No. 19-1019

United States Court of Appeals for the Fourth Circuit

JOYCE MCKIVER, ET AL.,

Plaintiffs-Appellees,

V.

MURPHY-BROWN, LLC,
D/B/A SMITHFIELD HOG PRODUCTION DIVISION,

Defendant-Appellant.

On Appeal from the United States District Court for the Eastern District of North Carolina at Wilmington in Case No. 7:14-cv-00180-BR
(Hon. W. Earl Britt, Senior U.S. District Court Judge)

BRIEF OF THE NORTH CAROLINA JUSTICE CENTER AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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May 6, 2019

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 19-1019 Caption: McKiver, et al. v. Murphy-Brown, LLC

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If yes, identify any trustee and the members of any creditors' committee:

Signature: Emily P. Turner Date: 5/6/19

Counsel for: North Carolina Justice Center

CERTIFICATE OF SERVICE

****

I certify that on 5/6/19 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

Emily P. Turner 5/6/19
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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The North Carolina Justice Center (the "Justice Center") is a non-profit research and legal advocacy organization working across North Carolina since 1996. The Justice Center's mission is to eliminate poverty in North Carolina by ensuring that every household has access to the resources, services, and fair treatment needed to achieve economic security.

This case is of interest to the Justice Center because industrial hog production operations as conducted by defendant Murphy-Brown, LLC create unfair and profoundly deleterious consequences for neighboring homeowners of modest means. Both simple fairness and North Carolina law counsel against retroactive elimination of common law rights, particularly under the circumstances in which the legislation at issue here was enacted. The Justice Center submits this brief for the purpose of providing the court with a statement of the

[1] Pursuant to Rule 29(a)(4)(E), *amicus* affirms that no party to this appeal or party's counsel authored this brief in whole or in part and no person or entity other than *amicus* has made a monetary contribution to its preparation or submission. This brief is filed pursuant to Rule 29(a)(2); all parties have consented to the filing.

North Carolina legal rules that preclude the retrospective statutory abrogation of plaintiff homeowners' common law rights in this case.

ARGUMENT

The 2017 amendment to the Right to Farm Act ("RTFA") sharply limits damages "that may be awarded to a plaintiff for a private nuisance action where the alleged nuisance emanated from an agricultural or forestry operation." If N.C. Sess. Law 2017-11, (the "2017 amendment") applies to the instant case, it will substantially reduce the relief awarded to plaintiffs. It does not apply to this case for three reasons.

First, the paramount principle of statutory construction under North Carolina law is that legislative intent controls, such intent to be derived from, among other things, the statute's language and legislative history. The 2017 amendment states "This act takes effect when it becomes law and applies to causes of action arising on or after that date." 2017 N.C. Sess. Laws 11, § 2(a). Statutes are presumed not to have a retroactive effect without clear evidence of legislative intent to the contrary. Here, the legislative history demonstrates that the 2017 amendment was not intended to apply to pending cases.

Second, while amendments "clarifying" prior statutes may affect pending cases notwithstanding similar effective date language, the 2017 amendment is not a "clarifying" amendment. Rather, it substantively changes unambiguous law by engrafting a new type of limitation on a common-law right of action.

Third, if the 2017 amendment were applied to pending cases, this would violate the North Carolina Constitution. The 2017 amendment should be interpreted in a manner that avoids any constitutional concerns.

I. THE NORTH CAROLINA GENERAL ASSEMBLY DID NOT INTEND FOR THE 2017 AMENDMENT TO APPLY RETROACTIVELY.

According to the North Carolina Supreme Court, "[t]he goal of statutory interpretation is to determine the meaning that the legislature intended upon the statute's enactment." *State v. Rankin*, 821 S.E.2d 787, 792 (N.C. 2018); *see also State v. Curtis*, 817 S.E.2d 187, 189 (N.C. 2018) (quoting *Liberty Mut. Ins. Co. v. Pennington*, 573 S.E.2d 118, 121 (N.C. 2002)) ("The primary goal of statutory construction is to effectuate the purpose of the legislature in enacting the statute."). In North Carolina, "[l]eglislative intent controls the meaning of a statute."

State v. Langley, 817 S.E.2d 191, 196 (N.C. 2018) (quoting in full *Midrex Techs., Inc. v. N.C. Dep't of Revenue*, 794 S.E.2d 785, 792 (N.C. 2016)). "The intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history, the spirit of the act and what the act seeks to accomplish." *Id.* at 196 (quoting in full *Midrex*, 794 S.E.2d at 792).

