240 (2011). "When a party repudiates his obligations under the contract before the time for performance under the terms of the contract, the issue of anticipatory breach or breach by anticipatory repudiation arises." *Id.* Yet "[f]or repudiation to result in a breach of contract, the refusal to perform must be of the whole contract or of a covenant going to the whole consideration, and must be distinct, unequivocal, and absolute." *D.G. II, LLC v. Nix*, 211 N.C. App. 332, 338, 712 S.E.2d 335, 340 (2011) (cleaned up).

Upon review of the amended complaint, Plaintiff has not alleged that Defendant's "refusal to perform" was of the "whole contract, or of a covenant going to the whole consideration[.]" *Id.* Plaintiff's allegation of anticipatory breach pertains to one discrete part of one section of the Agreement, Section 4.4, which provides for "College Education for the Parties' Children." Therefore, we conclude that Wife has failed to state a claim for anticipatory breach of the Agreement and the trial court properly dismissed her claim for the son's future college expenses. *Leary*, 157 N.C. App. at 400, 580 S.E.2d at 4.

C. Statute of Limitations

[2] We now determine whether the statute of limitations bars Wife's claim regarding Husband's obligations concerning monthly child support, health insurance, and uninsured medical expenses.

In his answer to the amended complaint, Husband asserts that

> [N.C. Gen. Stat. § 1-52(1)] sets the applicable statute of limitations at three years for actions arising out of contract. [Wife] has alleged [Husband] breached the contract with [Wife] in August of 2017. This action was not filed until [9 March 2022], some five years following [Husband]'s alleged breach. Thus, on the face of the [amended] complaint, Plaintiff has alleged facts that defeat her claims founded upon the parties' alleged contract.

Generally, "[t]he statute of limitations for a breach of contract action is three years[,]" pursuant to N.C. Gen. Stat. § 1-52(1). *Ludlum v. State*, 227 N.C. App. 92, 94, 742 S.E.2d 580, 582 (2013); *see also* N.C. Gen. Stat. § 1-52(1) (2021) (stating that an action "[u]pon a contract" is subject to a three-year statute of limitations). However, an action "[u]pon a sealed instrument" is subject to a ten-year statute of limitations.

N.C. Gen. Stat. § 1-47(2) (2021). Accordingly, when a "[s]eparation [a]greement [i]s executed under seal, a ten-year statute of limitations, rather than the three-year statute of limitations, is applicable to [the] plaintiff's breach of contract claim." *Crogan v. Crogan*, 236 N.C. App. 272, 277, 763 S.E.2d 163, 166 (2014); *see also Harris v. Harris*, 50 N.C. App. 305, 314, 274 S.E.2d 489, 494 (applying the ten-year statute of limitations to an unincorporated separation agreement signed under seal), *disc. review denied and appeal dismissed*, 302 N.C. 397, 279 S.E.2d 351 (1981).

In the case at bar, the contracting parties—Wife and Husband—signed the Agreement under seal before a notary public. The Agreement plainly states that "the parties hereto have hereunto set their hands and seals to this Agreement"; the word "SEAL" appears in parentheses immediately adjacent to both Wife's and Husband's signatures on the final page of the Agreement. "Because the Separation Agreement was executed under seal, a ten-year statute of limitations, rather than the three-year statute of limitations is applicable to [Wife]'s breach of contract" claim. *Crogan*, 236 N.C. App. at 277, 763 S.E.2d at 166.

It is well settled that a "cause of action generally accrues and the statute of limitations begins to run as soon as the right to institute and maintain a suit arises." *Penley v. Penley*, 314 N.C. 1, 20, 332 S.E.2d 51, 62 (1985). In her amended complaint, Wife alleges that Husband "ha[d] failed to comply with the terms of the Agreement . . . [s]tarting in August of 2017," when he "unilaterally reduced his child support payment from $908.00 to $600.00." She further alleges that "in June of 2021, Husband unilaterally reduced his child support payment to $150.00 per month[,] and as of December 2021, Husband ha[d] stopped paying monthly child support all together, in violation of the Agreement." Moreover, Wife alleges that Husband has ceased payment of his share of the children's uninsured medical expenses for an indeterminate period and has not provided health insurance coverage since 2021 or reimbursed her for providing coverage since 2022.

The dates on which Husband is alleged to have breached the Agreement with regard to his obligations for child support, health insurance, and uninsured medical expenses are well within the ten-year statute of limitations applicable to a separation agreement executed under seal. Thus, "there is no bar to recovery of unpaid child support payments[,]" health insurance, and uninsured medical expenses pursuant to the Agreement "which came due during the ten years immediately prior to the filing of [Wife's] claim" on 1 April 2022. *Belcher v. Averette*, 136 N.C. App. 803, 806, 526 S.E.2d 663, 665 (2000) (citation omitted).

For the foregoing reasons, we conclude that the allegations of Wife's amended complaint, taken as true, are sufficient to state a claim upon which relief may be granted. Wife's claim for breach of contract—for which she requests specific performance of Husband's obligations as to child support, health insurance, and uninsured medical expenses under the Agreement—is not tolled by the statute of limitations. Accordingly, the trial court erred in dismissing Wife's amended complaint for breach of contract and specific performance pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. We therefore reverse this portion of the trial court's order.

D. Child Support Pursuant to the NC Child Support Guidelines

[3] We next address Wife's claim for child support pursuant to the North Carolina Child Support Guidelines, which she advances independent of her claim under the Agreement. Wife contends that, like her claim for child support under the Agreement, the trial court similarly erred by dismissing her alternative claim for support under the Guidelines. We agree.

It is axiomatic that the trial court cannot modify the terms of an unincorporated separation agreement, which stands as a contract between the parties. *See Lasecki v. Lasecki*, 257 N.C. App. 24, 43, 809 S.E.2d 296, 310 (2017) (explaining that a "separation agreement is a contract between the parties and the court is without power to modify it except . . . to provide for adequate support for minor children, and . . . with the mutual consent of the parties thereto" (citation and emphases omitted)). Moreover, to "accord sufficient weight to parties' separation agreements, as our common law directs[,]" when the parties "have executed a separation agreement that includes [a] provision for child support, the court must apply a rebuttable presumption that the amount set forth is just and reasonable[.]" *Pataky v. Pataky*, 160 N.C. App. 289, 302–03, 585 S.E.2d 404, 412–13 (2003), *aff'd per curiam*, 359 N.C. 65, 602 S.E.2d 360 (2004).

If, however, the trial court "determines by the greater weight of the evidence that the presumption of reasonableness afforded the separation agreement allowance is rebutted . . . the court then looks to the presumptive guidelines" to determine whether "application of the guidelines would not meet or would exceed the needs of the child[.]" *Id.* at 305, 585 S.E.2d at 415.

"[T]he three-year statute of limitations under Section 1-52(2) bars the recovery of child support expenditures incurred more than three years before the date the action for child support is filed." *Napowsa*

v. Langston, 95 N.C. App. 14, 21, 381 S.E.2d 882, 886, *disc. review denied*, 325 N.C. 709, 388 S.E.2d 460 (1989). Therefore, the applicable statute of limitations for an action for support of a minor child pursuant to N.C. Gen. Stat. § 50-13.4(c) is three years from the "filing of the action." N.C. Gen. Stat. § 1-52(2) (2021); *see also Smith v. Smith*, 247 N.C. App. 135, 150, 786 S.E.2d 12, 24 (2016) (noting that the cause of action "only limits reimbursement to three years prior to the filing of the action").

In the present case, should the trial court determine that the parties' Agreement does not adequately provide for the children's needs, Wife's claim for ongoing child support (independent of the child support provisions of the Agreement) is not barred by the statute of limitations. However, the Guidelines prohibit the award of retroactive child support when the parties have an unincorporated separation agreement that contains provisions for child support, absent a showing of an emergency:

> [I]f a child's parents have executed a valid, unincorporated separation agreement that determined a parent's child support obligation for the period of time before the child support action was filed, the court shall not enter an order for retroactive child support or prior maintenance in an amount different than the amount required by the unincorporated separation agreement.

North Carolina Child Support Guidelines at 2 (2019); *see also Carson v. Carson*, 199 N.C. App. 101, 111, 680 S.E.2d 885, 892 (2009) ("Absent an emergency situation, the Agreement was binding, and the trial court had no authority to award retroactive child support in excess of the terms of the Agreement.").

E. Attorney's Fees

[4] Wife also maintains that the trial court erred in dismissing her claim for attorney's fees pursuant to the terms of the Agreement, or in the alternative, pursuant to N.C. Gen. Stat § 50-13.6.

Section 6.15 of the Agreement provides, *inter alia*, that "[i]n the event it becomes necessary to institute legal action to enforce compliance with the terms of this Agreement . . . the parties agree that at the conclusion of such legal proceeding the losing party shall be solely responsible for all legal fees and costs incurred[.]" In the alternative, Wife seeks statutory relief under N.C. Gen. Stat. § 50-13.6, which provides that "the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit" in "actions for custody and support of minor children." N.C. Gen. Stat. § 50-13.6 (2021).

It remains to be determined whether Husband has breached the Agreement or is obligated to pay child support independent of the child support provisions of the Agreement. Thus, the issue of attorney's fees shall be addressed by the trial court on remand.

III. Conclusion

The trial court properly dismissed Wife's claim for breach of contract as concerns the son's future college expenses; accordingly, we affirm the court's order as to this provision. Regarding the issues of child support, health insurance, and uninsured medical expenses, however, the trial court erred in dismissing Wife's claim for breach of contract because "as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted[,]" *Leary*, 157 N.C. App. at 400, 580 S.E.2d at 4, and the claim is not barred by the applicable statute of limitations, *Laster*, 199 N.C. App. at 576, 681 S.E.2d at 861. If the trial court determines that the Husband's child support obligation under the Agreement is not reasonable, the statute of limitations has not tolled Wife's claim for ongoing child support independent of the child support provisions of the Agreement. Thus, the trial court erred by dismissing this claim as well.

For the foregoing reasons, the trial court's order is affirmed in part, reversed in part, and remanded for further proceedings.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

Judges COLLINS and RIGGS concur.

GREGORY COHANE, PLAINTIFF
v.
THE HOME MISSIONERS OF AMERICA D/B/A GLENMARY HOME MISSIONERS, ROMAN CATHOLIC DIOCESE OF CHARLOTTE, NC, AND AL BEHM, DEFENDANTS

No. COA22-143

Filed 12 September 2023

Civil Procedure—motion to dismiss—SAFE Child Act—revival of previously time-barred sexual abuse claims

In plaintiff's action utilizing the revival provision of the SAFE Child Act to file sexual abuse claims against two religious organizations and the alleged abuser for acts that occurred when plaintiff was a child, the trial court erred by dismissing with prejudice plaintiff's claims against the two organizations (for negligence and negligent assignment, supervision, and retention) on the basis that those claims fell outside the scope of the revival provision. Since the plain language of the Act in allowing previously time-barred claims consisting of "any civil action for child sexual abuse" to be revived during a specified window of time was not limited to claims against the perpetrator of the abuse, the trial court's interpretation was too narrow.

Judge CARPENTER dissenting.

Appeal by plaintiff from order entered 27 October 2021 by Judge Daniel A. Kuehnert in Mecklenburg County Superior Court. Heard in the Court of Appeals 6 June 2023.

White & Stradley, PLLC, by Leto Copeley and J. David Stradley, for plaintiff-appellant.

Poyner & Spruill, LLP, by Steven B. Epstein, for defendant-appellee The Home Missioners of America, et al.

Troutman Pepper Hamilton Sanders, LLP, by Joshua D. Davey and Mary K. Grob, for defendant-appellee Roman Catholic Diocese of Charlotte, NC.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Orlando L. Rodriguez, for the North Carolina Attorney General's Office, amicus curiae.

Tin, Fulton, Owen, & Walker, by Sam McGee, for Child USA, amicus curiae.

Skye Alexandria David, for the North Carolina Coalition Against Sexual Assault, amicus curiae.

GORE, Judge.

Plaintiff, Gregory Cohane, appeals the trial court's interlocutory Order Denying in Part and Granting in Part Defendants' Motions to Dismiss and Denying as Moot Plaintiff's Motion to Transfer. The trial court certified the Order as a final judgment pursuant to Rule 54(b), as it determined there was "no just reason for delay in entry of final judgment on Plaintiff's claims against [defendant] Glenmary and [defendant] the Diocese." Upon review of the parties' briefs and the record, we reverse and remand for further proceedings.

I.

In 1972, defendant Al Behm met plaintiff while Behm was assigned by defendant, Glenmary Home Missioners ("Glenmary"), to a Roman Catholic parish in Connecticut. Behm befriended plaintiff, who was nine years old at the time, and became his "loving, kind and supportive adult presence" compared to plaintiff's emotionally and verbally abusive parents. Behm regularly visited plaintiff's home and eventually invited plaintiff for overnight stays and for overnight trips, which plaintiff's parents consented to. During these times, Behm began grooming plaintiff.

Glenmary reassigned Behm to a parish in Kentucky but Behm maintained connection with plaintiff through mail and phone calls. While in Kentucky, Behm was accused of child sexual abuse, but this was never reported to authorities; instead, Behm was transferred to Cincinnati. While Behm pursued a degree in human sexuality, financed by Glenmary, Behm invited plaintiff and a friend to visit. During this visit, Behm performed sexual acts on plaintiff. Behm was later assigned by Glenmary and defendant Roman Catholic Diocese of Charlotte ("Diocese") to be the campus clergy at Western Carolina University ("WCU") campus. Glenmary and the Diocese did not give any information about the prior child sexual abuse allegations to staff at WCU. Behm continued to sexually abuse plaintiff through phone calls and overnight visits to North Carolina. Behm introduced plaintiff to alcohol, marijuana, and amyl nitrates, and convinced both plaintiff and his parents that plaintiff should go to college at WCU.

While plaintiff attended WCU, Behm continued to sexually abuse him. During this time, Behm was required to travel to a "support group" to meet with other Glenmary clergy who had been accused of child sexual abuse but were still employed. In 1983, according to plaintiff, the Diocese reassigned Behm to Tennessee because of his sexual misconduct with plaintiff. In Tennessee, Behm was accused yet again of child sexual abuse.

On 6 July 2021, plaintiff filed this lawsuit at the age of 57, in reliance upon the passage of Session Law 2019-245 (the "SAFE Child Act"), and specifically, the revival provision in section 4.2(b) of the Act that revived previous civil claims for child sexual abuse barred by the statute of limitations in Section 1-52. Plaintiff brought civil claims against Glenmary and the Diocese for negligence, negligent assignment, supervision, and retention. Plaintiff brought civil claims against Behm for assault, battery, negligent infliction of emotional distress, and intentional infliction of emotional distress. Glenmary and the Diocese filed motions to dismiss and amended motions to dismiss under Rules 12(b)(1), 12(b)(6) and 9(k). They specifically argued plaintiff's claims were time-barred because the SAFE Child Act did not apply to these claims. Plaintiff filed a motion to transfer the 12(b)(6) motions to a three-judge panel because defendants also facially challenged the constitutional validity of the revival provision.

The trial court set the motions to dismiss for hearing on 27 September 2021. The trial court determined plaintiff's claims did not fall within the revival provision's scope. Accordingly, the trial court granted defendants' motions to dismiss in part because it determined plaintiff's claims were time-barred, denied defendants' motion to dismiss in part for lack of subject matter jurisdiction, and denied plaintiff's motion to transfer as moot. Further the trial court certified the order as final for defendants Glenmary and the Diocese pursuant to Rule 54(b). Plaintiff timely appealed this order.

II.

Plaintiff appeals of right pursuant to N.C. R. Civ. P. 54(b) and section 7A-27(b). Plaintiff argues the trial court erred by granting the Rule 12(b)(6) motions on the basis plaintiff's claims are time-barred by section 1-52. Plaintiff argues the trial court erroneously interpreted section 4.2(b), within the SAFE Child Act, narrowly to exclude claims for negligence, negligent retention, assignment, and supervision. We agree.

We review challenges to Rule 12(b)(6) motions to dismiss de novo. *Hinson v. City of Greensboro*, 232 N.C. App. 204, 208, 753 S.E.2d 822, 826 (2014). "Issues of statutory interpretation are also subject to [de

novo] review." *Swauger v. Univ. of N.C. at Charlotte*, 259 N.C. App. 727, 728, 817 S.E.2d 434, 435 (2018).

In November 2019, the General Assembly unanimously adopted the SAFE Child Act, which was signed into law by Governor Cooper, to protect children from sexual abuse and to strengthen and modernize sexual assault laws. SAFE Child Act, 2019 N.C. Sess. Laws 1231, ch. 245 (2019). Within the Act, the General Assembly included a part to "Extend Civil Statute of Limitations and Require Training" in which it amended sections 1-17 and 1-52 of the North Carolina General Statutes. 2019 N.C. Sess. Laws 1231, 1234–35, ch. 245. It amended section 1-17 to include the following provision: "(d) Notwithstanding the provisions of subsections (a), (b), (c), and (e) of this section, a plaintiff may file a civil action against a defendant for claims related to sexual abuse suffered while the plaintiff was under 18 years of age until the plaintiff attains 28 years of age." 2019 N.C. Sess. Laws 1231, 1234, ch. 245, sec. 4.1(d). Within its amendment to section 1-52, it included the following provision, "Effective from January 1, 2020, until December 31, 2021, this section 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." 2019 N.C. Sess. Laws 1231, 1235, ch. 245, sec. 4.2(b).

Plaintiff initiated his lawsuit within the window of time set by section 4.2(b) with claims of negligence, negligent supervision, assignment, and retention against Glenmary and the Diocese. The trial court granted defendants' motions to dismiss because it determined plaintiff's lawsuit was time-barred under section 1-52. It reasoned the phrase "any civil action for child sexual abuse" only included claims against the perpetrator of the sexual abuse, and therefore, the claims brought against Glenmary and the Diocese fell outside the scope of section 4.2(b). It determined this phrase was "narrow and limited" due to the "broader language" within section 4.1(d) that states "a plaintiff may file a civil action against a defendant for claims *related to* sexual abuse." The trial court made this comparison to ascertain the intent of the legislature. In essence, the trial court narrowed the scope of section 4.2(b) through its comparison of the words "related to" and "for," because it determined the differing language in each provision represented legislative intent.

Our Supreme Court applies the following rules to interpret statutes:

> In construing this statutory language, we are guided by long-standing rules of statutory interpretation. First, if a statute is clear and unambiguous, no construction of the legislative intent is required and the words are applied in their

> normal and usual meaning. However, when the language of a statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment. Additionally, if a statute is remedial in nature, seeking to advance the remedy and repress the evil it must be liberally construed to effectuate the intent of the legislature.

Misenheimer v. Burris, 360 N.C. 620, 623, 637 S.E.2d 173, 175 (2006) (cleaned up).

We recently addressed this revival statutory provision in *Doe v. Roman Catholic Diocese of Charlotte*, 283 N.C. App. 177, 872 S.E.2d 810 (2022) ("*Doe* 2022"). The plaintiff had previously filed a lawsuit in 2011 against the Diocese alleging the following claims: constructive fraud, breach of fiduciary duty, fraud and fraudulent concealment, negligent supervision and retention, civil conspiracy, negligent infliction of emotional distress, intentional infliction of emotional distress, and equitable estoppel. *Id.* at 178, 872 S.E.2d at 812.[1] These claims were time-barred under the statute of limitations. *Doe* 2015, 242 N.C. App. at 545, 775 S.E.2d at 923. In *Doe* 2022, plaintiff filed the second lawsuit against the Diocese after the passage of the SAFE Child Act, and in reliance on the section 4.2(b) revival provision. 283 N.C. App. at 178, 872 S.E.2d at 812. The plaintiff asserted the following claims in the second lawsuit: assault and battery, intentional infliction of emotional distress, negligence, negligent infliction of emotional distress, breach of fiduciary duty, constructive fraud, and misrepresentation and fraud. *Id.*

We ultimately ruled that the plaintiff's claims were precluded under the doctrine of res judicata. *Id.* at 181, 872 S.E.2d at 814. However, we noted in that case the revival provision "revive[d] only civil actions for child sexual abuse otherwise time-barred and does not revive civil actions . . . barred by disposition of a previous action." *Id.* at 180, 872 S.E.2d at 813. We also suggested in dicta that plaintiff's claims would have been viable under the revival provision if not for the prejudicial dismissal in *Doe* 2015. *Id.* at 181, 872 S.E.2d at 814.

We discuss *Doe* 2015 and *Doe* 2022 at length, because within these cases lie the subtle recognition that section 4.2(b) may be interpreted through its plain language as there is no ambiguity in the legislature's word usage. Nor does the language "related to" and "for" need to be

---

1. We noted the plaintiff "abandoned" his negligent supervision and retention, civil conspiracy, negligent infliction of emotional distress, and intentional infliction of emotional distress claims prior to summary judgment. *Doe v. Roman Catholic Diocese of Charlotte, NC*, 242 N.C. App. 538, 542 n.2, 775 S.E.2d 918, 921 n.2 (2015) ("*Doe* 2015").

distinguished. The trial court appears to have bypassed the plain language of the statute, and immediately sought to discern legislative intent through the use of pari materia foregoing the "longstanding rules of statutory interpretation." *Misenheimer*, 360 N.C. at 623, 637 S.E.2d at 175. In so doing, the trial court had to add language to the revival provision to make the provision fit within its opinion of the legislature's intent. Treading beyond the well-trodden path of methodical statutory interpretation is what leads to such tortured results, which are unnecessary when the plain language provides the courts with direction.

The legislature marked out the broad nature of section 4.2(b) by using the term "any" as a modifier of civil action, and including section 1-52, which includes the civil claims raised by plaintiff. The only limit, based upon the plain language, is that the civil actions concern child sexual abuse allegations. Interpreting section 4.2(b) in this manner does not detract from the language in section 4.1(d). Had the legislature intended to limit the revival provision to torts by the perpetrator, as defendants suggest, the legislature could have specified the subsections within section 1-52, but it did not specify any subsections. Accordingly, what was previously suggested in dicta we now hold, that the plain language of section 4.2(b) includes the civil claims brought by plaintiff for his childhood sexual abuse allegations. Therefore, the trial court erred by interpreting section 4.2(b) narrowly and dismissing plaintiff's claims as outside the scope of the revival provision.

Defendants also raise issues of constitutionality and that the claims were alternatively dismissed for failure to state a claim upon which relief may be granted. We decline to consider these issues, as we only address the issues raised by plaintiff on appeal and expressly determined by the trial court.

III.

For the foregoing reasons, we conclude the trial court erred in dismissing plaintiff's claims with prejudice on the basis they were not revived by section 4.2(b) and were therefore time-barred. Accordingly, we reverse the trial court's order granting defendant's motions for failure to file a complaint within the statutory limitations and denying as moot plaintiff's motion to transfer.

REVERSED AND REMANDED.

Judge RIGGS concurs.

Judge CARPENTER dissents by separate opinion.

CARPENTER, Judge, dissenting.

I respectfully dissent from the Majority's opinion. For the same reasons I detailed in my dissent in *McKinney v. Goins*, COA22-261, 290 N.C. App. 403, 892 S.E.2d 460 (2023), I believe the Revival Window of the SAFE Child Act is unconstitutional. Thus, regardless of the asserted scope of the Window, I believe the lower court appropriately dismissed this case. Therefore, I respectfully dissent.

GRAY MEDIA GROUP, INC., D/B/A WBTV, PLAINTIFF
v.
CITY OF CHARLOTTE, THROUGH THE CITY COUNCIL, DEFENDANT

No. COA23-154

Filed 12 September 2023

1. Appeal and Error—declaratory judgment action—request under Public Records Act—mootness—capable of repetition yet evading review

In an action filed by a media group (plaintiff) against a city (defendant), where a private consulting firm—pursuant to a contract with defendant—had developed a public leadership survey for city council members, the trial court erred in granting summary judgment for defendant on plaintiff's request for a declaratory judgment that the survey form and responses constituted "public records" subject to disclosure under the Public Records Act. Although defendant eventually produced the survey materials before the summary judgment hearing, it did so without conceding that those documents constituted "public records," and therefore the main issue at stake—whether those documents and any other records created by public officials but possessed solely by a third party are "public records" under the Act—was not moot. At any rate, this issue would have fallen under the mootness exception for cases that are "capable of repetition yet evading review," where there was a reasonable likelihood that plaintiff would continue to request similar types of records from defendant and that defendant could evade review of the "public records" issue by producing the records during discovery.

2. Public Records—Public Records Act request—electronic survey form and responses—records created or owned by public

officials—in sole physical custody of third party—subject to disclosure

Under the plain language of the Public Records Act, documents created or owned by public officials but possessed solely by a third party constitute "public records." Therefore, in an action filed by a media group (plaintiff) against a city (defendant), where a private consulting firm—pursuant to a contract with defendant—had developed a public leadership survey for city council members, emailed the survey to each council member in the form of a unique hyperlink, and then stored the responses in the firm's own server, the trial court erred in granting summary judgment for defendant on plaintiff's request for a declaratory judgment that the survey form and responses constituted "public records" subject to disclosure under the Act.

3. Attorney Fees—declaratory judgment action—Public Records Act request—substantially prevailing in compelling disclosure—unreasonable reliance on prior precedent

In an action filed by a media group (plaintiff) against a city (defendant), where plaintiff sought a declaratory judgment that certain documents created by city council members but physically possessed by a private consulting firm constituted "public records" subject to disclosure under the Public Records Act, plaintiff was entitled to attorney fees under N.C.G.S. § 132-9 where: plaintiff substantially prevailed in compelling disclosure of those documents through its initial records request under the Act and then through its litigation efforts, and where defendant unreasonably relied on inapplicable case law when denying the initial records request.

Appeal by Plaintiff from Order entered 11 October 2022 by Judge Carla N. Archie in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 August 2023.

Flannery | Georgalis, LLC, by Elizabeth F. Greene, and Ballard Spahr LLP, by Lauren P. Russell and Kaitlin M. Gurney (pro hac vice), for Plaintiff-Appellant.

Parker Poe Adams & Bernstein LLP, by Daniel E. Peterson, for Defendant-Appellee.

Stevens Martin Vaughn & Tadych, PLLC, by Elizabeth J. Soja and Michael J. Tadych, for Amici Curiae.

RIGGS, Judge.

"Government agencies and officials exist for the benefit of the people, and 'an informed citizenry [is] vital to the functioning of a democratic society.' " *State Employees Ass'n of N.C. v. N.C. Dep't of State Treasurer*, 364 N.C. 205, 210, 695 S.E.2d 91, 95 (2010) (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242, 57 L. Ed. 2d 159, 178 (1978)). Fundamentally, "public records and public information compiled by the agencies of North Carolina Government, or its subdivisions are *the property of the people*." N.C. Gen. Stat. § 132-1(b) (2021) (emphasis added). For that reason, the North Carolina General Assembly provided a means for fostering transparency and accountability in government through the Public Records Act, which provides broad access to public records. *State Employees Ass'n of N.C.*, 364 N.C. at 211, 695 S.E.2d at 95. The Act is intended to be liberally construed to ensure that governmental records be open and made available to the public, subject only to a few limited exceptions. *DTH Media Corp. v. Folt*, 374 N.C. 292, 300, 841 S.E.2d 251, 257–58 (2020)

In this appeal, Gray Media, LLC ("Gray Media") asks this Court to consider whether records held by a third party are subject to the Public Records Act. The trial court declared the issue moot and granted summary judgment to Defendant, City of Charlotte ("the City"), because the City voluntarily produced the documents. However, Gray Media requests that this Court provide declaratory relief related to this public records request made pursuant to the Public Records Act, N.C. Gen. Stat. §§ 132, *et seq*. (2021). Additionally, Gray Media appeals the trial court's denial of attorneys' fees associated with its Public Records request.

Upon review, we hold that Gray Media's request for declaratory relief is not moot, and the requested records are public records as defined by N.C. Gen. Stat. § 132-1(a). Further, because we hold that the litigation compelled the release of the documents, Gray Media is entitled to reasonable attorneys' fees. Therefore, we remand for summary judgment in favor of Gray Media and additional factfinding to determine the fee award pursuant to N.C. Gen. Stat. § 132-9(c).

I. FACTS & PROCEDURAL HISTORY

In April of 2020, the City executed a one-year contract ("Contract") with Ernst and Young ("EY") to advance more streamlined and effective local government operations. The contract included two (2) one-year renewal options to extend until March of 2023; the City exercised at least one of these renewal options and extended the contract to March

2022. The contract provided that the City would "have exclusive ownership of all reports, documents, designs, ideas, materials, concepts, plans, creative works, software, data, programming code, and other work product developed for or provided to the City in connection with this Contract, and all patent rights, copyrights, trade secret rights and other intellectual property rights relating thereto (collectively the 'Intellectual Property')." In the same paragraph of the contract, EY retained its ownership rights in "Preexisting IP," which it defined as "proprietary data, methodologies, processes, know-how, and trade services that [EY] owns in performing services under this Contract[.]"

The Contract also gave the City exclusive ownership of "Contract Data" defined as: "(a) all data produced or generated under this Contract for the benefit of the City and its customers; and (b) all data provided by, accessed through, or processed for the City under this Contract." The Contract gave the City access to Contract data through language requiring EY to "promptly provide the Contract data to the City in machine readable format upon the City's request at any time while the contract is in effect or within three years from when the contract terminates." The Contract states that work product, excluding confidential information of EY, shall be treated as public records under North Carolina law. Pursuant to the terms of the contract, EY agreed to treat Contract Data as Confidential Information and "not reproduce, copy, duplicate, disclose, or use the Contract Data in any manner except as authorized by the City in writing or expressly permitted by this Contract."

On 24 November 2020, the City and EY signed a statement of work ("SOW") under the Contract, which included having EY develop and deploy a survey focused on transformative leadership and high-performing council topics for the City Council members. In December 2020, EY deployed this survey by sending an email to each City Council member's work email address with a unique hyperlink to access and fill out the survey.

On 2 March 2021, WBTV reporter David Hodges, an employee of Gray Media, requested and received the contract and SOW as part of a public information request made pursuant to N.C. Gen. Stat. § 132-6. Mr. Hodges followed up on the same day, requesting the EY survey form and City Council member responses. The City immediately denied his request via email saying that "[w]e are not in possession of those surveys and EY used those surveys solely for the purpose of developing their recommendations." The City clarified its stance on 9 March 2021 in a letter stating the City Attorney's Office had "determined that documents that are solely in EY's possession are not subject to the Public Records

Law." During April and May, the parties exchanged correspondence on the topic of whether the survey and responses were public records subject to disclosure. On 1 June 2021, the City sent Gray Media the final report that EY developed based in part on the survey information; however, the final report did not include the survey or survey responses.

Gray Media filed a complaint and petition for writ of mandamus on 29 June 2021. The City responded with a motion to dismiss, motion to strike, and request for a protective order on 27 August 2021. After a hearing on the issues, the trial court entered an order on 12 November 2021 granted the City's motion to dismiss in part and denied the motion in part; the trial court also directed Gray Media to amend its complaint in accordance with the order.

Gray Media filed an amended complaint on 23 November 2021 requesting relief declaring the documents were public records and a writ of mandamus requiring the City to comply with the Public Record Act. The City responded to the amended complaint on 24 January 2022 arguing *inter alia* that the requested records were not public records. As part of the discovery process following the amendment of the complaint, the City served EY with a subpoena *duces tecum* on 27 May 2022 requesting that EY produce the survey questions and responses no later than 3 June 2022. The City extended this deadline to 10 June 2022 in exchange for EY's agreement to accept service by email. Nine working days later, EY timely produced the requested material to the City on 10 June 2022; the City turned the survey questions and responses over to Gray Media on the same day. During oral argument on appeal, the City confirmed that this subpoena *duces tecum* was the first time the City requested the survey and responses from EY.

Prior to the production of the requested survey and responses, Gray Media filed a motion for summary judgment in April 2022. After production of the survey and responses, the City filed a motion for summary judgment in July 2022.

The trial court held a hearing on 18 August 2022 on the motions for summary judgment and entered an order on 11 October 2022 granting the City's motion for summary judgment and denying Gray Media's motion for summary judgment. The trial court found that:

> (i) there is no genuine issue of material fact precluding entry of summary judgment; (ii) no genuine present controversy exists between the parties; (iii) as the Defendant has produced the records, Plaintiff's request for declaratory and injunctive relief is moot; (iv) there is no applicable

> exception to the mootness doctrine because while there is reasonable possibility that the Plaintiff may be subjected to the same action again, such action is capable of being fully litigated at that time.

Further, the trial court denied Gray Media's motion for attorneys' fees. Gray Media timely appealed the order on 7 November 2022.

II. ANALYSIS

A. The Issue Is Not Moot

[1] The trial court found that because the City had produced the requested records, the issue was moot and granted summary judgment for the City. On appeal Gray Media argues its request for a declaratory judgment that the requested documents are public records is not moot and is, in fact, "ripe for judicial review." In the alternative, Gray Media argues, even if the issue is moot, the issue is capable of repetition but evading review and, therefore, an exception to the doctrine of mootness. The City argues that this request for declaratory judgment is moot because, if rendered, such judgment could not have any practical effect on the existing controversy. We hold that the issue is not moot.

1. Standard of Review

While the trial court granted summary judgment based upon a finding of mootness, the North Carolina Supreme Court has held that "the proper procedure for a court to take upon a determination that a case has become moot is dismissal of the action rather than entry of summary judgment." *Roberts v. Madison County Realtors Assn.*, 344 N.C. 394, 399, 474 S.E.2d 783, 787 (1996). The issue of whether a trial court properly dismissed a case as moot is reviewed *de novo*. *Alexander v. N.C. State Bd. of Elections*, 281 N.C. App. 495, 499, 869 S.E.2d 765, 769 (2022) *appeal dismissed*, *review denied*, 383 N.C. 679, 880 S.E.2d 689-90 (2022). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (internal quotation marks and citation omitted).

2. Plaintiff's Request for Declaratory Judgment Is Not Moot

Actions filed under the Uniform Declaratory Judgment Act, N.C. Gen. Stat. §§ 1-253–267 (2021), are subject to traditional mootness analysis. *Citizens Addressing Reassignment & Educ., Inc. v. Wake Cty. Bd. of Educ.*, 182 N.C. App. 241, 246, 641 S.E.2d 824, 827 (2007). This is the case because "jurisdiction does not extend to questions that are

altogether moot." *Calabria v. N.C. State Bd. of Elections*, 198 N.C. App. 550, 554, 680 S.E.2d 738, 743 (2009) (quoting *Pearson v. Martin*, 319 N.C. 449, 451, 355 S.E.2d 496, 498 (1987). Mootness arises "[w]henever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue." *News and Observer Publishing Co. v. Coble*, 128 N.C. App. 307, 309–10, 494 S.E.2d 784, 786 *aff'd*, 349 N.C. 350, 507 S.E.2d 272 (1998) (quoting *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978)). Understood another way, a case is considered moot when a "determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Lange v. Lange*, 357 N.C. 645, 647, 588 S.E.2d 877, 879 (2003) (internal citation omitted).

The Public Records Act specifically authorizes requesting parties that have been denied access to records to initiate judicial action, including seeking declaratory judgment. *Virmani v. Presbyterian Health Services Corp.*, 350 N.C. 449, 461, 515 S.E.2d 675, 684 (1999) (noting a declaratory judgment action represents one of several legal methods by which questions of public access to courts and their records are most frequently and successfully raised). A declaratory judgment should be granted when it will: (1) "serve a useful purpose in clarifying and settling the legal relations at issue, and (2) [] terminate and afford relief from the uncertainty, insecurity and controversy giving rise to the proceeding." *Augur v. Augur*, 356 N.C. 582, 588, 573 S.E.2d 125, 130 (2002). Declaratory judgments should not be made "in the abstract, i.e. without definite concrete application to a particular state of facts which the court can by the declaration control and relieve and thereby settle the controversy." *Id.* The purpose of the Declaratory Judgment Act is "to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." *Insurance Co. v. Roberts*, 261 N.C. 285, 287, 134 S.E.2d 654, 657 (1964) (internal citations omitted). Under the Declaratory Judgment Act, any person whose rights are affected by a statute may request a determination of rights arising out of the statute, and our trial courts have the jurisdiction to issue a declaratory judgment to define rights, status, and other legal relations, even if other relief is or could be claimed. N.C. Gen. Stat. § 1-253. *See Insurance Co.*, 261 N.C. at 287, 134 S.E.2d at 656-57 (recognizing that trial courts have jurisdiction to render a declaratory judgment when there is a genuine controversy as to legal rights and liabilities related to, *inter alia*, contracts, and statutes). The North Carolina Supreme Court has emphasized that the Declaratory Judgment Act should be liberally construed and administered. *Id.* at 287, 134 S.E.2d at 657.

Here, Gray Media asked the trial court to declare Gray Media's right, and by extension, the public's right, to access the survey and survey responses. Specifically, Gray Media asked the trial court to confirm that the documents are public records as defined in N.C. Gen. Stat § 132-1(a) even if the documents are solely in the possession of a third party. The City only turned over the requested documents to Gray Media after Gray Media filed for summary judgment but before the summary judgment hearing, without conceding that the records were public records when they were in the possession of EY. Indeed, the City still vigorously contends that the requested documents were not public records when in EY's physical possession.

Because the trial court did not reach the merits of the declaratory judgment action and thus did not afford the precise relief request by Gray Media—that the Court declare that the records were public records even when solely in the physical possession of EY, the issue is not moot. Where there is still outstanding requested relief that could alter the legal relationship between the parties and have a practical effect on the dispute between the parties, the case is not moot. *Cf. In re Hamilton*, 220 N.C. App. 350, 353, 725 S.E.2d 393, 396 (2012) ("Whenever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law.")

One need not look further than the terms of the Contract to identify the practical import of this declaration of rights under the Public Records Act. The disclosed survey and the responses are a small piece in a much larger contract between the City and EY; the surveys represented only $46,500 of a multi-year Contract between the City and EY with a total value not to exceed $400,000. It is reasonable to anticipate that EY gathered additional information under this Contract that was created by City Officials utilizing hyperlinks or other cloud technology that remains solely in EY's physical possession. A declaratory judgment on the merits has the practical implication of defining the public's right to access records created by a public official but possessed solely by a third party (and this specific third party, EY, given how much work may still be done under the Contract) and would remove any uncertainty on that issue. *Lide v. Mears*, 231 N.C. 111, 117–18, 56 S.E.2d 404, 409 (1949) ("The [Declaratory Judgment] Act recognizes the need of society 'for officially stabilizing legal relations by adjudicating disputes before they have ripened into violence and destruction of the *status quo*.' "). Therefore, we hold that this issue is not moot.

3. Applicable Exception to the Doctrine of Mootness

While we hold that the issue in this matter is not moot, we also note, in the alternative, that we would reach the merits of this case because of an exception to the doctrine of mootness. Although the general rule is that an appeal presenting a question that has become moot will be dismissed, a court may consider moot cases falling within one of several limited exceptions to the doctrine. *Anderson v. N.C. State Bd. of Elections*, 248 N.C. App. 1, 7, 788 S.E.2d 179, 184 (2016).[1] One such exception is that this Court may consider otherwise-moot issues capable of repetition but evading review. *In re Jackson*, 84 N.C. App. 167, 171, 352 S.E.2d 449, 452 (1987) (citing *Moore v. Ogilvie*, 394 U.S. 814, 816, 23 L. Ed. 2d 1, 4 (1969)). For an issue to be capable of repetition yet evading review, the challenged action must (1) have a duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the complaining party would be subject to the same action again. *Boney Publishers, Inc. v. Burlington City Council*, 151 N.C. App. 651, 654, 566 S.E.2d 701, 703-04 (2002) (citing *Crumpler v. Thornburg*, 92 N.C. App. 719, 723, 375 S.E.2d 708, 711 (1989)). The controversy in this matter satisfies both elements for an issue to be capable of repetition yet evading review.

First, there is a reasonable likelihood that these same parties will find themselves in this same dispute in the future. The trial court acknowledged that there is a reasonable possibility that the Plaintiff may be subjected to the same action again if it requested similar information. The City conceded at oral argument that this is a scenario that could occur in the future. Additionally, with the ever-increasing role that online data storage plays in our modern world, more governmental agencies are storing data and records using cloud-based technology, often to aid in compliance with public records laws by allowing easier access to the public. D'Onfro, Danielle, *The New Bailments*, 97 Wash. L. Rev. 97, 99 (2022); David A. Lawrence, *Public Records Law* 94-5 (2nd ed. 2009). This Court has held that where there is a "reasonable likelihood

1. *See e.g.*, *Shell Island Homeowners Ass'n v. Tomlinson*, 134 N.C. App. 286, 293, 517 S.E.2d 401, 405 (1999) (noting that voluntary cessation of a challenged action does not deprive a court of jurisdiction to determine the legality of the practice); *N.C. State Bar v. Randolph*, 325 N.C. 699, 701, 386 S.E.2d 185, 186 (1989) (per curiam) (concerning the public duty exception); *Crumpler v. Thornburg*, 92 N.C. App. 719, 723, 375 S.E.2d 708, 711 (1989) (explaining "capable of repetition, yet evading review" exception); *In re Hatley*, 291 N.C. 693, 694, 231 S.E.2d 633, 634 (1977) (recognizing exception where there exists "collateral legal consequences of an adverse nature"); *Simeon v. Hardin*, 339 N.C. 358, 370, 451 S.E.2d 858, 867 (1994) (noting appeal was reviewable where the claims of unnamed class members are not mooted by the termination of the class representative's claim).

that defendants . . . could repeat the conduct, which is at issue here, subjecting the plaintiff to the same action," this Court should consider the issues raised on appeal as an exception to the mootness doctrine. *Boney Publishers*, 151 N.C. App. at 654, 566 S.E.2d at 705. We note, though, that for an issue to be capable of repetition, it is not necessary that a future dispute involve the exact same parties and circumstances. *See In re Jackson*, 84 N.C. App. at 171, 352 S.E.2d at 452 (explaining the issue was capable of repetition yet evading review because it is not improbable that the Board of Education or other local school boards will be repeatedly subject to similar orders). Here, given the City's position that the Public Records Act does not apply to documents in the physical custody of a third party and Gray Media's interest in timely news coverage of city government activity, it is likely that these parties will end up in our courts again.

Second, the challenged action has a duration too short to be fully litigated prior to cessation or expiration. The trial court stated, and the City argues on appeal, that the statutory procedure for expedited hearings allows for timely review. N.C. Gen. Stat. § 132-9. However, the City omits the fact that in future challenges, it can exercise its ownership rights, demand production from the third party, and turn the documents over to the requesting party long after the initial request but before the hearing date, thereby frustrating the intent of the Public Record Act, while still evading review. *In re Jackson*, 84 N.C. App. at 171, 352 S.E.2d at 452 (holding that a case involving the school system's right to suspend students for misconduct was capable of repetition yet evading review because a suspension could never be longer than the balance of the school year.) *Cf. Womack Newspapers, Inc. v. Town of Kitty Hawk*, 181 N.C. App. 1, 9, 639 S.E.2d 96, 102 (2007) (recognizing that the "capable of repetition yet evading review" mootness exception was not applicable where the governmental entity attempting to withhold the documents was the appealing party, and in the future, that entity could simply withhold the disputed documents and avoid mootness).

Thus, although the controversy is not moot, we are, alternatively, justified in exercising our discretion to consider the question because the issue is capable of repetition yet evading review. Accordingly, we turn to the merits of Gray Media's request for declaratory judgment.

B. The Requested Documents Are Public Records and the City Had an Obligation to Produce the Documents Promptly.

[2] At the center of this dispute is whether the requested documents are, in fact, public records subject to public disclosure when they were

solely held by a third party. Put another way, can a government agency place public records solely in the possession of a third party or otherwise ensure that only the third party has immediate access to what would undoubtedly be public records if in the possession of the government agency and then assert that the documents are not subject to disclosure under the Public Records Act? We hold that it cannot.

We first consider the plain language of the statute and statutory exceptions to ascertain whether the requested records are public records under the statute. Second, we consider the City's argument regarding whether physical possession is a statutory requirement of the Public Records Act. Finally, we evaluate whether the test established in *Womack* for documents held by a third party is applicable to the facts of this case. Ultimately, we hold that under the plain language of the statute, the requested documents are public records not subject to any exception. The Public Records Act does not require actual possession as a requirement for disclosure. Finally, the test used in *Womack* is not applicable because the documents at issue in this case were created by public officials.

1. The Documents Are Public Records Under the Plain Language of the Statute

The principles governing statutory construction are well established: when the language of a statute is clear and unambiguous, there is no room for judicial construction, and courts must give the statute its plain meaning. *News and Observer v. State*, 312 N.C. 276, 282, 322 S.E.2d 133, 137 (1984). In the construction of any statute, "words must be given their common and ordinary meaning, nothing else appearing." *In re Clayton-Marcus Co.*, 286 N.C. 215, 219, 210 S.E.2d 199, 202-03 (1974). The goal of statutory construction is to effectuate the purpose of the legislature in enacting the statute. *DTH Media Corp.*, 374 N.C. at 299, 841 S.E.2d at 257.

Here, the General Assembly specifically defined a public record as a document, regardless of physical form, made or received by a public official:

> all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material, *regardless of physical form or characteristics*, *made or received* pursuant to law or ordinance in connection with the transaction of public business *by* any agency of North Carolina government or

> its subdivisions. Agency of North Carolina government or its subdivisions shall mean and include every public office, *public officer or official* (State or local, *elected or appointed*), institution, board, commission, bureau, council, department, authority or other unit of government of the State or of any county, unit, special district or other political subdivision of government.

N.C. Gen. Stat. § 132-1(a) (emphasis added).

The parties agree that the survey and survey responses are not physical documents; rather, they are electronic records created through the City Council member's use of a hyperlink to create a record on EY's servers. The City contends that it is of legal significance that Council members were never emailed these surveys as, for example, an attachment to an email. Rather, because they were sent hyperlinks to EY webspace, we should not view the responses, developed by Council members in their governmental capacity, on taxpayer-funded time, as public records. At oral argument, the City conceded that if the issue was an email stored on a third-party server, the record would be a public record.

To accept the argument that a hyperlinked survey instead of an attached survey removes the document from the universe of public records requires us to read the statutory language much too narrowly. Such a reading would defeat the purpose of the statute, creating a clear path to hide huge swaths of governmental work from public scrutiny. Instead, we note that the statute includes broad language including "all documents . . . electronic data-processing records . . . *regardless of physical form or characteristics*." N.C. Gen. Stat. § 132-1(a) (emphasis added). Further, the Public Records Act has been repeatedly interpreted to provide liberal access to public records. *Virmani*, 350 N.C. at 462, 515 S.E.2d at 685. *See also News and Observer Publishing Co. v. Poole*, 330 N.C. 465, 475, 412 S.E.2d 7, 13 (1992) (recognizing that "[b]y enacting the Public Records Act, the legislature intended to provide that, as a general rule, the public would have liberal access to public records." (internal quotation marks omitted)). Therefore, we decline to adopt the City's narrow interpretation that a hyperlink to EY webspace does not constitute a "document or electronic data processing record."

Having determined that the survey responses are public records under the Public Records Act, we turn to the City's arguments that the requested documents fall under an exception to disclosure because a portion of the information may be the propriety information of EY. In the Public Records Act, the General Assembly identified specific exceptions

to general access for inspection or disclosure. N.C. Gen. Stat. § 132-1.1–1.14. However, those exceptions and exemptions to the Public Records Act must be construed narrowly. *See News and Observer Publishing Co.*, 330 N.C. at 486, 412 S.E.2d at 19 (holding that in the absence of clear statutory exemption or exception, documents falling within the definition of "public records" in the Public Records Act must be made available for public inspection).

Here, the City does not cite any specific statutory exception and only asserts that third-party EY may consider the records to be EY's Pre-existing IP, which, under the contract terms, EY owns. However, EY disclosed both the survey and the survey responses to the City without making a claim that any of the requested survey questions or responses contained Pre-existing IP. EY did mark the documents disclosed under the subpoena as "Confidential," however, the Contract mandates that EY treat all contract data as confidential.

Even assuming *arguendo* that some information was confidential as defined in N.C. Gen. Stat. § 132-1.2(1), which the City does not argue, the Public Records Act specifically addresses the issue of confidential information comingled with nonconfidential information and prohibits the denial of a request to inspect, examine, or obtain public records on the ground that confidential information is commingled with the non-confidential information. N.C. Gen. Stat. § 132-6(c). If it is necessary to separate confidential information from nonconfidential information, the burden is upon the public agency to arrange such separation and to assume the cost of separation. *Id. See Ochsner v. N.C. Dep't of Revenue*, 268 N.C. App. 391, 400, 835 S.E.2d 491, 498 (2019) (recognizing that denial of access to public records is improper on the basis that the public record contains nonpublic information).

Therefore, we hold that the documents created using the hyperlinked survey and solely held by a third party are public records subject to disclosure and that, on the facts here, no confidentiality arguments prevent disclosure.

2. Actual Possession Is Not a Requirement of the Public Records Act

On appeal, the City argues that it did not have actual possession of the records or "substantial control" over EY to demand the records. The City also argues that it does not have an obligation to retrieve records from its contractors or consultants to comply with the Public Records Act. Finally, the City argues that this Court's holding in *State Employee Ass'n of N.C., Inc. v. N.C. Dep't of State Treasurer* creates a possession

requirement for documents to be considered public records. 364 N.C. 205, 214, 695 S.E.2d 91, 97 (2010). Therefore, the City argues, it did not have an obligation to disclose the records. We disagree.

The Public Records Act provides a procedure to inspect, review or copy documents in the custodian's *custody* by requesting access from the custodian of the public records. N.C. Gen. Stat. § 132-6 (emphasis added). Custody is defined as "care and control of a thing or person for inspection, preservation, or security." *Custody*, *Black Law Dictionary* (11th ed. 2019). Because custody encompasses control of a thing, actual or constructive possession is sufficient to meet the requirement for custody. *See Fordham v. Eason*, 351 N.C. 151, 155, 521 S.E.2d 701, 704 (1999) ("Constructive possession is a legal fiction existing when there is no actual possession, but there is title granting an immediate right to actual possession.")[2]

Notably, the phrase "actual possession" does not appear in the section. Adding the words "actual possession" into the statute would add new substantive language that meaningfully alters the statute's scope, and we may not "insert words not used in the relevant statutory language during the statutory construction process." *Midrex Techs., Inc. v. N.C. Dep't. of Revenue*, 369 N.C. 250, 258, 794 S.E.2d 785, 792 (2016) (citations and quotation marks omitted).

When the issue of whether the custodian has custody of a record is disputed, it is the role of the court to ensure that public records are properly shared with the public—it is not the role of the state agencies to self-regulate compliance with the Public Records Act. In *State Employees Ass'n of N.C.*, the North Carolina Supreme Court said:

> The final determination of *possession or custody* of the public records requested is not properly conducted by the state agency itself. The approach that the state agency has the burden of compliance, subject to judicial oversight,

2. We find it informative that other states with similar public records acts have held that the public's right to access public records should not depend on where the records are physically located at the time of the request. *See Evertson v. City of Kimball*, 767 N.W.2d 751, 759 (Neb. 2009) ("The public's right of access should not depend on where the requested records are physically located."); *Tribune Review v. Westmoreland Hous. Auth.*, 833 A.2d 112, 118 (Pa. 2003) (recognizing that the lack of possession of existing writing by the public entity at the time of the request is not, by itself, determinative of the question of whether the writing is a public record subject to disclosure); *NCAA v. Associated Press*, 18 So.3d 1201, 1207 (Fla. App. 1 Dist. 2009) (explaining that the term "received" in the Florida Public Records Act refers not only to a situation "in which a public agent takes physical delivery of a document but also to one in which a public agent uses documents residing on a remote computer" for public business).

> is entirely consistent with the policy rationale underpinning the Public Records Act, which strongly favors the release of public records to increase transparency in government. Judicial review of a state agency's compliance with a request, prior to the categorical dismissal of this type of complaint, is critical to ensuring that, as noted above, public records and information remain the property of the people of North Carolina. Otherwise, the state agency would be permitted to police its own compliance with the Public Records Act, a practice not likely to promote these important policy goals.

364 N.C. 205, 214, 695 S.E.2d 91, 97 (2010) (emphasis added). Therefore, any dispute regarding whether the City was properly in *possession or custody* of the documents is one that only our courts can resolve.

In this case, the Contract is unequivocal that the surveys and responses—*i.e.*, Contract data as defined in the Contract—are exclusively owned by the City. The contractual language plainly indicates that EY must "promptly provide the Contract data to the City in machine-readable format upon the City's request at any time while the contract is in effect or within three years from when the contract terminates." Therefore, the City maintained custody through constructive possession of the records and was required under the Public Records Act to have exercised its right to demand the records from EY when Gray Media made the public records request.

Accordingly, we hold that the City had custody of the records by virtue of its constructive possession of the records and that physical, actual custody is not a requirement of the statute. The City was obligated to request the document from EY to comply with the public records request made by Gray Media.[3]

3. Womack Is Not Applicable

The City argues that the two-part analysis that this Court used in *Womack*, 181 N.C. App. at 12, 639 S.E.2d at 104, should be applied in this

---

3. The City's argument that Gray Media was required to request the documents directly from EY is in painful tension with the terms of the Contract. The Contract specifically requires that EY "will not reproduce, copy, duplicate, disclose, or use the Contract Data in any manner *except as authorized by the City in writing or expressly permitted by the Contract*." (Emphasis added). The City may not pass off the burden of complying with the Public Records Act to a third party, and it cannot credibly advance an argument that a requesting party should go to a third party when it knows that the third party would be contractually prevented from replying to such a request.

case to support the City's argument that it has no obligation to retrieve documents from contractors or consultants to comply with the Public Records Act.[4] However, a careful reading of the case that established the two-part analysis, *Durham Herald Co., Inc.*, clarifies that this analysis applies to "records *made by contractors* and subcontractors (contractors) of the Authority, *kept by the contractors* and *not actually received* by the Authority." *Durham Herald Co. v. Low-Level Radioactive Waste Mgmt. Auth.*, 110 N.C. App. 607, 610–11, 430 S.E.2d 441, 444 (1993) (emphasis added). This *Womack* analysis is not applicable here because the requested records were not made by contractors.

The surveys were received by the City Council members on 11 December 2020 when the email with the unique hyperlink to the survey was sent to the Council members' email accounts. The survey responses were created by the City Council members, who are public officials. As discussed *supra*, when the Council member received the email with the unique hyperlink, accessed the hyperlink, and began filling out the survey, the records were public records subject to disclosure under the Public Records Act. *News Reporter Co., Inc. v. Columbus Cty.*, 184 N.C. App. 512, 514, 646 S.E.2d 390, 392 (2007) (holding that a letter written by a county employee and received by the County Board in connection with its decision to hire a medical director was a public record).

Accordingly, we hold that the trial court erred in entering summary judgment for the City. Records created or received by a government entity, even when stored or held by a third party, are subject to disclosure under the Public Records Act and the government agency must exercise its right to possession of the records to allow the requestor to inspect or examine the records. We reverse the order of the trial court and remand for entry of summary judgment in favor of Gray Media.

C. Plaintiff Is Entitled to Attorneys' Fees for Compelling Production.

[3] Finally, Gray Media argues it substantially prevailed in compelling the production of the records and, therefore, is entitled to attorneys' fees pursuant to N.C. Gen. Stat. § 132-9. The City argues that Gray Media should not be awarded attorneys' fees for two reasons: (1) Gray Media did not *substantially prevail* in compelling the disclosure of public records,

---

4. The two-part test requires, first, a determination of whether the contractor is an " '[a]gency of North Carolina government or its subdivisions'; then, if a contractor is found to be an agency, inquiring whether its records are 'public records' that were 'made or received pursuant to law or ordinance in connection with the transaction of public business . . . .' " *Womack Newspapers*, 181 N.C. App. at 12, 639 S.E.2d at 104.

and (2) the City acted in reasonable reliance on opinions from this Court including *Womack* and *Durham Herald*. We hold that Gray Media did substantially prevail in compelling disclosure and the City did not act in reasonable reliance on *Womack* and *Durham Herald*.

North Carolina General Statute § 132-9 requires the award of attorneys' fees to a party whose litigation efforts substantially compel the disclosure of public records. The statute, however, directs a denial of a fee award if the losing party relied on established precedent, specifically:

> The court may not assess attorneys' fees against the governmental body or governmental unit if the court finds that the governmental body or governmental unit acted in reasonable reliance on any of the following:
>
> (1) A judgment or an order of a court applicable to the governmental unit or governmental body.
>
> (2) The published opinion of an appellate court, an order of the North Carolina Business Court, or a final order of the Trial Division of the General Court of Justice.
>
> (3) A written opinion, decision, or letter of the Attorney General.

N.C. Gen. Stat. § 132-9.

The General Assembly modified the Public Records Act in 2010 to award attorneys' fees to the party that "substantially prevails" rather than simply the prevailing party. 2010 N.C. Sess. Laws 638, 660 ch. 169, sec. 132-9. The parties do not provide caselaw and we have not found North Carolina caselaw interpreting what "substantially prevails" means under this statute. "Because the actual words of the legislature are the clearest manifestation of its intent, we give every word of the statute effect, presuming that the legislature carefully chose each word used." *N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201, 675 S.E.2d 641, 649 (2009). "[I]n effectuating legislative intent, it is our duty to give effect to the words actually used in a statute and not to delete words[.]" *Lunsford v. Mills*, 367 N.C. 618, 623, 766 S.E.2d 297, 301 (2014). Thus, we understand that by adding the word substantially to the language of the statute, the Legislature expanded the class of parties entitled to attorneys' fees under the Public Records Act. This expansion includes entitling to attorneys' fees parties that may not receive all requested relief but do obtain relief, such as that resulting from the change in position of the opposing party during the litigation.

Here, Gray Media pursued production of the requested document under the Public Records Act and, when that was not successful, through

statutorily-authorized litigation. Gray Media and the City exchanged correspondence on this public records request for three months between March and May of 2021. After almost four months of negotiation after the initial records request, Gray Media filed the complaint under the Public Records Act. Even after the complaint was filed, the City did not request the documents from EY until after Gray Media filed for summary judgment on 19 April 2022. Because the City only moved to obtain the documents, which it contractually owned, sixteen months after the original request, after litigation was commenced, and, indeed, after Gray Media sought summary judgment in its favor, this sequence of events compels a conclusion that Gray Media's actions substantially precipitated the ultimate disclosure of the records.

Additionally, this result finds support in the statutory definition of "substantially prevails" in the Federal Freedom of Information Act ("FOIA"), which uses similar language to determine when an award of attorneys' fee is appropriate. 5 U.S.C. § 552 (a)(4)(E)(ii) (2018). Under FOIA, "substantially prevails" is defined by statute as obtaining relief through either a judicial order, an enforceable written agreement, a consent decree, or a voluntary or unilateral change in position by the agency if the complainant's claim is not insubstantial. *Id.* Federal courts have held that an important factor in determining whether a plaintiff has substantially prevailed is whether litigation was reasonably necessary to induce the agency to release the information. *See, e.g.*, *Brayton v. Office of the U.S. Trade Representative*, 641 F.3d 521, 525 (D.C. Cir. 2011) (recognizing that the OPEN Government Act of 2007 redefined "substantially prevailing" to include obtaining relief through a voluntary or unilateral change in position by the agency if the complaint's claim was not insubstantial; substantially prevailing does not require winning court-ordered relief on the merits of the FOIA claim); *Batton v. I.R.S.*, 718 F.3d 522, 526 (5th Cir. 2013) (holding appellant "substantially prevailed" when the IRS only began producing documents one year after the initial request and after the appellant filed a lawsuit); *Cf. Weishaupt-Smith v. Town of Banner Elk*, 264 N.C. App. 618, 623, 826 S.E.2d 734, 738 (2019) (recognizing that although this Court is not bound by federal caselaw, we may find its analysis and holdings persuasive in interpreting analogous federal rules).