There is a general presumption that the legislature did not intend a statute to operate retroactively. *See Smith v. Mercer*, 172 S.E.2d 489, 494 (N.C. 1970) ("Ordinarily, an intention to give a statute a retroactive operation will not be inferred." (internal quotation omitted)); *accord In re Mitchell's Will*, 203 S.E.2d 48, 50 (N.C. 1974) ("A statute will not be construed to have retroactive effect unless that intent is clearly expressed or arises by necessary implication from its terms."). This North Carolina interpretive rule reflects the "presumption against retroactive legislation" that "is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994).

A. The language of the 2017 amendment makes the amendment operate prospectively, not retroactively.

While the effective-date language in the *original* version of the bill that became the 2017 amendment stated it would apply to pending cases, J.A. 2227-28 ("This act is effective when it becomes law and applies to actions filed, arising, *or pending on* or after that date." (emphasis added)), the effective date language was changed twice: first to read "This act is effective when it becomes law and applies to causes of action arising on or after that date. This act shall not affect pending litigation," J.A. 2331-32; and, again, as enacted "This act is effective when it becomes law and applies to causes of action commenced or brought on or after that date," J.A. 2841, 2847.

The language of the statute as enacted evidences an intent that it operate prospectively. *Peeler v. State Highway Comm'n*, 273 S.E.2d 705, 708 (N.C. 1981) ("By its very terms, the amending legislation provides that it is to be effective 'from and after July 1, 1973.' Such language provides no room for a judicial construction otherwise."); *cf. Schoolfield v. Collins*, 189 S.E.2d 208, 216 (N.C. 1972) (finding that an effective date that specifically applies "to actions and proceedings

pending on that date" evidences the "clear intent of the General Assembly" to apply the statute to pending cases).

B. The legislative history is clear.

In construing a North Carolina statute, "legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." *Waste Indus. USA, Inc., v. State*, 725 S.E.2d 875, 883 (N.C. Ct. App. 2012) (quoting in full *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977)) (emphasis omitted); *accord Langley*, 817 S.E.2d at 196.

The debate over the 2017 amendment focused on the matter at issue here: whether the proposed legislation would affect pending lawsuits. *See* J.A. 2771 (transcript of House floor debate on April 10, 2017) ("And what Judge Britt did is the geneses [sic] of why we are here tonight"); J.A. 2776 (same transcript) ("[T]he Bill is only addressing the pending litigation, that's what it's for. . . . [T]he defendant is worried about losing and so they're asking us to pull their chestnuts out of the fire."); J.A. 2780 (same transcript) ("This Bill seeks to affect the substantive rights or parties, specifically how damages the amount of

potential recovery are to be calculated in – in a trial brought by approximately 500 North Carolina citizens . . .").

Against this background of debate, with legislators' attention focused on whether the amendment would apply to pending cases, the sponsors of the legislation *assured legislators in both houses that it would not*. These assurances were made (i) on a matter that had been the subject of extensive, vociferous debate, (ii) on the floor of the Senate and the House, (iii) by the sponsors of the legislation, (iv) immediately prior to the vote in the Senate and immediately prior to the vote in the House. *See* J.A. 2812-13 (transcript of Senate floor debate on April 28, 2017) (Senator Jackson, sponsor of the legislation in the Senate, stating "And this Bill does not pertain to anything dealing with pending lawsuits"); J.A. 2814 (same transcript) (Senator Jackson responding to a question "I can't comment on any pending cases because . . . this Bill would not pertain to them"); J.A. 2815 (Senate vote); J.A. 2819-20 (transcript of House floor debate on April 27, 2018) (Representative Dixon, sponsor of the legislation in the House, stating the legislation has "absolutely zero retroactivity relative to causes of action filed" and that "Section 2A is the operative thing that some of you had a problem

with. This act is effective when it becomes law and applies to causes of action commenced or brought on or after that date"); J.A. 2821 (House vote).

The legislative history concerning whether the 2017 amendment was intended to apply to pending cases is unequivocal.