Finding that Gray Media successfully compelled the disclosure of the records, we turn our attention to whether the City reasonably relied upon *Womack* or *Durham Herald* in its denial of the Public Records Request. Section 132-9 of the Public Records Acts provides the trial court "may not assess attorneys' fees against the governmental body or governmental unit if the court finds that the governmental body or

governmental unit acted in reasonable reliance on . . . [a] published opinion of an appellate court . . . ." N.C. Gen. Stat. § 132-9. In the hearing for summary judgment, the City claimed that it relied upon the two-part test in *Womack*, arguing that because EY was not a government agency, the City was not obligated to produce documents.

Because neither *Durham Herald* nor *Womack* stand for the City's proposition that documents created by City Council members but held by third parties are not subject to the Public Records Act, the City could not have reasonably relied on either *Durham Herald* or *Womack* for the purposes of avoiding attorneys' fees. As discussed *supra*, the two-prong test used in *Womack* came from *Durham Herald* and specifically applied to documents created by a third party that have not been received by the government agency. *Durham Herald*, 110 N.C. App. at 610–11, 430 S.E.2d at 444 ("This case presents a question of first impression here—whether records *made by contractors and subcontractors* (contractors) of the Authority, *kept by* the contractors and *not actually received* by the Authority are public records, as defined under [N.C. Gen. Stat.] § 132–1, requiring disclosure under North Carolina's public records law." (emphasis added)). *Womack* held that because the result in *Durham Herald* that the requested documents were not public records turned on the specificity of the North Carolina Low-Level Radioactive Waste Act, its logic was unpersuasive in that later case. *Womack*, 181 N.C. App. at 12, 639 S.E.2d at 103.

Here, it is undisputed that the email with the hyperlink was received by the City Council members and the City Council members created the survey responses in the course of City business. While the City needed to request the survey responses from EY, the City was obliged to do so under the plain language of the statute and was not excused from that obligation by any decision from our appellate courts. We do not suggest that the City acted in bad faith by arguing that *Womack* and *Durham Herald* supports their position, but an erroneous legal interpretation of those cases cannot excuse a governmental entity from its financial obligations to parties authorized to claim attorneys' fees by statute. Significantly, in *Womack*, this Court signaled that it would reject the precise argument offered by the City here, noting that "permitting [a public agency] to place documents such as these in the hands of a so-called independent contractor in order to escape the public records requirements[]" would allow government agencies to skirt the public records disclosure requirement and shield records from public scrutiny. *Womack*, 181 N.C. App. at 14, 639 S.E.2d at 105. That same admonition applies equally here—public records are "*the property of the people*." N.C. Gen. Stat. § 132-1(b).

Therefore, we hold that attorneys' fees are warranted and remand for an award of attorneys' fees with the amount to be determined by the trial court.

III. CONCLUSION

We hold that the question of whether the records held solely by EY as part of the contract between the City and EY are subject to the Public Record Act is not moot. Accordingly, we reverse the order of summary judgment in favor of the City. We remand for entry of an order granting summary judgment in favor of Gray Media declaring the documents created by City Council members and stored on EY servers to be public records subject to disclosure under the Public Records Act. We further remand for entry of an award of attorneys' fees to Gray Media, with the amount to be determined by the trial court after further hearing.

REVERSED AND REMANDED.

Judges ZACHARY and COLLINS concur.

DUSTIN MICHAEL MCKINNEY, GEORGE JEREMY MCKINNEY AND JAMES ROBERT TATE, PLAINTIFFS
v.
GARY SCOTT GOINS AND THE GASTON COUNTY BOARD OF EDUCATION, DEFENDANTS

No. COA22-261

Filed 12 September 2023

Constitutional Law—North Carolina—Law of the Land clause—statute of limitations defense—retrospective claim revival

The divided decision of a three judge panel dismissing plaintiffs' claims against a county board of education—for allegedly failing to protect them from sexual abuse committed by a school employee when they were in high school—was reversed where the dismissal was based on the majority's erroneous determination that the SAFE Child Act, under which plaintiffs' claims were filed and which allowed them to revive previously time-barred claims, was facially unconstitutional. Although the majority concluded that the revival provision of the Act violated due process rights protected by the Law of the Land clause by retroactively taking away defendant's statute of limitations defense, and thus interfered with a vested right,

nothing in the North Carolina Constitution prohibits the revival of statutes of limitation and, therefore, the Act was constitutional and plaintiffs' claims were dismissed in error.

Judge GORE concurring in result only.

Judge CARPENTER dissenting.

Appeal by Plaintiffs and Intervenor State of North Carolina from an order entered 20 December 2021 by Judges R. Gregory Horne and Imelda J. Pate, with Judge Martin B. McGee dissenting, in Wake County Superior Court. Heard in the Court of Appeals 6 June 2023.

Lanier Law Group, P.A., by Donald S. Higley, II, Robert O. Jenkins, and Lisa Lanier, for Plaintiffs-Appellants.

Attorney General Joshua H. Stein, by Solicitor General Ryan Y. Park, Deputy Solicitor General Nicholas S. Brod, Solicitor General Fellow Zachary W. Ezor, and Special Deputy Attorney General Orlando L. Rodriguez, for Intervenor-Appellant State of North Carolina.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Elizabeth Lea Troutman, Robert J. King, III, Jill R. Wilson, and Lindsey S. Barber, for Defendant-Appellee Gaston County Board of Education.

No brief filed by Defendant-Appellee Gary Scott Goins.

Fox Rothschild LLP, by Troy D. Shelton, for Amici Curiae Student Victims of Sexual Abuse.

Troutman Pepper Hamilton Sanders LLP, by Joshua D. Davey and Mary K. Grob, for Amicus Curiae Roman Catholic Diocese of Charlotte, North Carolina.

Wilder Pantazis Law Group, by Sam McGee, for Amicus Curiae CHILD USA.

Tharrington Smith, L.L.P., by Deborah R. Stagner, for Amicus Curiae North Carolina School Boards Association.

Nelson Mullins Riley & Scarborough, LLP, by Lorin J. Lapidus, G. Gray Wilson, Denise M. Gunter, and Martin M. Warf, and Bell, Davis & Pitt, P.A., by Kevin G. Williams, for Amicus Curiae Young Men's Christian Association of Northwest North Carolina d/b/a Kernersville Family YMCA.

RIGGS, Judge.

Plaintiffs Dustin Michael McKinney, George Jeremy McKinney, and James Robert Tate, along with Intervenor-Appellant State of North Carolina, appeal from an order entered by a divided three-judge panel in Wake County dismissing Plaintiffs' complaint under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. The majority below dismissed Plaintiffs' complaint on the rationale that the Sexual Assault Fast reporting and Enforcement Act (the "SAFE Child Act")—which revived Plaintiffs' civil claims for child sexual abuse after expiration of the statute of limitations—was facially unconstitutional as violating due process rights protected by the "Law of the Land" clause in Article I, Section 19 of the North Carolina Constitution. *See* 2019 N.C. Sess. Laws 1231, 1235, ch. 245, sec. 4.2.(b) ("Effective from January 1, 2020, until December 31, 2021, this section 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."); N.C. Const. art. I, § 19 ("No 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.").

Defendant Gaston County Board of Education (the "Board")—who, per the complaint in this case, failed to protect the children in its care from a sexually abusive employee over a period of years—asks us to elevate a purely procedural statute of limitations defense into an inviolable constitutional right to be free from any civil liability for whatever misdeeds would be provable at trial. But affording all statutes of limitation that exceptional status is nowhere required by the constitutional text, nor is it mandated by the precedents of our Supreme Court. Because adopting the Board's position would require us to strike down as unconstitutional a duly enacted statute of our General Assembly and disregard the narrowly crafted legislation designed to address a stunningly pressing problem affecting vulnerable children across the state, we decline to convert an affirmative defense into a free pass for those who engaged in and covered up atrocious child sexual abuse. After careful review, we reverse the trial court and remand for further proceedings not inconsistent with this opinion.

I. FACTUAL AND PROCEDURAL HISTORY

A. Underlying Abuse of Plaintiffs

The allegations of the complaint, taken as true for purposes of review at the 12(b)(6) stage, establish the following:

Plaintiffs were all high school students and members of the East Gaston High School wrestling team at different times during the mid-1990s and early 2000s. All were coached by Defendant Gary Scott Goins, who physically and sexually assaulted each of the boys during their pre-teen and/or teenage years. Defendant Goins desensitized his victims to sex, used foul language, and exposed them to vulgarity and pornography. He further engaged in acts of physical violence, psychological harm, and sexual abuse. On trips to tournaments and other team events, Defendant Goins precluded Plaintiffs from travelling or rooming with their parents so that he could sexually assault them without raising suspicion. Plaintiffs suffered lasting psychological harm—including post-traumatic stress disorder, anxiety, depression, and/or substance abuse issues—as a result of Defendant Goins' illegal acts.

The Board, Defendant Goins' employer, received numerous complaints concerning his physical abuse of wrestlers under his tutelage. The Board, however, made no corrective action in response to these reports, electing instead to dismiss them after minimal investigation. Nor did the Board properly supervise Defendant Goins' activities to protect Plaintiffs from his abuse, including while in school facilities, travelling on school vehicles, and during overnight trips sanctioned by the Board.

In 2014, Defendant Goins was convicted of the following offenses in connection with his sexual abuse of wrestlers on the East Gaston High School wrestling team: (1) two counts of statutory sexual offense; (2) six counts of taking indecent liberties with a minor; (3) four counts of taking indecent liberties with a student; (4) three counts of sexual activity with a student; and (5) two counts of crimes against nature. *State v. Goins*, 244 N.C. App. 499, 511, 781 S.E.2d 45, 54 (2015). He was sentenced to a collective minimum term of 34.5 years for his crimes, and his conviction and sentences were upheld on appeal. *Id.*

B. Statute of Limitations and the SAFE Child Act

Under the statute of limitations then in effect, Plaintiffs had three years from their eighteenth birthdays to bring civil suits against Defendants for the torts arising out of their sexual abuse. *See* N.C. Gen. Stat. § 1-17 (2007) (providing that persons under the age of eighteen may generally pursue claims "within the time limited in this Subchapter"

upon reaching the age of majority); N.C. Gen. Stat. § 1-52 (2007) (establishing a three-year statute of limitations for assault, battery, and false imprisonment). None of Plaintiffs brought civil suits against Defendants for these torts within three years of their eighteenth birthdays, with the latest of the claims expiring in 2008.

The North Carolina General Assembly passed the SAFE Child Act unanimously on 31 October 2019, and it was signed by the Governor a week later. 2019 N.C. Sess. Laws 1231, 1239, ch. 245, sec. 9(c). Among the many substantial statutory changes in the SAFE Child Act were revisions to the statute of limitations governing Plaintiffs' claims against Defendants, including the following "Revival Window" provision: "Effective from January 1, 2020, until December 31, 2021, this section 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." *Id.*, 1235, ch. 245, sec. 4.2(b). This change by the legislature mirrored scientific developments and greater understanding by lawmakers from 2000 to the present[1] that child sex abuse victims frequently delayed disclosure of their traumas well into adulthood and suffer lifelong impacts to their physical, mental, and behavioral health. *See* Melissa Hall & Joshua Hall, *The Long-Term Effects of Childhood Sexual Abuse: Counseling Implications*, Am. Counseling Ass'n VISTAS Online, 2-5 (2011), https://www.counseling.org/docs/disaster-and-trauma_sexual-abuse/long-term-effects-of-childhood-sexual-abuse.pdf; Ramona Alaggia et al., *Facilitators and Barriers to Child Sexual Abuse (CSA) Disclosures: A Research Update (2000-2016)*, 20(2) Trauma, Violence, & Abuse 260, 276 (2019), https://journals.sagepub.com/doi/pdf/10.1177/1524838017697312; CHILD USA, *Delayed Disclosure: A Factsheet Based on Cutting-Edge Research on Child Sex Abuse*, 4 (March 2020), https://childusa.org/wp-content/uploads/2020/04/Delayed-Disclosure-Factsheet-2020.pdf; Ctrs. for Disease Control, *Preventing Child Sexual Abuse*, 1 (2021), https://www.cdc.gov/violenceprevention/pdf/can/CSA-Factsheet_508.pdf (collecting research from the late 1990s through the late 2010s).

---

1. Connecticut, California, and Delaware were the first three states to revive civil claims under expired statutes of limitations for child sexual abuse in 2002, 2003, and 2007, respectively. *2023 SOL Tracker*, CHILD USA, https://childusa.org/2023sol/ (last visited June 27, 2023). Twenty-three states and three territories followed suit between 2010 and 2023. *Id. See also* Brief of *Amicus Curiae* CHILD USA in Support of Plaintiffs-Appellants Urging Reversal of the Decision Below, 17-22, *McKinney v. Goins*, COA22-261 (N.C. Ct. App. Apr. 19, 2023).

C. Plaintiffs' Suit and the Board's Facial Constitutional Challenge

Relying on the SAFE Child Act's Revival Window, Plaintiffs filed suit against Defendants on 2 November 2020 in Gaston County Superior Court for: (1) assault/battery; (2) negligent hiring, retention, and supervision; (3) negligent infliction of emotional distress; (4) intentional infliction of emotional distress; (5) constructive fraud; (6) false imprisonment; and (7) punitive damages.[2] The Board filed an answer and counterclaim on 27 January 2021, specifically asserting that the complaint must be dismissed because the Revival Window "is facially unconstitutional" and the claims were time-barred by the applicable statute of limitations. The Board later filed a 12(b)(6) motion to dismiss on this same basis, as well as a motion to transfer the action to a three-judge panel of the Superior Court of Wake County. *See* N.C. Gen. Stat. § 1-267.1(a1) (2021) ("[A]ny facial challenge to the validity of an act of the General Assembly shall be transferred pursuant to G.S. 1A-1, Rule 42(b)(4), to the Superior Court of Wake County and shall be heard and determined by a three-judge panel of the Superior Court of Wake County[.]").

Plaintiffs and the Board subsequently filed a joint motion to transfer and stay the remainder of the action, and the Gaston County Superior Court granted that motion on 17 May 2021. Chief Justice Paul Newby of the Supreme Court of North Carolina subsequently appointed Superior Court Judges Martin B. McGee, R. Gregory Horne, and Imelda J. Pate to hear the Board's facial challenge to the Revival Window. Shortly after their appointment, the State filed a motion to intervene to defend the constitutionality of the SAFE Child Act's Revival Window, and the panel unanimously granted that motion.

D. Dismissal of Plaintiffs' Suit

The three-judge panel heard the Board's motion to dismiss on 21 October 2021. After taking the matter under advisement, the panel entered a divided decision granting the Board's motion to dismiss on the basis that the Revival Window facially violated due process protections provided by the Law of the Land Clause. The majority concluded, based on several decisions from the Supreme Court of North Carolina and this Court, that a statute of limitations defense is a constitutionally protected vested right. *See Wilkes County v. Forester*, 204 N.C. 163, 169, 167 S.E. 691, 695 (1933); *Waldrop v. Hodges*, 230 N.C. 370, 373, 53 S.E.2d

2. Defendant Goins was later dismissed from the lawsuit without prejudice and is therefore omitted from further discussion in this opinion.

263, 265 (1949); *Stereo Center v. Hodson*, 39 N.C. App. 591, 595, 251 S.E.2d 673, 675 (1979); *Colony Hill Condominium I Assoc. v. Colony Co.*, 70 N.C. App. 390, 394, 320 S.E.2d 273, 276 (1984). The majority further held that, because retroactive interference with a vested right is violative of the Law of the Land Clause's constitutional due process protections, the Revival Window's dissolution of the Board's statute of limitations defense was *per se* unconstitutional. *See Lester Brothers v. Insurance Co.*, 250 N.C. 565, 568, 109 S.E.2d 263, 266 (1959) (noting that a *plaintiff's* vested right to hold a defendant individually liable for business debts could not be extinguished by a later statute eliminating that individual liability because "[a] retrospective statute, affecting or changing vested rights, is founded on unconstitutional principles and consequently void" (citation omitted)).

Judge McGee respectfully dissented from the majority's determination. In his dissent, Judge McGee found the caselaw and constitutional history surrounding retrospective laws, statutes of limitations, and vested rights less clear-cut than the majority, noting that: (1) Article I, Section 16 of the North Carolina Constitution only explicitly prohibits retrospective *criminal* laws and taxes, N.C. Const. art. I, § 16; (2) the North Carolina Constitution nowhere describes a statute of limitations defense as a vested property right; (3) the cases relied upon by the majority did not anchor their vested rights and statute of limitations analyses to any constitutional provisions; and (4) at least two decisions from our Supreme Court recognize that retrospective laws are not *per se* prohibited by our State Constitution, *see State v.* — , 2 N.C. 28, 39-40 (1794) (upholding judgments against delinquent receivers of public money after hearing the Attorney General's argument that "[s]ection 24 of our Bill of Rights . . . prohibits the passing of a retrospective law so far as it magnifies the criminality of a former action, but leaves the Legislature free to pass all others[.]"); *State v. Bell*, 61 N.C. 76, 83 (1867) (holding, prior to amendment of N.C. Const. art. I, § 16 prohibiting retrospective taxes, that a retrospective tax was constitutional because "[t]he omission of any such prohibition [against retrospective laws beyond *ex post facto* criminal statutes] 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").

Judge McGee viewed the above history in light of the maxim that laws are presumed constitutional and are not to be invalidated "unless [the reviewing court] determine[s] that it is unconstitutional beyond reasonable doubt." *State ex rel. McCrory v. Berger*, 368 N.C. 633, 639, 781 S.E.2d 248, 252 (2016). Concluding that a vested right in

a statute of limitations defense is never described as a fundamental right in our State and Federal Constitutions and related caselaw, Judge McGee examined the Revival Window under the rational basis test. *See Rhyme v. K-Mart Corp.*, 358 N.C. 160, 180, 594 S.E.2d 1, 15 (2004) ("[I]f the statute impacts neither a fundamental right nor a suspect class, we employ the rational basis test."). He then identified the State's interest in "providing an avenue in our civil courts for victims of child sexual abuse to hold accountable child abusers, and their enablers, for past actions" as a rational basis for the Revival Window and would have rejected the Board's facial challenge. *See id.* at 181, 594 S.E.2d at 15 ("As long as there could be some rational basis for enacting the statute at issue, this Court may not invoke principles of due process to disturb the statute." (cleaned up)).

Judge McGee further concluded that, even if the vested right in a statute of limitations defense amounted to a fundamental right because it impacted a property interest, the Revival Window survived heightened strict scrutiny analysis. *See Toomer v. Garrett*, 155 N.C. App. 462, 469, 574 S.E.2d 76, 84 (2002) ("If [the impacted] liberty or property interest is a fundamental right under the Constitution, the government action may be subjected to strict scrutiny." (citation omitted)). Turning to that test, Judge McGee believed several compelling state interests were served by the Revival Window: namely "protecting children from physical and psychological harm, the legislators' determination that many incidents of sexual abuse involved delayed disclosure, and supplying civil remedies to victims of childhood sexual abuse." He then reasoned that the Revival Window—limited to a two-year period and civil actions for child sexual abuse—was narrowly tailored to advance those compelling state interests. As a result, Judge McGee would have denied the Board's motion under this more stringent standard. *See Stephenson v. Bartlett*, 355 N.C. 354, 377, 562 S.E.2d 377, 393 (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.").

Plaintiffs and the State both timely appealed from the majority's order.[3]

---

3. Plaintiffs and the State initially sought and were granted discretionary review by our Supreme Court prior to a determination by this Court. After briefing, the Supreme Court rescinded its grant of discretionary review and remanded the matter to this Court, directing us to "accept the parties' briefs previously filed in [the Supreme] Court as the basis for review in the Court of Appeals." Order, *McKinney v. Goins*, 109PA22 (N.C. March 1, 2023). We subsequently ordered supplemental briefing and authorized *amici* who filed briefs before the Supreme Court to file the same with this Court. Order, *McKinney v. Goins*, COA22-261 (N.C. Ct. App. March 22, 2023). Thus, our consideration of this appeal

II. ANALYSIS

The central constitutional question raised by the parties, as appropriately considered by the three-judge panel, is whether a retroactive statute resuscitating a claim previously barred by a statute of limitations runs afoul of the North Carolina Constitution regardless of the circumstances. Recognizing that our precedents related to this issue may not provide the most clear-cut answer, we ultimately hold that our Constitution does not *per se* prohibit such an act by our legislature and, regardless of the degree of scrutiny applicable, the Revival Window passes constitutional muster. We therefore reverse the trial court's order dismissing Plaintiffs' complaint on the basis that the Revival Window is facially unconstitutional.

A. Standards of Review

Whether the trial court properly granted a motion to dismiss pursuant to Rule 12(b)(6) is reviewed *de novo* on appeal. *S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC*, 189 N.C. App. 601, 606, 659 S.E.2d 442, 447 (2008). We take the allegations in the non-movant's pleading as true for purposes of this analysis. *Id.* at 606, 659 S.E.2d at 448. Dismissal is proper under the Rule only when "it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief." *Block v. County of Person*, 141 N.C. App. 273, 277-78, 540 S.E.2d 415, 419 (2000) (citation omitted).

Similarly, whether a statutory provision is unconstitutional presents a question of law subject to that same *de novo* standard. *State v. Romano*, 369 N.C. 678, 685, 800 S.E.2d 644, 649 (2017). Constitutional challenges generally take two forms: (1) facial challenges, which "maintain[ ] that no constitutional applications of [a] statute exist, prohibiting its enforcement in any context," *State v. Packingham*, 368 N.C. 380, 383, 777 S.E.2d 738, 743 (2015) (citation omitted), *rev'd and remanded on other grounds*, *Packingham v. North Carolina*, 582 U.S. 98, 198 L. Ed. 2d 273 (2017); and (2) as-applied challenges, which ask if a statute "can be constitutionally applied to a particular defendant, even if the statute is otherwise generally enforceable." *Id.* There is no dispute amongst the parties that the instant appeal solely involves a facial challenge.

---

is on: (1) the briefs filed with our Supreme Court; (2) the parties' supplemental briefs; (3) *amici* briefs properly filed with this Court in accordance with our order, Rule 28(i) of the North Carolina Rules of Appellate Procedure, and relevant caselaw; (4) the record on appeal; and (5) the parties' oral arguments.

Several core principles govern the exercise of *de novo* review over facial challenges like the one before us. We are obliged to recognize that "the North Carolina Constitution is not a grant of power, but a limit on the otherwise plenary police power of the State. We therefore presume that a statute is constitutional, and we will not declare it invalid unless its unconstitutionality is demonstrated beyond reasonable doubt." *Hart v. State*, 368 N.C. 122, 131, 774 S.E.2d 281, 287 (2015) (citations omitted). Moreover, "a facial challenge to the constitutionality of an act . . . is the most difficult challenge to mount successfully." *Id.* at 131, 774 S.E.2d at 288 (citation omitted). The challenger must therefore "meet the high bar of showing that there are no circumstances under which the statute might be constitutional." *Id.* (citation and quotation marks omitted).

B. The Law of the Land Clause and Federal Due Process

The Law of the Land Clause found in Article I, Section 19 of the North Carolina Constitution provides 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. It is generally equivalent to—but *not* coterminous with—the Fourteenth Amendment's Due Process Clause in the Constitution of the United States. *Singleton v. N.C. Dep't of Health & Hum. Servs.*, 284 N.C. App. 104, 112-13, 874 S.E.2d 669, 676-77 (2022). As such, "a decision of the United States Supreme Court interpreting the Due Process Clause is persuasive, though not controlling, authority for interpretation of the Law of the Land Clause." *Evans v. Cowan*, 132 N.C. App. 1, 6, 510 S.E.2d 170, 174 (1999) (citation omitted). Our Law of the Land Clause is thus principally subject to independent interpretation under the particular laws of this state, so long as that interpretation does not contravene the baseline protections provided by the Constitution of the United States. *See, e.g.*, *State v. Jackson*, 348 N.C. 644, 648, 503 S.E.2d 101, 103 (1998) ("[T]he United States Constitution is binding on the states . . . , so no citizen will be accorded lesser rights no matter how we construe the state Constitution. . . . [T]he United States Constitution provides a constitutional floor of fundamental rights guaranteed all citizens of the United States[.]" (quotation marks omitted)).

The Supreme Court of the United States has held that the Fourteenth Amendment's Due Process Clause does not prohibit states from reviving civil claims otherwise barred by a lapsed statute of limitations. *See, e.g.*, *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 315-16, 89 L. Ed. 2d 1628, 1636 (1945) ("[C]ertainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is per se an offense against the Fourteenth Amendment.").

Resolution of this appeal turns, then, on whether the Law of the Land Clause provides such protection above and beyond the Fourteenth Amendment. This analysis consists of two questions: (1) are acts reviving expired statutes of limitations *per se* unconstitutional as interfering with vested rights under the text of the North Carolina Constitution, its history, and interpretive judicial decisions from this state?; and (2) if not, is the Revival Window otherwise unconstitutional under the modern due process framework applicable to the Law of the Land Clause?

C. Interpretive Principles Applicable to the North Carolina Constitution

Every facial constitutional challenge under the Constitution of North Carolina begins with "the text of the constitution, the historical context in which the people of North Carolina adopted the applicable constitutional provision, and our precedents." *McCrory*, 368 N.C. at 639, 781 S.E.2d at 252. Our Supreme Court recently reiterated both the difficulty faced by and the high burden imposed upon litigants asserting that a legislative enactment plainly and clearly violates an express provision of the State Constitution. *See generally Harper v. Hall*, 384 N.C. 292, 886 S.E.2d 393 (2023).

D. The Law of the Land Clause, *Ex Post Facto* Laws, and Retrospective Laws Through Reconstruction

An examination of the history of this state's jurisprudence on the Law of the Land Clause and retrospective laws through Reconstruction is illuminating to the instant analysis because of these cases' temporal proximity to the Founding of this State and because of their discussion of constitutional provisions that were retained through subsequent constitutional revisions. Specific provisions of the North Carolina Constitution impose express limitations on the General Assembly's ability to pass legislation of retroactive effect. Our Constitution, as originally ratified at the time of the Founding, provided that "retrospective Laws, punishing facts committed before the Existence of such Laws, and by them only declared criminal, are oppressive, unjust, and incompatible with Liberty; wherefore no ex post facto law ought to be made." N.C. Const. of 1776, Declaration of Rights, § XXIV. Two decades later, our state's Founding-era appellate court[4] considered whether this provision

4. Under the Judicial Act of 1777, and prior to the formal establishment of our Supreme Court as a distinct judicial body, a single superior court judge could hold trials, while two or more superior court judges could convene "to sit as an appellate or Supreme Court." Hon. Kemp P. Battle, President, Univ. of N.C., An Address on the History of the Supreme Court, 103 N.C. 339, 353 (1889).

of our original constitution precluded the State from pursuing judgments against delinquent receivers of public money pursuant to a statute retroactively authorizing such collection. *State v.* —, 2 N.C. at 28-29. Although the Court resolved *State v.* — , without issuance of a formal opinion, it is both illuminating of and relevant to a historical understanding of the Law of the Land Clause as originally ratified and enforced in connection with retroactive claims for monetary relief.

In *State v.* —, the trial judge initially ruled that the Attorney General could not pursue such judgments under several state constitutional provisions, including the Law of the Land Clause. *Id.* at 29-30. The Attorney General subsequently revisited the issue with the trial judge, arguing as follows:

> It has been said, amongst other objections to the clause now in question, that this is a retrospective law. Does any part of our constitution prohibit the passing of a retrospective law? It certainly does not. The objection is grounded upon section 24 of our Bill of Rights, which prohibits the passing of an *ex post facto law*. This prohibition is essential to freedom and the safety of individuals. . . . [T]his clause, I admit, is in restraint of legislative power in this particular. This indeed prohibits the passing of a retrospective law so far as it magnifies the criminality of a former action, but leaves the Legislature free to pass all others, and without such a power no government could exist for any considerable length of time, without experiencing great mischiefs. The exercise of such power has been found frequently necessary here since the Revolution, and divers[e] retrospective acts, which the Legislature have passed[,] have been carried into execution and sanctioned by the judiciary. . . . The Convention foresaw the necessity there would be for sometimes enacting such laws, and therefore they have been careful to word section 24 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. at 39. When the trial judge was unmoved by the explained necessity of retroactive legislation, the Attorney General raised the issue and presented the same argument to a two-judge panel, who overruled the trial judge. *Id.* at 40. While no formal opinion was provided by the Court, the ruling likely—if not necessarily—involved an inherent determination

that the Attorney General's actions to enforce a retrospective law were constitutional.[5]

This understanding of due process and retrospective laws under the North Carolina Constitution—that is, that an overly broad prohibition on retrospective laws interferes with the ability of a legislative body to effectively represent its people in a changing era—appears to have prevailed through the Civil War, as evidenced by *State v. Bell*, 61 N.C. 76, 80 (1867). There, our Supreme Court was tasked with determining whether the North Carolina Constitution barred a retrospective tax. In resolving the issue, the Court observed that:

> Whenever a retrospective statute applies to crimes and penalties, it is an *ex post facto* law, and as such is prohibited by the Constitution of the United States, not only to the States, as we have already seen, but to Congress. The 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. It furnishes an instance for the application of the maxim *expressio unius est exclusion alterius*.[6] We know that retrospective statutes have been enforced in our courts[.]

Bell, 61 N.C. at 82-83. Then, with this understanding, the Supreme Court upheld the retroactive tax as constitutional in light of the "well established right to pass a retrospective law which is not in its nature criminal[.]" *Id.* at 86.

The following year, the Supreme Court again had an opportunity to consider whether other kinds of retrospective laws—and specifically, laws reviving claims previously barred by a statute of limitations—violated the State Constitution. In *Hinton v. Hinton*, 61 N.C. 410 (1868), the Court was tasked with determining whether a law reviving the rights of widows to claim dower[7] that had expired under a statute of limitations

---

5. Indeed, that Court had been the first judicial body in the nation to recognize judicial review seven years earlier, holding in *Bayard v. Singleton* that statutes in violation of the North Carolina Constitution were unenforceable. 1 N.C. 5, 7 (1787).

6. "Under the doctrine of *expressio unius est exclusion alterius*, when a [law] lists the situations to which it applies, it implies the exclusion of situations not contained in the list." *Evans v. Diaz*, 333 N.C. 774, 779-80, 430 S.E.2d 244, 247 (1993) (citation omitted).

7. Dower is "[t]he portion of or interest in the real estate of a deceased husband that is given by law to his widow during her life[.]" *Yount v. Yount*, 258 N.C. 236, 241-42, 128 S.E.2d 613, 618 (1962).

was an unconstitutional retrospective law. It first observed that the right of dower "existed at common law, and was not created by the act of 1784 [that imposed time limitations on dower claims.] . . . [T]he act . . . is a 'statute of limitations,' which in such cases bars the right to a writ of dower, but does not extinguish the preexisting common-law right of dower." *Hinton*, 61 N.C. at 412. When asked, "[d]id the Legislature have power to pass the act [reviving barred dower claims]," *id.* at 415, the Supreme Court held that it did.

First, the Supreme Court noted that revival of a claim barred by the statute of limitations does not inherently affect any particular property of the defendant, and thus does not necessarily implicate any vested rights:

> It is said the Legislature has not the power to interfere with "vested rights," and take property from one and give it to another! That is true[.] . . . There is in this case no interference with vested rights. The effect of the statute is not to take from the devisee his property and give it to the widow, but merely to take from him *a right conferred by the former statute*[.]

Id. Stated simply, no claim to or interest in property invariably stems from a defendant's reliance on the procedural bar provided by the statute of limitations, and thus no vested right is impacted when that bar is lifted.

The Supreme Court then went on to explain why this is so, reasoning that removing a procedural bar imposed by a statute of limitations affects the *plaintiff's* claim rather than any interest of the defendant, as "it affects the *remedy* and not the [defendant's] right of property." *Id.* (emphasis in original). In other words, a statute of limitations, as a general proposition, simply serves to procedurally bar recovery by a plaintiff and does not, by contrast, create a property right in the defendant by extinguishing any underlying liability.[8] The Supreme Court then recognized that retrospective legislation posed no inherent constitutional

---

8. This distinction persists today. *See, e.g.*, *Williams v. Thompson*, 227 N.C. 166, 168, 41 S.E.2d 359, 360 (1947) ("The lapse of time [under a statute of limitations] does not discharge the liability. It merely bars recovery." (citations omitted)). It also separates statutes of limitation from statutes of repose. *See, e.g.*, *Boudreau v. Baughman*, 322 N.C. 331, 340-41, 368 S.E.2d 849, 856 (1988) ("Ordinary statutes of limitation are clearly procedural, affecting only the remedy directly and not the right to recover. The statute of repose, on the other hand, acts as a condition precedent to the action itself. . . . For this reason we have previously characterized the statute of repose as a substantive definition of rights rather than a procedural limitation on the remedy used to enforce rights." (citations omitted)).

problem in this circumstance, as "[t]he power of the Legislature to pass retroactive statutes affecting remedies is settled." *Id.* Finally, the Supreme Court made explicit, by example, that this holding extended beyond the context of dower and reached even ordinary claims for money owed:

> Suppose a simple contract debt created in 1859. In 1862, the right of action was barred by the general statute of limitations, which did not *extinguish the debt*, but simply barred the right of action. Then comes the act of 1863, providing that the time from 20 May, 1861, shall not be counted. Can the debtor object that this deprives him of a vested right? Surely not. It only takes from him the privilege of claiming the benefit of a former statute, the operation of which is for a season suspended.

Id. (emphasis in original).

The Board contends that *Hinton* is of no application here because it involved law particular to the vested right of dower. But, as the Supreme Court's debt collection example recounted above plainly illustrates, the Court did not intend the holding and rationale of *Hinton* to be so limited. And Plaintiffs' substantive claims are not entirely dissimilar, insofar as they likewise sound in the common law of torts rather than any statutorily created right of action. Further, "[a] vested right of action is property. The statute may change the remedies, but cannot defeat or modify a right of action that has already accrued." *Mizell v. R.R.*, 181 N.C. 36, 39, 106 S.E. 133, 135 (1921). We therefore reject the Board's attempt to cast *Hinton*'s substantive holdings as inapposite.

Hinton's pertinent substantive holdings, then, are threefold: (1) a statute of limitations only inherently affects the availability of a plaintiff's remedy, *Hinton*, 61 N.C. at 415; (2) the procedural bar imposed by a lapsed statute of limitations does not intrinsically or inevitably create a vested right in the defendant, as it does not eliminate liability for the underlying claim or otherwise necessarily implicate property rights, *id.* at 415-16; and (3) the General Assembly is not constitutionally constrained from lifting such a procedural bar in these circumstances, *id.* at 415. In brief, under *Hinton*, revival of a statute of limitations does not *per se* violate the North Carolina Constitution, as the procedural bar created by those statutes is not a vested claim to land, goods, currency, or any incorporeal interest in the same. *Id.* at 415-16.

Within a year of both *Bell* and *Hinton*, the people of North Carolina saw fit to further restrict the ability of the General Assembly to pass

retrospective laws when they ratified a new constitution in 1868.[9] In addition to restricting *ex post facto* criminal laws, Article I, Section 32 of the 1868 Constitution newly provided that "[n]o law taxing retrospectively sales, purchases, or other acts previously done, ought to be passed." N.C. Const. of 1868, art. I, § 32. But, beyond restricting *ex post facto* criminal laws and retrospective taxation—the latter in apparent reaction to *Bell*—the people ratified no other express provisions further restricting retrospective acts specifically, let alone those deemed constitutional by *Hinton*. Both the language of the Law of the Land Clause and the *Ex Post Facto* Clause of the 1868 Constitution survive in our current state Constitution. *Compare* N.C. Const. of 1868, art. I, §§ 17 & 32, *with* N.C. Const. art. I, §§ 16 & 19 (containing the same language, with added clauses in the current Section 19 providing for equal protection of the laws and prohibiting discrimination on the basis of race, color, religion, or national origin).

This history plainly demonstrates that retroactive civil laws, including ones reviving statutes of limitation, are not inherently unconstitutional; they do not unerringly violate either the Law of the Land Clause or the express provisions of the *Ex Post Facto* Clause of our state Constitution as understood and enacted from the Founding through Reconstruction. *State v. —*, 2 N.C. at 39-40; *Bell*, 61 N.C. at 86; *Hinton*, 61 N.C. at 415-16. And though phrased in antiquated language, the core holdings of *Hinton* ring as clearly today as they did centuries ago: a procedural bar to a plaintiff's claim imposed by an expired statute of limitations does not, standing alone, create any property right in the defendant, and said bar may be retroactively lifted without interfering with a defendant's vested rights. *Hinton*, 61 N.C. at 415-16. Inviolable vested rights affecting real or personal property are not equivalent to the fungible benefits of statutory procedure affecting remedies. *Id.* Even more simply, a right of a *plaintiff* to a *potential recovery* does not bear upon a right of a *defendant* to be free from *liability*. *Id. See also Colony Hill Condominium I Assoc.*, 70 N.C. App. at 394, 320 S.E.2d at 276 (recognizing that, unlike statutes of limitation, a statute of repose may not be retroactively suspended to revive a cause of action because it "gives the defendant a vested right not to be sued" (citation omitted)). While the Board points us to several decisions and authorities from other jurisdictions to the contrary, they cannot, by their very nature, control this state's historical understanding, interpretation, and application of its own Constitution. *See McCrory*, 368 N.C. at 639, 781 S.E.2d at 252.

---

9. *Bell* was decided in 1867 and *Hinton* at the January term of 1868. The 1868 Constitution was subsequently ratified in April 1868.

In urging us to read this history differently, the Board relies principally on *University v. Foy*, 5 N.C. 58 (1804). But *Foy* involved a narrow legal question—whether the General Assembly could retroactively rescind a prior grant of *title to real property* consistent with the Law of the Land Clause's explicit prohibition against deprivations of "property." 5 N.C. at 84, N.C. Const. art. I, § 19. *Foy*'s resolution of that limited issue by declaring such a revocation of real property rights unconstitutional, *Foy*, 5 N.C. at 88-89, thus cannot overrule the much broader recognition in *State v.* — that, as a general matter, retroactive civil laws are not always unconstitutional. *State v.* —, 2 N.C. at 39-40. Nor did *Foy*—unlike *Hinton*—purport to decide whether vested property rights necessarily flow from an expired statute of limitations such that a retroactive revival of expired claims implicates the Law of the Land Clause. Finally, *Foy* could in no way deprive the later decisions in *Bell* and *Hinton*—as well as the limited change to the *Ex Post Facto* Clause in the 1868 Constitution—of force of law or relevant historical context.

Indeed, other decisions from this time period confirm, consistent with both *Foy* and *Hinton*, that: (1) where a retroactive statute interferes with an established right to property, it violates the Law of the Land Clause as implicating vested rights, *Foy*, 5 N.C. at 87-89; and (2) where a retrospective statute affects only a party's reliance on a procedural statute, no vested rights are affected, *Hinton*, 61 N.C. at 415-16.

For example, in *Hoke v. Henderson*, 15 N.C. 1, 17 (1833), *overruled by Mial v. Ellington*, 134 N.C. 131, 46 S.E. 961 (1903), the Supreme Court was tasked with deciding whether a position of public office constituted a vested right that could not be retrospectively abridged. The Court first observed that constitutionally protected vested rights, in accord with the plain text of the Law of the Land Clause, generally sounded in "every species of *corporeal property*, real and personal." *Hoke*, 15 N.C. at 16 (emphasis added). It then extended the concept of vested rights to incorporeal property rights, such as "the right to exercise a[n] . . . employment, and to take the fees and emoluments thereunto belonging." *Id.* at 17. Thus, because public office includes the right to "secure the possession of it and its emoluments," retrospective interference with that office violated the Law of the Land Clause as abridging vested incorporeal property rights. *Id.* at 19.[10]

---

10. Importantly, as the later decisions of *Bell* and *Hinton* would demonstrate, the fact that a retroactive statute implicates a defendant's monetary interests does not invariably render it as unconstitutionally affecting a vested property right. *Bell*, 61 N.C. at 86; *Hinton*, 61 N.C. at 415-16. And *Mial* would later overrule *Hoke* on the basis that its definition of "property" in connection with public office was unworkable when taken "to its logical

Hoke's implicit holding—and *Hinton*'s explicit one—that constitutionally vested rights sound in corporeal or incorporeal property interests rather than procedure is seen throughout other cases of the era. *Compare Robinson v. Barfield*, 6 N.C. 391, 422 (1818) (holding a statute retrospectively validating deeds improperly executed under prior law was unconstitutional as violating vested rights), *Scales v. Fewell*, 10 N.C. 18, 18-20 (1824) (holding liens on real property create a vested right), *Pratt v. Kitterell*, 15 N.C. 168, 168-71 (1833) (holding a right to claim, control, and possess an estate as administrator is a vested right), *Battle v. Speight*, 31 N.C. 288, 292 (1848) (holding devises of property by will create a vested right), *and Green v. Cole*, 35 N.C. 425, 428 (1852) ("The legislature cannot interfere with vested rights of property." (citing *Hoke*)), *with Oats v. Darden*, 5 N.C. 500, 501 (1810) ("[W]hen an act of Assembly takes away from a citizen a vested right, its constitutionality may be inquired into; but when it alters the remedy or mode of proceeding as to rights previously vested, it certainly, in that respect, runs in a constitutional channel."), *Harrison v. Burgess*, 8 N.C. 384, 391-92 (1821) (holding a law authorizing the Supreme Court to order new trials for errors of law did not affect vested rights when applied to cases pending appeal at the time of enactment), *and Phillips v. Cameron*, 48 N.C. 390, 392 (1856) (stating "[w]e admit, that the Act of 1852, applying as it does to the remedy and not to the rights of the parties, might have been made retrospective in its operation," before opining that such intent could have been made clear by entitling the statute "[a]n act to encourage litigation, by reviving stale claims").

E. Modern Jurisprudence Addressing Statutes of Limitation, Vested Rights, and Due Process

Of course, as all parties acknowledge, our history did not terminate in 1868, and later decisions would elucidate certain principles that make the question of the Revival Window's constitutionality still a searching one. Understandably, the Board relies heavily on a line of cases from the Reconstruction era and the early twentieth century to argue, essentially, that *Hinton* is no longer good law. Our careful review of those cases leads us to conclude that they are inapposite to the dispute before us, and respecting our role as an intermediate court, we decline to hold that *Hinton* is no longer good law absent any explicit overruling of it.

In 1869, in *Johnson v. Winslow*, the Supreme Court addressed a slightly different question than that presented here: namely, whether the

---

conclusion," 134 N.C. at 154, 46 S.E. at 969, and was uniformly contrary to the law in other state and federal jurisdictions, *id.* at 156, 46 S.E. at 970.

General Assembly could suspend statutes of limitation for claims that had not yet run. 63 N.C. 552, 553 (1869). In *dicta*, the Supreme Court cited a legal treatise for the proposition that "the Legislature has no power to revive a right of action after it has been barred, *i.e.*, to suspend the operation of the Statute of Limitations retrospectively, after it has operated." *Id.* (citation omitted). Its decision did not however, turn on that general principle, nor did it purport to abrogate or overrule *Hinton*—a decision that *did* squarely address the legal question of reviving an *expired* statute of limitations. In fact, in 1880, our Supreme Court would reaffirm *Hinton*. *See Tabor v. Ward*, 83 N.C. 291, 294 (1880) ("Retroactive laws are not only not forbidden by the state constitution but they have been sustained by numerous decisions in our own state. See . . . *Hinton v. Hinton*, Phil., 410, where it was expressly held 'that retroactive legislation is not unconstitutional, and that retroactive legislation is competent to affect remedies not rights.' " (other citations omitted)).

A few years later, in *Whitehurst v. Dey*, the Supreme Court would once more, in *dicta*, cite a treatise for the proposition that " '[s]tatutes of limitation relate only to the remedy and may be altered or repealed before the statutory bar has become complete, but not after, so as to defeat the effect of the statute in extinguishing the rights of action.' " 90 N.C. 542, 545-46 (1884). But that decision on contract rights also expressly distinguished *Hinton*—again, in *dicta*, and without expressly overruling it—on an understanding that such statutes are "an impairment of vested rights and . . . fall[ ] within the inhibition of the *federal* constitution[.]" *Id.* at 545 (emphasis added). The Supreme Court of the United States would subsequently show *Whitehurst*'s reading of the federal constitution to be erroneous less than a year later. *See Campbell v. Holt*, 115 U.S. 620, 628, 29 L. Ed. 483, 487 (1885) (holding that the Fourteenth Amendment does not bar a state legislature from reviving civil claims after a statute of limitations has run because "no right is destroyed when the law restores a remedy which had been lost").

This pattern of discussing statutes of limitation as vested rights in *dicta* returned after the turn of the century in *Wilkes County v. Forester*, 204 N.C. 163, 167 S.E. 691 (1933). There, Wilkes County sought to foreclose on tax liens filed against the defendants' property for unpaid taxes in 1924 and 1925, relying on tax sale certificates obtained in 1928. *Id.* at 165-66, 167 S.E. at 692-93. However, Wilkes County delayed filing its action until 1930—well after the 18-month filing period allowed by statute. *Id.* at 166, 167 S.E. at 693. The defendants pled that statute of limitations, and Wilkes County sought to counter that defense on a revival act passed during the pendency of the suit in 1931 which extended the statute of limitations for tax certificates through December of that year.

Id. at 166, 167 S.E. at 692-93. The trial court dismissed Wilkes County's claim, and it appealed to the Supreme Court, arguing that the extension statute applied to save the tax certificates in question. *Id.*

The Supreme Court ultimately disagreed with Wilkes County, concluding that the revival act did not apply to the case. The relevant revival act, enacted in 1931 *after* Wilkes County had filed its foreclosure action, stated as follows:

> Any . . . *board of commissioners of any county* . . . holding a certificate of sale on which an action to foreclose has not been brought . . . shall have until the first day of December, one thousand nine hundred and thirty-one, to institute such action. *This section and extension shall include all* certificates executed for the sales prior to and including sales for the tax levy of the year one thousand nine hundred twenty-eight. . . . *Provided, however, that where any action to foreclose has heretofore been instituted or brought for the collection of any tax certificate, prior to the ratification of this act, under the then existing laws, nothing herein shall prevent or prohibit the continuance and suing to completion any of said suit or suits under the laws existing at the time of institution of said action.*

Id. at 166, 167 S.E. at 693 (citation omitted) (emphasis in original). The plain language of the revival statute—limiting its applicability to actions filed after enactment and disclaiming any effect on foreclosures already instituted—thus rendered it of no application to the controversy, as the foreclosure action had been filed *before* the revival act was passed. *Id.* at 168, 167 S.E. at 693-94. And, because the statute of limitations had run at the time of the foreclosure action's filing and the revival act did not apply, Wilkes County's claim was time-barred under applicable law. *Id.*

Despite having settled the dispute with the foregoing holding, the Supreme Court nonetheless went on to consider another question not necessary to its decision: whether the 1931 act could revive previously barred claims had it applied to the foreclosure action. *Id.* at 168, 167 S.E. at 694. It proceeded to analyze *dicta* from various North Carolina decisions, provisions of various legal treatises, and holdings from other jurisdictions, before opining:

> Whatever 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. . . . It takes away vested rights of defendants and therefore is unconstitutional.

Id. at 170, 167 S.E. at 695 (citing *Booth v. Hairston*, 193 N.C. 278, 286, 136 S.E. 879, 883 (1927) (holding an enabling act purporting to retroactively validate late-filed *deeds to real property* in probate that would otherwise be void was inoperative to cure and save such a late-filed deed)). This is *dicta*.

Even if the above language is not considered *dicta*, the rationale and reasoning of *Wilkes County* show—consistent with the property vs. procedural distinctions drawn from *Foy*, *Hinton*, *etc.*—that the above discussion is addressing cases in which expired statutes of limitation affect vested *property* rights, not a procedural defense. In keeping with Wilkes County's attempt to foreclose on real property in the action at hand, virtually all the decisions cited by the Supreme Court in *Wilkes County* discussed the unconstitutionality of revival statutes where the expired claim was explicitly for *title* to property. *Id.* at 168-70, 167 S.E. at 694-95. For example, in addition to relying on the real property dispute resolved in *Booth*, the Supreme Court favorably quoted *Campbell*'s statement that "[i]t may . . . very well be held that, in an action to recover *real or personal property*, where the question is as to the removal of the bar of the statute of limitations by legislative act passed after the bar has become perfect[,] such act deprives the party of his property without due process of law." *Id.* at 168, 167 S.E. at 694 (quoting *Campbell*, 115 U.S. at 623, 29 L. Ed. at 483) (emphasis added). It then cited several treatises, two of which stated as follows:

> There appears to be no divergence of opinion as to the full applicability of the principle that the Legislature cannot divest a vested right to a defense under the statute of limitations, whether the case involves the title to real estate or personal property. . . . Where title to property has vested under a statute of limitations it is not possible by any enactment to extend the statute or revive the remedy since this would impair a vested right in the property."

Id. at 169, 167 S.E. at 694 (emphasis added) (citations and quotation marks omitted). Critically, the Supreme Court did not purport to overrule *Hinton* based on any controlling holding that the revival of expired actions involving claims unrelated to real or personal property offend the Law of the Land Clause or some other express provision of the North Carolina Constitution. And, notwithstanding any debate over the controlling effect of *dicta* or the significance of the property vs. procedure distinction, the

Supreme Court immediately reaffirmed that the revival statute *did not apply* to the controversy at issue. *Id.* at 170, 167 S.E. at 695.

In an attempt to read *Wilkes County* more broadly, the Board cites to numerous cases repeating *Wilkes County*'s vested rights commentary in subsequent *dicta*. *See Sutton v. Davis*, 205 N.C. 464, 467-69, 171 S.E. 738, 739-40 (1933) (holding an amendment to a statute that barred recovery for debts discharged in bankruptcy to subsequently allow for recovery did not have retroactive effect and thus did not apply to the case at bar, while also citing *Wilkes County* to note that *if* the amendment did have retroactive effect, such retroactivity would be unconstitutional); *Waldrop v. Hodges*, 230 N.C. 370, 373-74, 53 S.E.2d 263, 265 (1949) (observing, based on *Johnson*, *Whitehurst*, and *Wilkes County*, that the General Assembly may not revive an expired statute of limitations before holding that issue did not arise in the case before the Court because the relevant statute extended the limitations period prior to expiration); *Jewell v. Price*, 264 N.C. 459, 461, 142 S.E.2d 1, 3 (1965) (holding a non-retroactive amendment to the statute of limitations after filing of the plaintiffs' suit was not applicable while citing *Waldrop*, *Wilkes County* and related cases for their discussions of revival statutes);[11] *Stereo Center*, 39 N.C. App. at 595, 251 S.E.2d at 675 (citing *Waldrop* for the proposition that expired statutes of limitations may not be revived in violation of a vested right, but resolving the appeal on a different question because the appellant conceded the amended statute of limitations extending his time to bring suit did not apply).[12] But *dicta* upon *dicta* does not the law make. *See Hayes v. Wilmington*, 243 N.C.

---

11. We read *Jewell* as addressing the same factual and legal circumstances raised in *Wilkes County*: a statute of limitations expired, the plaintiff filed suit, and the General Assembly later enlarged the statute of limitations *non-retroactively*. *Wilkes County*, 204 N.C. at 168, 167 S.E. at 693-94; *Jewell*, 264 N.C. at 461, 142 S.E.2d at 3. The session law cited in *Jewell* enlarging the statute of limitations at issue unambiguously disclaimed any retroactive effect. *See* 1963 N.C. Sess. Laws 1300, 1301, ch. 1050, sec. 3 ("This Act shall be in full force and effect *from and after its ratification*." (emphasis added)). Moreover, statutes are prohibited from retroactive effect unless such intent is manifest in the statute. *Estridge v. Ford Motor Co.*, 101 N.C. App. 716, 718-19, 401 S.E.2d. 85, 87 (1991). The plaintiff in *Jewell* thus rightly conceded—and the Supreme Court accepted—that the session law extending the session law revising the statute of limitations after plaintiff had filed suit "ha[d] no application." 264 N.C. at 461, 142 S.E.2d at 3. As noted *supra*, the Revival Window at issue here materially differs from the statutes in *Wilkes County* and *Jewell* in that it unambiguously applies retroactively, and Plaintiffs filed suit after the Revival Window's enactment. Thus, we do not read *Jewell* as controlling precedent on the facts of this case.

12. To the extent that any decisions of this Court purported to announce that expiration of a statute of limitations creates a vested right in all civil actions, we could not do so in conflict with the undisturbed holding of *Hinton. Emp't Staffing Grp., Inc. v. Little*, 243 N.C. App. 266, 271 n.3, 777 S.E.2d 309, 313 n.3 (2015).

525, 539, 91 S.E.2d 673, 684 (1956) (declining to follow "double *dicta*"). Nor can *dicta* in subsequent decisions serve to expand or modify earlier holdings, as *dicta* is itself without legal effect. *Id.* at 538, 91 S.E.2d at 684. Finally, *dicta* does not empower us to reach beyond our limited role as an intermediate appellate court and announce a new constitutional rule in contravention of undisturbed precedent from our Supreme Court. *Compare State ex rel. Utilities Comm. v. Central Telephone Co.*, 60 N.C. App. 393, 395, 299 S.E.2d 264, 266 (1983) (holding this Court is not bound by *dicta* from our Supreme Court), *with State v. Fowler*, 159 N.C. App. 504, 516, 583 S.E.2d 637, 645 (2003) ("This Court is bound by decisions of the North Carolina Supreme Court." (citations omitted)).

F. *Wilkes County* and Its Progeny Do Not Establish the Revival Window's Facial Unconstitutionality Beyond a Reasonable Doubt

With the benefit of the above pilgrimage through our constitutional jurisprudence—necessary to a thorough understanding of these seemingly contradictory precedents that we ultimately conclude weigh against the facial constitutional challenge to the Revival Window—we revisit our initial question: does the "text of the constitution, the historical context in which the people of North Carolina adopted [the Law of the Land Clause], and our precedents," *McCrory*, 368 N.C. at 639, 781 S.E.2d at 252, make "plain and clear," *id.*, that the General Assembly may not revive a tort claim—as opposed to one sounding in property or contract—after the relevant statute of limitations has expired? More specifically, is *Wilkes County* "clear and dispositive," as the Board claims, in establishing that such an exercise of the General Assembly's otherwise plenary powers "*directly* conflicts with an *express* provision of the constitution"? *Harper*, 384 N.C. at 325, 886 S.E.2d at 415 (emphases added). Under the applicable standard of review and burden of proof borne by the Board, we answer these questions in the negative.

As forecast above, the language in *Wilkes County* controlling the outcome of that case does not clearly answer the question posed here. First, its ultimate holding did not turn on the question of whether revival of a statute of limitations violates the state Constitution, as the Supreme Court instead held that the purported revival statute in that case did not, by its own language, apply to the subject action filed pre-enactment. *Wilkes County*, 204 N.C. at 168, 167 S.E. at 693-94. Second, despite the Board's assertions, *Wilkes County did* directly implicate property rights, and only property rights, because the county's claim was a foreclosure of "[a] lien *upon real estate for taxes or assessments due thereon*," *id.* at 167, 167 S.E. at 693 (emphasis added) (citation and quotation marks

omitted); indeed, many of the treatises and decisions cited in *Wilkes County* likewise related to property.[13] Third, *Wilkes County* did not elucidate "an express provision of the [state] constitution" limiting such an exercise of legislative power. *Harper*, 384 N.C. at 325, 886 S.E.2d at 415. Finally, *Wilkes County* did not purport to overrule *Hinton*, a decision that *did* squarely address and resolve whether the revival of statutes of limitation *per se* violates the state Constitution and ultimately holding that they did not where no property rights were at issue.

On balance, *Hinton* thus resolves—with more direct applicability than *Wilkes*—whether the Revival Window is *per se* unconstitutional.[14] As *State v.* — and *Bell* had previously elucidated, the only provision of the state Constitution expressly concerning retrospective statutes is found in the *Ex Post Facto* Clause, and the omission of any provision either describing retrospective protections for "vested rights" strongly suggests that statutes reviving claims barred by statutes of limitation "were not intended to be forbidden." *Bell*, 61 N.C. at 83. The ratification of a new Constitution in 1868—abrogating *Bell* but leaving *Hinton* untouched—furthers the point that statutes reviving barred claims under expired statutes of limitation are "no interference with vested rights" in all cases and are not *per se* unconstitutional on that basis. *Hinton*, 61 N.C. at 415. That *Hinton* does not appear to have ever been overruled, and instead was merely mentioned in *Wilkes County*'s discussion of an issue on which its holding did not ultimately turn, further weighs in its favor.

---

13. Of note, in stating that "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," *id.* at 170, 167 S.E. at 695, the Supreme Court cited only to *Booth*. There, the Supreme Court held that an enabling act purporting to retroactively validate late-filed *deeds to real property* in probate that would otherwise be void was inoperative to cure and save such a late-filed deed. *Booth*, 193 N.C. at 286, 136 S.E. at 883.

14. To be clear, we do not purport to overrule *Wilkes County* in excess of our authority as an intermediate appellate court. To the contrary, we recognize that *Wilkes County does* apply with precedential force to those legally and factually analogous cases governed by its substantive holding. We simply disagree with our respected colleague that this case counts among them. *See Howard v. Boyce*, 254 N.C. 255, 265, 118 S.E.2d 897, 905 (1961) (noting, in reconciliation of arguably conflicting North Carolina Supreme Court precedents, that "[d]ecided cases should be examined more from the standpoint of the total factual situations presented than the exact language used. A decision of the Supreme Court must be interpreted within the framework of the facts of that particular case."); *In re Civil Penalty*, 324 N.C. 373, 378, 379 S.E.2d 30, 33 (1989) (holding this Court erred in reading a Supreme Court decision too broadly and reversing our decision on that basis); *State ex rel. Utils. Comm'n v. Virginia Elec.*, 381 N.C. 499, 523 n.4, 873 S.E.2d 608, 624 n.4 (2022) ("[W]e note that the concept of stare decisis requires, in essence, that a court identify certain material differences between the case that is currently before the court and potentially-relevant precedent before declining to follow that precedent[.]").

Our understanding of this constitutional history is reaffirmed by the similarities evident in *Hinton* and the United States Supreme Court's decision in *Campbell*. *See Evans*, 132 N.C. App. at 6, 510 S.E.2d at 174 ("[A] decision of the United States Supreme Court interpreting the Due Process Clause is persuasive, though not controlling, authority for interpretation of the Law of the Land Clause." (citation omitted)). Both *Hinton* and *Campbell* recognized that the expiration of a statute of limitations bars a right of action and thus "affects the *remedy* and not the right of property." *Hinton*, 61 N.C. at 415 (emphasis in original). *See also Campbell*, 115 U.S. at 628, 29 L. Ed. at 487 ("[N]o right is destroyed when the law restores a remedy which had been lost."). This understanding of statutes of limitation as bars to remedies—not underlying claims—persists in our modern jurisprudence. *See*, *e.g.*, *Christie v. Hartley Constr., Inc.*, 367 N.C. 534, 538, 766 S.E.2d 283, 286 (2014) ("[S]tatutes of limitation are procedural, not substantive, and determine not whether an injury has occurred, but whether a party can obtain a remedy for that injury." (citation omitted)).[15] Thus, just as the revival statute in *Hinton* "t[ook] from [defendant] the privilege of claiming the benefit of a former statute" rather than any property interest or vested right under the North Carolina Constitution, 61 N.C. at 415, the Supreme Court of the United States recognized that, under the federal constitution, there is "no right which the [defendant] has in the law which permits him to plead lapse of time . . . [and] which shall prevent the legislature from repealing that law because its effect is to make him fulfill his honest obligations." *Campbell*, 115 U.S. at 629, 29 L. Ed. at 487.