II. THE 2017 AMENDMENT IS NOT A "CLARIFYING" AMENDMENT.

While countless North Carolina Supreme Court cases hold that the meaning of a statute is to be determined by legislative intent, *see, e.g.*, *supra* pp. 3-4, there is also a case holding an amendment that "clarif[ies]" a previously enacted statute takes effect from the date of the original statute being clarified, notwithstanding effective date language like that of the 2017 amendment. *Ray v. N.C. Dept. of Transportation*, 727 S.E.2d 675, 682 (N.C. 2012) (further explaining that "[i]n the event that the amendment is a substantive change in the law, the effective date will apply" and the statute operate only prospectively).

Despite the North Carolina General Assembly's unequivocal intent that the 2017 amendment not affect pending cases, Murphy-

Brown and its *amici* urge this Court to apply the "clarifying amendment" exception here.

A. The 2017 amendment does not "clarify" the prior statute.

Murphy-Brown's argument fails because there is no antecedent statute that the 2017 amendment clarifies. "A clarifying amendment, unlike an altering amendment, is one that does not change the substance of the law but instead gives further insight into *the way in which the legislature intended the law to apply from its original enactment*." *Ray*, 727 S.E.2d at 681 (emphasis added). The North Carolina RTFA, as it existed before the 2017 amendment, barred changed-conditions common-law nuisance claims against agricultural or forestry entities that had been in operation for more than a year. *See* N.C. Gen. Stat. § 106-700; 2013 N.C. Sess. Laws 314 (enacting version of N.C. Gen. Stat. § 106-701 in force at time of the 2017 amendment). It did not address nuisance actions not barred by that defense, such as the instant case.

The 2017 amendment added an entirely new section to the General Statutes dealing with a completely new topic: limits on damages. *See* 2017 N.C. Sess. Laws 11, § 1 ("adding a new section,"

N.C. Gen. Stat. § 106-702). Murphy-Brown effectively admits that the 2017 amendment does not clarify previous statutory law: rather, it argues that the amendment "clarifies North Carolina *common law* on the damages recoverable in nuisance." Def. Br. at 44; *see also* J.A.1918-19 (Murphy-Brown presenting to the trial court as an undisputed fact that "Proposed House Bill 467 . . . *seeks to statutorily clarify the common law of damages* available to plaintiffs in North Carolina who file nuisance actions against an agricultural operation." (emphasis added)).

The 2017 change in the law is not "clarifying" for the purposes of the exception set forth in *Ray* because it provides no insight into the legislature's intent regarding a previously enacted statute.

B. The 2017 amendment does not fill a gap left by the prior statute.

The North Carolina Supreme Court has sometimes characterized clarification as gap-filling: "[W]hen a statute that fails expressly to address a particular point is subsequently amended to address that point, the amendment is more likely to be clarifying than altering." *Ferrell v. Dep't of Transp.*, 435 S.E.2d 309, 315 (N.C. 1993). Although Murphy-Brown interprets this sentence broadly to mean that any

amendment introducing previously absent statutory language is presumptively clarifying, *see* Def.'s Brf. at 43, neither *Ferrell* nor *Ray* supports this argument.

In *Ferrell,* the prior version of the statute at issue created an obligation for the Department of Transportation to "sell land previously condemned but no longer needed to the original owner when the original owner offers to repurchase the land," but failed to "specify at what price the DOT is to sell to the original owners." 435 S.E.2d at 314. The amendment at issue specified the price. *Id.* In *Ray*, the previously enacted State Tort Claims Act created a private right of action for negligence by state actors but "did not address the application of the public duty doctrine to claims made under [that Act]." 727 S.E.2d at 682. The amendment at issue in *Ray* "incorporated much of [North Carolina's] public duty doctrine case law" to fill the gap in the original law. *Id.* at 680.

Here, in contrast to *Ferrell* and *Ray*, the 2017 amendment did not clarify any ambiguity or fill any hole in N.C. Gen. Stat. §§ 106-700 or 701. Rather, the 2017 amendment created a new limitation "from whole cloth." *See Bryant v. United States*, 768 F.3d 1378, 1385 (11th

Cir. 2014) (applying *Ferrell* and *Ray* to find amendment not retroactive because amendment "created a substantively distinct exception from whole cloth"). Again, the fundamental point of *Ray* is that a "clarifying amendment" is one that "gives further insight into the way in which the legislature intended the law to apply from its original enactment." 727 S.E.2d at 681. Because the 2017 amendment addresses a wholly different topic than N.C. Gen. Stat. §§ 106-700 and 701, it does not provide any such insight as to *prior legislative intent*.