In sum, the Law of the Land Clause does not, either in its plain text or through further elucidation in the *Ex Post Facto* Clause, "limit legislative power [to pass the Revival Window of the SAFE Child Act]

---

15. The Board asserts that Plaintiffs' claims also violate the purported ten-year statute of repose found in N.C. Gen. Stat. § 1-52(16) (2023), which provides that "no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action." This issue was not considered by the three-judge panel below, and their ruling does not address it. Nonetheless, because there is no contention that Plaintiffs suffered latent injuries—and given that the Board repeatedly asserts that the Plaintiffs' claims accrued prior to their eighteenth birthdays—we hold that the purported statute of repose cited by the Board does not apply. *See Wilder v. Amatex Corp.*, 314 N.C. 550, 555, 336 S.E.2d 66, 69 (1985) ("[N.C. Gen. Stat. § 1-52(16)] added a ten-year statute of repose . . . which applies only to latent injury claims."); *Boudreau*, 322 N.C. at 334 n.2, 368 S.E.2dat 853 n.2 (holding N.C. Gen. Stat. § 1-52(16) "was intended to apply to plaintiffs with latent injuries. It is undisputed that plaintiff was aware of his injury as soon as it occurred. Thus the statute is inapplicable on the facts of this case." (citations omitted)); *Soderlund v. Kuch*, 143 N.C. App. 361, 370, 546 S.E.2d 632, 638 (2001) (holding a sexual assault victim's injuries were not latent, accrued and were barred by the three-year statute of limitations, and, "thus, § 1-52(16) is inapplicable to the facts of this case").

by *express* constitutional restriction[s]." *Harper*, 384 N.C. at 322, 886 S.E.2d at 414 (emphasis added) (citation omitted). Precedents from the Founding through Reconstruction and the ratification of the 1868 Constitution further undercut the Board's argument to the contrary. *See State v. —*, 2 N.C. at 40; *Bell*, 61 N.C. at 82-83; *Hinton*, 61 N.C. at 415; *Tabor*, 83 N.C. at 294. And while *Wilkes County*'s discussion of the question, ancillary to its ultimate holding, is relevant, it does not establish a "plain and clear" constitutional violation, *McCrory*, 368 N.C. at 639, 781 S.E.2d at 252, particularly when *Hinton* has not been overruled, is on all fours, and comports with the persuasive authority found in the United States Supreme Court's interpretation of the Fourteenth Amendment. Stated briefly, and for those reasons, the Board has not shown, by reliance on *Wilkes County* and similar *dicta* in some subsequent cases, that the Revival Window "is unconstitutional beyond reasonable doubt." *Id.* at 639, 781 S.E.2d at 252.

G. The Revival Window Satisfies Due Process

Having held that the Board has failed to show beyond a reasonable doubt—and based on our constitutional text, unique state history, and related jurisprudence—that resuscitations of claims under expired statutes of limitation are *per se* violative of the express text of the Law of the Land Clause, we now turn to whether the Revival Window violates constitutional due process under the present law of this State, *i.e.*, the modern substantive due process analysis. *See*, *e.g.*, *Bunch v. Britton*, 253 N.C. App. 659, 674-75, 802 S.E.2d 462, 473-74 (2017) (reviewing the substantive and procedural due process tests applicable under the state and federal constitutions); *Affordable Care*, *Inc. v. N.C. State Bd. of Dental Exam'rs*, 153 N.C. App. 527, 535-36, 571 S.E.2d 52, 59 (2002) (holding substantive due process challenges under the Law of the Land Clause asserting infringements of fundamental rights are subject to strict scrutiny, while other rights are subject to rational basis review).

Substantive due process, derived by the United States Supreme Court from the Fourteenth Amendment to the United States Constitution—the Law of the Land Clause's federal complement—originally subjected *all* statutes restricting protected property interests to the highest level of judicial scrutiny. *See*, *e.g.*, *Lochner v. New York*, 198 U.S. 45, 64, 49 L. Ed. 937, 944 (1905) (invalidating a workplace regulation that did not involve conduct "dangerous in any degree to morals, or in any real and substantial degree to the health of the employees"). Nonetheless, some legislative concerns were so pressing as to allow impingement of property and contract interests under even this exacting standard. *See Holden v. Hardy*, 169 U.S. 366, 392, 42 L. Ed. 780, 791 (1898) (upholding a state

statute regulating mine work hours because regulations restricting property interests "may be lawfully resorted to for the purpose of preserving the public health, safety, or morals, or the abatement of public nuisances" (citation omitted)).

The law of substantive due process has not been static. Only a few years after our Supreme Court's 1933 decision in *Wilkes County*, the United States Supreme Court recognized that not all life, liberty, and property interests under the Fourteenth Amendment are automatically subjected to the highest form of judicial inquiry. *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391, 81 L. Ed. 703, 708 (1937) (upholding a state minimum wage statute as "reasonable in relation to its subject and . . . adopted in the interests of the community"); *U.S. v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4, 82 L. Ed. 1234, 1241 n.4 (1938) (announcing a rational basis test for regulations restricting economic activity, but stricter scrutiny for those that, *inter alia*, discriminate against minorities). Under this modern formulation, such a claim is now subject to either strict scrutiny or the more permissive "rational basis" review. *Bunch*, 253 N.C. App. at 674-75, 802 S.E.2d at 473-74. Currently, "[n]ot every deprivation of liberty or property constitutes a violation of substantive due process granted under article I, section 19. Generally, any such deprivation is only unconstitutional where the challenged law bears no rational relation to a valid state objective." *Affordable Care, Inc.*, 183 N.C. App. at 535, 571 S.E.2d at 59 (citation omitted).

Whether to apply strict scrutiny or rational basis review to a statute challenged under both the federal Constitution and the Law of the Land Clause of the North Carolina Constitution is determined by our precedents according to the following principles:

> Substantive due process is a guaranty against arbitrary legislation, demanding that the law shall not be unreasonable, arbitrary or capricious, and that the law be substantially related to the valid object sought to be obtained. Thus, substantive due process may be characterized as a standard of reasonableness, and as such it is a limitation upon the exercise of the police power.
>
> . . . .
>
> In order to determine whether a law violates substantive due process, we must first determine whether the right infringed upon is a fundamental right. If the right is constitutionally fundamental, then the court must apply a strict scrutiny analysis wherein the party seeking to apply the

> law must demonstrate that it serves a compelling state interest. If the right infringed upon is not fundamental in the constitutional sense, the party seeking to apply it need only meet the traditional test of establishing that the law is rationally related to a legitimate state interest.

State v. Fowler, 197 N.C. App. 1, 20-21, 676 S.E.2d 523, 540-41 (2009) (cleaned up).

Assuming, *arguendo*, that an affirmative defense based on a statute of limitations implicates a fundamental right—which we do not think is a likely conclusion, as discussed above—we hold that the Revival Window passes constitutional muster even under the more stringent strict scrutiny test. This test imposes two requirements on the challenged statute: (1) it must advance "a compelling state interest," *id.* at 21, 676 S.E.2d at 540 (citation and quotation marks omitted); and (2) it must be "narrowly drawn to express only the legitimate interests at stake," *M.E. v. T.J.*, 275 N.C. App. 528, 546, 854 S.E.2d 74, 93 (2020) (citation and quotation marks omitted), *aff'd as modified on separate grounds*, 380 N.C. 539, 869 S.E.2d 624 (2022).

As detailed s*upra* Part I.B., the General Assembly's unanimous enactment of the SAFE Child Act and its Revival Window was a united response to developing science that, by the 2010s, had solidified an understanding that child sex abuse victims suffer lifelong injuries and delay disclosure well into adulthood. Vindication of the rights of child victims of sexual abuse—and ensuring abusers and their enablers are justly held to account to their victims for the trauma inflicted—are unquestionably compelling state interests. *Cf.*, *e.g.*, N.C. Gen. Stat. § 14-208.5 (2021) ("[T]he protection of [sexually abused] children is of great governmental interest."); *Packingham*, 368 N.C. at388, 777 S.E.2d at 746 ("[P]rotecting children from sexual abuse is a substantial governmental interest."). Moreover, encouraging entities—trusted by parents to care and protect their children—to guard against abusive employees or agents through civil penalties is likewise a compelling interest. *Cf. State v. Bishop*, 368 N.C. 869, 877, 787 S.E.2d 814, 820 (2016) (recognizing, in applying strict scrutiny review to an anti-cyberbullying statute, that "the General Assembly has a compelling interest in protecting the physical and psychological well-being of minors"). So, too, is ensuring that the law—when premised on an outdated and inaccurate understanding of child sexual abuse—does not frustrate the ability of child victims to pursue their common law remedies.

The SAFE Child Act's Revival Window is also so narrowly tailored as to satisfy strict scrutiny review. The revival period is limited to only

two years and, at the time of this opinion's filing, has long expired. 2019 N.C. Sess. Laws 1231, 1234, ch. 245, sec. 4.2(b). It likewise restricts the category of claims revived to: (1) "civil actions," for (2) "child sexual abuse." *Id.* Finally, it limits itself to a procedural change only—it in no way lowers the burden of proof that a plaintiff must meet, creates new claims for which a defendant may be held liable, or invalidates any of a defendant's substantive defenses to liability on the merits. The Revival Window's lifting of a procedural bar goes no further than necessary to satisfy the compelling state interests identified above: namely, that child victims of sexual abuse, injured before science and society reached a full and complete understanding of the nature of their trauma, have a fair and just opportunity to hold their abusers to account for their injuries.

The Board advances several policy arguments to contend that the Revival Window is ineffective to accomplish its goals. Specifically, the Board notes numerous hardships stemming from stale or unpreserved evidence. "[T]hese arguments are more properly directed to the legislature." *State v. Anthony*, 351 N.C. 611, 618, 528 S.E.2d 321, 325 (2000). To the extent they are proper for this Court to consider, these contentions do not support an argument that the Revival Window is *facially*, *i.e.*, in all cases, unconstitutional. As the Board acknowledges, there is no statute of limitations for felony child sex abuse, and the State, facing the highest possible burden of proof, was nonetheless able to convict Plaintiffs' abuser. Moreover, any staleness of evidence was not so significant as to interfere with the ability of a trial court to accept a child sex abuser's guilty plea upon an independent factual basis in a related appeal decided contemporaneously with this decision. *Taylor v. Piney Grove Vol. Fire and Rescue Dept.*, COA22-259, slip op. at 3 (N.C. Ct. App. Sept. 12, 2023) (unpublished); *see also Cryan v. Nat'l Council of Young Men's Christian Ass'ns of U.S.*, 384 N.C. 569, 570, 887 S.E.2d 848, 850 (2023) (discussing the guilty plea entered by the abuser in *Taylor*). These policy arguments' limited relevance does not support the Board's assertion that the Revival Window is unconstitutional in *all* contexts beyond a reasonable doubt.

III. CONCLUSION

Evaluating a facial constitutional challenge to an enactment of our General Assembly is perhaps the single most solemn duty of this Court. It represents an "important and momentous subject," *Bayard*, 1 N.C. at 2, and is conducted "with great deliberation and firmness," *id.* Given our courts' "great reluctance . . . [to] involv[e] themselves in a dispute with the Legislature of the State," *id.* at 2-3, a party challenging the facial constitutionality of a statute is faced with a particularly heavy burden: "a

claim that a law is unconstitutional must surmount the high bar imposed by the presumption of constitutionality and meet the highest quantum of proof, a showing that a statute is unconstitutional beyond a reasonable doubt." *Harper*, 384 N.C. at 324, 886 S.E.2d at 414-15 (citation omitted). On review of the text of the North Carolina Constitution, its history, and our jurisprudence interpreting it, we hold that the Board has failed to show beyond a reasonable doubt that an express provision of that supreme document prohibits revivals of statutes of limitation. Similarly, we hold that, under even the highest level of scrutiny, the SAFE Child Act's Revival Window passes constitutional muster. The divided order of the three-judge panel reaching the contrary conclusion is reversed, and this matter is remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Judge GORE concurs in result only.

Judge CARPENTER dissents by separate opinion.

CARPENTER, Judge, dissenting.

I respectfully dissent from the Majority's opinion. I will start by noting our common ground. I completely agree: Sexual abuse of children is vile. I agree that striking down legislation as facially unconstitutional is strong medicine, only suitable for clear constitutional violations. I also agree that the prohibition of reviving time-barred claims is not a textual one; the text of the North Carolina Constitution lacks such a provision.

But that is where our common ground ends. We are bound by the precedents of this Court and the North Carolina Supreme Court. Stare decisis is not limited to decisions this Court deems well-reasoned. Stare decisis is not limited to decisions that produce desirable results. And stare decisis is not limited to decisions tethered to textualism—indeed, stare decisis is often an exception to textualism. The stability and predictability of our justice system requires that we adhere to the precedents of our Court and the North Carolina Supreme Court.

We lack the authority to overrule the North Carolina Supreme Court, and it appears that my colleagues and I disagree on this point. *Wilkes County* and its progeny control this case. Regardless of whether *Wilkes* produces a desirable outcome or whether it is a bastion of

textualism, *Wilkes* is an opinion from the highest court in our state, and it exceeds our power to overrule it. In my view, the Majority is overruling several binding cases from this Court, and the Majority effectively overrules *Wilkes*, itself. Because we are bound by stare decisis, I would affirm the majority order entered by the three-judge panel. Therefore, I respectfully dissent.

I. Standard of Review & Stare Decisis

The Majority correctly notes that "[w]e review constitutional questions de novo." *Piedmont Triad Reg'l Water Auth. v. Sumner Hills, Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001). "In exercising de novo review, we presume that laws enacted by the General Assembly are constitutional, and we will not declare a law invalid unless we determine that it is unconstitutional beyond reasonable doubt." *State ex rel. McCrory v. Berger*, 368 N.C. 633, 635, 781 S.E.2d 248, 250 (2016).

Stare decisis binds us beyond a reasonable doubt. *Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993) (stating this Court must follow North Carolina Supreme Court decisions). Stare decisis means "that where a principle of law has become settled by a series of decisions, it is binding on the courts and should be followed in similar cases." *State v. Ballance*, 229 N.C. 764, 767, 51 S.E.2d 731, 733 (1949). Stare decisis supports the age-old axiom: "the law must be characterized by stability." *Id.* at 767, 51 S.E.2d at 733.

But of course, the North Carolina Supreme Court may overrule flawed cases. *See, e.g.*, *State v. Elder*, 383 N.C. 578, 603, 881 S.E.2d 227, 245 (2022) (overruling a portion of *State v. Hall*, 305 N.C. 77, 286 S.E.2d 552 (1982)); *Cedarbrook Residential Ctr., Inc. v. N.C. Dep't Health & Hum. Servs.*, 383 N.C. 31, 56–57, 881 S.E.2d 558, 576–77 (2022) (overruling *Nanny's Korner Day Care Ctr., Inc. v. N.C. Dep't Health & Hum. Servs.*, 264 N.C. App. 71, 825 S.E.2d 34 (2019)). This is because "stare decisis will not be applied in any event to preserve and perpetuate error and grievous wrong." *Ballance*, 229 N.C. at 767, 51 S.E.2d at 733.

We, however, are not the Supreme Court, and notwithstanding the Majority's desire to do so, we lack authority to overrule decisions from our Supreme Court. *Dunn*, 334 N.C. at 118, 431 S.E.2d at 180. Nor can we overrule a previous case decided by this Court, "unless it has been overturned by a higher court." *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989); *Musi v. Town of Shallotte*, 200 N.C. App. 379, 383, 684 S.E.2d 892, 896 (2009) (explaining that stare decisis binds courts of the same or lower level). We are undeniably bound by our precedents, even if we do not like the outcomes they produce, and in my view, our

precedents hold revival statutes are unconstitutional. Thus, the Revival Window is unconstitutional beyond a reasonable doubt. *See, e.g.*, *Wilkes Cnty. v. Forester*, 204 N.C. 163, 170, 167 S.E. 691, 695 (1933).

II. Law of the Land Clause & Vested Rights

The Law of the Land Clause of the North Carolina Constitution provides 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.

The Law of the Land Clause is similar to the United States Constitution's Due Process Clause, found in the Fourteenth Amendment; both provide procedural and substantive protections. *See Bentley v. N.C. Ins. Guar. Ass'n*, 107 N.C. App. 1, 9, 418 S.E.2d 705, 712 (1992) (" 'Law of the land' is synonymous with 'due process of law' under the Fourteenth Amendment . . . ."). One of the substantive protections of the Law of the Land Clause is the protection of "vested rights." *Godfrey v. Zoning Bd. of Adjustment*, 317 N.C. 51, 62, 344 S.E.2d 272, 279 (1986) (stating the vested-rights doctrine "is rooted in the 'due process of law' and the 'law of the land' clauses of the federal and state constitutions"). A vested right is "a right which is otherwise secured, established, and immune from further legal metamorphosis." *Gardner v. Gardner*, 300 N.C. 715, 718–19, 268 S.E.2d 468, 471 (1980).

The Law of the Land Clause protects vested rights against retroactive legislation. *Id.* at 719, 268 S.E.2d at 471 (" 'Vested' rights may not be retroactively impaired by statute; a right is 'vested' when it is so far perfected as to permit no statutory interference."); *Armstrong v. Armstrong*, 322 N.C. 396, 402, 368 S.E.2d 595, 598 (1988) (quoting *Godfrey v. State*, 84 Wash. 2d 959, 963, 530 P.2d 630, 632 (1975)) ("A vested right, entitled to protection from legislation, must be something more than a mere expectation based upon an anticipated continuance of the existing law; it *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*.").

III. Statutes of Limitations as Vested Rights

Our appellate courts have repeatedly recognized a vested right to rely on a statute-of-limitations defense. *See, e.g.*, *Waldrop v. Hodges*, 230 N.C. 370, 373, 53 S.E.2d 263, 265 (1949) (citing *Wilkes Cnty.*, 204 N.C. at 170, 167 S.E. at 695) ("A right or remedy, once barred by a statute of limitations, may not be revived by an Act of the General Assembly.");

Troy's Stereo Ctr., Inc. v. Hodson, 39 N.C. App. 591, 595, 251 S.E.2d 673, 675 (1979) ("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."); *Congleton v. Asheboro*, 8 N.C. App. 571, 573, 174 S.E.2d 870, 872 (1970) ("It is equally clear that the statute of limitations operates to vest a defendant with the right to rely on the statute of limitations as a defense."). The root of this right is in *Wilkes*. *See Wilkes Cnty.*, 204 N.C. at 170, 167 S.E. at 695.

A. *Wilkes County*

In *Wilkes*, the county owned "certificates of tax sales," and the county tried to foreclose on the defendant's real property to satisfy the certificates after the applicable statute of limitations lapsed. *Id.* at 167–68, 167 S.E. at 693–94. The General Assembly, however, passed a law that revived the period in which counties could foreclose on these certificates. *Id.* at 168, 167 S.E. at 694. One of the issues before the North Carolina Supreme Court was whether this attempted revival was constitutional, and the Court held that it was not. *Id.* at 170, 167 S.E. at 695. Indeed, after explicitly recognizing federal caselaw on the subject, the Court said: "Whatever 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." *Id.* at 170, 167 S.E. at 695.

1. *Wilkes* Is Not Limited to Real Property

The Majority concludes that even if *Wilkes* is binding, it only applies to cases involving real property. In my view, *Wilkes* applies to all statutes of limitations, not merely those relating to real property. *See id.* at 170, 167 S.E. at 695. I do not dispute, however, that in *Wilkes*, the General Assembly attempted to revive a claim that affected the defendant's real property. *Id.* at 167–68, 167 S.E. 693–94. And I concede that judicial language must be read in the context of the case. *State v. Jackson*, 353 N.C. 495, 500, 546 S.E.2d 570, 573 (2001). The *Wilkes* holding, then, could plausibly be read to prohibit only revival statutes affecting real property. *See Wilkes Cnty.*, 204 N.C. at 170, 167 S.E. at 695. But our appellate courts have not read *Wilkes* that way, and neither should we. *See, e.g.*, *Waldrop*, 230 N.C. at 373, 53 S.E.2d at 265; *Troy's Stereo*, 39 N.C. App. at 595, 251 S.E.2d at 675; *Congleton*, 8 N.C. App. at 573, 174 S.E.2d at 872.

For example, in *Jewell v. Price*, the plaintiffs sued the defendants for negligence, and the defendants asserted a statute-of-limitations defense.

264 N.C. 459, 460–61, 142 S.E.2d 1, 3 (1965). In analyzing the defense, the Court cited *Wilkes* and said: "If this action was already barred when it was brought . . . it may not be revived by an act of the legislature, although that body may extend at will the time for bringing actions not already barred by an existing statute." *Id.* at 461, 142 S.E.2d at 3. In other words, *Jewell* shows that the prohibition of revival statutes applies to tort claims, too. *See id.* at 461, 142 S.E.2d at 3.

Therefore, *Jewell* illustrates that our Supreme Court has not limited the application of its holding in *Wilkes* to vested rights in real property. *See id.* at 461, 142 S.E.2d at 3. *Wilkes* established a broad vested right against revival legislation; real property was merely the vessel that brought the issue before the Court. *See id.* at 461, 142 S.E.2d at 3; *Wilkes Cnty.*, 204 N.C. at 170, 167 S.E. at 695.

2. *Wilkes* Applied the Law of the Land Clause

The Majority also suggests that we are not bound by *Wilkes* because the *Wilkes* Court did not explicitly cite the Law of the Land Clause. I disagree. Granted, the Court in *Wilkes* did not cite the Law of the Land Clause, *see Wilkes Cnty.*, 204 N.C. at 170, 167 S.E. at 695, but deductive reasoning, however, shows the Court was indeed interpreting the Law of the Land Clause.

The *Wilkes* Court repeatedly analyzed the term "vested right." *See id.* at 168–70, 167 S.E. at 693–95. Our jurisprudence shows that the vested-rights doctrine is nested in either the Law of the Land Clause or the federal Due Process Clause. *See Godfrey*, 317 N.C. at 62, 344 S.E.2d 272 at 279. It is not found anywhere else.

The *Wilkes* Court was necessarily interpreting the Law of the Land Clause because the Court expressly stated it was *not* interpreting federal cases or the Due Process Clause. *See Wilkes Cnty.*, 204 N.C. at 168–70, 167 S.E. at 693–95. Rather, the *Wilkes* Court stated: "*Whatever 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." *Id.* at 170, 167 S.E. at 695 (emphasis added).

Because the North Carolina Supreme Court is the final arbiter of the Law of the Land Clause—"[w]hatever may be the holdings in other jurisdictions"—we are bound by *Wilkes* and its Law of the Land interpretation. *See id.* at 170, 167 S.E. at 695. *Wilkes* is no less binding because the Court did not explicitly cite the constitutional clause in question.

B. Dicta Discussion

The Majority also dismisses *Wilkes* and its progeny as spouting dicta. The Majority, however, casts its dicta net too wide. Because I believe *Wilkes*, coupled with *Jewell*, controls this case, I will only address the binding nature of those two decisions. I will discuss why their revival-statute discussions are not dicta, and thus why they control this case.

Dicta is language "not essential to a decision." *State v. Cope*, 240 N.C. 244, 246, 81 S.E.2d 773, 776 (1954). In other words, dicta is "not determinative of the issue before [a court]." *Jackson*, 353 N.C. at 500, 546 S.E.2d at 573. Only parties that have standing in a live case or controversy, however, can get issues before *federal* courts. *Raines v. Byrd*, 521 U.S. 811, 818, 117 S. Ct. 2312, 2317, 138 L. Ed. 2d 849, 857 (1997) ("No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.").

But unlike federal courts, our state Supreme Court is not bound to live cases or controversies; it can issue advisory opinions. *See e.g.*, *In re Separation of Powers*, 305 N.C. 767, 775, 295 S.E.2d 589, 594 (1982) (opining, in an advisory opinion, that statutes authorizing a joint legislative commission to make budget decisions exceeded legislative power and interfered with the governor's duty to administer the budget); *Cooper v. Berger*, 376 N.C. 22, 29–30, 852 S.E.2d 46, 54 (2020) (citing *In re Separation of Powers*, 305 N.C. at 772, 295 S.E.2d at 592); *State ex rel. Martin v. Melott*, 320 N.C. 518, 523, 359 S.E.2d 783, 787 (1987) (citing *In re Separation of Powers*, 305 N.C. at 774, 295 S.E.2d at 593). So naturally, our Supreme Court opinions can address a wider range of issues, and so long as Court language helps resolve an "issue before [it]," the language is not dicta. *See Jackson*, 353 N.C. at 500, 546 S.E.2d at 573.

The *Wilkes* Court explicitly addressed two issues: "(1) The first question involved: Is plaintiff barred by the eighteen months statute of limitations, which is properly pleaded, where it attempted to foreclose certain certificates of tax sales?" *Wilkes Cnty.*, 204 N.C. at 167, 167 S.E. at 693. And "(2) [t]he second question involved: Public Laws, 1931, chap. 260, sec. 3; at p. 320." *Id.* at 168, 167 S.E. at 694. In other words, the Court explicitly addressed (1) whether Wilkes County was time barred, and (2) whether the challenged revival provision was constitutional. *Id.* at 167–68, 167 S.E. at 693–94. The Court held the county's foreclosure effort was time barred, and the revival provision was unconstitutional. *Id.* at 167–70, 167 S.E. at 693–95.

The Majority thinks the Court's answer to the second question was dicta because it was unnecessary to answer the first question. If the first question was the only one presented to the Court, I would agree. But it was not, and I do not. True, if *Wilkes* was heard in federal court, the plaintiff may have lacked standing to present the second question. But *Wilkes* was not in federal court, and our Supreme Court does not require live cases or controversies. *See In re Separation of Powers*, 305 N.C. at 775, 295 S.E.2d at 594. Because the constitutionality of the revival provision was expressly presented to the *Wilkes* Court, *see Wilkes Cnty.*, 204 N.C. at 167, 167 S.E. at 694, the Court properly decided its constitutionality, *see Jackson*, 353 N.C. at 500, 546 S.E.2d at 573. In other words—*Wilkes*' revival-provision language was not dicta.

In *Jewell*, "[t]he critical question [was] whether plaintiffs have offered any evidence tending to show that they instituted this action within three years from the date it accrued." *Jewell*, 264 N.C. at 460–61, 142 S.E.2d at 3. In other words, the "critical question" was whether the case was barred by a statute of limitations. *See id.* at 460–61, 142 S.E.2d at 3. To answer that question, the *Jewell* Court correctly held that a revamped statute of limitations, passed after the case commenced, could not revive a lapsed negligence claim. *Id.* at 461–62, 142 S.E.2d at 3–4. Such a determination was "essential to [the] decision," *see Cope*, 240 N.C. at 246, 81 S.E.2d at 776, because if the lapsed negligence claim could have been revived, the statute-of-limitations defense would have failed, *Jewell*, 264 N.C. at 461, 142 S.E.2d at 3. But the lapsed claim could not be revived, and the defense did not fail. *Id.* at 461, 142 S.E.2d at 3. Therefore, the revival discussion in *Jewell* was necessary, not dicta. *See Cope*, 240 N.C. at 246, 81 S.E.2d at 776.

In sum, I do not read the applicable language from *Wilkes* and *Jewell* as dicta. *See id.* at 246, 81 S.E.2d at 776. Thus, because *Wilkes* established a vested right against revival statutes, *Wilkes Cnty.*, 204 N.C. at 170, 167 S.E. at 695, and because *Jewell* established that *Wilkes* is not limited to real-property rights, *Jewell*, 264 N.C. at 461, 142 S.E.2d at 3, we must apply those principles to this case, *see Musi*, 200 N.C. App. at 383, 684 S.E.2d at 896.

C. *Hinton*

The Majority relies heavily on *Hinton v. Hinton*, 61 N.C. 410 (1868), and the Majority believes *Hinton* controls this case. I disagree with the Majority, but *Hinton* certainly deserves discussion.

In *Hinton*, there was a six-month statute of limitations for widows to exercise their common-law rights of dower. *Id.* at 413. In 1863, because

of the Civil War, the General Assembly decided to retroactively toll the running of this statute from May 1861. *Id.* at 414. As to whether the General Assembly could do so under the North Carolina Constitution, the *Hinton* Court answered: "The power of the Legislature to do so is unquestionable." *Id.* at 415. One could read *Hinton* merely to hold this: The legislature can *toll* a statute, rather than revive lapsed claims. We have acknowledged as much. *See Troy's Stereo*, 39 N.C. App. at 595, 251 S.E.2d at 675 ("[T]he General Assembly may extend at will the time within which a right may be asserted . . . ."). But it is hard to square that reading with the following language from *Hinton*, which illustrates the Court's logic:

> Suppose a simple contract debt created in 1859. In 1862 the right of action was barred by the general statute of limitations, which did not *extinguish the debt*, but simply barred the right of action. Then comes the act of 1863, providing that the time from 20 May, 1861, shall not be counted. Can the debtor object that this deprives him of a vested right? Surely not. It only takes from him the privilege of claiming the benefit of a former statute, the operation of which is for a season suspended.

Hinton, 61 N.C. at 415–16.

I tend to agree with the Majority's understanding of *Hinton*: Contrary to *Wilkes*, the *Hinton* Court held that a statute-of-limitations defense is not a vested right.

D. Reconciling *Wilkes* & *Hinton*

The Majority tries to reconcile *Hinton* and *Wilkes* in several ways—by limiting *Wilkes* to real-property cases, dismissing *Wilkes* as vague, and dismissing *Wilkes* as dicta. As discussed above, I disagree with the Majority on those fronts, but I agree with the Majority's reading of *Hinton*. Thus, because I agree with the Majority on *Hinton*, and because I read *Wilkes* to authoritatively hold the opposite of *Hinton*, I cannot read the two in harmony. My reconciliation is simpler than the Majority's: In my view, *Wilkes* overruled *Hinton*.

The North Carolina Supreme Court often overrules cases by implication; it need not do so explicitly. *See, e.g.*, *McAuley v. N.C. A&T State Univ.*, 383 N.C. 343, 355, 881 S.E.2d 141, 149 (2022) (Barringer, J., dissenting) (noting that the majority opinion "refuse[d] to follow . . . [ninety] years of this Court's precedent" established in *Wray v. Carolina Cotton & Woolen Mills Co.*, 205 N.C. 782, 783, 172 S.E. 487, 488 (1934)); *State*

v. Styles, 362 N.C. 412, 415–16, 665 S.E.2d 438, 440–41 (2008) (abrogating *State v. Ivey*, 360 N.C. 562, 633 S.E.2d 459 (2006)).

I read *Hinton* to hold that the General Assembly can revive lapsed claims, *Hinton*, 61 N.C. at 415, and I read *Wilkes* to hold that the General Assembly cannot revive lapsed claims, *Wilkes Cnty.*, 204 N.C. at 170, 167 S.E. at 695. These are opposite conclusions. The Court decided *Hinton* in 1868. *See Hinton*, 61 N.C. at 410. And the Court decided *Wilkes* in 1933. *See Wilkes Cnty.*, 204 N.C. at 163, 167 S.E. at 691. Thus, our state Supreme Court overruled *Hinton* when it decided *Wilkes*. *See Styles*, 362 N.C. at 415–16, 665 S.E.2d at 440–41; *Wilkes Cnty.*, 204 N.C. at 170, 167 S.E. at 695. Further, our subsequent caselaw follows *Wilkes*, not *Hinton*; this supports the proposition that *Wilkes* overruled *Hinton*. *See*, *e.g.*, *Waldrop*, 230 N.C. at 373, 53 S.E.2d at 265.

Therefore, *Wilkes* controls this case, not *Hinton*. This follows from the two cases themselves and from the subsequent caselaw. *See Hinton*, 61 N.C. at 415; *Wilkes Cnty.*, 204 N.C. at 170, 167 S.E. at 695; *Waldrop*, 230 N.C. at 373, 53 S.E.2d at 265. Accordingly, I would follow *Wilkes* and affirm the majority decision of the three-judge panel below.

IV. Tiers of Scrutiny

The Majority also holds that, even if *Wilkes* applies to the Revival Window, the window is constitutional because it passes both the relaxed rational-basis test and the exacting strict-scrutiny test. I disagree with the Majority's testing premise: I do not think we should analyze this case through a tiers-of-scrutiny scheme.

I acknowledge that we analyze certain Law of the Land cases under a tiers-of-scrutiny framework. But those cases involve "fundamental rights." *See*, *e.g.*, *Affordable Care*, *Inc. v. N.C. State Bd. of Dental Examiners*, 153 N.C. App. 527, 535, 571 S.E.2d 52, 59 (2002) (stating that fundamental rights are subject to strict scrutiny); *Bunch v. Britton*, 253 N.C. App. 659, 674, 802 S.E.2d 462, 473–74 (2017) (discussing the tiers-of-scrutiny framework for fundamental rights).

Under our jurisprudence, similar to our federal counterpart, fundamental rights include those enumerated in the North Carolina Constitution. *Hoke Cnty. Bd. of Educ. v. State*, 382 N.C. 386, 432, 879 S.E.2d 193, 222–23 (2022) (discussing, among others, the fundamental rights to free elections, free speech, and education). We also find fundamental rights beyond the text of our state's Constitution. *Comer v. Ammons*, 135 N.C. App. 531, 539, 522 S.E.2d 77, 82 (1999) ("A fundamental right is a right explicitly *or implicitly* guaranteed to individuals by the United States Constitution or a state constitution.") (emphasis

added). Typically, these implied fundamental rights are nestled in the Law of the Land Clause. *See*, *e.g.*, *N.C. Dep't of Transp. v. Rowe*, 353 N.C. 671, 676, 549 S.E.2d 203, 208 (2001) (finding a right to "just compensation" in the Law of the Land Clause).

Vested rights, however, are distinct. "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). Like the fundamental rights mentioned in tiered-scrutiny cases, vested rights are grounded in due process. *Godfrey*, 317 N.C. at 62, 344 S.E.2d at 279. But vested rights are paramount—protected from *any* legislative attack. *See*, *e.g.*, *See Lester Bros.*, *Inc. v. Pope Realty & Ins. Co.*, 250 N.C. 565, 568, 109 S.E.2d 263, 266 (1959) ("[A] retrospective statute, affecting or changing vested rights, is founded on unconstitutional principles and consequently void."). Fundamental rights, on the other hand, can be taken by legislation—so long as the legislation passes "strict scrutiny." *See Affordable Care*, 153 N.C. App. at 535, 571 S.E.2d at 59.

It is admittedly difficult to mesh the vested-rights doctrine with the fundamental-rights doctrine. But the idea of vested rights predates fundamental rights, and in my reading of the cases, vested rights are a special species of fundamental rights. In other words, all vested rights are fundamental, but not all fundamental rights are vested. Vested rights are treated like property, *Rhyne*, 358 N.C. at 176, 594 S.E.2d at 12, and they are so "fundamental" that *no* legislation can take them away, *Lester Bros.*, 250 N.C. at 568, 109 S.E.2d at 266.

Adopting the Majority's view of this area would erase our vested-rights doctrine. Under the Majority's approach, fundamental rights would swallow vested rights, and our vested-rights doctrine would be consumed by the adopted federal framework. *See Affordable Care*, *Inc.*, 153 N.C. App. at 535, 571 S.E.2d at 59. But our vested-rights doctrine is distinct—predating any tiered scrutiny approach—and our courts have developed the doctrine for decades. *See*, *e.g.*, *Wilkes Cnty.*, 204 N.C. at 170, 167 S.E. at 695; *Lester Bros.*, 250 N.C. at 568, 109 S.E.2d at 266.

The vested-rights doctrine is ill-suited for the tiers-of-scrutiny approach. Indeed, if vested, a right is *beyond* legislative encroachment; if not vested, a right is only as protected as the level of scrutiny allows. *See Lester Bros.*, 250 N.C. at 568, 109 S.E.2d at 266; *Gardner*, 300 N.C. at 718–19, 268 S.E.2d at 471 (stating that a vested right is "a right which is otherwise secured, established, and *immune from further legal metamorphosis*") (emphasis added).

The issue before us is a state constitutional issue—not a federal one, and the North Carolina Supreme Court is the final arbiter of the North Carolina Constitution. If our state Supreme Court decides to lockstep with the federal Supreme Court and the Due Process Clause, then so be it. But concerning vested rights, our Supreme Court has not done so. *See Lester Bros.*, 250 N.C. at 568, 109 S.E.2d at 266; *Gardner*, 300 N.C. 715, 719, 268 S.E.2d at 471 (" 'Vested' " rights may not be retroactively impaired by statute; a right is 'vested' when it is so far perfected as to permit *no statutory interference*.") (emphasis added).

Until our state Supreme Court holds that vested rights are merely fundamental and subject to the federal tiers-of-scrutiny approach, we should apply the decisive vested-rights doctrine: If legislation violates a vested right, the legislation is void. *See Lester Bros.*, 250 N.C. at 568, 109 S.E.2d at 266. Thus, the "interests" and "tailoring" within the tiers-of-scrutiny approach are irrelevant to vested rights. Because I think the Revival Window violates a vested right, I think the Revival Window is void. Therefore, I would affirm the panel below.

V. Conclusion

The Majority thinks *Wilkes* should be overruled, and this Court has the authority to do so. Given its lack of support from the text of our state Constitution, perhaps *Wilkes* should be overruled. *See Harper v. Hall*, 384 N.C. 292, 886 S.E.2d 393 (2023). Although, in my view, the effects of doing so would extend far beyond this case and would carry unintended consequences and undermine a hallmark of our justice system–stability in our jurisprudence.

Regardless, whether revival statutes are good policy is not for us to decide. We cannot overrule *Wilkes*, its progeny, or our vested-rights doctrine. Only our state Supreme Court can. *See In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37; *Musi*, 200 N.C. App. at 383, 684 S.E.2d at 896. The *Wilkes* Court was clear: "Whatever 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 Cnty.*, 204 N.C. at 170, 167 S.E. at 695. Because *Wilkes* and its progeny control this case, the Revival Window is "unconstitutional beyond reasonable doubt." *State ex rel. McCrory*, 368 N.C. at 635, 781 S.E.2d at 250. Therefore, I would affirm the majority of the panel below, and I respectfully dissent.

STATE v. DANIELS

[290 N.C. App. 443 (2023)]

STATE OF NORTH CAROLINA
v.
KENDRA MARIA DANIELS, DEFENDANT

No. COA22-756

Filed 12 September 2023

Probation and Parole—revocation—statutory basis—erroneous finding—discretion otherwise properly exercised

The trial court's order revoking defendant's probation was affirmed as modified where, although the court made an erroneous written finding that each of defendant's alleged probation violations constituted a basis for revocation (since only one of defendant's violations—a new criminal offense—could statutorily support revocation), the remainder of the judgment demonstrated that the trial court understood the appropriate basis for revocation and properly exercised its discretion.

Appeal by Defendant from judgment entered 17 February 2022 by Judge Thomas D. Haigwood in Pitt County Superior Court. Heard in the Court of Appeals 7 March 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly Randolph, for the State.

Currie Law Offices, PC, by Patrick W. Currie, for defendant-appellant.

MURPHY, Judge.

A trial court may only revoke a defendant's probation if the defendant commits a new criminal offense, absconds, or violates any condition after previously serving two periods of confinement in response to violations. As long as one of these conditions is met, the trial court may exercise its sound discretion in determining whether revocation is appropriate. When a trial court indicates in its written order that factors outside of these three conditions constituted sufficient bases to revoke the defendant's probation and we cannot determine what weight the trial court gave to each of the relevant factors at defendant's revocation hearing, we vacate the revocation order and remand for a new revocation hearing in which the trial court properly exercises its discretion. However, when the written order improperly indicates that additional factors constituted sufficient bases to revoke probation, but we are

nevertheless able to determine that the trial court understood and exercised its discretion by weighing the appropriate bases for revocation, we modify the findings to reflect only the appropriate bases for revocation and affirm the revocation.

BACKGROUND

On 1 March 2021, Defendant pled guilty to driving while impaired based on an arrest on 8 July 2020. The trial court gave her a 12-month sentence, suspended for 36 months of supervised probation; ordered her to surrender her license; and added a condition to her probation forbidding the possession or consumption of alcohol or controlled substances and authorizing warrantless searches for such substances.

On 12 November 2021, Defendant's probation officer filed a violation report with the court, citing three positive results for marijuana drug screens, delinquency on court payments, and commission of a new criminal offense on 14 June 2021. On 13 January 2022, Defendant's probation officer filed a second violation report for a fourth positive marijuana drug screen.

On 17 February 2022, Defendant admitted to the violations contained in the two reports. During the revocation hearing, the State noted that Defendant attended her meetings with her probation officer, and, because of this partial compliance, Defendant requested the trial court exercise its discretion to order a confinement in response to violation rather than revocation. However, the trial judge stated, "I find the violations to be willful and intentional[,] and therefore I am going to revoke her probation . . . ." He subsequently activated her 12-month sentence. On 24 February 2022, the trial court amended its 17 February 2022 judgment to reflect an activated sentence of 6 months.

In both its *Impaired Driving Judgment and Commitment Upon Revocation of Probation*, form AOC-CR-343, and its amended version of this form judgment, the trial court checked boxes indicating it made the following findings:

> 4. Each of the conditions violated as set forth [in Paragraphs 1-4 of the 12 November 2021 Violation Report and Paragraph 1 of the 13 January 2022 Violation Report] is valid. The defendant violated each condition willfully and without valid excuse and each violation occurred at a time prior to the expiration or termination of the period of the defendant's probation.
>
> . . . .

5. The [trial court] may revoke defendant's probation . . .
   a. for the willful violation of the condition(s) that he/she not commit any criminal offense, [N.C.G.S. §] 15A-1343(b)(1), or abscond from supervision, [N.C.G.S. §] 15A-1343(b)(3a), as set out above.

Defendant timely appealed.

ANALYSIS

"A trial court may only revoke probation for committing a criminal offense or absconding, except as provided in N.C.G.S. § 15A-1344(d2)." *State v. Newsome*, 264 N.C. App. 659, 661 (2019) (marks omitted); *see* N.C.G.S. § 15A-1344(a) (2022). For other violations of probation, "a defendant under supervision for a felony conviction" may be subject to "a period of confinement of 90 consecutive days" and "a defendant under supervision for a misdemeanor conviction not sentenced pursuant to Article 81B[,]" such as a defendant in an impaired driving case, may be subject to "a period of confinement of *up to* 90 consecutive days." N.C.G.S. § 15A-1344(d2) (2022) (emphasis added).

We have previously held that, when a trial court makes a written finding that each violation is a sufficient basis upon which it may revoke probation, "the written order controls for purposes of appeal." *State v. Hemingway*, 278 N.C. App. 538, 544 (2021) (quoting *State v. Johnson*, 246 N.C. App. 677, 684 (2016)) (marks omitted). In *Hemingway*, although the trial court judge made a verbal finding that "the basis of [] revocation is that [the defendant] has committed a new criminal offense," *id.*, we reversed the trial court's written finding that the defendant's positive drug test was adequate to revoke his probation. However, the judgment revoking the defendant's probation in *Hemingway* was ultimately vacated and remanded on other grounds. *Id.* at 552.

In its judgment revoking Defendant's probation, the trial court checked finding box 4, which states "each violation is, in and of itself, a sufficient basis upon which [the trial court] should revoke probation and activate the suspended sentence." Defendant argues this is an "obvious[] err[or]" in violation of N.C.G.S. § 15A-1344(a) because the trial court made a finding of fact that *all* alleged violations constitute a basis for revocation. Defendant contends the trial court improperly failed to consider "that some of the alleged violations were not revocable offenses, and therefore the totality of the circumstances may not justify the ultimate punishment of revocation of probation."

Defendant further asserts the trial court's finding within box 4 reflects a failure to exercise its discretion, which resulted in prejudice to Defendant. Defendant is correct that, under N.C.G.S. § 15A-1344(a), only Defendant's commission of a new offense on 14 June 2021 would support the trial court's decision to revoke her probation. However, the trial court also checked the box for finding 5 and the box for subpart (a) within that finding. This subpart made the finding that the trial court "may revoke [D]efendant's probation . . . for the willful violation of the condition(s) that he/she not commit any criminal offense . . . ." While Defendant contends that the written order reflects that the trial court "believed that all of the violations of probation constituted a basis of revocation, and not just [the one] authorized by statute" and therefore it "could not have properly exercised its discretion in determining the appropriate judgment for [Defendant,]" the State argues the trial court's finding in 5(a) demonstrates that "checking box number 4 was a clerical error." In *Hemingway*, we declined to hold that such an error was clerical in nature and reversed the finding; however, in *Hemingway*, we did not have an opportunity to analyze the appropriate remedy for this reversible error by the trial court. We have, however, had opportunities to address similar issues with regard to sentencing.

In *State v. Hardy*, we held the appropriate remedy "[w]hen a trial court consolidates multiple convictions into a single judgment but one of the convictions was entered in error . . . is to remand for resentencing when the appellate courts 'are *unable to determine what weight*, if any, the trial court gave each of the separate convictions . . . in calculating the sentences imposed upon the defendant.' " *State v. Hardy*, 242 N.C. App. 146, 160 (2015) (quoting *State v. Moore*, 327 N.C. 378, 383 (1990)) (emphasis added); *see also State v. Jones*, 265 N.C. App. 644, 651 (2019) ("As we are *unable to determine what weight*, *if any*, the trial court gave to the erroneously entered assault conviction, we must remand for resentencing.") (emphasis added). Although we review an order revoking probation based upon multiple violations in this case rather than a sentencing order based upon multiple convictions, the underlying jurisprudential considerations remain the same. The principle that we remand when the trial court considered an erroneous basis in its discretionary punishment decision and we are unable to determine what weight the trial court gave to each of the violations of law, including the erroneous one, in reaching its decision ensures the trial court exercised its discretion and restrained Defendant's liberty as a conscious and fully informed decision. *See State v. Robinson*, 383 N.C. 512, 523 (2022) (holding that, if a review of the trial court's commentary and rationale underlying its sentencing decision makes apparent "that the trial court was

fully familiar with its given statutory discretion" to impose a lesser judgment if it "desired to do so[,]" an appellate court may find no abuse of discretion, despite remarks which a defendant argues may suggest the trial court's misunderstanding of its ability to exercise such discretion).

In *Hardy*, the defendant was convicted of both larceny and felonious possession of stolen goods and sentenced at the midpoint of the allowable mitigated range under the appropriate guidelines. *Hardy*, 242 N.C. App. at 160-61. Later that same day, the trial court – likely upon its recognition that a defendant cannot be convicted of both of these offenses for the same conduct – arrested judgment on the conviction for possession of stolen goods but did not alter the length of the defendant's sentence. *Id.* at 161. The trial court's initial sentence based on the two convictions remained within the allowable guidelines for larceny; however, we remanded the case to the trial court for resentencing within the trial court's discretion, as we had no way to determine "whether the trial court gave any weight to [the improper conviction] when it [originally] sentenced defendant in the middle of the mitigated range instead of at a lower point in that range." *Id.* In *Jones*, we applied *Hardy* and remanded to the trial court for resentencing where the defendant was erroneously convicted of two assault charges, rather than one, and sentenced at the high end of the presumptive range. *Jones*, 265 N.C. App. at 650-51.

Here, unlike in *Hardy* and *Jones*, we are able to ascertain that the trial court properly weighed the probation violations, as it acknowledged by checking the box for finding 5(a) that the revocation of Defendant's probation was based upon the commission of a new criminal offense.

CONCLUSION

Although the trial court improperly found that each of Defendant's probation violations constituted sufficient bases upon which to revoke her probation, it is clear from the trial court's indication in the same judgment that it properly considered and understood the statutory basis for revoking Defendant's probation and properly exercised its discretion. We affirm the trial court's judgment revoking Defendant's probation; however, we reverse the trial court's finding 4.

AFFIRMED AS MODIFIED.

Judges ARROWOOD and RIGGS concur.

STATE OF NORTH CAROLINA
v.
PARIS JUJUAN TODD, DEFENDANT

No. COA22-680

Filed 12 September 2023

Constitutional Law—effective assistance of counsel—appellate —failure to raise sufficiency of evidence

The trial court properly denied defendant's motion for appropriate relief, in which defendant alleged that his appellate counsel provided ineffective assistance because he failed to raise a sufficiency of the evidence argument on direct appeal from defendant's conviction for robbery with a dangerous weapon, where defendant failed to demonstrate that his appellate counsel provided deficient performance. Although defendant contended that fingerprint evidence from the victim's backpack was the only evidence of defendant being the perpetrator of the crime and therefore should have been challenged on the basis that there was no evidence that the fingerprint could only have been impressed at the time of the robbery, any argument to that effect would have failed because the State presented other pieces of evidence linking defendant to the crime.

Appeal by writ of certiorari by Defendant from order entered 6 August 2021 by Judge Paul C. Ridgeway in Superior Court, Wake County. Heard in the Court of Appeals 7 February 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Caden William Hayes, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Anne M. Gomez, for defendant-appellant.

STROUD, Chief Judge.

Defendant Paris Jujuan Todd appeals, by a previously granted writ of certiorari, from an order denying his motion for appropriate relief ("MAR") on the ground Defendant failed to show his appellate counsel provided ineffective assistance of counsel. Because Defendant cannot show his appellate counsel deficiently performed and therefore cannot demonstrate ineffective assistance of counsel, we affirm the trial court's denial of Defendant's MAR.

I. Background

On appeal from the denial of his MAR, Defendant argues his appellate counsel was ineffective for failing to raise a sufficiency of the evidence issue in his direct appeal. To determine whether appellate counsel was ineffective for failing to raise an argument the evidence at trial was insufficient, we need to consider the strength of the sufficiency argument. *See State v. Casey*, 263 N.C. App. 510, 521, 823 S.E.2d 906, 914 (2019) (stating "failing to raise a claim on appeal that was plainly stronger than those presented to the appellate court is deficient performance" (emphasis in original) (citing *Davila v. Davis*, 582 U.S. 521, 533, 198 L. Ed. 2d 603, 615 (2017)); *see also State v. Todd*, 369 N.C. 707, 711, 799 S.E.2d 834, 837 (2017) ("*Todd III*") (indicating deficient performance and prejudice are the two requirements "for a successful ineffective assistance of counsel claim"); *State v. Blackmon*, 208 N.C. App. 397, 403, 702 S.E.2d 833, 837 (2010) (holding the defendant could not show prejudice as part of an ineffective assistance of counsel claim because the State presented sufficient evidence he was the perpetrator). Therefore, we start by recounting what the State's evidence tended to show at trial.

This Court's decision in Defendant's direct appeal, *State v. Todd*, No. COA13-67, 229 N.C. App. 197 (2013) ("*Todd I*") (unpublished), provides many of the relevant facts here, and we supplement that discussion with more facts from the trial transcript relevant to Defendant's appeal from the denial of his MAR. The *Todd I* Court recounted the basic facts of the case as follows:

> Shortly before midnight on 23 December 2011, the Raleigh Police Department responded to a report of an armed robbery at 325 Buck Jones Road. Upon arrival, George Major (the "victim") informed police that, as he was walking home from work, an unknown African-American male approached him from behind, placed his hand on his shoulder, told him to get on the ground if he did not want to be hurt, and then forced him to the ground on his stomach. Once victim was on the ground, a second unknown African-American male approached and held victim's hands while the original assailant went through victim's pockets and felt around victim's clear plastic backpack. As the assailants prepared to flee, they ordered victim to remain facedown on the ground until he counted to 200 because they "didn't want to shoot him." Victim complied until he could no longer hear the assailants' footsteps. The assailants took victim's wallet containing an identification

> card, credit cards, and a small velvet drawstring bag containing change.
>
> During the police investigation, Stacey Sneider of the City–County Identification Bureau was dispatched to assist in processing the backpack for fingerprints. During her analysis, Sneider collected two fingerprints from the backpack, one of which was later determined to be . . . [D]efendant's right middle finger. As a result, a warrant was issued for [D]efendant's arrest.

Todd I, slip op. at 2-3 (brackets altered).

"On 18 January 2012, Officer Potter of the Raleigh Police Department stopped [D]efendant for illegal tint on his car's windows near the scene of the robbery. During the stop, Officer Potter came across [D]efendant's outstanding warrant and arrested [D]efendant." *Id.*, slip op. at 3. Specifically, Defendant was arrested as he went into a dead end about 300 yards from the scene of the robbery. The arrest location was also in the same direction that one assailant ran after the robbery.

Following his arrest, Officer Potter brought Defendant for an interview with the officer investigating the robbery, Detective Codrington. During this interview, Defendant denied he lived at an address on the same street on which he was arrested, which was only 300 yards from the robbery, and Defendant instead said he lived in a different town.

Defendant was indicted for robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon on 8 April 2012. *Todd I*, slip op. at 3. Following a continuance, Defendant's trial was set to begin on 12 June 2012. *Id.* The day before trial, "the State received a copy of the fingerprints" and "provided them to defense counsel that same day." *Id.* The State had already provided defense counsel with its forensic report showing "[D]efendant's fingerprints were located at the scene of the crime" in January 2012. *Id.* After receiving a copy of the fingerprints the day before trial, "defense counsel stated that she was prepared to go to trial," but "she requested a continuance in order for her to obtain an expert to analyze the fingerprints." *Id.* "No affidavit was attached to counsel's unsigned motion, which neither indicated the expert she planned to call nor what testimony the expert would offer." *Id.*, slip op. at 3-4. The trial court denied Defendant's motion for a continuance. *Id.*, slip op. at 4.

At trial, the State's witnesses included: the victim of the robbery; an officer who spoke with the victim the night of the robbery; Agent Sneider who collected the fingerprints off the backpack; a "fingerprint

expert[,]" *id.*, slip op. at 4; Officer Potter who arrested Defendant, *id.*, slip op. at 3; and Detective Codrington who investigated the robbery and interviewed Defendant. As relevant to the denied continuance motion, "Defendant's counsel was prepared to rebut the State's expert's testimony, and she cross-examined [the fingerprint expert] on various weaknesses in the fingerprint identification." *Id.*, slip op. at 4. At the close of the State's evidence, Defendant moved to dismiss on the grounds the State had "not proven their case." The trial court denied the motion to dismiss. After Defendant said he would not present any evidence and renewed his motion to dismiss at the close of all the evidence, the trial court again denied the motion to dismiss.

"On 14 June 2012, the jury found [D]efendant guilty of robbery with a dangerous weapon. The trial court entered judgment on the verdict, sentencing defendant to a term of 84 to 113 months' [sic] imprisonment. Defendant gave oral notice of appeal in open court." *Todd I*, slip op. at 4.

On appeal, Defendant's appellate counsel argued two issues: "(1) the trial court erred when it denied [D]efendant's motion for a continuance made on the first day of trial, and alternatively, (2) [Defendant] received ineffective assistance of trial counsel" because trial counsel "should have called an expert to produce testimony[.]" *See id.*, slip op. at 12-13 (describing Defendant's ineffective assistance of counsel argument as a "vague assertion"). Defendant's appellate counsel raised no argument about the sufficiency of the evidence identifying him as the perpetrator of the robbery. As to the continuance and ineffective assistance of trial counsel arguments Defendant actually raised in his direct appeal, this Court held the trial court did not err and Defendant did not receive ineffective assistance of trial counsel. *Id.*, slip op. at 13.

On or about 23 September 2014, Defendant filed a MAR alleging ineffective assistance of appellate counsel. Specifically, Defendant argued his appellate counsel was ineffective "in failing to argue that the case should have been dismissed for lack of evidence" based on *State v. Irick*, 291 N.C. 480, 231 S.E.2d 833 (1977) and its progeny. (Capitalization altered.) Based on *Irick*, Defendant argued "for fingerprint evidence *standing alone* to withstand a motion to dismiss, there must be 'substantial evidence of circumstances from which the jury can find that the fingerprints could only have been impressed at the time the crime was committed.' " (Emphasis in original) (Quoting *Irick*, 291 N.C. at 491-92, 231 S.E.2d at 841). Defendant contended (1) the fingerprint evidence in his case stood alone and (2) the State did not present substantial evidence the fingerprint could only have been impressed when the crime was committed. The MAR court "summarily denied" Defendant's MAR.

After granting Defendant's petition for a writ of certiorari, this Court heard an appeal of the denial of Defendant's MAR in *State v. Todd*, 249 N.C. App. 170, 790 S.E.2d 349 (2016) ("*Todd II*"), *rev'd Todd III*, 369 N.C. 707, 799 S.E.2d 834. The *Todd II* Court reversed the denial of the MAR because "the State presented insufficient evidence that [D]efendant committed the underlying offense, and if [D]efendant's appellate counsel had raised this issue in the initial appeal, [D]efendant's conviction would have been reversed." *Todd II*, 249 N.C. App. at 191, 790 S.E.2d at 364. As a result, the *Todd II* Court remanded for an order granting Defendant's MAR and vacating his conviction. *Id.* Judge Tyson dissented on the ground the State had presented sufficient evidence and thus Defendant failed to show his appellate counsel's performance was deficient. *Id.* at 193, 790 S.E.2d at 365 (Tyson, J., dissenting).

Our Supreme Court then issued an opinion, based on the State's appeal from *Todd II*, in *Todd III*. *See Todd III*, 369 N.C. at 709, 799 S.E.2d at 836 (indicating State took appeal). The *Todd III* Court reversed because it found the record was "not thoroughly developed regarding [D]efendant's appellate counsel's reasonableness, or lack thereof, in choosing not to argue sufficiency of the evidence" when reasonableness is "the proper measure of attorney performance" for ineffective assistance of counsel. *Id.* at 710, 712, 799 S.E.2d at 837-38 (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 80 L. Ed. 2d 674, 694 (1984) on the "proper measure of attorney performance") (brackets altered). Therefore, the record was "insufficient to determine whether [D]efendant received ineffective assistance of counsel." *Id.* at 712, 799 S.E.2d at 838. The *Todd III* Court directed this Court to remand to the MAR court "with instructions to fully address whether appellate counsel made a strategic decision not to raise a sufficiency of the evidence argument, and, if such a decision was strategic, to determine whether that decision was a reasonable decision." *Id.*

The matter was remanded to the MAR court on 19 July 2017. By that time, Defendant had been released from custody under an appeal bond he posted on 3 January 2017. Following the remand to the MAR Court in July 2017, "[i]nexplicably" the MAR Court did not hold further proceedings until a new judge took over the MAR proceedings and discovered that oversight on 11 February 2021.

The MAR Court then held an evidentiary hearing on 26 July 2021. The only witness at the evidentiary hearing was Defendant's appellate counsel. As summarized in the trial court's unchallenged findings of fact, appellate counsel testified he decided and "was confident in the decision to not raise the *Irick* sufficiency of the evidence argument[.]" (Quotation marks omitted.)

Following the evidentiary hearing, the MAR court entered a written order denying Defendant's MAR on 6 August 2021. After recounting the procedural history of the case, the trial court made findings of fact about the underlying trial, appellate counsel's background, and how appellate counsel decided what issues to present in Defendant's appeal. Based on that review, the MAR court found appellate counsel "made a strategic, intentional decision to put forward what he believed were the two best arguments in the [D]efendant's case[,]" which did not include "the Irick sufficiency of the evidence argument[.]"

After reviewing the applicable law and analyzing the relevant history of the case, the MAR court could not conclude Defendant's "appellate counsel was unreasonable in choosing to advance two issues on appeal . . . while foregoing the sufficiency of the evidence issue that he thought would detract from his stronger arguments." Therefore, the MAR court concluded Defendant had failed to show he had received ineffective assistance of appellate counsel, and denied his MAR. On 8 April 2022, this Court granted Defendant's petition for writ of certiorari to review the denial of the MAR.

II. Analysis

In his sole argument on appeal, Defendant contends "the MAR court erred by denying [his] MAR alleging ineffective assistance of appellate counsel." (Capitalization altered.) As a matter of due process, a criminal defendant has the right to effective assistance of counsel in their first appeal of right. *See Evitts v. Lucey*, 469 U.S. 387, 396, 83 L. Ed. 2d 821, 830 (1985) ("A first appeal as of right . . . is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney."). In determining whether a defendant received ineffective assistance of appellate counsel, we use the two-pronged test first articulated by the United States Supreme Court in *Strickland*. *See Todd III*, 369 N.C. at 710-11, 799 S.E.2d at 837 (2017) (stating *Strickland* standard in case about claim of ineffective assistance of appellate counsel). Thus, Defendant must show "both deficient performance and prejudice" to prevail on his "ineffective assistance of counsel claim." *Id.* at 711, 799 S.E.2d at 837.

A. Standard of Review

When the MAR court has conducted an evidentiary hearing, the reviewing appellate court determines "whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *State v. Allen*, 378 N.C. 286, 297, 861 S.E.2d 273, 282 (2021) (citations and quotation marks omitted). "The

MAR court's factual findings are binding upon the defendant if they are supported by evidence, even if the evidence is conflicting, but the MAR court's conclusions of law are always reviewed de novo[.]" *Id.* (citation and quotation marks omitted) (brackets altered).