C. Treating the 2017 amendment as "clarifying" would be contrary to numerous presumptions.

The N.C. Supreme Court has explained that "[i]n construing a statute with reference to an amendment, the presumption is that the legislature intended to change the law." *State ex rel. Utilities Comm'n v. Pub. Serv. Co. of N.C., Inc.*, 299 S.E.2d 425, 429 (N.C. 1983). Treating the 2017 amendment as "clarifying" would contravene North Carolina law holding that a substantive addition to an unambiguous statute, particularly in derogation of a common-law right, presumptively changes, rather than clarifies, the law.

i. The 2017 amendment drastically altered an unambiguous statute.

First, the presumption of intent to change the law is heightened if "the statutory language" has been "drastically altered by the amendment." *Id.* Second, an "amendment to an unambiguous statute indicates the intent to change the law." *Childers v. Parker's, Inc.*, 162 S.E.2d 481, 484 (N.C. 1968).

N.C. Gen. Stat. §§ 106-700 and 701 (the RTFA as it stood prior to the 2017 amendment) were unambiguous—they codified a version of the common-law "coming to the nuisance" defense. *See, e.g.*, Margaret Rosso Grossman, Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against the Farmer, 1983 WIS. L. REV. 95, 120 (1983) (noting "statutes based on the North Carolina model codify the coming to the nuisance defense"); *see also* 1992 N.C. Sess. Laws 892 (amending the RTFA to extend defense to "forestry" operations); 2013 N.C. Sess. Laws 14 (further amending § 701 to specify exceptions to the defense and allowing fees and costs for frivolous or malicious claims or defenses). The 2017 amendment, in contrast, "drastically altered the statute," *State ex rel. Utilities Comm'n*, 299 S.E.2d at 429, by adding a

new provision dealing with a new topic: limits on damages. *See* 2017 N.C. Sess. Laws 11 ("adding a new section," N.C. Gen. Stat. § 106-702).

The 2017 amendment inarguably "change[d] the substance of the law," and thus is not "clarifying." *Ray*, 727 S.E.2d at 681.

ii. The 2017 amendment withdrew a common law right to compensatory damages in nuisance actions.

When the legislature "creat[es] a new right or withdraw[s] an existing one," an amendment is further presumed to effect a change rather than a clarification. *Childers,* 162 S.E.2d at 483 (1968) (internal quotation and citation omitted); *accord Smith v. Mercer*, 276 N.C. 329, 330, 172 S.E.2d 489 (1970) ("It is especially true that the statute or amendment will be regarded as operating prospectively only, where it is in derogation of a common-law right. . . . "). In North Carolina, as in the majority of states,[2] common law has long allowed for a variety of

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[2] *See, e.g.*, Tracy A. Bateman, Annotation, *Nuisance as entitling owner or occupant of real estate to recover damages for personal inconvenience, discomfort, annoyance, anguish, or sickness, distinct from, or in addition to, damages for depreciation in value of property or its use*, 25 A.L.R. 5th 568 (Originally published in 1994) ("It seems to be the prevailing view in most jurisdictions that, in a nuisance action, an owner or occupant of real estate is entitled to recover damages for personal inconvenience, discomfort, annoyance, anguish, or sickness, distinct from, or in addition to, damages for depreciation in value of

damages in nuisance claims. *See, e.g.*, *Hanna v. Brady*, 327 S.E.2d 22, 25 (N.C. Ct. App. 1985) (recognizing that damages for "physical pain, annoyance, stress, deprivation of the use and comforts of one's home" are best determined by "the trier of fact") (internal citation and quotation omitted); *see also Oates v. Algodon Mfg. Co.*, 8 S.E.2d 605, 606 (N.C. 1940); *King v. Ward*, 178 S.E. 577, 578 (N.C. 1935); *Thomason v. Seaboard Air Line Ry.*, 55 S.E. 198, 200 (N.C. 1906) ("An act or use of property, to constitute a nuisance, must violate some legal right, either public or private, and must work some material annoyance, inconvenience, or injury, either actual or implied from the invasion of the right." (internal quotation omitted)); *Duckworth v. Mull*, 55 S.E. 850, 850 (N.C. 1906) (upholding the jurisdiction of a justice of the peace to award annoyance and discomfort damages arising from, *inter alia*, the malodor of a decomposing horse corpse); *Duffy v. E.H. & J.A. Meadows Co.*, 42 S.E. 460, 461 (N.C. 1902) (noting in order to constitute a nuisance, odors "must work some substantial annoyance, some