Defendant's only argument referencing the MAR court's findings regards the alleged implication that an attendee at an appellate workshop told appellate counsel to abandon the sufficiency issue. Defendant can make this implied argument when arguing his attorney's "performance was deficient[,]" (capitalization altered) which is a prong of ineffective assistance of counsel, *see Todd III*, 369 N.C. at 711, 799 S.E.2d at 837, so we proceed straight to discussing the trial court's conclusion of law Defendant failed to show his "right to effective counsel ha[d] been violated." We discuss Defendant's challenge to this finding of fact as part of the deficiency analysis.

B. Deficient Performance Prong

We first address the deficient performance prong of the ineffective assistance of counsel standard. *See id.* (indicating the two prongs for an ineffective assistance of counsel claim are deficient performance and prejudice). To establish the deficiency prong "of an ineffective assistance of counsel claim, the defendant must show 'that his counsel's conduct fell below an objective standard of reasonableness.' " *State v. Baskins*, 260 N.C. App. 589, 600, 818 S.E.2d 381, 391 (2018) (quoting *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985) (in turn citing *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693)). This is a high bar; the deficiency prong "requires a showing that 'counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant[.]' " *Todd III*, 369 N.C. at 710, 799 S.E.2d at 837 (quoting *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693).

In the appellate context, "[g]enerally, 'the decision not to press a claim on appeal is not an error of such magnitude that it renders counsel's performance constitutionally deficient under the test of *Strickland*[.]' " *Baskins*, 260 N.C. App. at 600, 818 S.E.2d at 391 (quoting *Smith v. Murray*, 477 U.S. 527, 535, 91 L. Ed. 2d 434, 445 (1986)) (brackets altered). This standard reflects the "process of winnowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith*, 477 U.S. at 536, 91 L. Ed. 2d at 445 (citation and quotation marks omitted).

"However, failing to raise a claim on appeal that was plainly stronger than those presented to the appellate court *is* deficient performance."

Casey, 263 N.C. App. at 521, 823 S.E.2d at 914 (emphasis in original) (citing *Davila*, 582 U.S. at 533, 198 L. Ed. 2d at 615). To "eliminate the distorting effects of hindsight," courts look at the strength of the issues based on the law at the time appellate counsel submitted their opening brief. *See Smith*, 477 U.S. at 536, 91 L. Ed. 2d at 445-46 (citation and quotation marks omitted) (discussing the need to prevent the distortion of hindsight and then analyzing the decision of appellate counsel based on the "law at the time [he] submitted his opening brief").

Defendant argues his appellate counsel "made an unreasonable strategic decision to omit from [Defendant's] brief what likely would have been a winning issue and instead chose to raise two issues that were sure to lose." (Capitalization altered.) Specifically, Defendant contends the winning issue his appellate counsel should have raised was a claim the evidence was insufficient based on *Irick*.

To evaluate whether Defendant's *Irick* fingerprint evidence argument was "plainly stronger" than the arguments his appellate counsel raised, we must first evaluate the strength of the *Irick* claim. *See Casey*, 263 N.C. App. at 521, 823 S.E.2d at 914 (explaining it is "deficient performance" when appellate counsel fails to raise a claim "that was plainly stronger than those presented to the appellate court"). If the *Irick* claim itself lacks sufficient strength, then Defendant has failed to carry his burden to show deficient performance and we need not evaluate the relative strength of the two claims actually raised on appeal. *See Smith*, 477 U.S. at 535-36, 91 L. Ed. 2d at 445-46 (determining a decision not to pursue an objection to certain testimony on appeal was not "an error of such magnitude that it rendered counsel's performance constitutionally deficient under" *Strickland* and not mentioning any arguments actually raised in appeal as part of that analysis); *see also Todd III*, 369 N.C. at 710, 799 S.E.2d at 837 ("*Strickland* requires that *a defendant* first establish that counsel's performance was deficient." (emphasis added)).

In *Irick*, a burglary case, the defendant argued the trial court should have granted his motion to dismiss for insufficient evidence where "[a] key piece of circumstantial evidence . . . was [a] fingerprint" of the defendant's found within the burgled home. *Irick*, 291 N.C. at 488, 490-91, 231 S.E.2d at 839-41. First, our Supreme Court stated the general test for sufficiency of the evidence, i.e., "whether a reasonable inference of [the] defendant's guilt may be drawn from the circumstances." *Id.* at 491, 231 S.E.2d at 841 (citation and quotation marks omitted). Our Supreme Court then explained, "Fingerprint evidence, standing alone, is sufficient to withstand a motion for nonsuit only if there is substantial evidence of circumstances from which the jury can find that the

fingerprints could only have been impressed at the time the crime was committed." *Id.* at 491-92, 231 S.E.2d at 841 (citations, quotation marks, and emphasis omitted). While *Irick* did not include any circumstances showing the fingerprint "could only have been impressed at the time the crime was committed[,]" our Supreme Court found "other circumstances tend[ed] to show that [the] defendant was the criminal actor." *Id.* at 492, 231 S.E.2d at 841. As a result, the *Irick* Court returned to the general test for sufficiency and held, "[a]ll of these circumstances, taken with the fingerprint identification, when considered in the light most favorable to the State, permit a reasonable inference that [the] defendant was the burglar[.]" *Id.* at 492, 231 S.E.2d at 842; *see also id.* at 491, 231 S.E.2d at 841 (stating the general sufficiency of the evidence test is "whether a reasonable inference of [the] defendant's guilt may be drawn from the circumstances").

Since *Irick*, our Courts have further expanded upon the law around sufficiency of the evidence and fingerprints. First, this Court has clarified when there is "some evidence other than [the] defendant's fingerprints identifying him as the perpetrator . . . the *Irick* rule is inapplicable." *State v. Hoff*, 224 N.C. App. 155, 161, 736 S.E.2d 204, 208 (2012) (citing *Irick*, 291 N.C. at 491-92, 231 S.E.2d at 841). When the fingerprint evidence does not stand alone, we apply the normal sufficiency standard of whether, "[t]aken in the light most favorable to the State" the other evidence "together" with the fingerprint evidence "constitute[s] substantial evidence identifying [the] defendant as the perpetrator." *See Hoff*, 224 N.C. App. at 157, 161, 736 S.E.2d at 206, 208 (stating this in an analysis of the evidence after laying out the sufficiency standard as requiring "substantial evidence of . . . [t]he defendant's being the perpetrator of the charged offense" when the court "consider[s] the evidence in the light most favorable to the State" and gives the State "every reasonable inference to be drawn from that evidence" (citation and quotation marks omitted)). For example, in *Hoff*, the victim's "in-court identification of [the] defendant as the intruder" was "some evidence other than [t]he defendant's fingerprints identifying him as the perpetrator[,]" so "the *Irick* rule [was] inapplicable." *Id.* at 161, 736 S.E.2d at 208. Then, combining the identification evidence with the fingerprint evidence, the *Hoff* Court found "substantial evidence identifying [the] defendant as the perpetrator[,]" so "the trial court did not err in denying [the] defendant's motion to dismiss." *Id.*

Second, our Courts have expanded upon the type of additional evidence that can mean "the *Irick* rule is inapplicable[.]" *Hoff*, 224 N.C. App. at 161, 736 S.E.2d at 208. In *State v. Cross*, our Supreme Court

found sufficient to withstand a motion to dismiss the fingerprint evidence combined with the following additional evidence:

- "the assailant abandoned the victim within blocks of where the defendant was frequently seen and where [the] defendant was eventually located and arrested[;]"
- "a pathway existed near that location which led to the back of the apartment [the] defendant was in when he was arrested[;]"
- "the defendant made efforts to change his appearance by shaving his head[;]"
- "the defendant made an effort to evade arrest[;]" and
- "the defendant repeatedly denied to police officers that his name" was his name.

See State v. Cross, 345 N.C. 713, 718-19, 483 S.E.2d 432, 435-36 (1997) (noting this Court "overlooked" the listed "additional pieces of corroborating evidence" after determining the "fingerprint evidence, standing alone, was sufficient"); *see also Cross*, 345 N.C. at 719-20, 483 S.E.2d at 436 (Frye, J., concurring) (arguing it was "unnecessary to decide" whether the fingerprint evidence standing alone was insufficient given "other evidence tending to show that [the] defendant was the perpetrator of the crimes charged in this case was introduced at trial"). Similarly, in *State v. Futrell*, this Court determined the fingerprint evidence did not stand alone because "DNA evidence as well as placement of [the] defendant near the victim's apartment at the time of the crime by numerous witnesses linked him with the offenses charged." *State v. Futrell*, 112 N.C. App. 651, 668, 436 S.E.2d 884, 893 (1993) (citing *State v. Mercer*, 317 N.C. 87, 95-99, 343 S.E.2d 885, 890-92 (1986)).

Here, to evaluate the strength of the *Irick* claim, we must first determine whether the fingerprint evidence was standing alone. *See Hoff*, 224 N.C. App. at 161, 736 S.E.2d at 208 (explaining "the *Irick* rule is inapplicable" when there is "some evidence other than [the] defendant's fingerprints identifying him as the perpetrator"). If the fingerprint evidence stands alone, the fingerprint evidence can withstand a motion to dismiss "only if there is substantial evidence of circumstances from which the jury can find that the fingerprints could only have been impressed at the time the crime was committed." *Irick*, 291 N.C. at 491-92, 231 S.E.2d at 841. If the fingerprint evidence does not stand alone, however, we return to a normal sufficiency of the evidence standard and determine whether, taking the evidence in the light most favorable to

the State, there is substantial evidence defendant is "the perpetrator of the charged offense." *See Hoff*, 224 N.C. App. at 157, 161, 736 S.E.2d at 206, 208 (stating traditional sufficiency of the evidence standard, concluding additional evidence meant "the *Irick* rule [was] inapplicable[,]" and then determining the fingerprint evidence, combined with additional evidence, was "substantial evidence identifying [the] defendant as the perpetrator"); *see also Irick*, 291 N.C. at 491-93, 231 S.E.2d at 841-42 (determining other circumstances showed the defendant was the perpetrator and then concluding the fingerprint and the other circumstances "permit[ted] a reasonable inference that [the] defendant was the burglar").

The fingerprint evidence does not stand alone in this case. First, the State presented evidence Defendant was arrested a month later about 300 yards from the scene of the robbery and that place of arrest was in the direction one assailant ran after the robbery. This evidence resembles the additional evidence in *Cross* that the assailant abandoned the victim blocks away from where the defendant was arrested and that the place where the assailant abandoned the victim was connected to the place the defendant was arrested via a pathway. *See Cross*, 345 N.C. at 718-19, 483 S.E.2d at 435-36.

Second, the State presented evidence Defendant denied he lived at the address that was only 300 yards from where the robbery occurred and instead stated he lived in a different town, but "all information" the police could gather indicated he lived at the address near the robbery. This evidence resembles the situation in *Cross* where the defendant denied that his name was his name when asked about it by officers. *See id.* at 719, 483 S.E.2d at 436.

Finally, the robbery victim identified his assailants as African-American men, *see Todd I*, slip op. at 2, and Defendant is an African-American man. While our Courts have not specifically said the defendant matching the perpetrator's description is an additional factor in a fingerprint case, our Supreme Court has used it as a factor in a sufficiency case. *See Mercer*, 317 N.C. at 97-98, 343 S.E.2d at 891-92 (noting the victim described the defendant as "a tall, thin [B]lack man in his twenties[,]" which was "consistent with the defendant's appearance[,]" as part of a determination jewelry was not the only evidence that "link[ed] the defendant with the commission of the offenses"). Notably, this Court cited to *Mercer* in *Futrell*, a fingerprint evidence case. *See Futrell*, 112 N.C. App. at 668, 436 S.E.2d at 893 (citing *Mercer* to support its conclusion other evidence "linked [the defendant] with the offenses charged"). This is not to suggest that describing the race of an assailant

is sufficient, standing alone, to identify an assailant; it is only noted here to show that the race of the assailant was not inconsistent with the victim's description of Defendant. *See id.* Here, other factors besides the description of Defendant, i.e., fingerprint evidence and Defendant lying about his residence, were sufficient alone without the description.

Because of this additional evidence, the fingerprint evidence here was not standing alone. So *Irick*'s special rule—requiring an inquiry about whether there is substantial evidence the fingerprint "could only have been impressed at the time the crime was committed"—is inapplicable. *Irick*, 291 N.C. at 491-92, 231 S.E.2d at 841; *Hoff*, 224 N.C. App. at 161, 736 S.E.2d at 208. Instead, we apply the typical sufficiency of the evidence standard. *See Hoff*, 224 N.C. App. at 157, 161, 736 S.E.2d at 206, 208; *see also Irick*, 291 N.C. at 491-92, 231 S.E.2d at 841-42.

Returning to the typical sufficiency of the evidence standard, taking the evidence in the light most favorable to the State, the State presented substantial evidence Defendant is "the perpetrator of the charged offense." *See Hoff*, 224 N.C. App. at 157, 736 S.E.2d at 206 (describing this as the "well known" standard for a motion to dismiss (citation and quotation marks omitted)). Combining all the evidence, the State presented four pieces of evidence supporting Defendant was the perpetrator: (1) one of the two fingerprints on the victim's backpack was Defendant's and the victim had never let Defendant touch his bag; (2) Defendant was arrested a month later in close proximity to the robbery scene and at a location in the direction one of the assailants ran after the robbery; (3) Defendant denied to police he lived at the address in close proximity to the robbery and in the direction one of the assailants had run after the robbery despite "all information" the police could gather indicating he lived there; and (4) at least to the extent of the available evidence identifying the assailants, Defendant matched the description of the assailants. *See Todd I*, slip. op. at 2 (identifying assailants as African-American men). Taken together, and "in the light most favorable to the State," these four pieces of evidence are "substantial evidence identifying [D]efendant as the perpetrator[,]" and therefore the trial court had sufficient evidence to deny a Defendant's motion to dismiss. *Hoff*, 224 N.C. App. at 161, 736 S.E.2d at 208.

Our conclusion the trial court had sufficient evidence to deny Defendant's motion to dismiss at trial ultimately undermines Defendant's attempt to argue his appellate counsel was ineffective. Because the fingerprint evidence was not standing alone and the State presented sufficient evidence Defendant was the perpetrator of the robbery, Defendant would not have prevailed on the *Irick* issue. *See Hoff*, 224 N.C. App. at

161, 736 S.E.2d at 208 (determining the trial court did not err in denying the motion to dismiss because (1) the fingerprint evidence was not standing alone such that the *Irick* rule was "inapplicable" and (2) the fingerprint evidence and the additional evidence "together constitute[d] substantial evidence identifying [the] defendant as the perpetrator"). Because Defendant would not have prevailed on the *Irick* issue, the *Irick* issue was not "plainly stronger" than the other issues his attorney presented on appeal.[1] *See Casey*, 263 N.C. App. at 521, 823 S.E.2d at 914 (explaining it is "deficient performance" when appellate counsel fails to raise a claim "that was plainly stronger than those presented to the appellate court"). Because the unraised *Irick* argument was not "plainly stronger than those presented to the appellate court[,]" Defendant has not met his burden of showing deficient performance. *Id.*; *see also Todd III*, 369 N.C. at 710-11, 799 S.E.2d at 837 (indicating the defendant carries the burden of proving deficient performance). Because Defendant cannot show deficient performance of his appellate counsel, he cannot show his appellate counsel was ineffective. *See Todd III*, 369 N.C. at 711, 799 S.E.2d at 837 ("[B]oth deficient performance and prejudice are required for a successful ineffective assistance of counsel claim."). Finally, because Defendant cannot show ineffective assistance of appellate counsel, the trial court correctly denied his MAR.

Defendant's arguments on appeal do not convince us otherwise. Defendant first argues the fingerprint evidence here was standing alone—so the *Irick* argument was plainly stronger and his appellate counsel was ineffective—by drawing comparisons to *State v. Scott*, 296 N.C. 519, 251 S.E.2d 414 (1979) and *State v. Gilmore*, 142 N.C. App. 465, 542 S.E.2d 694 (2001).

In *Scott*, our Supreme Court started its analysis with a determination "[t]he only evidence tending to show that [the] defendant was even in the home of" the murder victim was "a thumbprint found on a metal box in the den on the day of the murder[.]" *Scott*, 296 N.C. at 522, 251 S.E.2d at 416-17; *see also Scott*, 296 N.C. at 524, 251 S.E.2d at 418 (indicating the crime was an attempted robbery that culminated in a death). Citing a long line of cases including *Irick*, the *Scott* Court explained, "The determinative question, therefore, is whether the State offered substantial evidence that the thumbprint could only have been placed on the box at

1. Notably, this conclusion remains the same even if we accept, *arguendo*, Defendant's contention "it was impossible to win the issues raised by appellate counsel." (Capitalization altered.) As a matter of logic, one losing argument cannot be plainly stronger than two arguments that also lose.

the time of the homicide." *See id.* at 522-53, 251 S.E.2d at 417 (stating the determinative question and then listing eight cases where our Supreme Court "has considered the sufficiency of fingerprint evidence" with *Irick* as the most recent). Our Supreme Court then determined testimony from the victim's niece was the "only evidence in this case to prove when the fingerprint could have been impressed" and "to her knowledge the defendant had never visited the house" nor handled the box on which his fingerprint was found. *Id.* at 524, 251 S.E.2d at 417-18. Because the victim's niece testified she was not home " 'during the five week days' " and could not have known if the defendant could have entered before the crime, the *Scott* Court found the evidence "insufficient to withstand a motion to dismiss." *Id.* at 526, 251 S.E.2d at 419.

Similarly, in *Gilmore*, the State presented evidence the defendant's fingerprint was found on glass from a broken window following a break-in at a store. *See Gilmore*, 142 N.C. App. at 470, 542 S.E.2d at 698. The defendant argued his fingerprint was "standing alone" and the *Gilmore* Court agreed because it proceeded to consider whether any additional circumstances showed his fingerprint "was impressed at the time of the break-in." *Id.* at 469-70, 542 S.E.2d at 697-98. This Court found "no additional circumstances tending to show [the d]efendant's fingerprint was impressed at the time of the break-in" because the fingerprint could have been impressed on the outside of the glass where a customer could "access" and the State had presented evidence the defendant was a customer in the store near the time of the break-in. *Id.* at 470, 470 n.2, 542 S.E.2d at 698, 698 n.2. After determining there were no additional circumstances, the *Gilmore* Court concluded, "As the State did not present any evidence, other than the fingerprint evidence, that Defendant was the perpetrator of the break-in . . . the charges against Defendant as to the break-in . . . should have been dismissed." *Id.* at 470, 542 S.E.2d at 698.

Defendant's Second Motion to Take Judicial Notice also asks we take judicial notice of attached "portions of the printed record on appeal and excerpts from the appellant and appellee briefs filed in" *Gilmore* because he argues they "are relevant to the issue of whether the fingerprint in this case stood alone." Defendant's motion for judicial notice is unnecessary. We always can look back at materials filed with this Court in a past case without the need to take judicial notice. If the parties want to argue based on past materials filed in this Court, they can make that argument by referring us to the case name, number, and specific material this Court should review. Therefore, we deny Defendant's Second Motion to Take Judicial Notice.

Turning to the additional items from *Gilmore* we can review without the need to take judicial notice, Defendant does not explain which facts we should consider or how exactly they relate to the issue in this case. The only potential facts in the briefs not specifically included in the *Gilmore* analysis discussed above are the following from the State's brief in *Gilmore*: (1) the defendant had come into the shop the same day or the day before and "was particularly noticed because he had on a very large coat for such a warm day" and (2) after the defendant left the store, the store's assistant manager found two of his court documents in the store parking lot. *See id.* at 469-70, 542 S.E.2d at 697-98 (relying on aforementioned facts in the opinion). These facts do not change how we view the *Gilmore* Court's analysis because they simply further establish, as the *Gilmore* Court already recognized, the defendant was "lawfully present in the store prior to the break-in" and therefore could have put his fingerprint on the store glass before the time the crime was committed. *Id.* at 470, 542 S.E.2d at 698. Notably, this was part of the *Gilmore* Court's analysis about whether there was substantial evidence the defendant impressed the fingerprint at the time of the break-in, *see id.*, which is only at issue *after* a court determines the fingerprint evidence stands alone. *See Hoff*, 224 N.C. App. at 161, 736 S.E.2d at 208 (explaining because there was "some evidence other than [the] defendant's fingerprints identifying him as the perpetrator . . . the *Irick* rule is inapplicable").

Thus, neither of Defendant's case comparisons are convincing because both cases determined the fingerprint evidence was standing alone and there was not sufficient evidence the fingerprint could only have been impressed when the crime was committed. *See Scott*, 296 N.C. at 522-26, 251 S.E.2d at 416-19; *Gilmore*, 142 N.C. App. at 469-71, 542 S.E.2d at 697-98. Here, by contrast, we have explained the State presented three pieces of additional evidence, so the fingerprint does not stand alone and therefore we do not address the question of whether the fingerprint could only have been impressed when the crime was committed. *See Hoff*, 224 N.C. App. at 158, 161, 736 S.E.2d at 206, 208 (explaining *Irick* rule and then stating it is inapplicable if the fingerprint evidence does not stand alone). Therefore, we are not convinced by Defendant's comparisons to *Scott* and *Gilmore*.

Defendant also contends "to the extent the MAR court's findings of fact imply that anyone at [an] appellate workshop told appellate counsel to abandon the sufficiency issue, the findings are unsupported." (Capitalization altered.) To the extent this finding is relevant to the issue of ineffective assistance of counsel, Defendant appears to argue

the finding relates to the deficiency prong's emphasis on whether "counsel's conduct fell below an objective standard of reasonableness." *Baskins*, 260 N.C. App. at 600, 818 S.E.2d at 391. The logic of the argument Defendant is trying to refute would be if "experienced appellate attorneys" told appellate counsel to abandon the *Irick* argument, then appellate counsel made a reasonable decision. While reasonableness is the general standard for deficient performance, *see Baskins*, 260 N.C. App. at 600, 818 S.E.2d at 391, United States Supreme Court caselaw also provides a more specific rule that "failing to raise a claim on appeal that was plainly stronger than those presented to the appellate court *is* deficient performance." *See Casey*, 263 N.C. App. at 521, 823 S.E.2d at 914 (citing *Davila*, 582 U.S. at 533, 198 L. Ed. 2d at 615 for this proposition). And based on that metric, we have already determined appellate counsel's performance was not deficient because the *Irick* issue was not plainly stronger than the two issues he raised on appeal. Therefore, even assuming *arguendo* this finding is unsupported, it does not impact our determination appellate counsel was deficient because we reached such a result without relying on the challenged finding.

Finally, Defendant asserts the MAR court erred in considering that the trial judge, who the MAR Court noted was an "experienced jurist[,]" "twice denied [Defendant]'s motions to dismiss." Notably, Defendant does not challenge the other portion of the MAR court's same conclusion of law that indicates Judge Tyson, who is "also an experienced jurist," concluded the State presented sufficient evidence of Defendant's identity as the perpetrator. However, the issue of whether multiple judges rejecting Defendant's argument adds anything to the reasonability analysis need not be considered further here because, as stated above, rather than relying on the general standard of reasonableness alone, we have used the more specific deficient performance standard for appellate counsel and determined the *Irick* claim was not "plainly stronger" than the issues Defendant's appellate counsel presented. *Casey*, 263 N.C. App. at 521, 823 S.E.2d at 914; *see also Baskins*, 260 N.C. App. at 600, 818 S.E.2d at 391 (indicating the deficiency prong generally asks whether "counsel's conduct fell below an objective standard of reasonableness").

After our *de novo* review of the trial court's conclusion Defendant failed to show his "right to effective counsel ha[d] been violated[,]" or the *Irick* issue was not plainly stronger than the issues appellate counsel raised in Defendant's direct appeal. Therefore, appellate counsel's performance was not deficient, *see Casey*, 263 N.C. App. at 521, 823 S.E.2d at 914 (indicating it is deficient performance if appellate counsel failed to raise an issue that was "plainly stronger" than the issues actually

raised on appeal), so Defendant has not shown ineffective assistance of counsel. *See Todd III*, 369 N.C. at 711, 799 S.E.2d at 837 (requiring "both deficient performance and prejudice" to prevail on an ineffective assistance of counsel claim). Thus, we affirm the trial court's denial of Defendant's MAR.

C. Prejudice

Since we have already determined Defendant failed to carry his burden on the deficient performance prong of the ineffective assistance of counsel test, we need not address prejudice. *See id.* (indicating a defendant must establish "both deficient performance and prejudice . . . for a successful ineffective assistance of counsel claim"). But we briefly note because we have concluded the State presented sufficient evidence Defendant was the perpetrator of the offense as part of our determination the *Irick* issue was not plainly stronger, Defendant also cannot show prejudice. *See Blackmon*, 208 N.C. App. at 403, 702 S.E.2d at 837 (holding the defendant could not show prejudice as part of an ineffective assistance of counsel claim because the State presented sufficient evidence he was the perpetrator).

III. Conclusion

Defendant has failed to show the *Irick* issue his appellate counsel did not raise on appeal was plainly stronger than the two issues his appellate counsel raised on appeal. As a result, Defendant has not proven his appellant counsel's performance was deficient and cannot demonstrate he received ineffective assistance of counsel. Therefore, we affirm the trial court's denial of Defendant's MAR.

AFFIRMED.

Judges CARPENTER and RIGGS concur.

STATE v. WRIGHT

[290 N.C. App. 465 (2023)]

STATE OF NORTH CAROLINA
v.
ERIC WRIGHT, DEFENDANT

No. COA22-996

Filed 12 September 2023

1. Appeal and Error—criminal case—untimely notice of appeal —petition for certiorari granted

In a criminal case where defendant sought to appeal the trial court's denial of his motion to suppress, but where defendant did not file his written notice of appeal within the fourteen-day deadline established under Appellate Rule 4(a), his petition for a writ of certiorari was granted because defendant showed that his arguments on appeal had merit and that there was good cause for issuing the writ.

2. Criminal Law—order denying motion to suppress—findings of fact—unsupported by the evidence

In a criminal defendant's appeal from an order denying his motion to suppress evidence seized from his backpack following a *Terry* stop and frisk, four of the trial court's findings of fact were stricken from the order because they were unsupported by the evidence. Three of these unsupported findings stated that one of the officers observed defendant entering a pathway marked on both sides by "No Trespass" signs and that all of the officers at the scene believed defendant was trespassing at the time of the *Terry* stop. The fourth unsupported finding stated that, after asking defendant for his identification card, the officers returned the identification card to defendant prior to searching his backpack.

3. Search and Seizure—Terry stop and frisk—reasonable suspicion—reliability of tip by confidential informant—search of backpack—beyond scope of frisk

In a prosecution for crimes relating to the possession of a stolen firearm by a felon, the trial court erred in denying defendant's motion to suppress evidence seized from his backpack following a *Terry* stop and frisk. Law enforcement had reasonable suspicion to conduct the stop and to frisk defendant's person based on a confidential informant's tip, which carried sufficient "indicia of reliability" where one of the officers had known the informant for over a year and had previously corroborated information from that informant. However, the search of defendant's backpack went beyond

the lawful scope of the initial frisk, which was limited to ensuring that defendant was unarmed and posed no threat to the officers.

4. Search and Seizure—warrantless search of backpack—consent exception—voluntariness—probable cause—tip from confidential informant

In a prosecution for crimes relating to the possession of a stolen firearm by a felon, the trial court erred in denying defendant's motion to suppress evidence seized from his backpack following a *Terry* stop and frisk which, though lawful, did not justify the warrantless search of the backpack. The search did not fall under the consent exception to the warrant requirement because, although defendant did consent to the search, he did not do so voluntarily where, on a cold and dark night, multiple uniformed police officers surrounded defendant—an older homeless man—and repeatedly requested to search the backpack after he repeatedly asserted his Fourth Amendment right to decline those requests. Further, where law enforcement had received a tip from a confidential informant saying that an individual matching defendant's description was carrying a firearm at the location where defendant was stopped, that tip (though sufficiently reliable to establish reasonable suspicion to stop and frisk defendant) was insufficient to establish probable cause to search the backpack because it provided no basis for the allegation that defendant was carrying an illegal firearm.

Appeal by Defendant from amended order entered 28 July 2022 by Judge Lisa Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 May 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Caden W. Hayes, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katy Dickinson-Schultz, for Defendant-Appellant.

RIGGS, Judge.

Defendant Eric Wright appeals an order denying his motion to suppress evidence found during a stop on 29 January 2020. On appeal, Mr. Wright first argues that the officers did not have reasonable suspicion to stop Mr. Wright. Second, Mr. Wright argues that he did not consent to the search of his backpack. Finally, Mr. Wright argues that the confidential

informant's statement was not sufficient to establish probable cause for a warrantless search.

After review, we hold that law enforcement had reasonable suspicion to stop and frisk Mr. Wright based upon the informant's tip; however, Mr. Wright did not voluntarily consent to the search of his backpack, and the search was not otherwise justified by probable cause. Therefore, we reverse the trial court's order denying Mr. Wright's motion to suppress the evidence.

I. FACTS & PROCEDURAL HISTORY

On 29 January 2020, around 11:30 p.m., Officer Christopher Martin ("Officer Martin") and Officer Nicholas Krause ("Officer Krause") of the Charlotte-Mecklenburg Police Department were on routine patrol in uptown Charlotte. Officer Martin received a tip from a known informant that there was an individual carrying an illegal firearm on Phifer Avenue. The informant described the individual, who was traveling on a bicycle, as a Black male with dreadlocks wearing a dark jacket, bright orange tennis shoes and blue jeans. Shortly after receiving this tip, the officers located an individual on Phifer Avenue who matched this description and was later identified as Mr. Wright. The officers followed Mr. Wright as he walked with his bicycle down North Tryon Street.

Officer Benjamin Slauter ("Officer Slauter") followed Mr. Wright on foot as he turned onto a dirt path near the East 12th Street bridge. Officers Martin and Krause parked their vehicle close to the intersection of East 12th Street and North College Street to meet Mr. Wright as he emerged from the dirt path on North College.

Before they intercepted Mr. Wright, the officers had the following conversation in their vehicle:

> OFFICER MARTIN: That's trespass, right?
>
> OFFICER KRAUSE: Yes.
>
> OFFICER MARTIN to Officer Slauter via radio: Slauter, that area's trespassing right?
>
> OFFICER SLAUTER: Known drug area, that's all I got. Voluntary contact.

Officers Martin and Krause exited their vehicle and approached Mr. Wright on North College Street. The officers gave Mr. Wright conflicting reasons for approaching him, with Officer Krause stating that Mr. Wright was trespassing on the dirt path and Officer Martin stating that the area

was known for street-level drug sales. At the hearing on 9 November 2020, Officer Martin testified that he decided to approach Mr. Wright based on the information he received from the known informant.

The officers asked Mr. Wright for his name and identification, and they also asked whether he was homeless. Mr. Wright provided his identification, told the officers he was homeless, and said that he was headed to a storage unit on College Street. Officer Martin asked Mr. Wright to step off his bicycle and remove his backpack and Mr. Wright complied with these requests. Officer Martin asked if he could perform a pat-down of Mr. Wright's person and Mr. Wright consented to the pat-down. Officer Martin did not find any weapons on Mr. Wright during the pat-down.

Officer Martin then asked if he could search Mr. Wright's backpack to make sure that he did not have a weapon. At this point in the encounter, Officers Martin and Slauter were standing on either side of Mr. Wright and Officer Krause was in the police vehicle with Mr. Wright's identification. Initially, Mr. Wright agreed to let Officer Martin search his backpack, but then quickly, before Officer Martin started searching, said that he did not want the officers to look in the backpack. Officer Martin and Officer Slauter asked Mr. Wright four more times for permission to search his backpack, and each time, Mr. Wright said no.

Even though Mr. Wright said that he was cold and scared of the police, Officer Slauter indicated that they were "looking for somebody" and could not take Mr. Wright "off the list" because he was being "deceptive." Officer Slauter asked Mr. Wright to open the backpack so that Officer Slauter could look inside, and Mr. Wright finally did as he was directed. Mr. Wright put the backpack on the ground and showed Officer Slauter some of the items inside the backpack. Officer Slauter saw a pistol grip in the backpack and placed Mr. Wright in handcuffs.

Officer Slauter conducted a thorough search incident to arrest and found cocaine and marijuana in Mr. Wright's pockets. The officers ran the serial number of the gun and found that it was a stolen firearm.

Mr. Wright was indicted on 10 February 2020 for unlawfully carrying a concealed weapon, possession with intent to sell cocaine, possession of a stolen firearm, possession of a firearm by a felon, and obtaining habitual felon status. On 2 September 2020, Mr. Wright filed a motion to suppress the evidence obtained from the search and seizure.[1] At a hearing on the motion to suppress held on 9 November 2020, the trial court

1. Mr. Wright also filed a motion to suppress statements on 29 October 2020. That motion is not a subject of this appeal.

denied Mr. Wright's motion. The trial court found that the initial contact between Mr. Wright and the officers was voluntary, and Mr. Wright consented to the search of his backpack. The trial court also found that the information provided by the confidential informant, combined with the officers' knowledge of the area, was enough to provide reasonable articulable suspicion to engage Mr. Wright. Mr. Wright gave oral notice of intent to appeal the denial of the motion to suppress. Mr. Wright entered an *Alford* plea to all charges and was sentenced to a minimum of 87 months and a maximum of 117 months of incarceration.

Mr. Wright originally appealed the denial of the motion to suppress in November 2020. In that appeal, this Court remanded the case for further findings of fact and conclusions of law regarding trespass, including but not limited to whether law enforcement believed that Mr. Wright was trespassing, whether this belief was reasonable, and the impact this would have on reasonable suspicion. *State v. Wright*, 283 N.C. App. 471, 871 S.E.2d 879, ___ (2022) (unpublished). The Court indicated that the additional findings should be based upon the evidence presented at the 9 November 2020 hearing.

On 28 July 2021, the trial court entered an amended order denying the motion to suppress evidence ("Amended Order"). The trial court made the following additional findings of fact related to trespassing:

> 5. A "No Trespassing" sign was affixed to one of the bridge pylons and was clearly visible to a person traveling under the underpass. Defendant's path of travel took him directly by this sign.
>
> 6. Officer Slauter observed Defendant enter a pathway marked by a "No Trespassing sign" leading from North Tryon to N. College Street. The "No Trespassing" sign was posted underneath the overpass next to the pathway.
>
> 7. Another sign was on the ground next to the fence that ran along one side of the dirt path. This sign read, "Mecklenburg County Property No Trespassing Violators will be subject to arrest and conviction."
>
> 8. The dirt path the Defendant entered was marked on both sides by no trespassing signs. It was obscured by vegetation, indicating it was not a maintained path intended for the public to use.
>
> 9. Defendant traveled along this dirt path for approximately 1500 to 2000 feet.

> …
>
> 11. The officers believed the Defendant was trespassing.
>
> …
>
> 20. That Officer Martin appeared to have retuned [sic] Defendant's identification card based on the conversation between them and the actions that were visible on the BWC.

The trial court made additional conclusions of law, which stated:

> 2. Based on the presence of two "No Trespassing" signs, including one that advised "violators will be subject to arrest and conviction," along with the officers' knowledge of the area and prior experience of having issued citations in the area provided the officers with reasonable belief that the Defendant was trespassing.
>
> 3. The information provided by the confidential informant and the officer's reasonable belief that the Defendant was trespassing combined with the officers' knowledge of the area was sufficient as to provide reasonable and articulable suspicion and probable cause for the Officers to engage with the Defendant.

On 18 August 2022, Mr. Wright filed a written notice of appeal from the Amended Order. As his notice was filed more than fourteen days after the entry of the order, Mr. Wright filed a petition for a writ of *certiorari* contemporaneously with his appeal.

II. ANALYSIS

A. Writ of *Certiorari* Granted

[1] A party may appeal an order of a superior court in a criminal action by giving oral notice of appeal at trial or by filing notice of appeal within fourteen days of the entry of the order. N.C. R. App. P. 4(a) (2023). Mr. Wright did not give oral notice of appeal from the Amended Order and his written notice of appeal was filed twenty-two days after the entry of the order. However, this Court may grant a writ of *certiorari* in appropriate circumstances to permit review of an order of a trial court when, as in this case, the right to prosecute an appeal has been lost by failure to take timely action. N.C. R. App. P. 21(a) (2023). *Certiorari* is a discretionary writ, to be issued only for good and sufficient cause shown. *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959).

We hold that Mr. Wright has shown good cause and that the arguments he presents on appeal have merit. Accordingly, we grant Mr. Wright's petition for *certiorari* to review the question of whether the trial court erred by denying his motion to suppress evidence.

B. Standard of Review

The scope of appellate review of an order denying a motion to suppress evidence is limited to determining whether the trial court's underlying findings of fact are supported by competent evidence, in which case, they are binding on appeal, and whether those factual findings support the trial court's conclusions of law. *State v. Terrell*, 372 N.C. 657, 665, 831 S.E.2d 17, 22 (2019). Uncontested findings of fact are binding on appeal. *State v. Ashworth*, 248 N.C. App. 649, 651, 790 S.E.2d 173, 176 (2016). The trial court's conclusions of law are reviewed *de novo*. *Terrell*, 372 N.C. at 665, 831 S.E.2d at 22.

C. Findings of Fact

[2] Mr. Wright challenges Findings of Fact 5, 6, 7, 8, 11, and 20 of the trial court's Amended Order as unsupported by competent evidence. We hold that Findings 6, 8, 11, and 20 are indeed unsupported by competent evidence. The remainder of the findings remain undisturbed.

Finding 6 states: "Officer Slauter observed Defendant enter a pathway marked by a 'No Trespassing sign' leading from North Tryon to N. College Street. The 'No Trespassing' sign was posted underneath the overpass next to the pathway." While there is evidence to support the finding that a "No Trespassing" sign was posted underneath the overpass, Officer Slauter did not testify that he observed Mr. Wright enter a pathway marked by a "No Trespassing" sign and there is no evidence that the pathway itself—as opposed to the pylon under the overpass—was marked by such a sign. To find a defendant guilty of trespassing, a court must find that there is a posting "in a manner reasonably likely to come to the attention of intruders," putting them on notice not to enter the premises. N.C. Gen. Stat. § 14-159.13 (2021). The "No Trespassing" sign is affixed to the overpass pylon a few yards from the pathway. While this sign would be reasonably likely to come to the attention of persons walking under the bridge along North Tryon Street, the positioning of the sign would reasonably give notice to a passerby to avoid trespassing on the bridge abutment directly behind the sign, rather than providing notice to avoid trespassing on a dirt path several yards to the side of the sign and barely visible in the photos provided to this Court. Because there was no competent evidence to support the finding that

Officer Slauter observed Mr. Wright enter a pathway marked by a "No Trespassing" sign, we strike Finding 6 from the Amended Order.

Finding 8 states: "The dirt path the Defendant entered was marked on both sides by no trespassing signs. It was obscured by vegetation, indicating that it was not a maintained path intended for the public to use." The first sentence is not supported by competent evidence as there is no evidence that the pathway Mr. Wright entered was marked on both sides. As discussed *supra*, the "No Trespassing" sign on the bridge pylon does not mark the dirt path. Additionally, Officer Martin testified that the "No Trespassing" sign on the ground inside the chain link fence referred to the empty lot inside the fence. The trial court's finding that these signs together marked the pathway mischaracterizes the placement and reasonably understood meaning of the signs and is not supported by competent evidence. Thus, we strike Finding 8 from the Amended Order.

Finding 11 states: "The officers believed the Defendant was trespassing." This finding is not supported by competent evidence. Prior to stopping Mr. Wright, the officers disagreed about whether Mr. Wright was trespassing on the pathway. In conversation amongst themselves before the stop, Officer Krause stated that Mr. Wright was trespassing when he was on the pathway, but Officer Martin asked Officer Slauter if it was trespass and Officer Slauter, who was walking on the pathway, indicated to the contrary that Mr. Wright was in an area known for street-level drug sales and police would have to make voluntary contact. After the fact, at the hearing, Officer Martin testified that he decided to make contact with Mr. Wright based on the tip from the confidential informant. Officer Slauter testified that he said "voluntary contact" to avoid sharing information about the confidential informant. On redirect, Officer Slauter testified somewhat equivocally that he thought "it's trespassing through the area" but he does not normally "arrest people for trespass." Officer Krause, the only officer to indicate that he suspected trespassing at the time of the encounter, did not testify. Thus, the evidence does not support the finding that the officers, at the time of the encounter, believed Mr. Wright was trespassing. Therefore, we strike Finding 11 from the Amended Order.

Finding 20 states: "Officer Martin appeared to have returned Defendant's identification card based on the conversation between them and the actions that were visible on the bodycam footage ("BWC")."[2] This

2. Neither Officer Martin nor Officer Slauter testified that they returned Mr. Wright's identification before the search, and this finding of fact appears to be based solely on the bodycam footage.

finding is not supported by the BWC. At the beginning of the encounter, Officer Martin asked Mr. Wright if he had identification. Mr. Wright gave his identification to Officer Krause, who took the identification back to the police vehicle. The videos show that Officer Krause did not return until after the officers had searched Mr. Wright's backpack, found the gun, and placed him in handcuffs. The videos also show Officer Krause holding an object that appears to be Mr. Wright's identification after Mr. Wright is handcuffed; while holding the identification, Officer Krause is asking Mr. Wright about his criminal history. The competent evidence does not support the finding that the officers returned Mr. Wright's identification prior to the search. Therefore, we strike Finding 20 from the Amended Order.

After careful review, we strike Findings 6, 8, 11, and 20 and leave the remainder of the findings of fact undisturbed.

D. The Trial Court Erred in Denying Mr. Wright's Motion to Suppress

On appeal, Mr. Wright argues that the trial court erred in denying the motion to suppress because he did not freely consent to the search of his backpack and the officers did not have probable cause to search the backpack. We hold that the officers had reasonable suspicion to stop, question, and perform a protective search of Mr. Wright based on the informant's tip. However, Mr. Wright did not voluntarily consent to the search of his backpack, and the officers did not have probable cause to search the backpack. Therefore, the trial court erred in denying Mr. Wright's motion to suppress the evidence.

1. The officers had reasonable suspicion to stop and frisk Mr. Wright, but the search of the backpack exceeded the scope of the initial justified frisk.

[3] The Fourth Amendment to the U.S. Constitution guarantees citizens the right to be secure in their person against unreasonable search and seizure. U.S. Const. amend. IV. The Fourth Amendment is applied against state governments through the Fourteenth Amendment, and comparable protection is afforded by the North Carolina Constitution. N.C. Const. Art. 1, § 20; *Mapp v. Ohio*, 367 U.S. 643, 655, 6 L. Ed. 2d 1081, 1090 (1961). A brief investigatory detention by law enforcement constitutes a seizure under the Fourth Amendment. *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 69-70 (1994); *Reid v. Georgia*, 448 U.S. 438, 440, 65 L. Ed. 2d 890, 893-94 (1980). However, only unreasonable investigatory stops are unconstitutional. *Watkins*, 337 N.C. at 441, 446 S.E.2d at 70. When a law enforcement officer has a reasonable suspicion

that a suspect has committed or is about to commit a crime, they may briefly seize the suspect and make reasonable inquiries aimed at confirming or dispelling the suspicion. *Minnesota v. Dickerson*, 508 U.S. 366, 373, 124 L. Ed. 2d 334, 344 (1993). An officer has a reasonable suspicion if a "reasonable, cautious officer, guided by his experience and training," would believe that criminal activity is afoot "based on specific and articulable facts, as well as the rational inferences from those facts." *State v. Williams*, 366 N.C. 110, 116, 726 S.E.2d 161, 167 (2012) (quoting *Watkins*, 337 N.C. at 441-42, 446 S.E.2d at 70). The stop must be justified at its inception and reasonably related in scope to the criminal activity that the officer suspects is occurring. *Terry v. Ohio*, 392 U.S. 1, 20, 20 L. Ed. 2d 889, 905 (1968).

An informant's tip can provide the requisite reasonable suspicion for an investigatory stop. *Alabama v. White*, 496 U.S 325, 330, 110 L. E. 2d 301, 309 (1990). Reasonable suspicion, like probable cause, is dependent upon both the content of the information possessed by police and its degree of reliability. *Id.* While the reasonable suspicion standard is less demanding than probable cause, it still requires that an informant's tip carry some "indicia of reliability." *State v. Watkins*, 120 N.C. App. 804, 809, 463 S.E.2d 802, 805 (1995) (quoting *White*, 496 U.S. at 332, 110 L. Ed. at 310). In evaluating whether an informant's tip sufficiently provides indicia of reliability, we consider the "totality-of-the-circumstances." *State v. Williams*, 209 N.C. App. 255, 263, 703 S.E.2d 905, 910 (2011) (quoting *Illinois v. Gates*, 462 U.S. 213, 233, 76 L. Ed. 2d 527, 545 (1983)). In weighing the reliability of an informant's tip, the court must consider the informant's veracity, reliability, and basis of knowledge. *Williams*, 209 N.C. App. at 262, 703 S.E.2d at 910 (quotation omitted).

Officer Martin testified at trial that he ultimately decided to stop Mr. Wright based on the tip from the confidential informant. Therefore, to determine whether the officers had the requisite reasonable suspicion to stop Mr. Wright, we must evaluate the reliability of the tip. At the hearing, Officer Martin testified that he had known the informant for about a year and had been able to corroborate information from the informant in the past; this history with the informant creates a stronger case for the reliability of the tip. *See Williams*, 209 N.C. App. at 262-63, 703 S.E.2d at 910 ("Where the informant is known or where the informant relays information to an officer face-to-face, an officer can judge the credibility of the tipster first-hand and thus confirm whether the tip is sufficiently reliable to support reasonable suspicion.")

According to Officer Martin, the informant described the individual as a Black male with dreads wearing a dark jacket, bright orange tennis

shoes, and blue jeans traveling on a bicycle; however, "reasonable suspicion does not arise merely from the fact that the individual encountered met the description given to the officer." *State v. Hughes*, 353 N.C. 200, 209, 539 S.E.2d 625, 632 (2000). When considering the totality of the circumstances here, we conclude the officer's history with the informant and the testimony about his ability to corroborate prior information from this informant, provides a minimal level of objective justification to establish reasonable suspicion for the *Terry* stop and frisk. *See State v. Maready*, 362 N.C. 614, 619, 669 S.E.2d 564, 567 (2008) ("When police act on the basis of an informant's tip, the indicia of the tip's reliability are certainly among the circumstances that must be considered in determining whether reasonable suspicion exists.").

Because we hold that the officers had reasonable suspicion to believe Mr. Wright was armed, they were authorized to perform a protective search of Mr. Wright for weapons. When an officer has reason to believe an individual that they have lawfully stopped is armed and dangerous, the officer may conduct a reasonable search for weapons that may be used to harm the officer or others nearby. *Terry*, 392 U.S. at 27, 20 L. Ed. 2d at 909; *State v. Johnson*, 246 N.C. App. 677, 692, 783 S.E.2d 753, 764 (2016). The scope of the search must be strictly limited to that which is necessary to determine whether an individual has a weapon on their person, and therefore consists of a pat-down of the individual's outer layer of clothing. *See State v. Smith*, 150 N.C. App. 317, 321, 562 S.E.2d 899, 902 (2002) ("A *Terry* frisk generally contemplates a limited pat-down of the outer clothing of an individual").

The pat-down of Mr. Wright's person was justified as a limited, protective search for weapons that could have been used to harm the officers. *Smith*, 150 N.C. App. at 321, 562 S.E.2d at 902 ("[A] protective search—permitted without a warrant and on the basis of reasonable suspicion less than probable cause—must be strictly 'limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby.' "). The pat-down did not reveal any weapons. Once the *Terry* frisk was complete, the officers could make inquiries of Mr. Wright to confirm or dispel their suspicions without fear of harm. *Smith*, 150 N.C. App. at 321, 562 S.E.2d at 902. Any search of the backpack would be beyond the scope of a *Terry* frisk. *State v. Shearin*, 170 N.C. App. 222, 226, 612 S.E.2d 371, 375–76 (2005) (stating the scope of the search under *Terry* is protective in nature and is limited to the person's outer clothing and to the search for weapons that may be used against the officer).

We hold that the officers had reasonable articulable suspicion to briefly detain Mr. Wright based on the tip from the confidential informant.

The officers were also justified in performing a protective *Terry* frisk for weapons on Mr. Wright's person. However, the search of the backpack was not justified as part of the frisk because it exceeded the scope of what was necessary to ensure that Mr. Wright did not have a weapon on his person and did not pose a threat to the officers.

2. The search of Mr. Wright's backpack was not lawful.

[4] Mr. Wright did not consent to the search of his backpack and the search was not otherwise justified by probable cause. Therefore, the search of Mr. Wright's backpack was not lawful.

a. Mr. Wright did not consent to the search of his backpack.

A search of private property conducted without a warrant is *per se* unreasonable unless the search falls within a well-delineated exception to the warrant requirement.[3] *State v. Cooke*, 306 N.C. 132, 135, 291 S.E.2d 618, 620 (1982); *Katz v. United States*, 389 U.S. 347, 357, 19 L. Ed. 2d 576, 585 (1967). "Consent, however, has long been recognized as a special situation excepted from the warrant requirement, and a search is not unreasonable within the meaning of the Fourth Amendment "when lawful consent to the search is given." *State v. Smith*, 346 N.C. 794, 798, 488 S.E.2d 210, 213 (1997) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 222, 36 L. Ed. 2d 854, 860 (1973). The North Carolina General Assembly allows law enforcement officers to conduct searches without a warrant or other authorization if consent to the search is given. N.C. Gen. Stat. § 15A-222(1) (2021).

For a "warrantless, consensual search to pass muster under the Fourth Amendment, consent must be given and the consent must be voluntary." *Smith*, 346 N.C. at 798, 488 S.E.2d at 213. "We treat the question of voluntariness as a conclusion of law." *State v. Cobb*, 248 N.C. App. 687, 695, 789 S.E.2d 532, 538 (2016). In determining what constitutes 'voluntary' consent, two competing concerns must be accommodated—"the legitimate need for such searches and the equally important requirement of assuring the absence of coercion." *Schneckloth*, 412 U.S. 218, 227, 36 L. Ed. 2d 854, 863 (1973). To be voluntary, consent must be free from coercion, express or implied. *State v. Little*, 270 N.C. 234, 239,

3. Recognized exceptions to the warrant requirement include: a protective search upon reasonable suspicion as described in Section D1, *Terry*, 392 U.S. 1, 30-31, L. Ed. 2d 889, 911; seizure of suspicious items that are in plain view if the officers possess the legal authority to be on the premise, *State v. Allison*, 298 N.C. 135, 140, 257 S.E.2d 417, 420 (1979); when probable cause exists and the exigencies of the situation make a search without a warrant imperative, *Allison*, 298 N.C. 135, 141, 257 S.E.2d 417, 421; and search incident to a lawful arrest, *State v. Cherry*, 298 N.C. 86, 92, 257 S.E.2d 551, 556 (1979).

154 S.E.2d 61, 65 (1967); *State v. Romano*, 369 N.C. 678, 691, 800 S.E.2d 644, 653 (2017).

In examining whether the consent was the product of coercion, the court must consider the possibility of subtly coercive questions from those with authority, as well as the possibly vulnerable subjective state of the person who consents. *Schneckloth*, 412 U.S. at 225-26, 36 L. Ed. 2d at 862. Whether consent is voluntary is based upon the totality of the circumstances, *Smith*, 346 N.C. at 798, 488 S.E.2d at 213, and the State has the burden of proving consent was voluntarily given. *State v. Long*, 293 N.C. 286, 293, 237 S.E.2d 728, 732 (1977); *Bumper v. North Carolina*, 391 U.S. 543, 548, 20 L. Ed. 2d 797, 802 (1968).

Based upon a review of the totality of the circumstances, Mr. Wright's consent to search the backpack was a product of coercion, albeit not ill-intentioned, and was not voluntary. Officers Martin and Slauter together asked Mr. Wright five times within a period of about one and a half minutes for permission to search the backpack, even though Mr. Wright continued to say no.[4] The officers had a duty to respect Mr. Wright's assertion of his Fourth Amendment right to say no to the request to search. *See United States v. Drayton*, 536 U.S. 194, 207, 153 L. Ed. 2d 242, 255 (2002) ("In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own. Police officers act in full accord with the law when they ask citizens for consent. It reinforces the rule of law for the citizen to advise the police of his or her wishes and for the police to act in reliance on that understanding. When this exchange takes place, it dispels inferences of coercion.").[5] However, the officers did not act in reliance on Mr. Wright's response; instead, Officer Slauter told Mr. Wright they were "specifically looking for somebody" and they could not take Mr. Wright "off the list" because he was being "deceptive." The statement strongly communicates that Mr. Wright would not be allowed to leave unless he consented to the search. *Schneckloth*, 412 U.S. at 225-26, 36 L. Ed. 2d at 862.

---

4. A sister state's intermediate court considered repeated requests for consent to search as a factor that supports the conclusion that a reasonable person would believe that compliance with the officer's request was mandatory. *See Kutzorik v. State*, 891 So.2d 645, 648 (Fla.App. 2 Dist. 2005).

5. As Justice Kennedy noted during oral argument: "It seems to me a strong world is when officers respect people's rights and—and people know what their rights are and—and assert their rights [and say to the police] I don't want to be searched. . . . I don't want to be searched. Leave me alone." Oral argument at 47:40, *United States v. Drayton*, 536 U.S. 194 (2002) (No. 01-631) https://www.oyez.org/cases/2001/01-631.

During the interaction in the middle of the night, Mr. Wright, an older homeless man, told the officers he was cold and afraid of the police. Throughout the conversation, Officers Martin and Slauter were standing on either side of Mr. Wright and Officer Krause had Mr. Wright's identification in the police vehicle. The combination of multiple uniformed police officers surrounding an older homeless man and making repeated requests to search his backpack on a cold, dark night after he repeatedly asserted his right not to be searched leads us to the conclusion that Mr. Wright's consent was the result of coercion and duress and therefore was not freely given. *Schneckloth*, 412 U.S. at 228, 36 L. Ed. 2d at 863 ("[N]o matter how subtly the coercion were applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed.").

b. The officers did not have probable cause to search the backpack.

Here, the officers needed probable cause for a warrantless search of Mr. Wright's backpack. To determine if probable cause exists based upon an informant's tip, we apply the totality-of-the-circumstances test which considers the informant's reliability and basis of knowledge. *State v. Benters*, 367 N.C. 660, 664, 766 S.E.2d 593, 598 (2014). Probable cause exists when there is "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty." *State v. Yates*, 162 N.C. App. 118, 122, 589 S.E.2d 902, 904 (2004) (quoting *State v. Harris*, 279 N.C. 307, 311, 182 S.E.2d 364, 367 (1971)).

In this case, the informant's tip was lacking in both the reliability and basis of knowledge that would be necessary to create probable cause. Officer Martin's testimony confirmed that the informant was known to him for a year and a half; however, Officer Martin did not testify that information from the informant had led to prior arrests. *Cf. State v. Arrington*, 311 N.C. 633, 642, 319 S.E.2d 254, 260 (1984) ("[t]he fact that statements from the informants in the past had led to arrests is sufficient to show the reliability of the informants"). Although Mr. Wright matched the description provided by the informant, corroboration of mere identifying information, such as the suspect's description and location, is not enough to indicate that a tip is reliable. *State v. Johnson*, 204 N.C. App. 259, 264, 693 S.E.2d 711, 715 (2010) ("Where the detail contained in the [anonymous] tip merely concerns identifying characteristics, an officer's confirmation of these details will not legitimize the tip."). The informant said there was an individual carrying a firearm on Phifer Avenue; however, the informant did not provide any basis for his knowledge about the criminal activity—unlawful possession of a firearm. *See Florida*

v. J.L., 529 U.S. 266, 272, 146 L. Ed. 2d 254, 261 (2000) (noting that the reliability of a tip requires reliability in the "assertion of illegality, not just in its tendency to identify a determinate person."). Put another way, neither the confidential informant, nor the officer testifying as to his relationship with the informant, provided enough information on the reliability or basis of knowledge of the tip to create more than the reasonable suspicion necessary to justify the *Terry* frisk; not to create probable cause. Additionally, the tip did not predict any future behavior; a characteristic of a tip that the U.S. Supreme Court has held can demonstrate the informant is not only honest but also well-informed. *See White*, 496 U.S. at 332, 110 L. Ed. 2d at 310 (holding that an anonymous tip can be corroborated by its accurate prediction of future activity).

Therefore, neither the informant's tip nor the *Terry* frisk provided the officers with probable cause for a warrantless search of Mr. Wright's backpack. *Terry*, 392 U.S. at 25-26, 20 L. Ed. 2d at 908. While we held that the informant's tip had an indica of reliability to establish reasonable suspicion for the stop, the tip was insufficient to establish the higher threshold of probable cause to search the backpack. *Cf. Adams v. Williams*, 407 U.S. 143, 144, 147, 32 L. Ed. 2d 612, 616, 617 (1972) (holding that the unverified tip from a known informant was sufficient for reasonable suspicion to support an investigatory stop but the Court noted that such an unverified tip may not be sufficient to support probable cause).

Because the informant's tip did not provide a basis of knowledge for the allegation that Mr. Wright had an illegal firearm, we hold that the informant's tip was insufficient to provide probable cause to search the backpack. Therefore, the warrantless search of Mr. Wright's backpack was not justified, and the evidence obtained from that illegal search must be excluded.

III. CONCLUSION

After careful review of the issues identified in Mr. Wright's brief, we hold that the trial court's Findings of Fact 6, 8, 11, and 20 were not properly supported by competent evidence. Additionally, we hold that the trial court erred in denying Mr. Wright's motion to suppress because the search that yielded the evidence was not lawful. Accordingly, we reverse the court's order denying Mr. Wright's motion to suppress the evidence and vacate the *Alford* plea.

REVERSED AND VACATED.

Judges HAMPSON and FLOOD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 12 SEPTEMBER 2023)

EDWARDS v. ANDERSON No. 23-14	Pitt (21CVD2029)	Affirmed
IN RE A.E. No. 23-28	Watauga (18JT60-64)	Affirmed
IN RE A.F.F. No. 23-125	Gaston (19JT11) (19JT64)	Affirmed
MONTESSORI SCH. OF DURHAM v. FUCHS No. 22-741	Durham (21CVS1382) (21CVS1387)	Affirmed and Remanded
STATE v. GILES No. 22-1032	Buncombe (17CRS89663)	No Error in Part, Remanded in Part.
STATE v. JONES No. 23-404	Davidson (22CRS1539)	Dismissed
STATE v. NUNEZ-SARRAIOS No. 23-306	Wake (19CRS209856-64) (19CRS221220-23)	Vacated and Remanded
STATE v. PRICE No. 22-1064	Cleveland (20CRS50345) (20CRS72)	No Error.
STATE v. PUTNAM No. 23-78	Catawba (18CRS54145-47)	No Error
STATE v. RIVERS No. 23-176	Union (20CRS350) (20CRS50732)	Dismissed in Part; No Prejudicial Error in Part
STATE v. RUSSELL No. 22-1059	Orange (18CRS1574) (18CRS53431)	No Error
STATE v. SANDERS No. 20-428	Forsyth (18CRS1973) (18CRS56475)	Affirmed
STATE v. SLOAN No. 23-272	Duplin (20CRS50621)	Vacated and Remanded

STATE v. SMALLWOOD No. 23-195	Iredell (16CRS55957, 16CRS55158, 16CRS55159, 16CRS55160, 16CRS55161)	No Prejudicial Error
STATE v. TAYLOR No. 22-1020	Gaston (15CRS1557) (15CRS2945) (15CRS5353)	No Error in Part; No Plain Error in Part; Dismissed Without Prejudice in Part
STATE v. TILLMAN No. 22-630	Anson (20CRS50538) (21CRS437-438)	No Error In Part; Vacated In Part; and Remanded.
TAYLOR v. PINEY GROVE VOLUNTEER FIRE & RESCUE DEP'T, INC. No. 22-259	Wake (20CVS13487)	Reversed and Remanded

COMMERCIAL PRINTING COMPANY
PRINTERS TO THE SUPREME COURT AND THE COURT OF APPEALS