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property or its use.").

material physical discomfort, to those who live in the neighborhood, or injury to their health or property"); *Broadbent v. Allison*, 626 S.E.2d 758, 762 (N.C. Ct. App. 2006) (quoting in full *Shadow Group v. Heather Hills Home Owners Assoc.*, 579 S.E.2d 285, 287 (N.C. Ct. App. 2003)) (reciting the same standard of "substantial annoyance, some material discomfort . . . or injury"); *accord* 22 N.C. Index 4th *Nuisances* § 1 (citing *The Shadow Group, L.L.C.*, 576 S.E.2d 142) ("The pattern jury instruction for private nuisance instructs that interference is substantial when it results in significant annoyance, material physical discomfort, or injury to a person's health or property . . ."). Because the 2017 amendment withdrew an existing common-law right, it is presumptively not "clarifying."

Murphy-Brown equates the 2017 amendment, which eradicates a common-law right, with an amendment that codifies existing common law in order to clarify prior statutory language. *See* Def. Br. at 44. As the court in *Ray* explained, however, "[b]ecause the legislature left essentially all [North Carolina's] pre-amendment cases intact, there ha[d] not been a complete change in the law," 727 S.E.2d at 683, and thus the codification of the public duty doctrine to fill a gap in the State

Torts Claims Act constituted a "clarifying" amendment: one that "does not change the substance of the law but instead gives further insight into" the legislature's intent, *id.* at 681.

Here, in contrast, there is no argument that the 2017 amendment "left essentially all . . . pre-amendment cases intact." *Id.* at 683. The 2017 amendment, which limits damages to a reduction in either "fair market value" or "fair rental value," does not codify existing common law in order to fill a gap in the original statute. *See, e.g.*, 22 N.C. Index 4th *Nuisances* § 18 (explaining "while the difference in market value of a property before and after injury caused by a nuisance may be a permissible measure of damages, it is by no means the only one"); *supra* pp. 14-16 (summarizing authority); *cf.* Def. Br. at 44 (acknowledging N.C. Supreme Court authority authorizing annoyance and discomfort damages). Rather, the 2017 amendment inarguably "change[d] the substance of the law" and provided no "insight" as to legislative intent regarding the prior sections of the RTFA. *Ray*, 727 S.E.2d at 681.

D. The title of the 2017 amendment does not support the contention that it is a retroactive clarification.

Murphy-Brown also argues that because the title of the 2017 amendment uses the word "clarify," it must be retroactive. Def. Br. at 42-43. This argument fails to address the obvious question: *what* does the amendment clarify? Because a retroactive "clarifying" amendment is one that "gives further insight into the way in which the legislature intended the law to apply from its original enactment," if the subject of a statutory amendment is not a prior statute, the amendment is not retroactively "clarifying." *Ray*, 727 S.E.2d at 681.

In *State ex rel. Cobey v. Simpson*, the North Carolina Supreme Court considered the title "An Act to Clarify the Development, Delegation, and Injunctive Relief Provisions of the Coastal Area Management Act," and found this title to indicate a legislative intent to clarify various provisions of that Act. 423 S.E.2d 759, 764 (N.C. 1992). In *Bowen v. Mabry*, the North Carolina Court of Appeals stated "intent is manifest in the title of the Act where the General Assembly notes its desire to 'clarify' section 50–20." 572 S.E.2d 809, 811 (N.C. Ct. App. 2002).

In contrast, the title of the 2017 amendment is "[a]n Act to Clarify the Remedies Available in Private Nuisance Actions Against Agricultural and Forestry Operations." 2017 N.C. Sess. Laws 11. The usage of the word "clarify" here targets common law remedies in common law nuisance actions, not any prior statute.

III. THE 2017 AMENDMENT SHOULD BE INTERPRETED SO AS NOT TO VIOLATE THE NORTH CAROLINA CONSTITUTION.

The General Assembly's understanding of the reasons for rejecting explicit retroactivity and characterizing the 2017 amendment as non-retroactive apparently included concerns about violating the North Carolina Constitution.[3] *See* J.A. 2798-2800 (April 3, 2017 letter to Sen. Tamara Barringer from Robert F. Orr, Justice, N.C. Supreme Court (retired), concluding "I am confident that the proposed legislation in question cannot be sustained when tested against the N.C. Constitution"); J.A. 2781-82 (April 10, 2017 House floor debate, remarks

[3] This evidence is "offered not to prove the intent of a legislative body but offered instead to prove the facts stated therein and the [body]'s consideration of them." *A-S-P Assocs. v. City of Raleigh*, 258 S.E.2d 444, 456 (N.C. 1979).

by Representative (and retired North Carolina trial and appellate judge) Joseph John, commenting that "constitutionality is measured against the North Carolina constitution" and quoting former Speaker Pro Tem Paul Stam's letter "it is improper to pass a Bill that has the effect of reducing accrued rights retroactively"); J.A. 2792-2796 (Stam's March 31, 2017 letter to the Chairs and Vice-Chair of the House Judiciary III Committee).

The Constitution of North Carolina prohibits legislation that interferes with or impinges upon vested rights. A common law claim for damages for nuisance is a right that becomes vested when it has accrued. *Rhyne v. K-Mart Corp.*, 594 S.E.2d 1, 12 (N.C. 2004) (stating "[w]ithout question, vested rights of action are property, just as tangible things are property"). Accordingly, the 2017 amendment should be interpreted so as not to apply to pending cases. *See Bolick v. Am. Barmag Corp.*, 293 S.E.2d 415, 420 (N.C. 1982) (noting that "[a]n accrued cause of action is a property interest" and explaining "[t]he proper question for consideration is whether the act as applied will interfere with rights which had vested or liabilities which had accrued at the time it took effect" (internal quotation and citations omitted));

Gardner v. Gardner, 268 S.E.2d 468, 471 (N.C. 1980) (likewise positing "the proper question for consideration is whether the act as applied will interfere with rights that have vested. Stated otherwise, the statute may be applied retroactively only insofar as it does not impinge upon a right which is otherwise secured, established, and immune from further legal metamorphosis" (internal quotation and citation omitted)); *Wood v. J. P. Stevens & Co.*, 256 S.E.2d 692, 701 (N.C. 1979) (explaining when determining whether an amendment is "unconstitutionally retroactive," the "question for consideration" is "whether the amendment . . . interferes with vested rights and liabilities" (internal citation omitted)); *Smith v. Mercer*, 172 S.E.2d 489, 494 (N.C. 1970) (quoting in full 50 Am. Jur. Stat. § 478) ("It is especially true that the statute or amendment will be regarded as operating prospectively only, where it is in derogation of a common-law right . . .").

The reasoning of *Ray* comports with these constitutional limitations. In *Ray*, retroactive application of an amendment did not interfere with or impinge upon citizens' substantive rights, but instead expanded those rights as against the State. "[T]he overall goal of the [State Tort Claims Act] . . . was . . . to give greater access to the courts

to plaintiffs in cases in which they were injured by the State's negligence"; accordingly, "[s]ince the goal of both the STCA and the amendment was to increase plaintiffs' ability to pursue recovery, it would be wholly inequitable to allow a person who was injured on or after [the effective date of the amendment] to recover from the State but to deny that same benefit to a person similarly injured before the amendment was enacted." *Ray*, 727 S.E.2d at 683.

Importantly, in *Ray*, the effect of retroactively applying the amendment did not abrogate a plaintiffs' substantive right, but instead expanded it. Here, the retroactive application of the 2017 amendment would do the opposite in contravention of the North Carolina Constitution.

CONCLUSION

For the foregoing reasons, the North Carolina Justice Center urges this Court to affirm the district court's conclusion that the 2017 amendment does not apply to this case.

Respectfully submitted,

/s/ Emily P. Turner

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Date: May 6, 2019

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because this brief contains 4,250 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook type style.

Date: May 6, 2019

/s/ Emily P. Turner
EMILY P. TURNER

CERTIFICATE OF SERVICE

I, Emily P. Turner, counsel for *amicus curiae* and a member of the Bar of this Court, certify that on May 6, 2019, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. I also certify that the foregoing document is being served on this day on all counsel of record via transmission of the Notice of Electronic Filing generated by CM/ECF. All participants in this case are registered CM/ECF users.

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EMILY P. TURNER

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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COUNSEL FOR: North Carolina Justice Center

_____ as the
(party name)

☐ appellant(s) ☐ appellee(s) ☐ petitioner(s) ☐ respondent(s) ☑ amicus curiae ☐ intervenor(s) ☐ movant(s)

s/Emily P. Turner
(signature)

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CERTIFICATE OF SERVICE

I certify that on 5/6/19 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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